Item number: 01

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: January 22, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Jury Instructions: Revisions to the Judicial Council of California Criminal Jury Instructions (CALCRIM)

Committee or other entity submitting the proposal:
Advisory Committee on Criminal Jury Instructions

Staff contact (name, phone and e-mail): Kara Portnow, 865-4961, kara.portnow@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: Maintenance, New Instructions and Expansion into New Areas, Technical Corrections

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

455 Golden Gate Avenue · San Francisco, California 94102-3688
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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: March 23–24, 2020

Title
Jury Instructions: Revisions to Criminal Jury Instructions

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

Recommended by
Advisory Committee on Criminal Jury Instructions
Hon. Peter J. Siggins, Chair

Agenda Item Type
Action Required

Effective Date
March 24, 2020

Date of Report
January 14, 2020

Contact
Kara Portnow, 415-865-4961
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Executive Summary

The Advisory Committee on Criminal Jury Instructions recommends approving for publication the revised criminal jury instructions prepared by the committee under rule 2.1050 of the California Rules of Court. These changes will keep the instructions current with statutory and case authority. Once approved, the revised instructions will be published in the 2020 edition of the *Judicial Council of California Criminal Jury Instructions (CALCRIM)*.

Recommendation

The Advisory Committee on Criminal Jury Instructions recommends that the Judicial Council, effective March 24, 2020, approve the following changes to the criminal jury instructions prepared by the committee:

1. Revisions to CALCRIM Nos. 101, 200, 334, 361, 377, 507, 540B, 540C, 548, 594, 600, 703, 850, 860, 1045, 1047, 1048, 1049, 1050, 1051, 1151, 1192, 1193, 1200, 1201, 1203, 1215, 1500, 1501, 1502, 1515, and 1801; and
2. Updates to the Guide For Using Judicial Council of California Criminal Jury Instructions to include a section about nonbinary personal pronouns and to clarify that the legal publisher is responsible for maintaining the most recent edition information for secondary sources.

A table of contents and the full text of the revised instructions are attached at pages 17–155.

Relevant 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 on Criminal Jury Instructions and its charge.[1] In August 2005, the council voted to approve the *CALCRIM* instructions under what is now rule 2.1050 of the California Rules of Court.

Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CALCRIM.* The council approved the last *CALCRIM* release at its September 2019 meeting.

Analysis/Rationale

The committee revised the instructions based on comments and suggestions from justices, judges, and attorneys; proposals by staff and committee members; and recent developments in the law.

Below is an overview of some of the proposed changes.

Failure to Explain or Deny Adverse Testimony **(CALCRIM No. 361)**

In *People v. Grandberry* (2019) 35 Cal.App.5th 599 [247 Cal.Rptr.3d 258], the defendant was charged with possession of a dirk or dagger in prison and testified that he did not know there was a weapon in his cell. During cross-examination, the defendant denied making statements attributed to him during a previous administrative hearing for the weapons violation. The prosecutor requested CALCRIM No. 361, arguing that the defendant failed to explain why he did not appeal the ruling of the administrative hearing where he was found to have possessed the weapon. On appeal, the court upheld this instruction over the defense objection that the prosecutor had failed to ask the defendant why he had not appealed his administrative hearing. Finding no error, *Grandberry* found that *People v. Saddler* authorizes this instruction whenever the defendant failed to explain or deny any fact of evidence that was within the scope of relevant cross-examination" and is not limited only to testimony that was adduced during cross-examination. In reaching this conclusion, *Grandberry* disagreed with case law that holds that this instruction should only be given if the defendant had failed to explain or deny adverse testimony in response to a question. In response to *Grandberry*, the committee noted the split in authority and modified the bench notes to provide guidance when the trial court should give this instruction, depending on which case the court decides to follow.

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

Justifiable Homicide: By Public Officer **(CALCRIM No. 507)**
Assembly Bill 392 amended Penal Code sections 196 and 835a to limit the lawful use of deadly force by a peace officer. Among other changes, this legislation redefined justifiable homicide by a peace officer to require a reasonable belief on the part of the officer, based on the totality of the circumstances, that deadly force is necessary to defend against an imminent threat of death or serious bodily injury to the officer or to another person. The legislation also authorizes the use of deadly force to apprehend a fleeing person for a felony that threatened or resulted in death or serious bodily injury, provided that the officer reasonably believes that the person will cause death or serious bodily injury to another unless the person is immediately stopped. In response to this legislation, the committee substantially revised this instruction to conform with the new statutory requirements.

Felony Murder **(CALCRIM Nos. 540B, 540C, and 703)**
During the public comment period last summer, two commenters suggested that these instructions include the factors delineated in *People v. Clark* (2016) 63 Cal.4th 522 [203 Cal.Rptr.3d 407, 372 P.3d 811] to help guide the jury in determining whether the defendant acted with reckless indifference to human life. In response to these suggestions, the committee incorporated the *Clark* factors in all three instructions. The committee also reorganized them as bullet points instead of numbers, to allow trial courts more flexibility in choosing which factors may apply in a given case.

Attempted Murder **(CALCRIM No. 600)**
In *People v. Canizales* (2019) 7 Cal.5th 591, 608 [248 Cal.Rptr.3d 370, 442 P.3d 686], the California Supreme Court held that a jury may rely on kill zone theory to convict a defendant of attempted murder when "there is sufficient evidence to support a jury determination that the *only* reasonable inference from the circumstances of the offense is that a defendant intended to kill everyone in the zone of fatal harm." The court also set forth specific findings that the jury should make in order to base an attempted murder conviction on a kill zone theory. Based on this case, the committee revised the kill zone theory section of the attempted murder instruction.

Sexual Penetration Offenses **(CALCRIM Nos. 1045, 1047, 1048, 1049, 1050, 1051)**
People v. McCoy (2013) 215 Cal.App.4th 1510, 1538 [156 Cal.Rptr.3d 382] held that "the crime of unlawful sexual penetration requires specific intent to gain sexual arousal or gratification or to inflict abuse on the victim." A user suggested that the sexual penetration offense instructions include a reference to this case to clarify that these offenses require specific intent. In response to this suggestion, the committee added the case to the authority sections.

Pandering **(CALCRIM No. 1151)**
In *People v. Jacobo* (2019) 37 Cal.App.5th 32 [249 Cal.Rptr.3d 236], the court upheld a pandering conviction where the evidence showed that the defendant offered and paid the victims money to have sex with him, and not with anyone else. The *Jacobo* court found that a violation of Penal Code section 266i(a)(2) does not require a third person. In reaching this conclusion, *Jacobo* rejected the holding of *People v. Dixon* (2011) 191 Cal.App.4th 1154, 1159–1160 [119 Cal.Rptr.3d 901], which held that the pandering statute requires a third person. The committee

added a bench note to the instruction that describes the split of authority and added brackets around the sentence: "Pandering requires that an intended act of prostitution be with someone other than the defendant."

Kidnapping Offenses (CALCRIM Nos. 1200, 1201, 1203, 1215)

People v. Fontenot (2019) 8 Cal.5th 57, 65–71 [251 Cal.Rptr.3d 341, 447 P.3d 252] held that attempted kidnapping is not a lesser included offense of kidnapping under Penal Code section 207(a). The committee replaced the reference to attempted kidnapping in the lesser included offenses sections with this case holding.

Arson Offenses (CALCRIM Nos. 1500, 1501, 1502, 1515)

In *People v. Shiga* (2019) 34 Cal.App.5th 466, 475 [246 Cal.Rptr.3d 198], the defendant had set fire to a church and the fire spread to an adjacent rectory where two priests lived. The jury convicted him of three counts of arson: aggravated arson (under Pen. Code, § 451.5), arson of a structure (under Pen. Code, § 451(c)), and arson of an inhabited structure or inhabited property (under Pen. Code, § 451(b)). Holding that Penal Code section 451 defines a single offense of arson, *Shiga* reversed the convictions for subdivisions (b) and (c) and remanded the case for the trial court to enter a conviction on only one of these subdivisions. In response to this holding, the committee added a note in the Related Issues section entitled "Dual Convictions Prohibited" with a citation to the case.

Guide for Using Judicial Council of California Criminal Jury Instructions (CALCRIM)

The committee revised the guide in two ways. First, a member of the CACI advisory committee suggested that the guide contain information about using a nonbinary gender category for personal pronouns, to be consistent with the spirit of California's Gender Recognition Act of 2017. As a result, the committee added a section about personal pronouns. Second, several users have noted that the secondary sources for some of the instructions contain out of date edition information. This problem occurred because the official publisher had previously been updating the secondary source citations only for instructions that the Judicial Council was independently revising. To rectify this problem, the legal publisher has agreed to update the secondary source citations for all instructions. The committee has added language to the user guide that clarifies that the legal publisher—and not the Judicial Council—remains responsible for updating the secondary source citations.

Policy implications

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. This proposal fulfills that requirement.

Comments

The proposed additions and revisions to *CALCRIM* circulated for public comment from November 19 through December 20, 2019. The committee received responses from two commenters. The text of all comments received and the committee's responses are included in a comments chart attached at pages 6–16.

Alternatives considered

The proposed revisions are necessary to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee considered no alternative actions.

Fiscal 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 and Links

1. Chart of comments, at pages 6–16
2. Full text of revised *CALCRIM* instructions, including table of contents, at pages 17–155

CALCRIM-2019-02 Invitation to Comment
Revised CALCRIM Instructions
All comments are verbatim unless indicated by an asterisk (*).

Instruction	Commentator	Comment	Response
101, 200, 334, 377, 507, 540B, 540C, 548, 594, 600, 703, 850, 860, 1045, 1047, 1048, 1049, 1050, 1051, 1192, 1193, 1200, 1201, 1203, 1215, 1500, 1501, 1502, 1515, 1801	Deirdre Kelly, president, on behalf of Orange County Bar Association	Agree.	No response necessary.
361	Deirdre Kelly, President, on behalf of Orange County Bar Association	**Agree as modified**. The proposed instruction highlights for the court and parties the split of authority and the issues the trial court must determine as a matter of law. The one suggested modification is to change the if clause statements to questions and make four instead of three, in the bench notes of the second paragraph of page 23, as follows: "If the court follows *Grandberry*, the trial court must ascertain as a matter of law: 1) Was the matter within the scope of relevant cross-examination? 2) Did the defendant know the facts necessary to explain or deny incriminating evidence? 3) Did some circumstance preclude the defendant from knowing such facts? 4) Did the defendant fail to explain the incriminating evidence? If the court follows *Roehler*, the trial court must ascertain as a matter of law: 1) Was a question asked calling for an explanation or denial of incriminating evidence? 2) Did the defendant know the facts necessary to answer the question? 3) Did some circumstance preclude the defendant from knowing such facts? 4) Did the defendant fail to deny or explain the incriminating evidence when answering the question?	The committee considered the commenter's alternate version but prefers the draft as currently written.
507	Peter Bibring, Director of Police Practices,	On behalf of the ACLU of California, I write to provide comment on the recent proposed revisions to the California Criminal Jury Instructions, and specifically the proposed revisions to Instruction 507, concerning justifiable homicide by a peace officer.	No response necessary.

Instruction	Commentator	Comment	Response
	on behalf of the ACLU of California	As a cosponsor of both AB 392, which amended Penal Code sections 196 and 835a[1] and gave rise to this proposed revision, and AB 931, a similar bill advanced in the prior legislative session, the ACLU of California has worked closely on the changes to California's law on police use of force, the standards advanced by AB 392 and that bill's language and interaction with prior law. The ACLU of California has also filed amicus briefs on the legal standards for police use of force, including in *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017) and 897 F.3d 1067 (9th Cir. 2018), *Nehad v. Browder*, 929 F.3d 1125 (9th Cir. 2019), and *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019) (en banc), and has frequently testified, commented, or otherwise advocated on the standards governing police use of force in both law and agency policy across California. **I. Background of AB 392** In an effort to address the number of deadly police shootings in California, the California legislature this year passed AB 392, revising California's laws on the use of deadly force by police. AB 392 marks a significant shift in the law that unquestionably requires updating jury instructions relating to the use of deadly force by peace officers. Prior to AB 392, Penal Code section 196, providing for the defense of justifiable homicide by a public officer, had not been amended since California first adopted the Penal Code in 1872. The language of that statute on its face provided a defense of justifiable homicide for homicides "necessarily committed in overcoming actual resistance … in the discharge of any other legal duty" or in arresting escaped felons or persons charged with a felony. Section 196. Importantly, the statute on its face required no threat of harm for such a homicide to be justified. In contrast to the defense to criminal liability for homicide provided in section 196, section 835a provided an affirmative authorization for police use of force that mirrored the constitutional limitations set by the Supreme Court's decisions. In *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989), the Supreme Court analyzed police use of force under the "reasonableness" standard of the Fourth Amendment, balancing the nature of the government interest and the "nature and quality of the intrusion on the individual's Fourth Amendment interests" to determine "whether	

[1] All statutory references are to the Penal Code unless otherwise specified.

Instruction	Commentator	Comment	Response
		the force used to effect a particular seizure is 'reasonable.'" *Graham v. Connor*, 490 U.S. at 396. As the Supreme Court clarified in 2007, the constitutional standard for police use of deadly force is the same as for any force: "*Graham* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' … Whether or not [the police officer's] actions constituted application of 'deadly force,' all that matters is whether [the officer's] actions were reasonable." *Scott v. Harris*, 550 U.S. 372, 382-83 (2007). Prior to the passage of AB 392, section 835a set a similar "reasonable force" standard, providing that peace officers "may use reasonable force to effect … arrest, to prevent escape or to overcome resistance." AB 392, which goes into effect on January 1, 2020, preserves the "reasonable force" standard for nondeadly force, but creates a separate, higher standard that authorizes police use of deadly force only when "necessary." Specifically, AB 392 provides that a peace officer is justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary for either of the following reasons: (A) To defend against an imminent threat of death or serious bodily injury to the officer or to another person. (B) To apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended. Where feasible, a peace officer shall, prior to the use of force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts. Penal Code § 835a(c)(1) (as amended by AB 392, effective Jan. 1, 2020). Along with the stricter legal standards for use of deadly force, AB 392 "clarifies that de-escalation techniques should be used by law enforcement agencies in California." Senate Floor Analysis at 7. The bill contains three provisions that work to require de-escalation. First, it imposes an express requirement that "[i]n determining whether deadly force is necessary, officers … shall use other available resources and techniques if reasonably safe	

Instruction	Commentator	Comment	Response
		and feasible to an objectively reasonable officer." § 835a(a)(2). Second, the new language clarifies that the "totality of the circumstances" which the factfinder considers in determining whether deadly force is necessary includes "the conduct of the officer … leading up to the use of deadly force." § 835a(e)(3). Finally, the bill adds to existing language providing that officers have no duty to retreat in the face of resistance clarifying that this does not mean that they have no duty to de-escalate. See § 835a(d) ("For purposes of this subdivision, 'retreat' does not mean tactical repositioning or other deescalation tactics."). AB 392 makes other modifications as well. It clarifies that while the standard for deadly force has changed to a "necessary" standard, the perspective used for the analysis remains the "reasonable officer" perspective based on the facts known to the officer at the time, generally consistent with both state tort law and constitutional law. Id. § 835a(a)(4), (d). Finally, the bill emphasizes the role physical and mental disability plays in police shooting, and expressly prohibits use of deadly force against a person solely based on the threat they pose to themselves. *Id.* § 835a(a)(5), (c)(2). **II. Support for Proposed Jury Instruction** We agree there is urgent need to revise CalCrim 507 to reflect the changed standards for justifiable homicide set forth in Penal Code sections 196 and 835a, as amended by AB 392, which goes into effect on January 1, 2020. We also strongly support most of the proposed revision as faithful to the language and structure of the newly amended Penal Code sections 196 and 835a. Specifically, we strongly support the following aspects of the Proposed Instruction: • The language and structure of Section 2-A and 2-B of the Proposed Instruction, which substantially mirror the operative standard for justified police use of deadly force, now set forth in section 835a(c)(1) and (2); • The definition of an "imminent" threat, which is a crucial term in the standard, for which the Proposed Instruction repeats verbatim the definition made applicable to deadly force in section 835a(e)(2); • The definition of "totality of the circumstances," another crucial term in the standard, and for which the Proposed Instruction also repeats the statute's definition as set forth in section 835a(e)(3);	

Instruction	Commentator	Comment	Response
		• The definition of "serious bodily injury," consistent with the statutory definition in section 243(f)(4); • The deletion of the paragraph in the current instruction describing the constitutional standard for police use of deadly force in *Tennessee v. Garner*, 471 U.S. 1, (1985), and California state cases interpreting that standard, as the revisions to section 835a and 196 now set a higher standard under California criminal law than this this constitutional minimum. Indeed, as set forth below, we recommend deleting *Garner* from the list of authorities for this instruction.	
507	Peter Bibring, Director of Police Practices, on behalf of the ACLU of California	**III. Recommended Changes to Proposed Jury Instruction** While we agree with and strongly support much of the revised Proposed Instruction, we recommend changes to correct several crucial omissions, and one inapposite reference to standard for unconstitutional force, which does not govern the standard for criminal defense to homicide under California state law. **A. The Instruction Omits Key Statutory Language Regarding De-escalation from the Paragraph Providing Officers Need Not Retreat From Resistance** In amending section 835a, the Legislature preserved language in the current statute providing that officers have no duty to retreat in the face of resistance, but added an important qualification that tactical repositioning and other de-escalation tactics are not retreat for such purposes, as follows: (d) A peace officer who makes or attempts to make an arrest need not retreat or desist from their efforts by reason of the resistance or threatened resistance of the person being arrested. A peace officer shall not be deemed an aggressor or lose the right to self-defense by the use of objectively reasonable force in compliance with subdivisions (b) and (c) to effect the arrest or to prevent escape or to overcome resistance. **For the purposes of this subdivision, "retreat" does not mean tactical repositioning or other de-escalation tactics.** Section 835a(d) (as amended, emphasis added). The Proposed Instruction includes substantially similar language to the first two sentences, but omits the crucial final sentence regarding de-escalation. The final sentence plays a vital role in explaining that the lack of any duty to retreat does not mean an officer has no duty to engage in de-escalation, where reasonable. The	The committee disagrees with the recommendation to add the sentence about retreat. By clarifying that tactical repositioning is not retreat, the statute does not clearly create a duty of repositioning. Therefore, the committee believes that adding the proposed sentence is unnecessary.

Instruction	Commentator	Comment	Response
		sentence specifically refers to "tactical repositioning," a common de-escalation tactic, described in the Consensus Policy on Use of Force drafted by eleven national law enforcement groups as follows: > De-escalation is defined as "taking action or communicating verbally or non-verbally during a potential force encounter in an attempt to stabilize the situation and reduce the immediacy of the threat so that more time, options, and resources can be called upon to resolve the situation without the use of force or with a reduction in the force necessary." … > [One] de-escalation technique is tactical repositioning. In many cases, officers can move to another location that lessens the level of danger. An example is an incident involving an individual with a knife. By increasing the distance from the individual, officers greatly reduce the risk to their safety and can explore additional options before resorting to a use of force, notwithstanding the need to control the threat to others. National Consensus Policy on Use of Force, International Ass'n of Chiefs of Police, at 6 (Dec. 2017) https://noblenational.org/wp-content/uploads/2017/10/Consensus-Policy-and-Discussion-2017.pdf The statutory language addresses a specific concern among law enforcement leadership and use of force experts – that de-escalation tactics that involve slowing a situation down, and most specifically "tactical repositioning" involving moving away from a suspect to reduce risk, might be interpreted by officers – or by factfinders – as "retreat," so that the statute would be wrongly read to instruct that they have no need to de-escalate. As one police chief and official with the Police Executive Research Forum characterized the problem, "We've created a culture in policing where officers believe repositioning is retreating."[2] The suggestion that officers need not engage in tactical repositioning and other de-escalation techniques is not only at odds with the express clarification of the meaning of "retreat," but also conflicts with the revised statute's requirement that officers use	

[2] Tom Jackman, *De-escalation training to reduce police shootings facing mixed reviews at launch*, Washington Post (Oct. 15, 2016) https://www.washingtonpost.com/local/public-safety/de-escalation-training-to-reduce-police-shootings-facing-mixed-reviewsvz-at-launch/2016/10/14/d6d96c74-9159-11e6-9c85-ac42097b8cc0_story.html

Instruction	Commentator	Comment	Response
		available resources and techniques other than deadly force whenever reasonably safe and feasible to an objectively reasonable officer. It is crucial that these conflicts be resolved by including the full statutory language. **Recommendation**: We strongly urge Judicial Council not to omit this key language, but to set forth the full paragraph from the statute, section 835a(d) (as amended) regarding peace officers' duty to retreat, including the crucial sentence that clarifies that de-escalation, as follows: A peace officer who makes or attempts to make an arrest need not retreat or stop because the person being arrested is resisting or threatening to resist. **For purposes of this instruction, "retreat" does not mean tactical repositioning or other deescalation tactics.** A peace officer does not lose (his/her) right to self-defense by using objectively reasonable force to arrest or to prevent escape or to overcome resistance. *See* Proposed Instructions, at 28.	
507	Peter Bibring, Director of Police Practices, on behalf of the ACLU of California	**B. The Instruction Omits The Requirement That Officers Use Other Available Resources And Techniques If Reasonably Safe And Feasible** As one of the important elements requiring officers de-escalate rather than use deadly force, where appropriate, the amended section 835a inserts a specific requirement regarding de-escalation, that "officers … shall use other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer." § 835a(a)(2). As set forth, this use of other resources and techniques is a requirement and not merely a consideration in whether force was "necessary." The Proposed Instruction incorporates other language verbatim from the subsection (a) of section 835a. It should include this important requirement as well. **Recommendation**: We recommend that the Proposed Instruction simply follow the text of the statute and insert the language from section 835a(a)(2) as a freestanding instruction, immediately before the definition of "serious bodily injury" (on p.27) follows: [An officer/The defendant] is justified in using deadly force only when necessary in defense of human life. An officer must use other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer.	The committee disagrees with this recommendation. The committee has incorporated the statutory requirements of section 835a(c) which sets forth when deadly force is authorized. The committee does not believe that the proposed addition from the legislative findings and declarations, rather than the definitional or directive portion of the statute, creates an additional statutory element of proof.

CALCRIM-2019-02 Invitation to Comment
Revised CALCRIM Instructions
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Instruction	Commentator	Comment	Response
507	Peter Bibring, Director of Police Practices, on behalf of the ACLU of California	**C. The Reference to *Tennessee v. Garner* Should Be Removed From the List of Authorities for the Instruction** The first line of the authority section cites legal authority for the standard under which officers may invoke the defense of justifiable homicide: Penal Code section 835a setting forth the authority of police use of deadly force, and sections 196 and 199 which make the criminal defense of justifiable homicide congruent with that authority. But the Proposed Instruction also here cites *Tennessee v. Garner, supra*, the leading case establishing the public's right against excessive force by police under the U.S. Constitution. But that constitutional standard – the standard for when force by police is excessive to the point that it violates the rights of the subject under the U.S. Constitution – is not relevant to the question of this instruction, and should be deleted. The Proposed Instruction addresses when, under California law, an officer's use of deadly force resulting in homicide constitutes a crime and when it can be excused as justifiable homicide. The standard for when police use of force violates the subject's rights under the U.S. Constitution has no direct bearing on this – California could decide to set a lower standard, and allow that some use of excessive force in violation of the Constitution does not expose police to criminal charges, or it could (as it has done in the amendments to Penal Code 196 and 835a impose a higher standard and provide that even some use of deadly force that does not violate the constitution is nonetheless prohibited in California and subject to criminal penalties. Importantly, *Tennessee v. Garner* only establishes a constitutional right for the public to be free of some degree of excessive force. It does not confer on police any particular right to use force. The constitutional standard is a minimum for police, as states and local departments may establish higher standards more restrictive of police force. **Recommendation**: We recommend the reference to *Tennessee v. Garner* be deleted from the "Authority" section of the Proposed Instruction. The amendments to section 196 and 835a set a higher standard than the "reasonable" standard of *Garner*. See Senate Floor Analysis of AB 392, Sen. Rules Committee, at 6 (June 26, 2019) at 6 ("Unlike existing California statutory law, the provisions of this bill would exceed the standards articulated and set forth by the U.S. Supreme Court in Graham and *Garner*."). The proposed instruction should not confuse this point by citing to a different standard that is no longer applicable.	The committee agrees with this suggestion and has removed the citation to *Tennessee v. Garner*.

CALCRIM-2019-02 Invitation to Comment
Revised CALCRIM Instructions
All comments are verbatim unless indicated by an asterisk (*).

Instruction	Commentator	Comment	Response
507	Peter Bibring, Director of Police Practices, on behalf of the ACLU of California	**D. The Instruction Omits The Prohibition in Section 835a(c)(2) on Using Deadly Force Against A Person Based Solely On the Danger They Pose to Themselves** The amended statute adds a specific limitation against the use of deadly force against someone based solely on the threat they pose to themselves. Section 835a(c)(2) provides: A peace officer shall not use deadly force against a person based on the danger that person poses to themselves, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person. The Proposed Instruction contains no mention of this important provision. While not relevant in every case, it should be included as an optional instruction where relevant. **Recommendation:** We recommend the limitation set forth in section 835a(c)(2) that deadly force not be used against a person based solely on the threat they pose to themselves be added verbatim to the Instructions as a bracketed optional instruction.	The committee disagrees with this suggestion. Because the proposed language would not be relevant in every case, it is unnecessary to include. Instead, trial counsel may request a pinpoint instruction when the issue arises.
507	Peter Bibring, Director of Police Practices, on behalf of the ACLU of California	**E. The List of Permissive Considerations Includes Requirements That Should Be Presented As Mandatory** The Proposed Instruction includes a list of considerations that jurors may weigh in evaluating the "totality of the circumstances": [In considering the totality of circumstances, you may consider whether: [● A reasonable officer would have believed that _____<insert name of fleeing felon> posed an imminent threat of death or serious bodily injury to the defendant or to another person(;/.)] [● Prior to the use of force, the defendant [identified] [or] [attempted to identify] him or herself as a peace officer and [warned] [or] [attempted to warn] that deadly force may be used(;/.)] [● Prior to the use of force, the defendant had objectively reasonable grounds to believe the person was aware that the defendant was a peace officer and that deadly force may be used(;/.)] [● [The defendant was able, under the circumstances, to [identify] [or] [attempt to identify] him or herself as a peace officer] [and] [to warn] [or] [attempt to warn] that deadly force may be used.]]	The committee disagrees with the recommendation to remove the permissive factors and to include a mandatory finding about police officer identification. However, the committee determined that the first bullet point in the list of permissive factors could be confusing when compared with the instructional language in 2B. Therefore, the committee has removed this bullet point from the list.

Instruction	Commentator	Comment	Response
		Proposed Instruction, at 28. This presentation wrongly characterizes each of these questions as factors that jurors are permitted to consider, when they are mandatory requirements. Certainly, any use of deadly force where a reasonable officer would have believed the fleeing person did not pose a threat of death or serious bodily injury to the defendant or another person unless immediately apprehended would not be justifiable homicide under the statute, regardless of any other considerations. Section 835a(c)(2). That circumstance is already addressed as a mandatory instruction in the Proposed Instruction, section 2-B, and inclusion of a different articulation that is permissive and uses the "imminent" threat is an unnecessary and confusing departure from the statute that should be deleted. Similarly, the Proposed Instruction incorrectly characterizes the requirement that a peace officer identify themselves and give a warning as a as a permissive consideration, rather than a requirement. The amended statute includes a requirement that before using deadly force against a fleeing person in specified situations, officers must provide a warning, if feasible: > Where feasible, a peace officer shall, prior to the use of force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts. Section 835a(c)(1)(B). The Proposed Instructions include this not as a requirement but as a consideration that jurors may weigh in evaluating the "totality of the circumstances." This improperly de-values the statutory provision regarding warning and identification, which is a requirement not merely a consideration. Notably, other instructions on justifiable homicide and self-defense in CALCRIM 505, 3470, and 3471 do not include a list of permissive "considerations," but instead list the elements of the defense followed by various clarifying requirements. **Recommendation**: We recommend that the list of permissive factors a jury "may consider" in evaluating the totality of the circumstances be deleted, and the provision	

All comments are verbatim unless indicated by an asterisk (*).

Instruction	Commentator	Comment	Response
		requiring a warning and identification of a peace officer be included as a freestanding mandatory provision by setting forth the statutory language of section 835a(c)(1)(B): Where feasible, a peace officer shall, prior to the use of force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts.	
507	Peter Bibring, Director of Police Practices, on behalf of the ACLU of California	**F. The Legislature's Findings on Disability Should Be Added as "Bench Notes"** In the findings section of AB 392, the Legislature took special care to highlight the role of physical and mental disability in contributing to encounters where police use deadly force: (5) That individuals with physical, mental health, developmental, or intellectual disabilities are significantly more likely to experience greater levels of physical force during police interactions, as their disability may affect their ability to understand or comply with commands from peace officers. It is estimated that individuals with disabilities are involved in between one-third and one-half of all fatal encounters with law enforcement. Section 835a(a)(5). While this language creates no binding limitation, the role of disability provides important context. Inclusion in the Bench Notes may help allow courts to craft special instructions on this issue as appropriate. We thank the Advisory Committee for its work and respectfully submit these recommendations, which we believe are necessary to give full effect to the Legislature's intent in passing AB 392.	The committee disagrees with the suggestion to add a bench note about disability. There are a number of factors, including disability, that may be relevant in any given case. The committee does not believe that it is necessary to highlight this particular factor.

CALCRIM Proposed Changes
Table of Contents

Instruction Number	Instruction Title
1801	Grand and Petty Theft
N/A	Guide For Using CALCRIM

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

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

During the trial, do not talk about the case or about any of the people or any subject involved in the case with anyone, not even your family, friends, spiritual advisors, or therapists. You may only say that you are on a jury and the anticipated length of the trial, and you may inform others of scheduling and emergency contact information. Do not share any information about the case by any means of communication, including in writing, by email, by telephone, on the Internet, social media, Internet chat rooms, and blogs~~or by any other means of communication~~. You must not talk about these things with other jurors either, until you begin deliberating.

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

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

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

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

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

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

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

You must not let bias, sympathy, prejudice, or public opinion influence your assessment of the evidence or your decision. Many people have assumptions and biases about or stereotypes of other people and may be unaware of them. You must not be biased in favor of or against any party, witness, attorney, defendant[s], or alleged victim because of his or her disability, gender, nationality, national origin, race or ethnicity, religion, gender identity, sexual orientation, [or] age (./,) [or socioeconomic status] (./,) [or _____*<insert any other impermissible form of bias>*.]
You must reach your verdict without any consideration of punishment.

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

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

New January 2006; Revised June 2007, April 2008, December 2008, April 2010, October 2010, April 2011, February 2012, August 2012, August 2014, September 2019, March 2020

BENCH NOTES

Instructional Duty

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

When giving this instruction during the penalty phase of a capital case, the court has a **sua sponte** duty to delete the sentence which reads "Do not let bias, sympathy, prejudice, or public opinion influence your decision." (*People v. Lanphear* (1984) 36 Cal.3d 163, 165 [203 Cal.Rptr. 122, 680 P.2d 1081]; *California v. Brown* (1987) 479 U.S. 538, 545 [107 S.Ct. 837, 93 L.Ed.2d 934].) The court should also delete the following sentence: "You must reach your verdict without any consideration of punishment."

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

AUTHORITY

- Statutory Admonitions. ▸ Pen. Code, § 1122.
- Avoid Discussing the Case. ▸ *People v. Pierce* (1979) 24 Cal.3d 199 [155 Cal.Rptr. 657, 595 P.2d 91]; *In re Hitchings* (1993) 6 Cal.4th 97 [24 Cal.Rptr.2d 74, 860 P.2d 466]; *In re Carpenter* (1995) 9 Cal.4th 634, 646–658 [38 Cal.Rptr.2d 665, 889 P.2d 985].
- Avoid News Reports. ▸ *People v. Holloway* (1990) 50 Cal.3d 1098, 1108–1111 [269 Cal.Rptr. 530, 790 P.2d 1327], disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830 [38 Cal.Rptr.2d. 394, 889 P.2d 588].
- Judge's Conduct as Indication of Verdict. ▸ *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].
- No Bias, Sympathy, or Prejudice. ▸ *People v. Hawthorne* (1992) 4 Cal.4th 43, 73 [14 Cal.Rptr.2d 133, 841 P.2d 118].
- No Independent Research. ▸ *People v. Karis* (1988) 46 Cal.3d 612, 642 [250 Cal.Rptr. 659, 758 P.2d 1189]; *People v. Castro* (1986) 184 Cal.App.3d 849,

853 [229 Cal.Rptr. 280]; *People v. Sutter* (1982) 134 Cal.App.3d 806, 820 [184 Cal.Rptr. 829].

- Prior Version of This Instruction Upheld. ▸ *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1182–1183 [67 Cal.Rptr.3d 871].
- Court's Contempt Power for Violations of Admonitions. ▸ Pen. Code, § 1122(a)(1); Code Civ. Proc. § 1209(a)(6) (effective 1/1/12).

RELATED ISSUES

Admonition Not to Discuss Case With Anyone

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

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

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

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

Jury Misconduct

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

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012), Criminal Trial § 726.

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

Posttrial Introductory

200. Duties of Judge and Jury

Members of the jury, I will now instruct you on the law that applies to this case. [I will give you a copy of the instructions to use in the jury room.] [Each of you has a copy of these instructions to use in the jury room.] [The instructions that you receive may be printed, typed, or written by hand. Certain sections may have been crossed-out or added. Disregard any deleted sections and do not try to guess what they might have been. Only consider the final version of the instructions in your deliberations.]

You must decide what the facts are. It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in this trial.

You must not let bias, sympathy, prejudice, or public opinion influence your assessment of the evidence or your decision. Many people have assumptions and biases about or stereotypes of other people and may be unaware of them. You must not be biased in favor of or against any party, witness, attorney, defendant[s], or alleged victim because of his or her disability, gender, nationality, national origin, race or ethnicity, religion, gender identity, sexual orientation, [or] age (./,) [or socioeconomic status] (./,) [or _____<*insert any other impermissible form of bias*>.]

You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions.

Pay careful attention to all of these instructions and consider them together. If I repeat any instruction or idea, do not conclude that it is more important than any other instruction or idea just because I repeated it.

Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in these instructions. Please be sure to listen carefully and follow the definitions that I give you. Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings.

Some of these instructions may not apply, depending on your findings about the facts of the case. [Do not assume just because I give a particular instruction that I am suggesting anything about the facts.] After you have

decided what the facts are, follow the instructions that do apply to the facts as you find them.

New January 2006; Revised June 2007, April 2008, December 2008, September 2019, March 2020

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct that the jurors are the exclusive judges of the facts and that they are entitled to a copy of the written instructions when they deliberate. (Pen. Code, §§ 1093(f), 1137.) Although there is no sua sponte duty to instruct on the other topics described in this instruction, there is authority approving instruction on these topics.

In the first paragraph, select the appropriate bracketed alternative on written instructions. Penal Code section 1093(f) requires the court to give the jury a written copy of the instructions on request. The committee believes that the better practice is to always provide the jury with written instructions. If the court, in the absence of a jury request, elects not to provide jurors with written instructions, the court must modify the first paragraph to inform the jurors that they may request a written copy of the instructions.

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

Do not give the bracketed sentence in the final paragraph if the court will be commenting on the evidence pursuant to Penal Code section 1127.

AUTHORITY

- Copies of Instructions. ▸ Pen. Code, §§ 1093(f), 1137.
- Judge Determines Law. ▸ Pen. Code, §§ 1124, 1126; *People v. Como* (2002) 95 Cal.App.4th 1088, 1091 [115 Cal.Rptr.2d 922]; see *People v. Williams* (2001) 25 Cal.4th 441, 455 [106 Cal.Rptr.2d 295, 21 P.3d 1209].
- Jury to Decide the Facts. ▸ Pen. Code, § 1127.
- Attorney's Comments Are Not Evidence. ▸ *People v. Stuart* (1959) 168 Cal.App.2d 57, 60–61 [335 P.2d 189].

- Consider All Instructions Together. ▸ *People v. Osband* (1996) 13 Cal.4th 622, 679 [55 Cal.Rptr.2d 26, 919 P.2d 640]; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [25 Cal.Rptr.2d 602]; *People v. Shaw* (1965) 237 Cal.App.2d 606, 623 [47 Cal.Rptr. 96].
- Follow Applicable Instructions ▸ *People v. Palmer* (1946) 76 Cal.App.2d 679, 686–687 [173 P.2d 680].
- No Bias, Sympathy, or Prejudice ▸ Pen. Code, § 1127h; *People v. Hawthorne* (1992) 4 Cal.4th 43, 73 [14 Cal.Rptr.2d 133, 841 P.2d 118].
- This Instruction Upheld ▸ *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1185 [67 Cal.Rptr.3d 871].

RELATED ISSUES

Jury Misconduct

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

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, §§ 726, 727.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 80, *Defendant's Trial Rights*, § 80.05[1], Ch. 83, *Evidence*, § 83.02, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[1], [2][c], 85.03[1], 85.05[2], [4] (Matthew Bender).

Evidence

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

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

AND

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 (a statement/ [or] testimony) of an accomplice that tends to incriminate the defendant 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.

New January 2006; Revised June 2007, April 2010, April 2011, February 2016, March 2019, March 2020

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].)

Do not give this instruction if accomplice testimony is solely exculpatory or neutral. (*People v. Smith* (2017) 12 Cal.App.5th 766, 778-780 [218 Cal.Rptr.3d 892] [telling jurors that corroboration is required to support neutral or exonerating accomplice testimony was prejudicial error].)

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].)

Give the bracketed sentence that begins with "The burden is on the defendant" unless acting with an accomplice is an element of the charged crime. (*People v. Martinez* (2019) 34 Cal.App.5th 721, 723 [246 Cal.Rptr.3d 442].) *Martinez* only involved charges where acting as an accomplice was an element.

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.Rtpr. 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].• No Corroboration Requirement for Exculpatory Accomplice Testimony ‣ *People v. Smith* (2017) 12 Cal.App.5th 766, 778-780 [218 Cal.Rptr.3d 892].

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.)

SECONDARY SOURCES

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, §§ 110, 111, 118, 122.

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).

361. Failure to Explain or Deny Adverse ~~Testimony~~Evidence

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.

New January 2006; Revised April 2010, February 2016, March 2017, March 2020

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].)

There is a split in authority over the application of *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] and whether this instruction should be given when a testifying defendant fails to explain or deny incriminating evidence in the absence of a question. (Compare *People v. Grandberry* (2019) 35 Cal.App.5th 599, 609 [247 Cal.Rptr.3d 258] [approving use of the instruction "when a testifying defendant has failed to explain or deny matters within the scope of relevant cross-examination, not simply those matters that were asked of the defendant on cross-examination"] with *People v. Roehler* (1985) 167 Cal.App.3d 353, 392 [213 Cal.Rptr. 353] ["If a defendant has not been asked an appropriate question calling for either an explanation or denial, the instruction cannot be given, as a matter of law"] and *People v. Vega* (2015) 236 Cal.App.4th 484, 497 [186 Cal.Rptr.3d 671] [noting restrictions for when the instruction may be given and quoting *Roehler*].)

If the court follows *Grandberry*, the trial court **must** ascertain as a matter of law: (1) if the matter was within the scope of relevant cross-examination; (2) if the defendant knew the facts necessary to explain or deny incriminating evidence or if

some circumstance precluded the defendant from knowing such facts; and (3) if the defendant failed to explain or deny the incriminating evidence.

If the court follows *Roehler*~~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].)

Give this instruction only when a testifying defendant completely fails to explain or deny incriminating evidence, or claims to lack knowledge although it appears from the evidence that defendant could reasonably be expected to have that knowledge. (*People v. Cortez* (2016) 63 Cal.4th 101, 117-118 [201 Cal.Rptr.3d 846, 369 P.3d 521].)

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].

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].)

SECONDARY SOURCES

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, § 102.

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).

377. Presence of Support Person/Dog/Dog Handler (Pen. Code, §§ 868.4, 868.5)

_____ *<insert name of witness>* **(will have/has/had) a (person/dog) present during (his/her) testimony. Do not consider the presence of the ~~support~~ (person~~'s~~/dog~~'s~~ [and dog handler]) ~~presence~~ who (is/was) with the witness for any purpose or allow it to distract you.**

New March 2018; Revised March 2020

BENCH NOTES

Instructional Duty

The court may give this instruction on request. If instructing on support persons, this instruction only applies to prosecution witnesses.

AUTHORITY

- Elements ▸ Pen. Code, §§ 868.4, 868.5.

378–399. Reserved for Future Use

507 Justifiable Homicide: By ~~Public~~ Peace Officer

The defendant is not guilty of (murder/ [or] manslaughter/attempted murder/ [or] attempted voluntary manslaughter) if (he/she) (killed/attempted to kill~~/killed~~) someone while (acting as a ~~public~~ peace officer/obeying a ~~public~~ peace officer's command for aid and assistance). ~~Such~~ (A/An~~a/an~~) [attempted] killing is justified, and therefore not unlawful, if:

1. **The defendant was (a ~~public~~ peace officer/obeying a ~~public~~ peace officer's command for aid and assistance);**

AND

2. **The [attempted] killing was committed while the defendant either: ~~(taking back into custody a convicted felon [or felons] who had escaped from prison or confinement[,]/ arresting a person [or persons] charged with a felony who (was/were) resisting arrest or fleeing from justice[,]/ overcoming actual resistance to some legal process[,]/ [or] while performing any [other] legal duty);~~**

A. Reasonably believed, based on the totality of the circumstances, that the force was necessary to defend against an imminent threat of death or serious bodily injury to the defendant or another person;

OR

B. Reasonably believed, based on the totality of the circumstances, that:

B1. _____ <*insert name of fleeing felon*> was fleeing;

B2. The force was necessary to arrest or detain _____ <*insert name of fleeing felon*> for the crime of _____ <*insert name of felony*>;

B3. The commission of the crime of _____ <*insert name of felony*> created a risk of or resulted in death or serious bodily injury to another person;

AND

B4. _____ <*insert name of fleeing felon*> would cause death or serious bodily injury to another person unless immediately arrested or detained.

~~**1. The [attempted] killing was necessary to accomplish (one of those/that) lawful purpose[s];**~~

~~**AND**~~

~~**2. The defendant had probable cause to believe that (_____ <*insert name of decedent*> posed a threat of death or great bodily injury, either to the defendant or to others/[or] that _____ <*insert name of decedent*> had committed (_____ <*insert forcible and atrocious crime*>/_____ <*insert crime decedent was suspected of committing, e.g.,* burglary>), and that crime threatened the defendant or others with death or great bodily injury)]. <*See Bench Note discussing this element.*>**~~

~~**A person has *probable cause* to believe that someone poses a threat of death or great bodily injury when facts known to the person would persuade someone of reasonable caution that the other person is going to cause death or great bodily injury to another.**~~

[A *serious bodily injury* means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (loss of consciousness/ concussion/ bone fracture/ protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).]

[A threat of death or serious bodily injury is *imminent* when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or to another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.]

[*Totality of the circumstances* means all facts known to the defendant at the time, including the conduct of the defendant and _____ <*insert name of decedent*> leading up to the use of deadly force.]

[In considering the totality of circumstances, you may consider whether:

- **[● Prior to the use of force, the defendant [identified] [or] [attempted to identify] him or herself as a peace officer and [warned] [or] [attempted to warn] that deadly force may be used(;/.)]**
- **[● Prior to the use of force, the defendant had objectively reasonable grounds to believe the person was aware that the defendant was a peace officer and that deadly force may be used(;/.)]**
- **[● [The defendant was able, under the circumstances, to [identify] [or] [attempt to identify] him or herself as a peace officer] [and] [to warn] [or] [attempt to warn] that deadly force may be used.]]**

[A peace officer who makes or attempts to make an arrest need not retreat or stop because the person being arrested is resisting or threatening to resist. A peace officer does not lose (his/her) right to self-defense by using objectively reasonable force to arrest or to prevent escape or to overcome resistance.]

~~**[An officer or employee of** _____ *<insert name of state or local government agency that employs public officer>* **is a *public officer*.]**~~

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

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

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

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

New January 2006; Revised April 2011, February 2012, August 2012, March 2020

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on justifiable homicide when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the

defendant's theory of the case." (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [addressing sua sponte duty to instruct on self-defense].)

Penal Code sections 196 and 835a, as amended by Statutes 2019, ch.170 (A.B. 392), became effective on January 1, 2020. If the defendant's act occurred before this date, the court should give the prior version of this instruction.

~~In element 2, select the phrase appropriate for the facts of the case.~~

~~It is unclear whether the officer must always have probable cause to believe that the victim poses a threat of future harm or if it is sufficient if the officer has probable cause to believe that the victim committed a forcible and atrocious crime. In *Tennessee v. Garner* (1985) 471 U.S. 1, 3, 11 [105 S.Ct. 1694, 85 L.Ed.2d 1], the Supreme Court held that, under the Fourth Amendment, deadly force may not be used to prevent the escape of an apparently unarmed suspected felon unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. "*Garner* necessarily limits the scope of justification for homicide under section 197, subdivision 4, and other similar statutes from the date of that decision." (*People v. Martin* (1985) 168 Cal.App.3d 1111, 1124 [214 Cal.Rptr. 873].) In a footnote, *Garner*, *supra*, 471 U.S. 1, 16, fn. 15, noted that California law permits a killing in either situation, that is, when the suspect has committed an atrocious crime or when the suspect poses a threat of future harm. (See also *Long Beach Police Officers Assn v. City of Long Beach* (1976) 61 Cal.App.3d 364, 371-375 [132 Cal.Rptr. 348] [also stating the rule as "either" but quoting police regulations, which require that the officer always believe there is a risk of future harm.]) The committee has provided both options, but see *People v. Ceballos* (1974) 12 Cal.3d 470, 478-479 [116 Cal.Rptr. 233, 526 P.2d 241]. The court should review relevant case law before giving the bracketed language.~~

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

Related Instructions
CALCRIM No. 508, *Justifiable Homicide: Citizen Arrest (Non-Peace Officer)*.

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

AUTHORITY

- Justifiable Homicide by ~~Public~~ Peace Officer. ▸ Pen. Code, §§ 196, 199, 835a.
- Burden of Proof. ▸ Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217]; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- ~~Public~~ Peace Officer Defined. ▸ ~~See~~ Pen. Code, § 830 et seq.~~§ 831(a) [custodial officer], 831.4 [sheriff's or police security officer], 831.5 [custodial officer], 831.6 [transportation officer], 3089 [county parole officer]; *In re Frederick B.* (1987) 192 Cal.App.3d 79, 89–90 [237 Cal.Rptr. 338], disapproved on other grounds in *In re Randy G.* (2001) 26 Cal.4th 556, 567 fn. 2 [110 Cal.Rptr.2d 516, 28 P.3d 239] ["public officers" is broader category than "peace officers"]; see also Pen. Code, § 836.5(a) [authority to arrest without warrant].~~
- ~~Felony Must Pose Threat of Death or Great Bodily Injury. ▸ *Kortum v. Alkire* (1977) 69 Cal.App.3d 325, 332–333 [138 Cal.Rptr. 26].~~Serious Bodily Injury Defined. ▸ Pen. Code, § 243(f)(4); *People v. Taylor* (2004) 118 Cal.App.4th 11, 25, fn. 4 [12 Cal.Rptr.3d 693].

~~RELATED ISSUES~~

~~***Killing Committed in Obedience to Judgment***~~
~~A homicide is also justifiable when committed by a public officer "in obedience to any judgment of a competent court." (Pen. Code, § 196, subd. 1.) There are no reported cases construing this subdivision. This provision appears to apply exclusively to lawful executions.~~

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, §~~§~~ ~~92,~~95~~,~~ ~~275~~.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.15[1]~~,~~ ~~[2]~~(Matthew Bender).

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

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

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

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

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

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

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

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

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

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

<Alternative for Pen. Code § 189(e)(2) and (e)(3) liability>
[5A. The defendant intended to kill;

AND

5B. The defendant (aided and abetted[,])/ [or] counseled[,]/ [or] commanded[,]/ [or] induced[,]/ [or] solicited[,]/ [or] requested[,]/ [or] assisted) the perpetrator in the commission of first degree murder(./;)]

[OR]

[(5A/6A). The defendant was a major participant in the_____<*insert felony or felonies from Pen. Code § 189*>**;**

AND

(5B/6B). When the defendant participated in the _____<*insert felony or felonies from Pen. Code § 189*>**, (he/she) acted with reckless indifference to human life(./;)]**
[OR]

<*Alternative for Pen. Code § 189(f) liability*>
[(5A/6A/7A). _____<*insert officer's name, excluding title***> was a peace officer lawfully performing (his/her) duties as a peace officer;**

AND

(5B/6B/7B). When the defendant acted, (he/she) knew, or reasonably should have known, that <*insert officer's name, excluding title***> was a peace officer performing (his/her) duties.]**

[A person may be guilty of felony murder of a peace officer even if the killing was unintentional, accidental, or negligent.]

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

[The defendant must have (intended to commit[,]/ [or] aid and abet[,]/ [or] been a member of a conspiracy to commit) the (felony/felonies) of _____

<insert felony or felonies from Pen. Code, § 189> **before or at the time of the death.]**

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

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

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

[You may not find the defendant guilty of felony murder unless all of you agree that the defendant or a perpetrator caused the death of another. You do not all need to agree, however, whether the defendant or a perpetrator caused that death.]

<*The following instructions can be given when reckless indifference and major participant under Pen. Code § 189(e)(3) applies>*
[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.]

[When you decide whether the defendant acted with *reckless indifference to human life*, consider all the evidence. No one of the following factors is necessary, nor is any one of them necessarily enough, to determine whether the defendant acted with reckless indifference to human life. Among the factors you may consider are:

- **[● Did the defendant know that [a] lethal weapon[s] would be present during the _____ <*insert underlying felony*>?]**
- **[● Did the defendant know that [a] lethal weapon[s] (was/were) likely to be used?]**
- **[● Did the defendant know that [a] lethal weapon[s] (was/were) used?]**
- **[● Did the defendant know the number of weapons involved?]**
- **[● Was the defendant near the person(s) killed when the killing occurred?]**
- **[● Did the defendant have an opportunity to stop the killing or to help the victim(s)?]**
- **[● How long did the crime last?]**
- **[● Was the defendant aware of anything that would make a coparticipant likely to kill?]**
- **[● Did the defendant try to minimize the possibility of violence?]**

[● _____ <*insert any other relevant factors*>]]

[When you decide whether the defendant was a *major participant*, consider all the evidence. No one of the following ~~se~~ factors is necessary, nor is any one of them necessarily enough, to determine whether the defendant was a major participant.]~~A~~Among the factors you may consider are:

[● ~~1.~~ What was the defendant's role in planning the crime that led to the death[s]?]
[● ~~2.~~ What was the defendant's role in supplying or using lethal weapons?]
[● ~~3.~~ What did the defendant know about dangers posed by the crime, any weapons used, or past experience or conduct of the other participant[s]?]
[● ~~4.~~ Was the defendant in a position to facilitate or to prevent the death?]
[● ~~5.~~ Did the defendant's action or inaction play a role in the death?]
[● ~~[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.]**~~

<Give the following instructions when Pen. Code § 189(f) applies>
[A person who is employed as a police officer by _____ *<insert name of agency that employs police officer>* **is a peace officer.]**

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

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

New January 2006; Revised April 2010, August 2013, February 2015, September 2019, March 2020

BENCH NOTES

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

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

The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecutor relies on it as a theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-561 [199 Cal.Rptr.60, 674 P.2d 1318].) The court has a **sua sponte** duty to instruct on conspiracy when the prosecution has introduced evidence of a conspiracy to prove liability for other offenses. (See, e.g., *People v. Pike* (1962) 58 Cal.2d 70, 88 [22 Cal.Rptr. 664, 372 P.2d 656]; *People v. Ditson* (1962) 57 Cal.2d 415, 447 [20 Cal.Rptr. 165, 369 P.2d 714].)

Give all appropriate instructions on all underlying felonies, aiding and abetting, and conspiracy.

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

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

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

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

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

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

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

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

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

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

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

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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 in its determination of 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.

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In *People v. Clark* (2016) 63 Cal.4th 522, 614-620 [203 Cal.Rptr.3d 407, 372 P.3d 811], the court identified certain factors to guide the jury in its determination of whether the defendant acted with reckless indifference to human life but did not hold that the court has a sua sponte duty to instruct on those factors. *Clark* noted that these factors had been applied by appellate courts "in cases involving nonshooter aiders and abettors to commercial armed robbery felony murders." (*Id.* at p. 618.) The trial court should determine whether the *Clark* factors need be given.

Related Instructions—Other Causes of Death

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

When the alleged victim dies during the course of the felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants, give CALCRIM No. 540C, *Felony Murder: First Degree—Other Acts Allegedly Caused Death*. (Cf. *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166]; but see

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

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

Related Instructions

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

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

AUTHORITY

- Felony Murder: First Degree. ▸ Pen. Code, § 189.
- Specific Intent to Commit Felony Required. ▸ *People v. Gutierrez (*2002) 28 Cal.4th 1083, 1140 [124 Cal.Rptr.2d 373, 52 P.3d 572].
- Infliction of Fatal Injury. ▸ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Defendant Must Join Felonious Enterprise Before or During Killing of Victim. ▸ *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].
- Logical Nexus Between Felony and Killing. ▸ *People v. Dominguez* (2006) 39 Cal.4th 1141]; *People v. Cavitt* (2004) 33 Cal.4th 187, 197–206].
- Merger Doctrine Does Not Apply to First Degree Felony Murder. ▸ *People v. Farley* (2009) 46 Cal.4th 1053, 1118-1120 [96 Cal.Rptr.3d 191, 210 P.3d 361].
- Reckless Indifference to Human Life. ▸ *People v. Clark* (2016) 63 Cal.4th 522, 614-620 [203 Cal.Rptr.3d 407, 372 P.3d 811]; *People v. Banks* (2015) 61 Cal.4th 788, 807-811 [189 Cal.Rptr.3d 208, 351 P.3d 330]; *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].
- Major Participant. ▸ *People v. Banks* (2015) 61 Cal.4th 788, 803-808 [189 Cal.Rptr.3d 208, 351 P.3d 330].

RELATED ISSUES

Conspiracy Liability—Natural and Probable Consequences

In the context of nonhomicide crimes, a coconspirator is liable for any crime committed by a member of the conspiracy that was a natural and probable consequence of the conspiracy. (*People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 842–843 [68 Cal.Rptr.2d 388].) This is analogous to the rule in aiding and abetting that the defendant may be held liable for any unintended crime that was the natural and probable consequence of the intended crime. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [26 Cal.Rptr.2d 323].) In the context of felony murder, the Supreme Court has explicitly held that the natural and probable consequences doctrine does not apply to a defendant charged with felony murder based on aiding and abetting the underlying felony. (See *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1658 [285 Cal.Rptr. 523].) The court has not explicitly addressed whether the natural and probable consequences doctrine continues to limit liability for felony murder where the defendant's liability is based solely on being a member of a conspiracy. In *People v. Pulido* (1997) 15 Cal.4th 713, 724 [63 Cal.Rptr.2d 625, 936 P.2d 1235], the court stated in dicta, "[f]or purposes of complicity in a cofelon's homicidal act, the conspirator and the abettor stand in the same position." [Citation; quotation marks omitted.]

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

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

SECONDARY SOURCES

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

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

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

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

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

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

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

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

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

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

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

<Alternative for Pen. Code § 189(e)(2) and (e)(3) liability>
[(4A/5A). The defendant intended to kill;

AND

(4B/5B). The defendant (aided and abetted[,]/[or] counseled[,]/ [or] commanded[,]/ [or] induced[,]/ [or] solicited[,]/ [or] requested[,]/ [or] assisted) the perpetrator in the commission of murder(./;)]

[OR]

[(4A/5A/6A). The defendant was a major participant in the _____<*insert felony or felonies from Pen. Code § 189*>**;**

AND

(4B/5B/6B). When the defendant participated in the _____<*insert felony or felonies from Pen. Code § 189*>**, (he/she) acted with reckless indifference to human life(./;)]**

[OR]

<*Alternative for Pen. Code § 189(f) liability*>
[(4A/5A/6A/7A). _____<*insert officer's name, excluding title***> was a peace officer lawfully performing (his/her) duties as a peace officer;**

AND

(4B/5B/6B/7B). When the defendant acted, (he/she) knew, or reasonably should have known, that <*insert officer's name, excluding title***> was a peace officer performing (his/her) duties.]**

[A person may be guilty of felony murder of a peace officer even if the killing was unintentional, accidental, or negligent.]

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

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

whether a consequence is natural and probable, consider all the circumstances established by the evidence.

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

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

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

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

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

<The following instructions can be given when reckless indifference and major participant under Pen. Code § 189(e)(3) applies>
[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.]

[When you decide whether the defendant acted with reckless indifference to human life, consider all the evidence. No one of the following factors is necessary, nor is any one of them necessarily enough, to determine whether the defendant acted with reckless indifference to human life. Among the factors you may consider are:

- **[● Did the defendant know that [a] lethal weapon[s] would be present during the _____ <*insert underlying felony*>?]**
- **[● Did the defendant know that [a] lethal weapon[s] (was/were) likely to be used?]**
- **[● Did the defendant know that [a] lethal weapon[s] (was/were) used?]**
- **[● Did the defendant know the number of weapons involved?]**
- **[● Was the defendant near the person(s) killed when the killing occurred?]**

[● Did the defendant have an opportunity to stop the killing or to help the victim(s)?]
[● How long did the crime last?]
[● Was the defendant aware of anything that would make a coparticipant likely to kill?]
[● Did the defendant try to minimize the possibility of violence?]
[● _____ *<insert any other relevant factors>*]]

[When you decide whether the defendant was a *major participant*, consider all the evidence. No one of the following factors is necessary, nor is any one of them necessarily enough, to determine whether the defendant was a major participant. Among the factors you may consider are:

[● ~~1.~~ [What was the defendant's role in planning the crime that led to the death[s]?]
[● ~~2.~~ What was the defendant's role in supplying or using lethal weapons?]
[● ~~3.~~ What did the defendant know about dangers posed by the crime, any weapons used, or past experience or conduct of the other participant[s]?]
[● ~~4.~~ Was the defendant in a position to facilitate or to prevent the death?]
[● ~~5.~~ Did the defendant's action or inaction play a 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.]~~

<Give the following instructions when Pen. Code § 189(f) applies>
[A person who is employed as a police officer by _____ *<insert name of agency that employs police officer>* **is a peace officer.]**

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

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

New January 2006; Revised April 2010, August 2013, September 2019, March 2020

BENCH NOTES

Instructional Duty

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

The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecutor relies on it as a theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-561 [199 Cal.Rptr.60, 674 P.2d 1318].) The court has a **sua sponte** duty to instruct on conspiracy when the prosecution has introduced evidence of a conspiracy to prove liability for other offenses. (See, e.g., *People v. Pike* (1962) 58 Cal.2d 70, 88 [22 Cal.Rptr. 664, 372 P.2d 656]; *People v. Ditson* (1962) 57 Cal.2d 415, 447 [20 Cal.Rptr. 165, 369 P.2d 714].)

Give all appropriate instructions on all underlying felonies, aiding and abetting, and conspiracy.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401]; see generally, *People v. Cervantes* (2001) 26 Cal.4th 860, 866–874 [111 Cal.Rptr.2d 148, 29 P.3d 225].) Because causation is likely to be an issue in any case in which this instruction is given, the committee has included the paragraph that begins with "An act causes death if." If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with "There may be more than one cause of death." (*People v. Sanchez* (2001) 26 Cal.4th 834, 845–849 [111 Cal.Rptr.2d 129, 29 P.3d 209]; *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135].)

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

If the prosecution's theory is that the defendant aided and abetted or conspired to commit the felony, select one of these options in element 1 and the corresponding intent requirement in element 2. Give bracketed element 3. Give the bracketed

sentence at the beginning of the instruction that begins with "The defendant may be guilty of murder." In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on any underlying felonies and on aiding and abetting and/or conspiracy with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the perpetrator committed," rather than "the defendant," in the instructions on the underlying felony.

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

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at p. 618.) The trial court should determine whether the *Clark* factors need be given.

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

AUTHORITY

- Felony Murder: First Degree. ▸ Pen. Code, § 189.
- Specific Intent to Commit Felony Required. ▸ *People v. Gutierrez (*2002) 28 Cal.4th 1083, 1140 [124 Cal.Rptr.2d 373, 52 P.3d 572].
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- Defendant Must Join Felonious Enterprise Before or During Killing of Victim. ▸ *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].
- Death Caused by Felony but Not by Act of Force or Violence Against Victim. ▸ *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542] [arson causing death of accomplice]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598] [heart attack caused by robbery]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166] [same]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [simultaneous or coincidental death is not killing].
- Logical Nexus Between Felony and Killing. ▸ *People v. Dominguez* (2006) 39 Cal.4th 1141 [47 Cal.Rptr.3d 575, 140 P.3d 866]; *People v. Cavitt* (2004) 33 Cal.4th 187, 197–206 [14 Cal.Rptr.3d 281, 91 P.3d 222].

- Merger Doctrine Does Not Apply to First Degree Felony Murder. ▸ *People v. Farley* (2009) 46 Cal.4th 1053, 1118-1120 [96 Cal.Rptr.3d 191, 210 P.3d 361].
- Reckless Indifference to Human Life. ▸ *People v. Clark* (2016) 63 Cal.4th 522, 614-620 [203 Cal.Rptr.3d 407, 372 P.3d 811]; *People v. Banks* (2015) 61 Cal.4th 788, 807-811 [189 Cal.Rptr.3d 208, 351 P.3d 330]; *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].
- Major Participant. ▸ *People v. Banks* (2015) 61 Cal.4th 788, 803-808 [189 Cal.Rptr.3d 208, 351 P.3d 330].

RELATED ISSUES

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

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

SECONDARY SOURCES

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

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

541–547. Reserved for Future Use

548. Murder: Alternative Theories

~~[~~**The defendant has been prosecuted for murder under multiple ~~two~~ theories~~:~~ ~~(1) malice aforethought, and (2) felony murder.] [[In addition,] (T/t)he defendant has been prosecuted for murder under multiple theories of felony murder.]~~**

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

You may not find the defendant guilty of murder unless all of you agree that the People have proved that the defendant committed murder~~.~~ . You need not all agree on the same theory but you must unanimously agree on the degree of 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].~~

New January 2006; Revised August 2014, February 2016, September 2019, March 2020

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 is also designed to be given when felony murder is charged on multiple 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*.

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].

594 Vehicular Manslaughter: Collision for Financial Gain (Pen. Code, § 192(c)(43))

The defendant is charged [in Count __] with vehicular manslaughter by causing a collision for financial gain [in violation of Penal Code section 192(c)(43)].

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

1. **While driving a vehicle, the defendant knowingly caused or participated in a vehicular collision;**

2. **When the defendant acted, (he/she) knew that the purpose of the vehicular collision was to make a false or fraudulent insurance claim for financial gain;**

3. **When the defendant acted, (he/she) did so with intent to defraud;**

AND

4. **The collision caused the death of another person.**

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

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

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

New January 2006; Revised March 2020

BENCH NOTES

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

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

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Related Instructions
CALCRIM No. 2002, *Insurance Fraud: Vehicle Accident*.

AUTHORITY

- Elements. ▸ Pen. Code, § 192(c)(~~4~~3).
- Causation. ▸ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Intent to Defraud—Defined. ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gual-Alexander* (1995) 32 Cal.App.4th 735, 745[38 Cal.Rptr.2d 176].
- Intent to Defraud Entity. ▸ Pen. Code, § 8.

RELATED ISSUES

Does Not Preclude Murder Charge
Section 192(c)(~~4~~3) of the Penal Code states that: "This ~~provision shall not be~~

~~construed to~~ paragraph does not prevent prosecution of a defendant for the crime of murder."

Probable and Natural Consequences of a Conspiracy

A nondriver coconspirator may be liable for a death that results from a conspiracy to commit a vehicular collision for insurance fraud under the natural and probable consequences doctrine. (*People v. Superior Court (Shamis)* (1998) 58 Cal.App.4th 833, 842–843 [68 Cal.Rptr.2d 388].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 262-263.

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, § 222.

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

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

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

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

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

AND

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

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

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

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

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

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

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

<*Give when kill zone theory applies***>**
[A person may intend to kill a primary target and also [a] secondary target[s] within a zone of fatal harm or "kill zone." A "kill zone" is an area in which the defendant used lethal force that was designed and intended to kill everyone in the area around the primary target.

In order to convict the defendant of the attempted murder of _____ *<insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>***, the People must prove that the defendant not only intended to kill** _____ *<insert name of primary target alleged>* **but also either intended to kill** _____ *<insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>***, or intended to kill everyone within the kill zone.**

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

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

[● The type of weapon used(;/.)]
[● The number of shots fired(;/.)]

[● The distance between the defendant and _____ <*insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory*>(;/.)]

[● The distance between _____ <*insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory*> and the primary target.]

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

New January 2006; Revised December 2008, August 2009, April 2011, August 2013, September 2019, March 2020

BENCH NOTES

Instructional Duty

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

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

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

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

Penal Code section 188, as amended by Statutes 2018, ch. 1015 (S.B. 1437), became effective January 1, 2019. The amendment added "malice shall not be imputed to a person based solely on his or her participation in a crime." The natural and probable consequences doctrine as the basis for attempted murder may be affected by this statutory change.

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

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

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

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

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

AUTHORITY

- Attempt Defined. ▸ Pen. Code, §§ 21a, 663, 664.
- Murder Defined. ▸ Pen. Code, § 187.
- Specific Intent to Kill Required. ▸ *People v. Guerra* (1985) 40 Cal.3d 377, 386 [220 Cal.Rptr. 374, 708 P.2d 1252].
- Fetus Defined. ▸ *People v. Davis* (1994) 7 Cal.4th 797, 814–815 [30 Cal.Rptr.2d 50, 872 P.2d 591]; *People v. Taylor* (2004) 32 Cal.4th 863, 867 [11 Cal.Rptr.3d 510, 86 P.3d 881].
- Kill Zone Explained. ▸ *People v. Canizales* (2019) 7 Cal.5th 591, 607-608 [248 Cal.Rptr.3d 370, 442 P.3d 686]; *People v. Stone* (2009) 46 Cal.4th 131, 137–138 [92 Cal.Rptr.3d 362, 205 P.3d 272].
- ~~Killer Need Not Be Aware of Other Victims in Kill Zone. ▸ *People v. Adams* (2008) 169 Cal.App.4th 1009, 1023 [86 Cal.Rptr.3d 915].~~
- This Instruction Correctly States the Law of Attempted Murder. ▸ *People v. Lawrence* (2009) 177 Cal.App.4th 547, 556-557 [99 Cal.Rptr.3d 324].

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Specific Intent Required

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

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

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

Solicitation

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

Single Bullet, Two Victims

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

No Attempted Involuntary Manslaughter

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

Transferred and Concurrent Intent

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

Kill Zone Theory

Give the kill zone instruction "only in those cases where the court concludes there is sufficient evidence to support a jury determination that the *only* reasonable inference from the circumstances of the offense is that a defendant intended to kill everyone in the zone of fatal harm. The use or attempted use of force that merely

endangered everyone in the area is insufficient to support a kill zone instruction." (*People v. Canizales* (2019) 7 Cal.5th 591, 608 [248 Cal.Rptr.3d 37, 442 P.3d 686].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Elements, §§ 56–71.

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

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

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 acted with reckless indifference to human life, consider all the evidence. No one of the following factors is necessary, nor is any one of them necessarily enough, to determine whether the defendant acted with reckless indifference to human life. Among the factors you may consider are:

- **[● Did the defendant know that [a] lethal weapon[s] would be present during the _____ <*insert underlying felony*>?]**
- **[● Did the defendant know that [a] lethal weapon[s] (was/were) likely to be used?]**
- **[● Did the defendant know that [a] lethal weapon[s] (was/were) used?]**
- **[● Did the defendant know the number of weapons involved?]**
- **[● Was the defendant near the person(s) killed when the killing occurred?]**
- **[● Did the defendant have an opportunity to stop the killing or to help the victim(s)?]**
- **[● How long did the crime last?]**
- **[● Was the defendant aware of anything that would make a coparticipant likely to kill?]**
- **[● Did the defendant try to minimize the possibility of violence?]**
- **[● _____ <*insert any other relevant factors*>]**

[When you decide whether the defendant was a *major participant*, consider all the evidence. No one of these following factors is necessary, nor is any one of them necessarily enough, to determine whether the defendant was a major participant.] Among the factors you may consider are:

- **[● ~~1.~~ [What was the defendant's role in planning the crime that led to the death[s]?]**
- **[● ~~2.~~ What was the defendant's role in supplying or using lethal weapons?]**
- **[● ~~3.~~ What did the defendant know about dangers posed by the crime, any weapons used, or past experience or conduct of the other participant[s]?]**
- **[● ~~4.~~ Was the defendant in a position to facilitate or to prevent the death?]**
- **[● ~~5.~~ Did the defendant's action or inaction play a 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].

New January 2006; Revised April 2008, February 2016, August 2016, September 2019, March 2020

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.)*

Do not give this instruction when giving CALCRIM No. 731, Special Circumstances: Murder in Commission of Felony—Kidnapping With Intent to Kill After March 8, 2000 or CALCRIM No. 732, Special Circumstances: Murder in Commission of Felony—Arson With Intent to Kill. (People v. Odom (2016) 244 Cal.App.4th 237, 256–257 [197 Cal.Rptr.3d 774].)

When multiple special circumstances are charged, one or more of which require intent to kill, the court may need to modify this instruction.

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 in its determination of 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.

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. Clark* (2016) 63 Cal.4th 522, 614-620 [203 Cal.Rptr.3d 407, 372 P.3d 811], the court identified certain factors to guide the jury in its determination of whether the defendant acted with reckless indifference to human life but did not hold that the court has a sua sponte duty to instruct on those factors. *Clark* noted that these factors had been applied by appellate courts "in cases involving nonshooter aiders and abettors to commercial armed robbery felony murders." (*Id.*

at p. 618.) The trial court should determine whether the *Clark* 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. Clark* (2016) 63 Cal.4th 522, 614-620 [203 Cal.Rptr.3d 407, 372 P.3d 811]; *People v. Banks* (2015) 61 Cal.4th 788, 807-811 [189 Cal.Rptr.3d 208, 351 P.3d 330]; *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 (4th ed. 2012) Punishment, §§ 536, 543.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, Death Penalty, § 87.14[2][b][ii] (Matthew Bender).

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

You have heard testimony from _____ <*insert name of expert*> regarding the effect of (battered women's syndrome/intimate partner battering/_____ <*insert other description used by expert for syndrome*>).

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

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

New January 2006; Revised March 2017, March 2020

BENCH NOTES

Instructional Duty

Several courts of review have concluded there is no sua sponte duty to give a similar limiting instruction (see CALCRIM No. 1193, *Testimony on Child Sexual Abuse Accommodation Syndrome)* when an expert testifies on child sexual abuse accommodation syndrome. (*People v. Mateo* (2016) 243 Cal.App.4th 1063, 1073-1074 [197 Cal.Rptr.3d 248]; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 736 [256 Cal.Rptr. 446] and *People v. Stark* (1989) 213 Cal.App.3d 107, 116 [261 Cal.Rptr. 479] [instruction required only on request].) See also *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088, fn. 5, 1090-1091, 1100 [56 Cal.Rptr.2d 142, 92 P.2d 1], which concludes that a limiting instruction on battered woman syndrome is required only on request. But see *People v. Housley* (1992) 6 Cal.App.4th 947, 958–959 [9 Cal.Rtpr.2d 431], which did find a sua sponte duty to give CALCRIM No. 1193.

In *People v. Brown* (2004) 33 Cal.4th 892, 906–908 [16 Cal.Rptr.3d 447, 94 P.3d 574], the Supreme Court held that testimony from an expert in battered women's syndrome could be admitted under Evidence Code section 801 even though there was no evidence of prior incidents of violence between the defendant and the alleged victim. The court held that the expert could testify generally about the "cycle of violence" and the frequency of recantation by victims of domestic abuse,

without testifying specifically about "battered women's syndrome". *(Ibid.)* It is unclear if the court is required to give a cautionary admonition sua sponte when such evidence is admitted.

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

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

AUTHORITY

- Instructional Requirements ▸ See Evid. Code, § 1107(a); *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088, fn. 5 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Abuse Defined ▸ Evid. Code, § 1107(c); Fam. Code, § 6203.
- Domestic Violence Defined ▸ Evid. Code, § 1107(c); Fam. Code, § 6211.
- Relevant After Single Incident of Abuse ▸ See *People v. Brown* (2004) 33 Cal.4th 892, 906–908 [16 Cal.Rptr.3d 447, 94 P.3d 574]; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1129 [93 Cal.Rptr.2d 356].
- Relevant to Rehabilitate Victim's Credibility ▸ *People v. Gadlin* (2000) 78 Cal.App.4th 587, 594–595 [92 Cal.Rptr.2d 890] [victim recanted incident and reunited with abuser]; *People v. Morgan* (1997) 58 Cal.App.4th 1210, 1215–1217 [68 Cal.Rptr.2d 772] [victim recanted].
- This Instruction Upheld ▸ *People v. Sexton* (2019) 37 Cal.App.5th 457, 465-468 [250 Cal.Rptr.3d 496].

RELATED ISSUES

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

Definition and Preferred Name

In 2004, the Legislature amended Evidence Code section 1107(d), changing all references from "battered women's syndrome" to "intimate partner battering and its effects." Previous decisional law continues to apply. (Evid. Code, § 1107(f).) Battered women's syndrome has been defined as "a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives." (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1083–1084 [56 Cal.Rptr.2d 142, 921 P.2d 1].) The Supreme Court had previously noted that experts prefer to call the syndrome "expert testimony on battered women's experiences." (See *People v. Humphrey, supra,* 13 Cal.4th at pp. 1083–1084, fn. 3.)

No Testimony on Actual State of Mind

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

SECONDARY SOURCES

1 Witkin, California Evidence (5th ed. 2012) Opinion Evidence, §§ 49–52.

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

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

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

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

<Alternative 1A—force with weapon>

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

[OR]

<Alternative 1B—force without weapon>

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

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

2. The defendant did that act willfully;

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

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

5. When the defendant acted, the person assaulted was lawfully performing (his/her) duties as a (firefighter/peace officer);

[AND]

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

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

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

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

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

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

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

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

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

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

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

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

AND

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

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

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

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

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

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

New January 2006; Revised April 2011, February 2012, February 2013, September 2019, March 2020

BENCH NOTES

Instructional Duty

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

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

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

Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. In addition, give CALCRIM No. 2672, *Lawful Performance: Resisting Unlawful Arrest With Force*, if requested.

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

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

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

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

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

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

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

The court may give the bracketed sentence that begins, "The duties of a _____ <*insert title . . . .*> include," on request. The court may insert a description of the officer's duties such as "the correct service of a facially valid

search warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

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

AUTHORITY

- Elements ▸ Pen. Code, §§ 240, 245(c) & (d)(1)–(3).
- Assault Weapon Defined ▸ Pen. Code, §§ 30510, 30515.
- Firearm Defined ▸ Pen. Code, § 16520.
- Machine Gun Defined ▸ Pen. Code, § 16880.
- Semiautomatic Pistol Defined ▸ Pen. Code, § 17140.
- .50 BMG Rifle Defined ▸ Pen. Code, § 30530.
- Peace Officer Defined ▸ Pen. Code, § 830 et seq.
- Firefighter Defined ▸ Pen. Code, § 245.1.
- Willful Defined ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▸ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault ▸ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Inherently Deadly Defined ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

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

Dual Convictions Prohibited

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

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 69.

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

1045 Sexual Penetration by Force, Fear, or Threats (Pen. Code, § 289(a)(1), (2), (g))

The defendant is charged [in Count __] with sexual penetration by force [in violation of Penal Code section 289].

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

1. **The defendant committed an act of sexual penetration with another person;**

2. **The penetration was accomplished by using (a/an) (foreign object[,]/ [or] substance[,]/ [or] instrument[,]/ [or] device[,]/ [or] unknown object);**

3. **The other person did not consent to the act;**

AND

4. **The defendant accomplished the act:**

<Alternative 4A—force or fear>
[by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to another person.]

<Alternative 4B—future threats of bodily harm>
[by threatening to retaliate against someone when there was a reasonable possibility that the defendant would carry out the threat. A *threat to retaliate* is a threat to kidnap, unlawfully restrain or confine, or inflict extreme pain, serious bodily injury, or death.]

<Alternative 4C—threat of official action>
[by threatening to use the authority of a public office to incarcerate, arrest, or deport someone. A *public official* is a person employed by a government agency who has authority to incarcerate, arrest, or deport. The other person must have reasonably believed that the defendant was a public official even if (he/she) was not.]

Sexual penetration **means (penetration, however slight, of the genital or anal opening of the other person/ [or] causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, however slightly, his or her own genital or anal opening) for the purpose of sexual abuse, arousal, or gratification.**

[A *foreign object, substance, instrument, or device* includes any part of the body except a sexual organ.] [An *unknown object* includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object penetrated the opening.]

[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]

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

[Evidence that the defendant and the other person (dated/were married/had been married) is not enough by itself to constitute consent.]

[Evidence that the other person (requested/suggested/communicated) that the defendant use a condom or other birth control device is not enough by itself to constitute consent.]

[An act is *accomplished by force* if a person uses enough physical force to overcome the other person's will.]

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

[*Retribution* is a form of payback or revenge.]

[*Menace* means a threat, statement, or act showing an intent to injure someone.]

[An act is *accomplished by fear* if the other person is actually and reasonably afraid [or (he/she) is actually but unreasonably afraid and the defendant knows of (his/her) fear and takes advantage of it].]

<Defense: Reasonable Belief in Consent>
[The defendant is not guilty of forcible sexual penetration if (he/she) actually and reasonably believed that the other person consented to the act. 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.]

New January 2006; Revised August 2016, March 2020

BENCH NOTES

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

The court should select the appropriate alternative in element 4 to instruct how the sexual penetration was accomplished.

Defenses—Instructional Duty
The court has a **sua sponte** duty to instruct on the defense of 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. 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].)

AUTHORITY

- Elements. ▸ Pen. Code, § 289(a)(1), (2), (g).
- Specific Intent Crime. ▸ *People v. McCoy* (2013) 215 Cal.App.4th 1510, 1538 [156 Cal.Rptr.3d 382].
- Consent Defined. ▸ Pen. Code, §§ 261.6, 261.7.
- Duress Defined. ▸ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221].

- Foreign Object, Substance, Instrument, or Device Defined. ▸ Pen. Code, § 289(k)(2); *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rtpr. 170] [a finger is a "foreign object"].
- Menace Defined. ▸ Pen. Code, § 261(c) [in context of rape].
- Sexual Penetration Defined. ▸ Pen. Code, § 289(k); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].
- Threatening to Retaliate Defined. ▸ Pen. Code, § 289(*l*).
- Unknown Object Defined. ▸ Pen. Code, § 289(k)(3).
- Fear Defined. ▸ *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. ▸ *People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089].
- Intent. ▸ *People v. Senior* (1992) 3 Cal.App.4th 765, 776 [5 Cal.Rptr.2d 14] [specific intent is "purpose of sexual arousal, gratification, or abuse"].
- Mistake of Fact Regarding Consent. ▸ See *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337] [in context of kidnapping and rape].
- Sexual Abuse Defined. ▸ *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].

COMMENTARY

Penal Code section 289 requires that the sexual penetration be "against the victim's will." (Pen. Code, § 289(a)(1), (2), (g).) "Against the will" has been defined as "without consent." (See *People v. Key* (1984) 153 Cal.App.3d 888, 895 [203 Cal.Rptr. 144] [in context of rape]; see also *People v. Young* (1987) 190 Cal.App.3d 248, 257 [235 Cal.Rptr. 361].)

The instruction include an optional definition of the sufficiency of "fear" because that term has meaning in the context of forcible sex offenses that is technical and may not be readily apparent to jurors. (See *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651] [fear in context of sodomy and oral copulation];

People v. Iniguez (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].)

The court is not required to instruct sua sponte on the definition of "duress" or "menace" and Penal Code section 289 does not define either term. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress]). Optional definitions are provided for the court to use at its discretion. The definition of "duress" is based on *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071], and *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]. The definition of "menace" is based on the statutory definitions contained in Penal Code sections 261 and 262 [rape]. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416] [using rape definition in case involving forcible lewd acts].) In *People v. Leal, supra,* 33 Cal.4th at pp. 1004–1010, the court held that the statutory definition of "duress" contained in Penal Code sections 261 and 262 does not apply to the use of that term in any other statute. The court did not discuss the statutory definition of "menace." The court should consider the *Leal* opinion before giving the definition of "menace."

The term "force" as used in the forcible sex offense statutes does not have a specialized meaning and court is not required to define the term sua sponte. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089].) In *People v. Griffin, supra,* the Supreme Court further stated,

> Nor is there anything in the common usage definitions of the term "force," or in the express statutory language of section 261 itself, that suggests force in a forcible rape prosecution actually means force "*substantially* different from or *substantially* greater than" the physical force normally inherent in an act of consensual sexual intercourse. [*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582].] To the contrary, it has long been recognized that "in order to establish force within the meaning of section 261, subdivision (2), the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim]." (*People v. Young* (1987) 190 Cal.App.3d 248, 257–258 [235 Cal.Rptr. 361] . . . .)

(*Ibid.* at 1023–1024 [emphasis in original].)

The committee has provided a bracketed definition of "force," consistent with *People v. Griffin, supra,* that the court may give on request.

LESSER INCLUDED OFFENSES

- Assault. ▸ Pen. Code, § 240.
- Assault With Intent to Commit Forcible Sexual Penetration. ▸ See Pen. Code, § 220; *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape].
- Attempted Forcible Sexual Penetration. ▸ Pen. Code, §§ 664, 289(a)(1), (2), (g).
- Battery. ▸ Pen. Code, § 242.
- Sexual Battery. Pen. Code, §§ 243.4(a), (e)(1) under the expanded accusatory pleading test; People v. Ortega (2015) 240 Cal.App.4th 956, 967–970 [193 Cal.Rptr.3d 142].

Nonforcible sex crimes requiring the perpetrator and victim to be within certain age limits are not lesser included offenses of forcible sex crimes. (*People v. Scott* (2000) 83 Cal.App.4th 784, 794 [100 Cal.Rptr.2d 70].)

RELATED ISSUES

Consent Obtained by Fraudulent Representation

A person may also induce someone else to consent to engage in sexual penetration by a false or fraudulent representation made with an intent to create fear, and which does induce fear and would cause a reasonable person to act contrary to his or her free will. (Pen. Code, § 266c [wobbler offense].) While section 266c requires coercion and fear to obtain consent, it does not involve physical force or violence. (See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937–938 [26 Cal.Rptr.2d 567] [rejecting defendant's argument that certain acts were consensual and without physical force, and were only violations of section 266c].)

Consent Withdrawn

A forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection. (*In re John Z.* (2003) 29 Cal.4th 756, 760 [128 Cal.Rptr.2d 783, 60 P.3d 183].) If there is an issue whether consent to sexual penetration was withdrawn, see CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats,* for language that may be adapted for use in this instruction.

Minor Victim

When sexual penetration is committed against the will of a person who is incapable of consent, such as a baby, and is accomplished by physical force that results in physical injury to the victim, the statutory requirements "against the will" and "use of force" are fully satisfied. (*People v. White* (1986) 179 Cal.App.3d 193, 202 [224 Cal.Rptr. 467].)

Multiple Penetrations

A violation of section 289 is complete when "slight" penetration occurs. A new and separate violation is completed each time a new and separate penetration, however slight, occurs. (*People v. Harrison* (1989) 48 Cal.3d 321, 329, 334 [256 Cal.Rtpr. 401, 768 P.2d 1078] [disapproving *People v. Hammon* (1987) 191 Cal.App.3d 1084, 1097 [236 Cal.Rptr. 822]].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 56, 58, 178.

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 292.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][d], [2] (Matthew Bender).

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

1047 Sexual Penetration of an Intoxicated Person (Pen. Code, § 289(e))

The defendant is charged [in Count __] with sexual penetration of a person while that person was intoxicated [in violation of Penal Code section 289(e)].

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

1. **The defendant committed an act of sexual penetration with another person;**

2. **The penetration was accomplished by using (a/an) (foreign object[,]/ [or] substance[,]/ [or]instrument[,]/ [or]device[,]/ [or] unknown object);**

3. **The effect of (a/an) (intoxicating/anesthetic/controlled) substance prevented the other person from resisting the act;**

AND

4. **The defendant knew or reasonably should have known that the effect of that substance prevented the other person from resisting the act.**

Sexual penetration **means (penetration, however slight, of the genital or anal opening of the other person/ [or] causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, however slightly, his or her own genital or anal opening) for the purpose of sexual abuse, arousal, or gratification.**

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

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

[A *foreign object, substance, instrument, or device* includes any part of the body except a sexual organ.] [An *unknown object* includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object penetrated the opening.]

[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]

<Defense: Reasonable Belief Capable of Consent>
[The defendant is not guilty of this crime if (he/she) actually and reasonably believed that the person was capable of consenting to the act, even if the defendant's belief was wrong. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the woman was capable of consenting. If the People have not met this burden, you must find the defendant not guilty.]

New January 2006; Revised March 2020

BENCH NOTES

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

A space is provided to identify controlled substances if the parties agree that there is no issue of fact.

Defenses—Instructional Duty
The court has a **sua sponte** duty to instruct on the defense of reasonable belief the person was capable of consent if there is sufficient evidence to support the defense. (See *People v. Giardino* (2000) 82 Cal.App.4th 454, 472 [98 Cal.Rptr.2d 315].)

Related Instructions
CALCRIM No. 1046, *Sexual Penetration in Concert*, may be given in conjunction with this instruction if appropriate.

AUTHORITY

- Elements. ▸ Pen. Code, § 289(e).
- Specific Intent Crime. ▸ *People v. McCoy* (2013) 215 Cal.App.4th 1510, 1538 [156 Cal.Rptr.3d 382].
- Controlled Substances Defined. ▸ Health & Safety Code, §§ 11054–11058; see *People v. Avila* (2000) 80 Cal.App.4th 791, 798, fn. 7 [95 Cal.Rptr.2d 651].
- Foreign Object, Substance, Instrument, or Device Defined. ▸ Pen. Code, § 289(k)(2); *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [a finger is a "foreign object"].
- Sexual Penetration Defined. ▸ Pen. Code, § 289(k)(1); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].
- Unknown Object Defined. ▸ Pen. Code, § 289(k)(3).
- Anesthetic Effect Defined. ▸ See *People v. Avila* (2000) 80 Cal.App.4th 791, 798–799 [95 Cal.Rptr.2d 651] [in context of sodomy].
- Prevented From Resisting Defined. ▸ See *People v. Giardino* (2000) 82 Cal.App.4th 454, 465–467 [98 Cal.Rptr.2d 315] [in context of rape].
- Sexual Abuse Defined. ▸ *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].

LESSER INCLUDED OFFENSES

- Assault. ▸ Pen. Code, § 240.
- Attempted Sexual Penetration. ▸ Pen. Code, §§ 664, 289(a)(1) & (2), (g).
- Attempted Sexual Penetration of Intoxicated Person. ▸ Pen. Code, §§ 663, 289(e).
- Battery. ▸ Pen. Code, § 242.

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1045, *Sexual Penetration by Force, Fear, or Threats*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 56, 59-61, 178.

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

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

1048 Sexual Penetration of an Unconscious Person (Pen. Code, § 289(d))

The defendant is charged [in Count __] with sexual penetration of a person who was unconscious of the nature of the act [in violation of Penal Code section 289(d)].

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

1. **The defendant committed an act of sexual penetration with another person;**

2. **The penetration was accomplished by using (a/an) (foreign object[,]/ [or] substance[,]/ [or] instrument[,]/ [or] device[,]/ [or] unknown object);**

3. **The other person was unable to resist because (he/she) was unconscious of the nature of the act;**

AND

4. **The defendant knew that the other person was unable to resist because (he/she) was unconscious of the nature of the act.**

Sexual penetration **means (penetration, however slight, of the genital or anal opening of the other person/ [or] causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, however slightly, his or her own genital or anal opening) for the purpose of sexual abuse, arousal, or gratification.**

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

[A *foreign object, substance, instrument, or device* includes any part of the body except a sexual organ.] [An *unknown object* includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object penetrated the opening.]

[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]

New January 2006; Revised March 2020

BENCH NOTES

Instructional Duty

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

Related Instructions

CALCRIM No. 1046, *Sexual Penetration in Concert*, may be given in conjunction with this instruction if appropriate.

AUTHORITY

- Elements. ▸ Pen. Code, § 289(d).
- Specific Intent Crime. ▸ *People v. McCoy* (2013) 215 Cal.App.4th 1510, 1538 [156 Cal.Rptr.3d 382].
- Foreign Object, Substance, Instrument, or Device Defined. ▸ Pen. Code, § 289(k)(2); see *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [a finger is a "foreign object"].
- Sexual Penetration Defined. ▸ Pen. Code, § 289(k)(1); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].
- Unknown Object Defined. ▸ Pen. Code, § 289(k)(3).
- Sexual Abuse Defined. ▸ *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].
- Unconscious of Nature of Act. ▸ *People v. Howard* (1981) 117 Cal.App.3d 53, 55 [172 Cal.Rptr. 539] [total unconsciousness is not required; in context of sodomy and oral copulation]; see *Boro v. Superior Court* (1985) 163 Cal.App.3d 1224, 1229–1231 [210 Cal.Rptr. 122] [rape victim not unconscious of nature of act; fraud in the inducement].

COMMENTARY

The statutory language describing unconsciousness includes "was not aware, knowing, perceiving, or cognizant that the act occurred." (See Pen. Code, § 289(d)(2).) The committee did not discern any difference among the statutory terms and therefore used "aware" in the instruction. If there is an issue over a particular term, that term should be inserted in the instruction.

LESSER INCLUDED OFFENSES

- Assault. ▸ Pen. Code, § 240.
- Attempted Sexual Penetration of Unconscious Person. ▸ Pen. Code, §§ 664, 289(d).
- Battery. ▸ Pen. Code, § 242.

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1045, *Sexual Penetration by Force, Fear, or Threats*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 56, 59-61, 178.

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

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

1049 Sexual Penetration of a Disabled Person (Pen. Code, § 289(b))

The defendant is charged [in Count __] with sexual penetration of a mentally or physically disabled person [in violation of Penal Code section 289(b)].

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

1. **The defendant committed an act of sexual penetration with another person;**

2. **The penetration was accomplished by using (a/an) (foreign object[,]/ [or] substance[,]/ [or] instrument[,]/ [or] device[,]/ [or] unknown object);**

3. **The other person had a (mental disorder/developmental or physical disability) that prevented (him/her) from legally consenting;**

AND

4. **The defendant knew or reasonably should have known that the other person had a (mental disorder/developmental or physical disability) that prevented (him/her) from legally consenting.**

Sexual penetration **means (penetration, however slight, of the genital or anal opening of the other person/ [or] causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, however slightly, his or her own genital or anal opening) for the purpose of sexual abuse, arousal, or gratification.**

A person is *prevented from legally consenting* **if he or she is unable to understand the act, its nature, and probable consequences.**

[A *foreign object, substance, instrument, or device* **includes any part of the body except a sexual organ.] [An *unknown object*** **includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object was used to accomplish the penetration.]**

[Penetration for *sexual abuse* **means penetration for the purpose of causing pain, injury, or discomfort.]**

New January 2006; Revised March 2020

BENCH NOTES

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

Related Instructions
CALCRIM No. 1046, *Sexual Penetration in Concert*, may be given in conjunction with this instruction if appropriate.

AUTHORITY

- Elements. ▸ Pen. Code, § 289(b).
- Specific Intent Crime. ▸ *People v. McCoy* (2013) 215 Cal.App.4th 1510, 1538 [156 Cal.Rptr.3d 382].
- Consent Defined. ▸ Pen. Code, § 261.6; see *People v. Boggs* (1930) 107 Cal.App. 492, 495–496 [290 P. 618].
- Foreign Object, Substance, Instrument, or Device Defined. ▸ Pen. Code, § 289(k)(2); see *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [a finger is a "foreign object"].
- Sexual Penetration Defined. ▸ Pen. Code, § 289(k)(1); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].
- Unknown Object Defined. ▸ Pen. Code, § 289(k)(3).
- Sexual Abuse Defined. ▸ *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].

LESSER INCLUDED OFFENSES

- Assault. ▸ Pen. Code, § 240.
- Attempted Sexual Penetration of Disabled Person. ▸ Pen. Code, §§ 664, 289(b).
- Battery. ▸ Pen. Code, § 242.

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1045, *Sexual Penetration by Force, Fear, or Threats*, and CALCRIM No. 1004, *Rape of a Disabled Woman*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 56, 59-61, 178.

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

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

1050 Sexual Penetration of a Disabled Person in a Mental Hospital (Pen. Code, § 289(c))

The defendant is charged [in Count __] with sexual penetration of a mentally or physically disabled person in a mental hospital [in violation of Penal Code section 289(c)].

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

1. **The defendant committed an act of sexual penetration with another person;**

2. **The penetration was accomplished by using (a/an) (foreign object[,]/ [or] substance[,]/ [or] instrument[,]/ [or] device[,]/ [or] unknown object);**

3. **The other person had a (mental disorder/developmental or physical disability) that prevented (him/her) from legally consenting;**

4. **The defendant knew or reasonably should have known that the other person had a (mental disorder/developmental or physical disability) that prevented (him/her) from legally consenting;**

AND

5. **At the time of the act, both people were confined in a state hospital or other mental health facility.**

Sexual penetration **means (penetration, however slight, of the genital or anal opening of the other person/ [or] causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, however slightly, his or her own genital or anal opening) for the purpose of sexual abuse, arousal, or gratification.**

A person is *prevented from legally consenting* if he or she is unable to understand the act, its nature, and probable consequences.

[A *foreign object, substance, instrument, or device* includes any part of the body except a sexual organ.] [An *unknown object* includes any foreign object,

substance, instrument, or device, or any part of the body, including a penis, if it is not known what object was used to accomplish the penetration.]

[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]

[_____ *<If appropriate, insert name of facility>* **is a (state hospital/mental health facility).] [A *state hospital or other mental health facility* includes a state hospital for the care and treatment of the mentally disordered or any other public or private facility approved by a county mental health director for the care and treatment of the mentally disordered.]**

New January 2006; Revised March 2020

BENCH NOTES

Instructional Duty

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

A space is provided to identify a facility as a state hospital or other mental health facility if the parties agree that there is no issue of fact. Alternatively, if there is a factual dispute about whether an institution is a state hospital or other mental health facility, give the final bracketed sentence. (See Pen. Code, § 289(c).)

Related Instructions

CALCRIM No. 1046, *Sexual Penetration in Concert*, may be given in conjunction with this instruction if appropriate.

AUTHORITY

- Elements. ▸ Pen. Code, § 289(c).
- Specific Intent Crime. ▸ *People v. McCoy* (2013) 215 Cal.App.4th 1510, 1538 [156 Cal.Rptr.3d 382].
- Consent Defined. ▸ Pen. Code, § 261.6; see *People v. Boggs* (1930) 107 Cal.App. 492, 495–496 [290 P. 618].
- Foreign Object, Substance, Instrument, or Device Defined. ▸ Pen. Code, § 289(k)(2); see *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [a finger is a "foreign object"].

- Sexual Penetration Defined. ▸ Pen. Code, § 289(k)(1); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].
- State Hospital or Mental Health Facility Defined. ▸ Pen. Code, § 289(c); see Welf. & Inst. Code, § 7100 [county psychiatric facilities], § 7200 [state hospitals for mentally disordered], § 7500 [state hospitals for developmentally disabled].
- Unknown Object Defined. ▸ Pen. Code, § 289(k)(3).
- Sexual Abuse Defined. ▸ *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].

LESSER INCLUDED OFFENSES

- Assault. ▸ Pen. Code, § 240.
- Attempted Sexual Penetration of Disabled Person. ▸ Pen. Code, §§ 664, 289(c).
- Battery. ▸ Pen. Code, § 242.

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1045, *Sexual Penetration by Force, Fear, or Threats*, and CALCRIM No. 1004, *Rape of a Disabled Woman*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 56, 59-61, 178.

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

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

1051 Sexual Penetration by Fraud (Pen. Code, § 289(f))

The defendant is charged [in Count __] with sexual penetration by fraud [in violation of Penal Code section 289(f)].

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

1. **The defendant committed an act of sexual penetration with another person;**

2. **At the time of the act, the defendant and the other person were not married to each other;**

3. **The penetration was accomplished by using (a/an) (foreign object[,]/ [or] substance[,]/ [or] instrument[,]/ [or] device[,]/ [or] unknown object);**

4. **The other person submitted to the act because (he/she) believed the person (committing the act/causing the act to be committed) was someone (he/she) knew, other than the defendant;**

AND

5. **The defendant tricked, lied, [used an artifice or pretense,] or concealed information, intending to make the other person believe that (he/she) was someone (he/she) knew, while intending to hide (his/her) own identity.**

Sexual penetration **means (penetration, however slight, of the genital or anal opening of the other person/ [or] causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, however slightly, his or her own genital or anal opening) for the purpose of sexual abuse, arousal, or gratification.**

[A *foreign object, substance, instrument, or device* includes any part of the body except a sexual organ.] [An *unknown object* includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object was used to accomplish the penetration.]

[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]

New January 2006; Revised February 2015, March 2020

BENCH NOTES

Instructional Duty

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

Penal Code section 289(f) was amended effective September 9, 2013, in response to *People v. Morales* (2013) 212 Cal.App.4th 583 [150 Cal.Rptr.3d 920].

Related Instructions

CALCRIM No. 1046, *Sexual Penetration in Concert*, may be given in conjunction with this instruction if appropriate.

AUTHORITY

- Elements. ▸ Pen. Code, § 289(f).
- Specific Intent Crime. ▸ *People v. McCoy* (2013) 215 Cal.App.4th 1510, 1538 [156 Cal.Rptr.3d 382].
- Foreign Object, Substance, Instrument, or Device Defined. ▸ Pen. Code, § 289(k)(2); see *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [a finger is a "foreign object"].
- Sexual Penetration Defined. ▸ Pen. Code, § 289(k)(1); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].
- Unknown Object Defined. ▸ Pen. Code, § 289(k)(3).
- Sexual Abuse Defined. ▸ *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].

LESSER INCLUDED OFFENSES

- Assault. ▸ Pen. Code, § 240.
- Attempted Sexual Penetration by Fraud. ▸ Pen. Code, §§ 664, 289(f).
- Battery. ▸ Pen. Code, § 242.

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1045, *Sexual Penetration by Force, Fear, or Threats*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 58.

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

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

1151 Pandering (Pen. Code, § 266i)

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

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

<Alternative 1A—persuaded/procured>

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

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

[1. The defendant used (promises[,]/ threats[,]/ violence[,]/ [or] any device or scheme) to (cause/persuade/encourage/induce) _____ <*insert name*> to become a prostitute[, although the defendant's efforts need not have been successful](;/.)]

<Alternative 1C—arranged/procured a position>

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

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

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

<Alternative 1E—used fraud>

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

<Alternative 1F—received money>

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

AND

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

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

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

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

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

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

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

New January 2006; Revised April 2011, February 2012, August 2012, February 2015, March 2020

BENCH NOTES

Instructional Duty

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

In element 1, give the appropriate alternative A-F depending on the evidence in the case. (See *People v. Montgomery* (1941) 47 Cal.App.2d 1, 12, 24, 27–28 [117 P.2d 437] [statutory alternatives are not mutually exclusive], disapproved on other grounds in *People v. Dillon* (19830 34 Cal.3d 441, 454 fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697] and *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301 fn. 11 [124 Cal.Rtpr. 204, 540 P.2d 44].)

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

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

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

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

There is a split of authority on whether pandering requires that services be procured for a person other than the defendant. (*People v. Dixon* (2011) 191 Cal.App.4th 1154, 1159-1160 [119 Cal.Rptr.3d 901] [third person required]; *People v. Jacobo* (2019) 37 Cal.App.5th 32, 47 [249 Cal.Rptr.3d 236] [no third person required].) If the court concludes that Penal Code section 266i(a)(2) requires a third person, give the bracketed sentence that begins with "Pandering requires."

Defenses—Instructional Duty

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

AUTHORITY

- Elements. ▸ Pen. Code, § 266i.
- Prostitution Defined. ▸ Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535 [163 Cal.Rptr. 99]; *People v. Romo* (1962) 200 Cal.App.2d 83, 90–91 [19 Cal.Rptr. 179]; *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433] [lewd act requires touching between prostitute and customer].
- Procurement Defined. ▸ *People v. Montgomery* (1941) 47 Cal.App.2d 1, 12 [117 P.2d 437], disapproved on other grounds in *People v. Dillon* (1983) 34 Cal.3d 441, 454 fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697] and *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301 fn. 11 [124 Cal.Rtpr. 204, 540 P.2d 44].
- Proof of Actual Prostitution Not Required. ▸ *People v. Osuna* (1967) 251 Cal.App.2d 528, 531–532 [59 Cal.Rptr. 559].
- Duress Defined. ▸ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]; *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416].
- Good Faith Belief That Minor Is 18 No Defense to Pimping and Pandering. ▸ *People v. Branch* (2010) 184 Cal.App.4th 516, 521-522 [109 Cal.Rptr.3d 412].
- Specific Intent Crime. ▸ *People v. Zambia* (2011) 51 Cal.4th 965, 980 [127 Cal.Rptr.3d 662, 254 P.3d 965].
- Victim May [Appear to] Be a Prostitute Already. ▸ *People v. Zambia* (2011) 51 Cal.4th 965, 981 [127 Cal.Rptr.3d 662, 254 P.3d 965].
- ~~Pandering Requires Services Procured for Person Other Than Defendant.~~ ▸ ~~*People v. Dixon* (2011) 191 Cal.App.4th 1154, 1159-1160 [119 Cal.Rptr.3d 901].~~
- Encouraging Person to Become Prostitute Need Not Be Successful. *People v. Zambia* (2011) 51 Cal.4th 965, 980 [127 Cal.Rptr.3d 662, 254 P.3d 965].

LESSER INCLUDED OFFENSES

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

There is no crime of aiding and abetting prostitution. (*People v. Gibson* (2001) 90

Cal.App.4th 371, 385 [108 Cal.Rptr.2d 809].)

RELATED ISSUES

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

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 85.

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

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

1192 Testimony on Rape Trauma Syndrome

You have heard testimony from _____ *<insert name of expert>* **regarding rape trauma syndrome.**

_____'s *<insert name of expert>* **testimony about rape trauma syndrome is not evidence that the defendant committed any of the crimes charged against (him/her) [or any conduct or crime[s] with which (he/she) was not charged].**

You may consider this evidence only in deciding whether or not _____'s *<insert name of alleged rape victim>* **conduct was not inconsistent with the conduct of someone who has been raped, and in evaluating the believability of her testimony.**

New January 2006; Revised March 2020

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if an expert testifies on rape trauma syndrome. (See *People v. Housley* (1992) 6 Cal.App.4th 947, 958–959 [8 Cal.Rptr.2d 431] [**sua sponte** duty in context of child sexual abuse accommodation syndrome (CSAAS)]; *CJER Mandatory Criminal Jury Instructions Handbook* (CJER ~~10th ed.~~ 20~~01~~19) Sua Sponte Instructions, § 2.163~~2~~; but see *People v. Sanchez* (1989) 208 Cal.App.3d 721, 736 [256 Cal.Rptr. 446] [instruction on CSAAS only required on request].)

Related Instructions

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

AUTHORITY

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

COMMENTARY

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

SECONDARY SOURCES

1 Witkin, California Evidence (5th ed. 2012) Opinion Evidence, § 53.

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

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

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

1193 Testimony on Child Sexual Abuse Accommodation Syndrome

You have heard testimony from _____ <*insert name of expert*> regarding child sexual abuse accommodation syndrome.

_____'s <*insert name of expert*> testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against (him/her) [or any conduct or crime[s] with which (he/she) was not charged].

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

New January 2006; Revised August 2016, March 2020

BENCH NOTES

Instructional Duty

Several courts of review have concluded there is no sua sponte duty to give this instruction when an expert testifies on child sexual abuse accommodation syndrome. (*People v. Mateo* (2016) 243 Cal.App.4th 1063, 1073-1074 [197 Cal.Rptr.3d 248]; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 736 [256 Cal.Rptr. 446] and *People v. Stark* (1989) 213 Cal.App.3d 107, 116 [261 Cal.Rptr. 479] [instruction required only on request].) See also *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088, fn. 5, 1090-1091, 1100 [56 Cal.Rptr.2d 142, 921 P.2d 1], which concludes that a limiting instruction on battered woman syndrome is required only on request. But see *People v. Housley* (1992) 6 Cal.App.4th 947, 958–959 [9 Cal.Rtpr.2d 431], which did find a sua sponte duty to give this instruction.

Related Instructions

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

AUTHORITY

- Eliminate Juror Misconceptions or Rebut Attack on Victim's Credibility. ▸ *People v. Bowker* (1988) 203 Cal.App.3d 385, 393–394 [249 Cal.Rptr. 886].

COMMENTARY

The jurors must understand that the research on child sexual abuse accommodation syndrome assumes a molestation occurred and seeks to describe and explain children's common reactions to the experience. (*People v. Bowker* (1988) 203 Cal.App.3d 385, 394 [249 Cal.Rptr. 886].) However, it is unnecessary and potentially misleading to instruct that the expert testimony assumes that a molestation has in fact occurred. (See *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1387 [7 Cal.Rptr.2d 660].)

The prosecution must identify the myth or misconception the evidence is designed to rebut (*People v. Bowker, supra*, 203 Cal.App.3d at p. 394; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 735 [256 Cal.Rptr. 446]; *People v. Harlan* (1990) 222 Cal.App.3d 439, 449–450 [271 Cal.Rptr. 653]), or the victim's credibility must have been placed in issue (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744–1745 [32 Cal.Rptr.2d 345]).

RELATED ISSUES

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

SECONDARY SOURCES

1 Witkin, California Evidence (5th ed. 2012) Opinion Evidence, §§ 54–56.

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

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

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

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

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

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

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

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

AND

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

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

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

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

New January 2006; Revised February 2012, February 2013, August 2013, March 2020

BENCH NOTES

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

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

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

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

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

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

AUTHORITY

- Elements. ▸ Pen. Code, §§ 207(b), 288(a).
- Increased Prison Term If Victim Under 14 Years of Age. ▸ Pen. Code, § 208(b).
- Asportation Requirement. ▸ See *People v. Robertson* (2012) 208 Cal. App. 4th 965, 982 [146 Cal.Rptr.3d 66]; *People v. Vines* (2011) 51 Cal.4th 830, 870 & fn. 20 [124 Cal.Rptr.3d 830, 251 P.3d 943]; *People v. Martinez* (1999) 20

Cal.4th 225, 232 & fn. 4 [83 Cal.Rptr.2d 533, 973 P.2d 512]; *People v. Rayford* (1994) 9 Cal.4th 1, 11–14, 20 [36 Cal.Rptr.2d 317, 884 P.2d 1369]; *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225].

- Lewd or Lascivious Acts Defined. ▸ *People v. Martinez* (1995) 11 Cal.4th 434, 452 [45 Cal.Rptr.2d 905, 903 P.2d 1037] [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 [14 Cal.Rptr.2d 67] and its progeny]; *People v. Levesque* (1995) 35 Cal.App.4th 530, 538–542 [41 Cal.Rptr.2d 439]; *People v. Marquez* (1994) 28 Cal.App.4th 1315, 1321–1326 [33 Cal.Rptr.2d 821].
- Movement of Victim Need Not Substantially Increase Risk of Harm to Victim. ▸ *People v. Robertson* (2012) 208 Cal.App.4th 965, 982 [146 Cal.Rptr.3d 66]; People v. Vines (2011) 51 Cal.4th 830, 870 & fn. 20 [124 Cal.Rptr.3d 830, 251 P.3d 943]; People v. Martinez (1999) 20 Cal.4th 225, 232 & fn. 4 [83 Cal.Rptr.2d 533, 973 P.2d 512].

LESSER INCLUDED OFFENSES

- Kidnapping. ▸ Pen. Code, § 207.

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

Attempted kidnapping is not a lesser included offense of simple kidnapping under subdivision (a) of section 207. (*People v. Fontenot* (2019) 8 Cal.5th 57, 65-71 [251 Cal.Rptr.3d 341, 447 P.3d 252].)

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

SECONDARY SOURCES

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

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

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

1201 Kidnapping: Child or Person Incapable of Consent (Pen. Code, § 207(a), (e))

The defendant is charged [in Count __] with kidnapping (a child/ [or] a person with a mental impairment who was not capable of giving legal consent to the movement) [in violation of Penal Code section 207].

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

1. **The defendant used (physical force/deception) to take and carry away an unresisting (child/ [or] person with a mental impairment);**

2. **The defendant moved the (child/ [or] person with a mental impairment) a substantial distance(;/.)**

[AND]

<Section 207(e)>
[3. The defendant moved the ~~(~~child~~/ [or] mentally impaired person)~~ with an illegal intent or for an illegal purpose(;/.)]

[AND]

<Alternative 4A—alleged victim under 14 years.>
[4. The child was under 14 years old at the time of the movement(;/.)]

<Alternative 4B—alleged victim has mental impairment.>
[(3/4). _____ *<Insert name of complaining witness>* **suffered from a mental impairment that made (him/her) incapable of giving legal consent to the movement.]**

Substantial distance **means more than a slight or trivial distance. In deciding whether the distance was substantial, consider all the circumstances relating to the movement. [Thus, in addition to considering the actual distance moved, you may also consider other factors such as whether the movement increased the risk of [physical or psychological] harm, increased the danger of a foreseeable escape attempt, gave the attacker a greater opportunity to commit additional crimes, or decreased the likelihood of detection.]**

A person is incapable of giving legal consent if he or she is unable to understand the act, its nature, and possible consequences.

[*Deception* includes tricking the (child/mentally impaired person) into accompanying him or her a substantial distance for an illegal purpose.]

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

New January 2006; Revised April 2008, March 2020

BENCH NOTES

Instructional Duty

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

Give alternative 4A if the defendant is charged with kidnapping a person under 14 years of age. (Pen. Code, § 208(b).) Do not use this bracketed language if a biological parent, a natural father, an adoptive parent, or someone with access to the child by a court order takes the child. (*Ibid.*) Give alternative 4B if the alleged victim has a mental impairment.

In the paragraph defining "substantial distance," give the bracketed sentence listing factors that the jury may consider, when evidence permits, in evaluating the totality of the circumstances. (*People v. Martinez* (1999) 20 Cal.4th 225, 237 [83 Cal.Rptr.2d 533, 973 P.2d 512].) However, in the case of simple kidnapping, if the movement was for a substantial distance, the jury does not need to consider any other factors. (*People v. Martinez, supra*, 20 Cal.4th at p. 237; see *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058].)

Give this instruction when the defendant is charged under Penal Code section 207(a) with using force to kidnap an unresisting infant or child, or person with a mental impairment, who was incapable of consenting to the movement. (See, e.g., *In re Michele D.* (2002) 29 Cal.4th 600, 610 [128 Cal.Rptr.2d 92, 59 P.3d 164]; see also 2003 Amendments to Pen. Code, § 207(e) [codifying holding of *In re Michele D.*].) Give CALCRIM No. 1200, *Kidnapping: For Child Molestation*, when the defendant is charged under Penal Code section 207(b) with kidnapping a child without the use of force for the purpose of committing a lewd or lascivious act.

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

Related Instructions

A defendant may be prosecuted for both the crimes of child abduction and kidnapping. Child abduction or stealing is a crime against the parents, while kidnapping is a crime against the child. (*In re Michele D.* (2002) 29 Cal.4th 600, 614 [128 Cal.Rptr.2d 92, 59 P.3d 164]; *People v. Campos* (1982) 131 Cal.App.3d 894, 899 [182 Cal.Rptr. 698].) See CALCRIM No. 1250, *Child Abduction: No Right to Custody*.

For instructions relating to defenses to kidnapping, see CALCRIM No. 1225, *Defense to Kidnapping: Protecting Child From Imminent Harm.*

AUTHORITY

- Elements. ▸ Pen. Code, § 207(a), (e).
- Punishment If Victim Under 14 Years of Age. ▸ Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206] [ignorance of victim's age not defense].
- Asportation Requirement. ▸ See *People v. Martinez* (1999) 20 Cal.4th 225, 235–237 [83 Cal.Rptr.2d 533, 973 P.2d 512] [adopting modified two-pronged asportation test from *People v. Rayford* (1994) 9 Cal.4th 1, 12–14 [36 Cal.Rptr.2d 317, 884 P.2d 1369] and *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225]].
- Force Required to Kidnap Unresisting Infant or Child. ▸ *In re Michele D.* (2002) 29 Cal.4th 600, 610 [128 Cal.Rptr.2d 92, 59 P.3d 164]; Pen. Code, § 207(e).
- Force Required to Kidnap Unconscious and Intoxicated Adult. ▸ *People v. Daniels* (2009) 176 Cal.App.4th 304, 333 [97 Cal.Rptr.3d 659].
- Movement Must Be for Illegal Purpose or Intent if Victim Incapable of Consent. ▸ *In re Michele D.* (2002) 29 Cal.4th 600, 610–611 [128 Cal.Rptr.2d 92, 59 P.3d 164]; *People v. Oliver* (1961) 55 Cal.2d 761, 768 [12 Cal.Rptr. 865, 361 P.2d 593].
- Substantial Distance Requirement. ▸ *People v. Daniels* (1993) 18 Cal.App.4th 1046, 1053 [22 Cal.Rptr.2d 877]; *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058] [since movement must be more than slight or trivial, it must be substantial in character].

- Deceit May Substitute for Force. ▸ *People v. Dalerio* (2006) 144 Cal.App.4th 775, 783 [50 Cal.Rptr.3d 724] [taking requirement satisfied when defendant relies on deception to obtain child's consent and through verbal directions and his constant physical presence takes the child substantial distance].

COMMENTARY

Penal Code section 207(a) uses the term "steals" in defining kidnapping not in the sense of a theft, but in the sense of taking away or forcible carrying away. (*People v. McCullough* (1979) 100 Cal.App.3d 169, 176 [160 Cal.Rptr. 831].) The instruction uses "take and carry away" as the more inclusive terms, but the statutory terms "steal," "hold," "detain" and "arrest" may be used if any of these more closely matches the evidence.

LESSER INCLUDED OFFENSES

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

Attempted kidnapping is not a lesser included offense of simple kidnapping under subdivision (a) of section 207. (*People v. Fontenot* (2019) 8 Cal.5th 57, 65-71 [251 Cal.Rptr.3d 341, 447 P.3d 252].)

RELATED ISSUES

Victim Must Be Alive

A victim must be alive when kidnapped. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 498 [117 Cal.Rptr.2d 45, 40 P.3d 754].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 286-289.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person* § 142.14[1], [2][a] (Matthew Bender).

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

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

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

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

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

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

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

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

[AND]

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

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

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

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

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

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

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

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

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

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

New January 2006; Revised June 2007, April 2008, February 2013, August 2013, March 2020

BENCH NOTES

Instructional Duty

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

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

Give the bracketed definition of "consent" on request.

Defenses—Instructional Duty

The court has a **sua sponte** duty to instruct on the defense of consent if there is sufficient evidence to support the defense. (See *People v. Davis* (1995) 10 Cal.4th 463, 516–518 [41 Cal.Rptr.2d 826, 896 P.2d 119] [approving consent instruction as given]; see also *People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 165 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [when court must instruct on defenses].) Give the bracketed paragraph on the defense of consent. On request, if supported by the evidence, also give the bracketed paragraph that begins with "Consent may be withdrawn." (See People v. Camden (1976) 16 Cal.3d 808, 814 [129 Cal.Rptr. 438, 548 P.2d 1110].)

The defendant's reasonable and actual belief in the victim's consent to go with the defendant may be a defense. (See *People v. Greenberger* (1997) 58 Cal.App.4th 298, 375 [68 Cal.Rptr.2d 61]; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [127 Cal.Rptr. 279] [reasonable, good faith belief that victim consented to movement is a defense to kidnapping].)

Timing of Necessary Intent

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

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

AUTHORITY

- Elements. ▸ Pen. Code, § 209(b)(1); *People v. Robertson* (2012) 208 Cal. App. 4th 965, 982 [146 Cal.Rptr.3d 66]; People v. Vines (2011) 51 Cal.4th 830, 869–870 & fn. 20 [124 Cal.Rptr.3d 830, 251 P.3d 943]; People v. Martinez (1999) 20 Cal.4th 225, 232 & fn. 4 [83 Cal.Rptr.2d 533, 973 P.2d 512]; People v. Rayford (1994) 9 Cal.4th 1 [36 Cal.Rptr.2d 317]; People v. Daniels (1969) 71 Cal.2d. 1119 [80 Cal.Rptr. 897, 459 P.2d 225].
- Robbery Defined. ▸ Pen. Code, § 211.
- Rape Defined. ▸ Pen. Code, § 261.
- Other Sex Offenses Defined. ▸ Pen. Code, §§ 262 [spousal rape], 264.1 [acting in concert], 286 [sodomy], 287 [oral copulation], 289 [sexual penetration].
- Intent to Commit Robbery Must Exist at Time of Original Taking. ▸ *People v. Tribble* (1971) 4 Cal.3d 826, 830–832 [94 Cal.Rptr. 613, 484 P.2d 589]; *People v. Bailey* (1974) 38 Cal.App.3d 693, 699 [113 Cal.Rptr. 514]; see *People v. Thornton* (1974) 11 Cal.3d 738, 769–770 [114 Cal.Rptr. 467], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668 [160 Cal.Rptr. 84, 603 P.2d 1].
- Kidnapping to Effect Escape From Robbery. ▸ *People v. Laursen* (1972) 8 Cal.3d 192, 199–200 [104 Cal.Rptr. 425, 501 P.2d 1145] [violation of section 209 even though intent to kidnap formed after robbery commenced].
- Kidnapping Victim Need Not Be Robbery Victim. ▸ *People v. Laursen* (1972) 8 Cal.3d 192, 200, fn. 7 [104 Cal.Rptr. 425, 501 P.2d 1145].
- Use of Force or Fear. ▸ See *People v. Martinez* (1984) 150 Cal.App.3d 579, 599–600 [198 Cal.Rptr. 565], disapproved on other grounds in *People v. Hayes* (1990) 52 Cal.3d 577, 627–628, fn. 10 [276 Cal.Rptr. 874, 802 P.2d 376]; *People v. Jones* (1997) 58 Cal.App.4th 693, 713–714 [68 Cal.Rptr.2d 506].
- Movement of Victim Need Not Substantially Increase Risk of Harm to Victim. ▸ *People v. Robertson* (2012) 208 Cal.App.4th 965, 982 [146 Cal.Rptr.3d 66]; *People v. Vines* (2011) 51 Cal.4th 830, 870 fn. 20 [124 Cal.Rptr.3d 830, 251 P.3d 943]; *People v. Martinez* (1999) 20 Cal.4th 225, 232 fn. 4 [83 Cal.Rptr.2d 533, 973 P.2d 512].

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

LESSER INCLUDED OFFENSES

- Kidnapping. ▸ Pen. Code, § 207; *People v. Bailey* (1974) 38 Cal.App.3d 693, 699 [113 Cal.Rptr. 514]; see *People v. Jackson* (1998) 66 Cal.App.4th 182, 189 [77 Cal.Rptr.2d 564].
- ~~Attempted Kidnapping. ▸ Pen. Code, §§ 664, 207.~~
- False Imprisonment. ▸ Pen. Code, §§ 236, 237; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1121 [281 Cal.Rptr. 338]; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547 [90 Cal.Rptr. 866]; *People v. Shadden* (2001) 93 Cal.App.4th 164, 171 [112 Cal.Rptr.2d 826].

Attempted kidnapping is not a lesser included offense of simple kidnapping under subdivision (a) of section 207. (*People v. Fontenot* (2019) 8 Cal.5th 57, 65-71 [251 Cal.Rptr.3d 341, 447 P.3d 252].)

RELATED ISSUES

Psychological Harm

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

SECONDARY SOURCES

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

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

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

1215 Kidnapping (Pen. Code, § 207(a))

The defendant is charged [in Count __] with kidnapping [in violation of Penal Code section 207(a)].

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

1. **The defendant took, held, or detained another person by using force or by instilling reasonable fear;**

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

[AND]

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

<Give element 4 when instructing on reasonable belief in consent.>
[AND]

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

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

***Substantial distance* means more than a slight or trivial distance. In deciding whether the distance was substantial, you must consider all the circumstances relating to the movement. [Thus, in addition to considering the actual distance moved, you may also consider other factors such as [whether the distance the other person was moved was beyond that merely incidental to the commission of _____*<insert associated crime>*], whether the movement increased the risk of [physical or psychological] harm, increased the danger of a foreseeable escape attempt, or gave the attacker a greater opportunity to commit additional crimes, or decreased the likelihood of detection.]**

<Defense: Good Faith Belief in Consent>

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

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

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

New January 2006; Revised October 2010, March 2020

BENCH NOTES

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

In the paragraph defining "substantial distance," give the bracketed sentence listing factors that the jury may consider, when evidence permits, in evaluating the totality of the circumstances. (*People v. Martinez* (1999) 20 Cal.4th 225, 237 [83 Cal.Rptr.2d 533, 973 P.2d 512].) However, in the case of simple kidnapping, if the movement was for a substantial distance, the jury does not need to consider any other factors. (*People v. Martinez*, supra, 20 Cal.4th at p. 237; see *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058].)

The court must give the bracketed language on movement incidental to an associated crime when it is supported by the evidence. (*People v. Martinez, supra,*

20 Cal.4th at p. 237; *People v. Bell* (2009) 179 Cal.App.4th 428, 439 [102 Cal.Rptr.3d 300].)
Give the bracketed definition of "consent" on request.

Defenses—Instructional Duty
The court has a **sua sponte** duty to instruct on the defense of consent if there is sufficient evidence to support the defense. (See *People v. Davis* (1995) 10 Cal.4th 463, 516–518 [41 Cal.Rptr.2d 826, 896 P.2d 119] [approving consent instruction as given]; see also *People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7 [112 Cal.Rptr. 1, 518 P.2d 913] overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 165 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [when court must instruct on defenses].) An optional paragraph is provided for this purpose, "Defense: Consent Given."

On request, if supported by the evidence, also give the bracketed paragraph that begins with "Consent may be withdrawn." (See *People v. Camden* (1976) 16 Cal.3d 808, 814 [129 Cal.Rptr. 438, 548 P.2d 1110].)

The court has a **sua sponte** duty to instruct on the defendant's reasonable and actual belief in the victim's consent to go with the defendant, if supported by the evidence. (See *People v. Greenberger* (1997) 58 Cal.App.4th 298, 375 [68 Cal.Rptr.2d 61]; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [127 Cal.Rptr. 279] [reasonable, good faith belief that victim consented to movement is a defense to kidnapping].) Give bracketed element 4 and the bracketed paragraph on the defense.

Related Instructions
If the victim is incapable of consent because of immaturity or mental condition, see CALCRIM No. 1201, *Kidnapping: Child or Person Incapable of Consent*.

A defendant may be prosecuted for both the crimes of child abduction and kidnapping. Child abduction or stealing is a crime against the parents, while kidnapping is a crime against the child. (*In re Michele D.* (2002) 29 Cal.4th 600, 614 [128 Cal.Rptr.2d 92, 59 P.3d 164]; *People v. Campos* (1982) 131 Cal.App.3d 894, 899 [182 Cal.Rptr. 698].) See CALCRIM No. 1250, *Child Abduction: No Right to Custody*.

For instructions relating to other defenses to kidnapping, see CALCRIM No. 1225, *Defense to Kidnapping: Protecting Child From Imminent Harm*, and CALCRIM No. 1226, *Defense to Kidnapping: Citizen's Arrest*.

AUTHORITY

- Elements. ‣ Pen. Code, § 207(a).
- Punishment If Victim Under 14 Years of Age. ‣ Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206] [ignorance of victim's age not a defense].
- Asportation Requirement. ‣ *People v. Martinez* (1999) 20 Cal.4th 225, 235–237 [83 Cal.Rptr.2d 533, 973 P.2d 512] [adopting modified two-pronged asportation test from *People v. Rayford* (1994) 9 Cal.4th 1, 12–14 [36 Cal.Rptr.2d 317, 884 P.2d 1369], and *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225]].
- Consent to Physical Movement. ‣ See *People v. Davis* (1995) 10 Cal.4th 463, 516–518 [41 Cal.Rptr.2d 826, 896 P.2d 119].
- Force or Fear Requirement. ‣ *People v. Moya* (1992) 4 Cal.App.4th 912, 916–917 [6 Cal.Rptr.2d 323]; *People v. Stephenson* (1974) 10 Cal.3d 652, 660 [111 Cal.Rptr. 556, 517 P.2d 820]; see *People v. Davis* (1995) 10 Cal.4th 463, 517, fn. 13, 518 [41 Cal.Rptr.2d 826, 896 P.2d 119] [kidnapping requires use of force or fear; consent not vitiated by fraud, deceit, or dissimulation].
- Good Faith Belief in Consent. ‣ Pen. Code, § 26(3) [mistake of fact]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–155 [125 Cal.Rptr. 745, 542 P.2d 1337]; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [127 Cal.Rptr. 279]; *People v. Patrick* (1981) 126 Cal.App.3d 952, 968 [179 Cal.Rptr. 276].
- Incidental Movement Test. ‣ *People v. Martinez* (1999) 20 Cal.4th 225, 237–238 [83 Cal.Rptr.2d 533, 973 P.2d 512].
- Intent Requirement. ‣ *People v. Thornton* (1974) 11 Cal.3d 738, 765 [114 Cal.Rptr. 467, 523 P.2d 267], disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Davis* (1995) 10 Cal.4th 463, 519 [41 Cal.Rptr.2d 826, 896 P.2d 119]; *People v. Moya* (1992) 4 Cal.App.4th 912, 916 [6 Cal.Rptr.2d 323].
- Substantial Distance Requirement. ‣ *People v. Derek Daniels* (1993) 18 Cal.App.4th 1046, 1053; *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058] [since movement must be more than slight or trivial, it must be substantial in character].

COMMENTARY

Penal Code section 207(a) uses the term "steals" in defining kidnapping not in the sense of a theft, but in the sense of taking away or forcible carrying away. (*People v. McCullough* (1979) 100 Cal.App.3d 169, 176 [160 Cal.Rptr. 831].) The instruction uses "take," "hold," or "detain" as the more inclusive terms, but

includes in brackets the statutory terms "steal" and "arrest" if either one more closely matches the evidence.

LESSER INCLUDED OFFENSES

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

- False Imprisonment ▸ Pen. Code, §§ 236, 237; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1120–1121 [281 Cal.Rptr. 338]; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547 [90 Cal.Rptr. 866].

Attempted kidnapping is not a lesser included offense of simple kidnapping under subdivision (a) of section 207. (*People v. Fontenot* (2019) 8 Cal.5th 57, 65-71 [251 Cal.Rptr.3d 341, 447 P.3d 252].)

RELATED ISSUES

Victim Must Be Alive

A victim must be alive when kidnapped. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 498 [117 Cal.Rptr.2d 45, 40 P.3d 754].)

Threat of Arrest

"[A]n implicit threat of arrest satisfies the force or fear element of section 207(a) kidnapping if the defendant's conduct or statements cause the victim to believe that unless the victim accompanies the defendant the victim will be forced to do so, and the victim's belief is objectively reasonable." (*People v. Majors* (2004) 33 Cal.4th 321, 331 [14 Cal.Rptr.3d 870, 92 P.3d 360].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 281–291, 316.

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

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

1500. Aggravated Arson (Pen. Code, § 451.5)

If you find the defendant guilty of arson [as charged in Count[s] __], you must then decide whether[, for each crime of arson,] the People have proved the additional allegation that the arson was aggravated. [You must decide whether the People have proved this allegation for each crime of arson and return a separate finding for each crime of arson.]

To prove this allegation, the People must prove that:

1. **The defendant acted willfully, maliciously, deliberately, and with premeditation;**

[AND]

2. **The defendant acted with intent to injure one or more persons, or to damage property under circumstances likely to injure one or more persons, or to damage one or more structures or inhabited dwellings(;/.)**

[AND

<Alternative 3A—loss exceeding $~~7~~8.3 million>
[3A. The fire caused property damage and other losses exceeding $~~7~~8.3 million[, including the cost of fire suppression].]

[OR]

<Alternative 3B—destroyed five or more inhabited structures>
[3B. The fire damaged or destroyed five or more inhabited structures.]]

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

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

The defendant acted *deliberately* if (he/she) carefully weighed the considerations for and against (his/her) choice and, knowing the

consequences, decided to commit the arson. The defendant acted with *premeditation* if (he/she) decided to commit the arson before committing the act that caused the arson.

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

[A (dwelling/ [or] structure) is *inhabited* if someone lives there and either is present or has left but intends to return.]

[A (dwelling/ [or] structure) is *inhabited* if someone used it as a dwelling and left only because a natural or other disaster caused him or her to leave.]

[A (dwelling/ [or] structure) is not *inhabited* if the former residents have moved out and do not intend to return, even if some personal property remains inside.]

[A *dwelling* includes any (structure/garage/office/_____) that is attached to the house and functionally connected with it.]

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 2015, March 2020

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the sentencing factor if the defendant is charged with aggravated arson.

If the prosecution alleges that the fire caused more than ~~7~~8.3 million dollars in damage, give alternative A in element 3. If the prosecution alleges that the fire damaged five or more inhabited structures, give alternative B in element 3.

If the prosecution alleges that the defendant was previously convicted of arson within ten years of the current offense, give elements 1 and 2 only. The court must also give either CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant has stipulated to the truth of the prior conviction.

The definitions of "deliberation" and "premeditation" and the bracketed paragraph that begins with "The length of time" are derived from the first degree murder instruction because no recorded case construes their meaning in the context of Penal Code section 451.5. (See CALCRIM No. 521, *Murder: Degrees*.)

Give the bracketed definitions of inhabited dwelling or structure if relevant.

If there is an issue as to whether the fire *caused* the property damage, give CALCRIM No. 240, *Causation*.

AUTHORITY

- Enhancement. ▸ Pen. Code, § 451.5.
- Inhabitation Defined. ▸ Pen. Code, § 459.
- House Not Inhabited Means Former Residents Not Returning ▸ *People v. Cardona* (1983) 142 Cal.App.3d 481, 483 [191 Cal.Rptr. 109].

LESSER INCLUDED OFFENSES

Arson under section 451 is not a lesser included offense of aggravated arson. (*People v. Shiga* (2019) 34 Cal.App.5th 466, 483 [246 Cal.Rptr.3d 198].)

RELATED ISSUES

See the Related Issues section to CALCRIM No. 1515, *Arson*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property §§ 268-273.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

1501. Arson: Great Bodily Injury (Pen. Code, § 451)

The defendant is charged [in Count __] with arson that caused great bodily injury [in violation of Penal Code section 451].

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

1. **The defendant set fire to or burned [or (counseled[,]/ [or] helped[,]/ [or] caused) the burning of] (a structure/forest land/property);**

2. **(He/She) acted willfully and maliciously;**

AND

3. **The fire caused great bodily injury to another person.**

To *set fire to or burn* means to damage or destroy with fire either all or part of something, no matter how small the part.

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

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

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

[A *structure* is any (building/bridge/tunnel/power plant/commercial or public tent).]

[*Forest land* means brush-covered land, cut-over land, forest, grasslands, or woods.]

[*Property* means personal property or land other than forest land.]

[A person does not commit arson if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire also injures someone else or someone else's structure, forest land, or property.]

New January 2006; Revised February 2013, March 2020

BENCH NOTES

Instructional Duty

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

Related Instructions

If attempted arson is charged, do not instruct generally on attempts but give CALCRIM No. 1520, *Attempted Arson*. (Pen. Code, § 455.)

AUTHORITY

- Elements ▸ Pen. Code, § 451.
- Great Bodily Injury ▸ Pen. Code, § 12022.7(f).
- Structure, Forest Land, and Maliciously Defined ▸ Pen. Code, § 450.
- To Burn Defined ▸ *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–167 [270 Cal.Rptr. 389].

LESSER INCLUDED OFFENSES

- Arson ▸ Pen. Code, § 451.
- Attempted Arson ▸ Pen. Code, § 455.
- Unlawfully Causing a Fire ▸ *People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [226 Cal.Rptr. 810], disapproved of in *People v. Barton* (1995) 12 Cal.4th 186 [47 Cal.Rptr.2d 569, 906 P.2d 531] on its holding that failure to instruct on this crime as a lesser included offense of arson was invited error because defense counsel objected to such instruction; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324 [3 Cal.Rptr.2d 816].

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1515, *Arson*.

Dual Convictions Prohibited

A single act of arson cannot result in convictions under different subdivisions of Penal Code section 451. (*People v. Shiga* (2019) 34 Cal.App.5th 466, 475 [246 Cal.Rptr.3d 198].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 268-276.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.47[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

1502. Arson: Inhabited Structure or Property (Pen. Code, § 451(b))

The defendant is charged [in Count __] with arson that burned an (inhabited structure /[or] inhabited property) [in violation of Penal Code section 451(b)].

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

1. **The defendant set fire to or burned [or (counseled[,]/ [or] helped[,]/ [or] caused) the burning of] (a structure/[or] property);**

2. **(He/She) acted willfully and maliciously;**

AND

3. **The fire burned an (inhabited structure /[or] inhabited property).**

To *set fire to or burn* means to damage or destroy with fire either all or part of something, no matter how small the part.

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

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

A *structure* is any (building/bridge/tunnel/power plant/commercial or public tent.)

A (structure /[or] property) is *inhabited* if someone uses it as a dwelling, whether or not someone is inside at the time of the fire. An (inhabited structure /[or] inhabited property) does not include the land on which it is located.

[*Property* means personal property or land other than forest land.]

New January 2006; Revised February 2013, August 2016, March 2017, September 2019, March 2020

BENCH NOTES

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

Related Instructions
If attempted arson is charged, do not instruct generally on attempts but give CALCRIM No. 1520, *Attempted Arson*. (Pen. Code, § 455.)

AUTHORITY

- Elements ▸ Pen. Code, § 451(b).
- Inhabited Defined ▸ Pen. Code, § 450; *People v. Jones* (1988) 199 Cal.App.3d 543 [245 Cal.Rptr. 85].
- Inhabitant Must Be Alive at Time of Arson ▸ *People v. Vang* (2016) 1 Cal.App.5th 377, 382-387 [204 Cal.Rptr.3d 455].
- Structure and Maliciously Defined ▸ Pen. Code, § 450.
- To Burn Defined ▸ *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–167 [270 Cal.Rptr. 389].

LESSER INCLUDED OFFENSES

- Arson ▸ Pen. Code, § 451.
- Attempted Arson ▸ Pen. Code, § 455.
- Unlawfully Causing a Fire ▸ *People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [226 Cal.Rptr. 810], disapproved of in *People v. Barton* (1995) 12 Cal.4th 186 [47 Cal.Rptr.2d 569, 906 P.2d 531] on its holding that failure to instruct on this crime as a lesser included offense of arson was invited error because defense counsel objected to such instruction; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324 [3 Cal.Rptr.2d 816].

RELATED ISSUES

Inhabited Apartment
Defendant's conviction for arson of an inhabited structure was proper where he set fire to his estranged wife's apartment several days after she had vacated it. Although his wife's apartment was not occupied, it was in a large apartment building where many people lived; it was, therefore, occupied for purposes of the

arson statute. (*People v. Green* (1983) 146 Cal.App.3d 369, 378–379 [194 Cal.Rptr. 128].)

Dual Convictions Prohibited

A single act of arson cannot result in convictions under different subdivisions of Penal Code section 451. (*People v. Shiga* (2019) 34 Cal.App.5th 466, 475 [246 Cal.Rptr.3d 198].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 268-276.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.47[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

1503–1514. Reserved for Future Use

1515. Arson (Pen. Code, § 451(c-d))

The defendant is charged [in Count __] with arson [in violation of Penal Code section 451(c/d)].

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

1. **The defendant set fire to or burned [or (counseled[,]/ [or] helped[,]/ [or] caused) the burning of] (a structure/forest land/property);**

AND

2. **(He/She) acted willfully and maliciously.**

To *set fire to or burn* means to damage or destroy with fire either all or part of something, no matter how small the part.

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

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

[A *structure* is any (building/bridge/tunnel/power plant/commercial or public tent).]

[*Forest land* means brush-covered land, cut-over land, forest, grasslands, or woods.]

[*Property* means personal property or land other than forest land.]

[A person does not commit arson if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire also injures someone else or someone else's structure, forest land, or property.]

New January 2006; Revised February 2013, August 2016, March 2020

BENCH NOTES

Instructional Duty

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

Related Instructions
If it is also alleged that the fire caused great bodily injury or burned an inhabited structure or property, see CALCRIM No. 1501, *Arson: Great Bodily Injury* and CALCRIM No. 1502, *Arson: Inhabited Structure*.

If attempted arson is charged, do not instruct generally on attempts but give CALCRIM No. 1520, *Attempted Arson*. (Pen. Code, § 455.)

AUTHORITY

- Elements ▸ Pen. Code, § 451(c-d).
- Structure, Forest Land, and Maliciously Defined ▸ Pen. Code, § 450; see *People v. Labaer* (2001) 88 Cal.App.4th 289, 293–294 [105 Cal.Rptr.2d 629] ["structure" does not require finished or completed building].
- General Intent Crime ▸ *People v. Atkins* (2001) 25 Cal.4th 76, 83–84, 86 [104 Cal.Rptr.2d 738, 18 P.3d 660] [evidence of voluntary intoxication not admissible to negate mental state].
- Property Defined ▸ *In re L.T.* (2002) 103 Cal.App.4th 262, 264–265 [126 Cal.Rptr.2d 778].
- To Burn Defined ▸ *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–167 [270 Cal.Rptr. 389].

LESSER INCLUDED OFFENSES

- Attempted Arson ▸ Pen. Code, § 455.
- Unlawfully Causing a Fire ▸ *People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [226 Cal.Rptr. 810], disapproved of in *People v. Barton* (1995) 12 Cal.4th 186 [47 Cal.Rptr.2d 569, 906 P.2d 531] on its holding that failure to instruct on this crime as a lesser included offense of arson was invited error because defense counsel objected to such instruction; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324 [3 Cal.Rptr.2d 816].

RELATED ISSUES

Fixtures
Fire damage to fixtures within a building may satisfy the burning requirement if the fixtures are an integral part of the structure. (*In re Jesse L.* (1990) 221

Cal.App.3d 161, 167–168 [270 Cal.Rptr. 389]; *People v. Lee* (1994) 24 Cal.App.4th 1773, 1778 [30 Cal.Rptr.2d 224] [whether wall-to-wall carpeting is a fixture is question of fact for jury].)

Property: Clothing

Arson includes burning a victim's clothing. (*People v. Reese* (1986) 182 Cal.App.3d 737, 739–740 [227 Cal.Rptr. 526].)

Property: Trash

Burning trash that does not belong to the defendant is arson. There is no requirement for arson that the property belong to anyone. (*In re L.T.* (2002) 103 Cal.App.4th 262, 264 [126 Cal.Rptr.2d 778].)

Dual Convictions Prohibited

A single act of arson cannot result in convictions under different subdivisions of Penal Code section 451. (*People v. Shiga* (2019) 34 Cal.App.5th 466, 475 [246 Cal.Rptr.3d 198].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 268-276.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

1516–1519. Reserved for Future Use

1801. Grand and Petty Theft (Pen. Code, §§ 486, 487–488, 490.2, 491)

If you conclude that the defendant committed a theft, you must decide whether the crime was grand theft or petty theft.

[The defendant committed petty theft if (he/she) stole property [or services] worth $950 or less.]

[The defendant committed grand theft if the value of the property [or services] is more than $950.]

[Theft of property from the person is grand theft if the value of the property is more than $950. Theft is *from the person* if the property taken was in the clothing of, on the body of, or in a container held or carried by, that person.]

[Theft of (an automobile/ ~~a firearm/~~a horse/_____<*insert other item listed in statute*>**) is grand theft if the value of the property is more than $950.]**

[Theft of a firearm is grand theft.]

[Theft of (fruit/nuts/_____<*insert other item listed in statute*>**) worth more than $950 is grand theft.]**

[Theft of (fish/shellfish/aquacultural products/_____<*insert other item listed in statute*>**) worth more than $950 is grand theft if (it/they) (is/are) taken from a (commercial fishery/research operation).]**

[The value of _____ <*insert relevant item enumerated in Pen. Code, § 487(b)(1)(B)*>**may be established by evidence proving that on the day of the theft, the same items of the same variety and weight as those stolen had a wholesale value of more than $950.]**

[The value of (property/services) is the fair (market value of the property/market wage for the services performed).]

<*Fair Market Value—Generally*>
[*Fair market value* is the highest price the property would reasonably have been sold for in the open market at the time of, and in the general location of, the theft.]

<*Fair Market Value—Urgent Sale*>

[*Fair market value* is the price a reasonable buyer and seller would agree on if the buyer wanted to buy the property and the seller wanted to sell it, but neither was under an urgent need to buy or sell.]

The People have the burden of proving beyond a reasonable doubt that the theft was grand theft rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of grand theft.

New January 2006; Revised February 2012, August 2015, March 2020

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction if grand theft has been charged.

When the People allege the defendant has a prior conviction for an offense listed in Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration pursuant to subdivision (c) of section 290, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial* or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

If the evidence raises an issue that the value of the property may be inflated or deflated because of some urgency on the part of either the buyer or seller, the second bracketed paragraph on fair market value should be given.

AUTHORITY

- Determination of Grand vs. Petty Theft ▸ Pen. Code, §§ 486, 487–488, 490.2, 491.
- Value/Nature of Property/Theft from the Person ▸ Pen. Code, §§ 487(b)-(d), 487a.
- Theft of a firearm is grand theft ▸ Pen. Code, §§ 487(d)(2), 490.2(c)

RELATED ISSUES

Proposition 47 (Penal Code Section 490.2)

After the passage of Proposition 47 in 2014, theft is defined in Penal Code section 487 as a misdemeanor unless the value of the property taken exceeds $950. Pen. Code, § 490.2. This represents a change from the way grand theft was defined under Penal Code section 487(b)-(d) before the enactment of Proposition 47. In

2016, Proposition 63 added subdivision (c) to Pen. Code, § 490.2 (excepting theft of a firearm).

Taking From the Person

To constitute a taking from the person, the property must, in some way, be physically attached to the person. (*People v. Williams* (1992) 9 Cal.App.4th 1465, 1472 [12 Cal.Rptr.2d 243].) Applying this rule, the court in *Williams* held that a purse taken from the passenger seat next to the driver was not a taking from the person. (*Ibid.* [see generally for court's discussion of origins of this rule].) *Williams* was distinguished by the court in *People v. Huggins* (1997) 51 Cal.App.4th 1654, 1656–1657 [60 Cal.Rptr.2d 177], where evidence that the defendant took a purse placed on the floor next to and touching the victim's foot was held sufficient to establish a taking from the person. The victim intentionally placed her foot next to her purse, physically touching it and thereby maintaining dominion and control over it.

Theft of Fish, Shellfish, or Aquacultural Products

Fish taken from public waters are not "property of another" within the meaning of Penal Code section 484 and 487; only the Fish and Game Code applies to such takings. (*People v. Brady* (1991) 234 Cal.App.3d 954, 959, 961–962 [286 Cal.Rptr. 19]; see, e.g., Fish & Game Code, § 12006.6 [unlawful taking of abalone].)

Value of Written Instrument

If the thing stolen is evidence of a debt or some other written instrument, its value is (1) the amount due or secured that is unpaid, or that might be collected in any contingency, (2) the value of the property, title to which is shown in the instrument, or (3) or the sum that might be recovered in the instrument's absence. (Pen. Code, § 492; see *Buck v. Superior Court* (1966) 245 Cal.App.2d 431, 438 [54 Cal.Rptr. 282] [trust deed securing debt]; *People v. Frankfort* (1952) 114 Cal.App.2d 680, 703 [251 P.2d 401] [promissory notes and contracts securing debt]; *People v. Quiel* (1945) 68 Cal.App.2d 674, 678 [157 P.2d 446] [unpaid bank checks]; see also Pen. Code, §§ 493 [value of stolen passage tickets], 494 [completed written instrument need not be issued or delivered].) If evidence of a debt or right of action is embezzled, its value is the sum due on or secured by the instrument. (Pen. Code, § 514.) Section 492 only applies if the written instrument has value and is taken from a victim. (See *People v. Sanders* (1998) 67 Cal.App.4th 1403, 1414, fn. 16 [79 Cal.Rptr.2d 806].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property §§ 4, 8.

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

Guide

Guide for Using Judicial Council of California Criminal Jury Instructions (CALCRIM)

The Judicial Council jury instructions are accurate, designed to be easy to understand, and easy to use. This guide provides an introduction to the instructions and explains conventions and features that will assist in their use.

In order to fulfill its mandate pursuant to Rule 10.59 of the California Rules of Court[1] to maintain the criminal jury instructions, members of the advisory committee meet several times a year to consider changes in statutes, appellate opinions, and suggestions from practitioners. *It bears emphasis that when the committee proposes changing a jury instruction, that does not necessarily mean the previous version of the instruction was incorrect.* Often the committee proposes changes for reasons of style, consistency among similar instructions, and to improve clarity.

Judicial Council Instructions Endorsed by Rule of Court

Rule 2.1050 of the California Rules of Court provides:

> The California jury instructions approved by the Judicial Council are the official instructions for use in the state of California …
>
> The Judicial Council endorses these instructions for use and makes every effort to ensure that they accurately state existing law …
>
> Use of the Judicial Council instructions is strongly encouraged.

Using the Instructions

Bench Notes

The text of each instruction is followed by a section in the Bench Notes titled "Instructional Duty," which alerts the user to any *sua sponte* duties to instruct and special circumstances raised by the instruction. It may also include references to other instructions that should or should not be used. In some instances, the directions include suggestions for modification. In the "Authority" section, all of the pertinent sources for the instruction are listed~~, including secondary source materials~~. Some of the instructions also have sections containing "Related Issues" and "Commentary." The Bench Notes also refer to any relevant lesser included offenses. Secondary sources appear at the end of instructions. The official publisher, and not the Judicial Council, is responsible for updating the citations for secondary sources. Users should consult the Bench Notes before using an instruction. Italicized notes between angle brackets in the language of the instruction itself signal important issues or choices. For example, in instruction 1750, Receiving Stolen Property, optional element 3 is introduced thus: <*Give element 3 when instructing on knowledge of presence of property; see Bench Notes*>.

Multiple-Defendant and Multiple-Count Cases

These instructions were drafted for the common case in which a single defendant is on trial. The HotDocs document assembly program from the Judicial Council's official publisher, LexisNexis, will modify the instructions for use in multi-defendant cases. It will also allow the user to name the defendants charged in a particular instruction if the instruction applies only to some of the defendants on trial in the case.

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

It is impossible to predict the possible fact combinations that may be present when a crime is charged multiple times or committed by different defendants against different victims involving different facts. Thus, when an instruction is being used for more than one count and the factual basis for the instruction is different for the different counts, the user will need to modify the instruction as appropriate.

Related California Jury Instructions, Criminal (CALJIC)

The CALJIC and CALCRIM instructions should *never* be used together. While the legal principles are obviously the same, the organization of concepts is approached differently. Mixing the two sets of instructions into a unified whole cannot be done and may result in omissions or confusion that could severely compromise clarity and accuracy. Nevertheless, for convenient reference this publication includes tables of related CALJIC instructions.

Titles and Definitions

The titles of the instructions are directed to lawyers and sometimes use words and phrases not used in the instructions themselves. The title is not a part of the instruction. The titles may be removed before presentation to the jury.

The instructions avoid separate definitions of legal terms whenever possible. Instead, definitions have been incorporated into the language of the instructions in which the terms appear. When a definition is lengthy, a cross-reference to that definition is provided.

Defined terms are printed in italics in the text of the definition.

Alternatives vs. Options

When the user must choose one of two or more options in order to complete the instruction, the choice of necessary alternatives is presented in parentheses thus: *When the defendant acted, George Jones was performing (his/her) duties as a school employee.*

The instructions use brackets to provide optional choices that may be necessary or appropriate, depending on the individual circumstances of the case: *[If you find that George Jones threatened or harmed the defendant [or others] in the past, you may consider that information in evaluating the defendant's beliefs.]*

Finally, both parentheses and brackets may appear in the same sentence to indicate options that arise depending on which necessary alternatives are selected: *[It is not required that the person killed be the (victim/intended victim) of the (felony/ [or] felonies).].*

General and Specific Intent

The instructions do not use the terms general and specific intent because while these terms are very familiar to judges and lawyers, they are novel and often confusing to many jurors. Instead, if the defendant must specifically intend to commit an act, the particular intent required is expressed without using the term of art "specific intent." Instructions 250–254 provide jurors with additional guidance on specific vs. general intent crimes and the union of act and intent.

Organization of the Instructions

The instructions are organized into 24 series, which reflect broad categories of crime (e.g., Homicide) and other components of the trial (e.g., Evidence). The series, and the instructions within each series, are presented in the order in which they are likely to be given in an actual trial. As a result, greater offenses (like DUI with injury) come before lesser offenses (DUI). All of the defenses are grouped together at the end of the instructions, rather than dispersed throughout. The misdemeanors are placed within the category of instructions to which they belong, so simple battery is found with the other battery instructions rather than in a stand-alone misdemeanor section.

Lesser Included Offenses

Users may wish to modify instructions used to explain lesser included offenses by replacing the standard introductory sentence, **"The defendant is charged with À ."** with **"The crime of** _____ (e.g., false imprisonment) **is a lesser offense than the crime of** _____ (e.g., kidnapping)**"** to amplify the explanation provided in instructions 3517–3519: **"**_____ <*insert crime*> **is a lesser crime of** _____ <*insert crime*> **[charged in Count _____].**"

When giving the lesser included offense instructions 640 and 641 (homicide) or instructions 3517–3519 (non-homicide), no further modification of the corresponding instructions on lesser crimes is necessary to

comply with the requirements of *People v. Dewberry* (1959) 51 Cal.2d 548.

Burden of Production/Burden of Proof

The instructions never refer to the "burden of producing evidence." The drafters concluded that it is the court's decision whether the party has met the burden of production. If the burden is not met, no further instruction is necessary. The question for the jury is whether a party has met its properly allocated burden based on the evidence received.

Instruction 103 on Reasonable Doubt states, "Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise]." Thus, when the concept of reasonable doubt is explained and defined, the jury is told that it is the standard that applies to every issue the People must prove, unless the court specifically informs the jury otherwise.

Sentencing Factors and Enhancements

Because the law is rapidly evolving regarding when sentencing factors and enhancements must be submitted to the jury, we have provided "template" instructions 3250 and 3251 so that the court may tailor an appropriate instruction that corresponds to this emerging body of law.

Personal pronouns

Many instructions include an option to insert the personal pronouns "he/she," "his/her," or "him/her." The committee does not intend these options to be limiting. It is the policy of the State of California that nonbinary people are entitled to full legal recognition and equal treatment under the law. In accordance with this policy, attorneys and courts should ensure that they are using preferred personal pronouns.

JUDICIAL COUNCIL OF CALIFORNIA

LEGAL SERVICES

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MEMORANDUM

Date
January 15, 2020

To
Rules and Projects Committee

From
Criminal Law Advisory Committee
Hon. J. Richard Couzens, Chair

Subject
Addition of Project to Annual Agenda

Action Requested
Approve Addition to Annual Agenda

Deadline
January 22, 2020

Contact
Sarah Fleischer-Ihn
415-865-7702
Sarah.Fleischer-Ihn@jud.ca.gov

Executive Summary

The Criminal Law Advisory Committee requests approval to amend its annual agenda to broaden the scope of an existing proposal to amend California Rules of Court, rule 4.530, Intercounty transfer of probation and mandatory supervision cases. The new rule amendment would add provisions allowing electronic transmission of court files from the transferring court to the receiving court and allowing only the receiving court to make certified copies of court records. The committee seeks to amend its annual agenda in order to propose changes to the rule in a single proposal rather than piecemeal.

Action Requested

The Criminal Law Advisory Committee asks that Rules and Projects Advisory Committee:

1. Approve adding to the 2020 Annual Agenda of the Criminal Law Advisory Committee amendments to California Rules of Court, rule 4.530, Intercounty transfer of probation and mandatory supervision cases, to modernize the rule and further clarify the roles of transferring and receiving courts through allowing electronic transmission of court files

from the transferring court to the receiving court and allowing only the receiving court to make certified copies of court records.

Basis for Request

Background

The Criminal Law Advisory Committee's annual agenda, which was approved by RUPRO on October 28, 2019, includes a proposal to amend rule 4.530 to require a receiving court to notify a transferring court if the transferred case's disposition changes, e.g., reduced to a misdemeanor or dismissed. The proposed additional amendment would add provisions to modernize the rule and further clarify the roles of transferring and receiving courts. The recommended provisions would allow court files to be transmitted electronically from the transferring court to the receiving court, reflecting that many courts have transitioned from paper to electronic case file systems; and allow only the receiving court to make certified copies of court records, clarifying confusion on whether the transferring or receiving court may certify records from a case. The committee seeks to amend its annual agenda in order to propose changes to rule 4.530 in a single proposal rather than piecemeal.

Annual Agenda

The Criminal Law Advisory Committee proposes amendments to California Rules of Court, rule 4.530 be added to its Annual Agenda as Priority level 1(e). The Specifications for the item would be:

Project Summary: Consider rule changes to rule 4.530 to modernize the rule and further clarify the roles of transferring and receiving courts through allowing electronic transmission of court files from the transferring court to the receiving court, and allowing only the receiving court to make certified copies of court records.

Status/Timeline: Anticipated effective date of January 1, 2021

Fiscal Impact/Resources: Committee staff

Internal/External Stakeholders: None

AC Collaboration: None

Completion Date proposed would be January 1, 2021.

Item number:03

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting:

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Rules and Forms: Technical Revision to Form ICWA-020

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee; Tribal Court –State Court Forum

Staff contact (name, phone and e-mail): Ann Gilmour, 415-865-4207

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: Item 3 on the Family and Juvenile Law Advisory Committee Annual Agenda: Monitor implementation of rules and forms created pursuant to AB 3176 (Waldron) Indian children. Assembly Bill 3176 updates the Indian Child Welfare Act provisions in the Welfare and Institutions Code to comply with recent Federal Bureau of Indian Affairs regulations

From the Tribal Court–State Court Forum annual agenda approved by the Executive and Planning Committee on March 13, 2019: Item 1:Implement Assembly Bill 3176 Indian Children (Waldron; Stats. 2018, ch. 833) Project Summary: AB 3176 Indian Children, amends provisions of the Welfare and Institutions Code to conform California law to the requirements of the federal Indian Child Welfare Act Regulations and Guidelines adopted in 2016. The legislation directs the Judicial Council to enact rules and forms necessary to implement the legislation.

If requesting July 1 or out of cycle, explain:
Requesting an effective date of March 25, 2020. The revision is urgently needed to avoid confusion.

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

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

For business meeting on: March 23–24, 2020

Title
Rules and Forms: Technical Revision to Form ICWA-020

Rules, Forms, Standards, or Statutes Affected
Revise form ICWA-020

Recommended by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Tribal Court–State Court Forum
Hon. Abby Abinanti, Cochair
Hon. Suzanne N. Kingsbury, Cochair

Agenda Item Type
Action Required

Effective Date
March 25, 2020

Date of Report
January 15, 2020

Contact
Ann Gilmour, 415-865-4207
ann.gilmour@jud.ca.gov

Executive Summary

The Family and Juvenile Law Advisory Committee and the Tribal Court–State Court Forum recommend that *Parental Notification of Indian Status* (form ICWA-020) be revised to correct an omission in the form that is causing confusion for judicial officers and justice partners.

Recommendation

The Family and Juvenile Law Advisory Committee and the Tribal Court–State Court Forum recommend that the Judicial Council, effective March 25, 2020, revise *Parental Notification of Indian Status* (form ICWA-020) to add a check box to item 3 of the form to be checked if none of the factors that give the court "reason to know" a child is an Indian child apply to the case.

The revised form is attached at page 5.

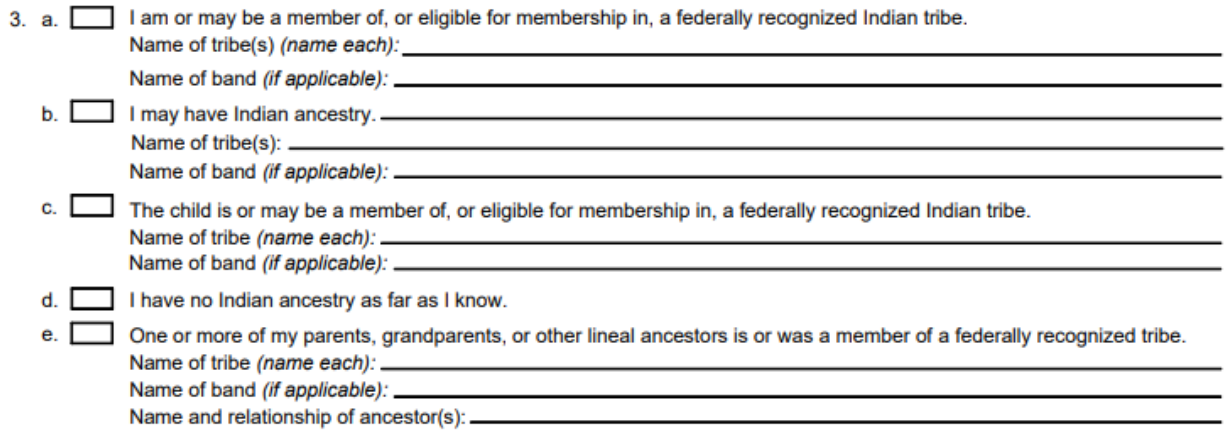
Relevant Previous Council Action

The *Parental Notification of Indian Status* (form ICWA-020) was adopted by the Judicial Council for mandatory use effective January 1, 2008, as part of a large rules and forms proposal implementing Senate Bill 678 (Ducheny; Stats. 2006, ch. 838) which wove the requirements of the Indian Child Welfare Act (25 U.S.C. §§ 1901 et seq. "ICWA") into the California Family, Probate, and Welfare and Institutions Codes.[1] The form was revised effective January 1, 2020, as part of a large rules and forms proposal implementing Assembly Bill 3176 (Waldron; Stats. 2018, ch. 833), which revised the Welfare and Institutions Code to conform California law to the requirements of the federal ICWA regulations found at 25 Code of Federal Regulations part 23 that were enacted in 2016.[2]

Analysis/Rationale

The *Parental Notification of Indian Status* (form ICWA-020) is a mandatory form used in all case types where inquiry about the child's Indian status is required for purposes of determining whether ICWA applies. The form is completed under penalty of perjury by each of the child's parents, and the child's Indian custodian, guardian, or other individual of whom ICWA inquiry is required.

The original form ICWA-020 included the following options with respect to an individual's Indian status:


3. a. ☐ I am or may be a member of, or eligible for membership in, a federally recognized Indian tribe.
Name of tribe(s) *(name each)*: _____
Name of band *(if applicable)*: _____
b. ☐ I may have Indian ancestry. _____
Name of tribe(s): _____
Name of band *(if applicable)*: _____
c. ☐ The child is or may be a member of, or eligible for membership in, a federally recognized Indian tribe.
Name of tribe *(name each)*: _____
Name of band *(if applicable)*: _____
d. ☐ I have no Indian ancestry as far as I know.
e. ☐ One or more of my parents, grandparents, or other lineal ancestors is or was a member of a federally recognized tribe.
Name of tribe *(name each)*: _____
Name of band *(if applicable)*: _____
Name and relationship of ancestor(s): _____

When the form was revised during the spring 2019 RUPRO cycle, all of these options were revised to conform to the factors set out in the 2016 federal regulations and the Welfare and Institutions Code as amended by AB 3176 that give the court "reason to know" the child is an

[1] The Rules and Forms package implementing SB 678 was approved at the Judicial Council's meeting on October 26, 2007, as Item A27. That item is available here: *https://www.courts.ca.gov/documents/102607ItemA27.pdf*.

[2] The Rules and Forms package implementing AB 3176 was approved at the Judicial Council's meeting on September 24, 2019, as Item 19-195. That item is available here: *https://jcc.legistar.com/View.ashx?M=F&ID=7684873&GUID=52B4C6B1-F704-458F-BF42-EB1AA4F82000*.

Indian child.[3] Simply having Indian ancestry is not among the factors that give the court "reason to know" a child is an Indian child. Therefore, both items "3. b. □ I may have Indian ancestry." and "3. d. □ I have no Indian ancestry as far as I know." were removed from the form. The proposed revisions were circulated for public comment during the spring 2019 RUPRO comment cycle.

The revised form as effective January 1, 2020, contains the following options with respect to Indian status:

3. a. ☐ I am or may be a member of, or eligible for membership in, a federally recognized Indian tribe.
   Name of tribe(s) *(name each)*: _____
   Location of tribe(s): _____
   b. ☐ The child is or may be a member of, or eligible for membership in, a federally recognized Indian tribe.
   Name of tribe(s) *(name each)*: _____
   Location of tribe(s): _____
   c. ☐ One or more of my parents, grandparents, or other lineal ancestors is or was a member of a federally recognized tribe.
   Name of tribe(s) *(name each)*: _____
   Location of tribe(s): _____
   Name and relationship of ancestor(s): _____
   d. ☐ I am a resident of or am domiciled on a reservation, rancheria, Alaska Native village, or other tribal trust land.
   e. ☐ The child is a resident of or is domiciled on a reservation, rancheria, Alaska Native village, or other tribal trust land.
   f. ☐ The child is or has been a ward of a tribal court.
   g. ☐ Either parent or the child possesses an Indian identification card indicating membership or citizenship in an Indian tribe.
   Name of tribe(s) *(name each)*: _____
   Membership or citizenship number *(if any)*: _____

Since the revised form's effective date, staff have received numerous expressions of concern from judicial officers, attorneys, and other justice partners that there is no longer a box to be affirmatively checked under penalty of perjury if the individual does not claim any affiliation that would trigger ICWA application in the case.

This proposal would correct this omission by adding to item 3 a further option as follows: "h. □ None of the above apply." The addition is noncontroversial and is required to correct confusion. The proposal comes within the scope of Rule 10.22(d)(2) as a nonsubstantive technical change or correction or a minor substantive change that is unlikely to create controversy that can be adopted without circulating it for comment.

Policy implications

This proposal has no major policy implications and is important to avoid confusion.

Comments

The recent changes to *Parental Notification of Indian Status* (form ICWA-020) were circulated for public comment from April 11 through June 10, 2019, as part of the spring 2019 invitation-to-comment cycle. That invitation to comment specifically asked whether the questions about

[3] The factors are set out at 25 C.F.R. § 23.107(c) and Welf. & Inst. Code, § 224.3(d).

Indian status in the proposed form ICWA-020 were sufficient. Comments were received on the ICWA-020, and revisions were made in response to those comments. However, this issue—the need for an option to state "None of the above apply"—was not raised during the comment period.

This minor change has not been circulated for public comment as it is not substantive or controversial and is urgently needed to avoid confusion. The proposal comes within the scope of Rule 10.22(d)(2) as a nonsubstantive technical change or correction or a minor substantive change that is unlikely to create controversy that can be adopted without circulating it for comment.

Alternatives considered

The committee and forum have considered whether this change could wait for the regular RUPRO cycle and circulate for public comment but have concluded that it is important to make this correction as soon as possible.

Fiscal and Operational Impacts

No fiscal or operational impacts are anticipated.

Attachments and Links

1. Form ICWA-020, at page 5

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	DRAFT Not Approved by the Judicial Council
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CHILD'S NAME:	
PARENTAL NOTIFICATION OF INDIAN STATUS	CASE NUMBER:

To the parent, Indian custodian, or guardian of the above named child: You must provide all the requested information about the child's Indian status by completing this form. If you get new information that would change your answers, you must let your attorney, all the attorneys on the case, and the social worker or probation officer, or the court investigator know immediately and an updated form must be filed with the court.

1. Name:
2. Relationship to child: ☐ Parent ☐ Indian custodian ☐ Guardian ☐ Other:

Indian Status

3. a. ☐ I am or may be a member of, or eligible for membership in, a federally recognized Indian tribe.
   Name of tribe(s) *(name each):* _____
   Location of tribe(s): _____
   b. ☐ The child is or may be a member of, or eligible for membership in, a federally recognized Indian tribe.
   Name of tribe(s) *(name each):* _____
   Location of tribe(s): _____
   c. ☐ One or more of my parents, grandparents, or other lineal ancestors is or was a member of a federally recognized tribe.
   Name of tribe(s) *(name each):* _____
   Location of tribe(s): _____
   Name and relationship of ancestor(s): _____
   d. ☐ I am a resident of or am domiciled on a reservation, rancheria, Alaska Native village, or other tribal trust land.
   e. ☐ The child is a resident of or is domiciled on a reservation, rancheria, Alaska Native village, or other tribal trust land.
   f. ☐ The child is or has been a ward of a tribal court.
   g. ☐ Either parent or the child possesses an Indian identification card indicating membership or citizenship in an Indian tribe.
   Name of tribe(s) *(name each):* _____
   Membership or citizenship number *(if any):* _____
   h. ☐ None of the above apply.
4. A previous form ICWA-020 ☐ has ☐ has not been filed with the court.

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

Date:

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE)

Note: This form is not intended to constitute a complete inquiry into Indian heritage. Further inquiry may be required by the Indian Child Welfare Act.

Form Adopted for Mandatory Use
Judicial Council of California
ICWA-020 [Rev. March 25, 2020]

Welfare & Institutions Code, § 224.2;
Family Code, § 177(a);
Probate Code, § 1459.5(b);
Cal. Rules of Court, rule 5.481
www.courts.ca.gov