Judicial Council *of* California

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INVITATION TO COMMENT

CALCRIM-2025-02

Title
Criminal Jury Instructions: Additions, Revisions, and Revocations

Action Requested
Review and submit comments by November 14, 2025

Proposed Rules, Forms, Standards, or Statutes
New and Revised Jury Instructions

Proposed Effective Date
February 20, 2026

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

Contact
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Summary

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

Please note:

The proposed revision to CALCRIM No. 2656 cites *People v. Gresham* (2025) 113 Cal.App.5th 59, 67 [335 Cal.Rptr.3d 176]. This case currently has a petition for review filed. If review is granted, the committee will remove this citation from the proposed revision.

The proposed revision to CALCRIM No. 3226 cites *People v. Mendez-Torres* (2025) 113 Cal.App.5th 1007 [336 Cal.Rptr.3d 298]. This case currently has a petition for review filed. If review is granted, the committee will remove this citation from the proposed revision.

CALCRIM Proposed Changes: Invitation to Comment October 13 – November 14, 2025

Instruction Number	Instruction Title
user guide	N/A
250, 251, 252	Union of Act and Intent: General Intent; Union of Act and Intent: Specific Intent or Mental State; General Intent; Union of Act and Intent: Specific Intent or Mental State
253 & 254	Union of Act and Intent: Criminal Negligence; Union of Act and Intent: Strict-Liability Crime
355	Defendant's Right Not to Testify
373	Other Perpetrator
375	Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.
400, 416, 417	Aiding and Abetting: General Principles; Evidence of Uncharged Conspiracy; Liability for Coconspirators' Acts
540A	Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act
540B & 540C	Felony Murder: First Degree—Coparticipant Allegedly Committee Fatal Act; Felony Murder—Other Acts Allegedly Caused Death;
561	Homicide: Provocative Act by Accomplice
571	Voluntary Manslaughter: Imperfect Self-Defense or Imperfect Defense of Another—Lesser Included Offense
703	Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder
840 & 841	Inflicting Injury on Spouse, Cohabitant, or Fellow Parent Resulting in Traumatic Condition; Simple Battery: Against Spouse, Cohabitant, or Fellow Parent
852A, 852B, 853A, 853B	Evidence of Uncharged Domestic Violence; Evidence of Charged Domestic Violence; Evidence of Uncharged Abuse of Elder or Dependent Person; Evidence of Charged Abuse of Elder or Dependent Person
965, 967, 968	Shooting at Inhabited House or Occupied Motor Vehicle; Shooting at Unoccupied Aircraft; Shooting From Motor Vehicle
1000, 1015, 1030, 1045	Rape by Force, Fear, or Threats; Oral Copulation by Force, Fear, or Threats; Sodomy by Force, Fear, or Threats; Sexual Penetration by Force, Fear, or Threats

Instruction Number	Instruction Title
1170	Failure to Register as Sex Offender
1191A & 1191B	Evidence of Uncharged Sex Offense; Evidence of Charged Sex Offense
1300	Criminal Threat
1520	Attempted Arson
1700	Burglary
1751	Defense to Receiving Stolen Property: Innocent Intent
New 1808	Organized Retail Theft
2110, 2111, 2112, 2113, 2114	Driving Under the Influence; Driving With 0.08 Percent Blood Alcohol; Driving While Addicted to a Drug; Driving With 0.05 Percent Blood Alcohol When Under 21; Driving With 0.04 Percent Blood Alcohol With a Passenger for Hire
2410	Possession of Controlled Substance Paraphernalia
2510, 2511, 2512, 2513	Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction; Possession of Firearm by Person Prohibited Due to Conviction—Stipulation to Conviction; Possession of Firearm by Person Prohibited by Court Order; Possession of Firearm by Person Addicted to a Narcotic Drug
2622	Intimidating a Witness
2656	Resisting Peace Officer, Public Officer, or EMT
2745	Possession or Manufacture of Weapon in Penal Institution
2840	Evidence of Uncharged Tax Offense: Failed to File Previous Return
2931	Trespass: Unlawfully Occupying Property
3160	Great Bodily Injury
3224—3234	Aggravating Factors
NEW 3225	Aggravating Factor: Numerous or Increasingly Serious Prior Convictions or Sustained Juvenile Delinquency Petitions;

Instruction Number	Instruction Title
NEW 3238	Aggravating Factor: Unsatisfactory Prior Performance on Probation, Supervision, or Parole
3260	Duty of Jury: Verdict Form for Enhancement, Sentencing Factor, or Prior Conviction
3406	Mistake of Fact
3411	Mistake of Law As a Defense
NEW 3459	Commitment of Person With Developmental Disability As Dangerous to Self or Others

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.

The California Supreme Court acknowledged CALCRIM's status as the state's official pattern jury instructions in *People v. Ramirez* (2021) 10 Cal.5th 983, 1008, fn.5 [274 Cal.Rptr.3d 309, 479 P.3d 797].

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. 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.
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.

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

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 252~~0~~–254 provide jurors with additional guidance on ~~specific vs. general intent crimes and~~ the union of act and mental state~~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 _____"** 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 an individual's personal pronouns. The court has the option to change the pronouns to "they/them" with care given to avoiding confusion in multiple defendant cases.

Revision Dates

In previous editions, the revision dates listed underneath the instructional language indicated when any text in the instruction had been updated, whether related to the instructional language or the bench notes and other commentaries. Beginning with the 2024 edition, an asterisk at the end of the revision date signifies that only the bench notes and other commentaries were updated during that publication cycle. A revision date without an asterisk indicates that the instructional text (as well as the bench notes and other commentaries, if applicable) were revised.

250. Union of Act and Intent: General Intent

The crime[s] [or other allegation[s]] charged in this case require[s] proof of the union, or joint operation, of act and wrongful intent.

For you to find a person guilty of the crime[s] (in this case/ of _____ *<insert name[s] of alleged offense[s] and count[s], e.g., battery, as charged in Count 1>* **[or to find the allegation[s] of** _____ *<insert name[s] of enhancement[s]>***true]), that person must not only commit the prohibited act [or fail to do the required act], but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act [or fails to do a required act]; however, it is not required that he or she intend to break the law. The act required is explained in the instruction for that crime [or allegation].**

New January 2006; Revised June 2007, April 2008, April 2011, March 2022, Revoked February 2026

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the union of act and general criminal intent. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].) However, this instruction **must not** be used if the crime requires a specific mental state, such as knowledge or malice, even if the crime is classified as a general intent offense. In such cases, the court must give CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*. (See *People v. Southard* (2021) 62 Cal.App.5th 424, 437 [276 Cal.Rptr.3d 656] [discussing Pen. Code, § 148, Pen. Code, § 69, and Health & Saf. Code, § 11377]*; People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rtpr.3d 260] [discussing Pen. Code, § 290].)

If the case involves both offenses requiring a specific intent or mental state and offenses that do not, the court may give CALCRIM No. 252, *Union of Act and Intent: General and Specific Intent Together*, in place of this instruction.

The court should specify for the jury which offenses require only a general criminal intent by inserting the names of the offenses and count numbers where indicated in the second paragraph of the instruction. (*People v. Hill* (1967) 67 Cal.2d 105, 118 [60 Cal.Rptr. 234, 429 P.2d 586].) If all the charged crimes and allegations involve general intent, the court need not provide a list in the blank provided in this instruction.

If the defendant is charged with aiding and abetting or conspiracy to commit a general-intent offense, the court must instruct on the specific intent required for aiding and abetting or conspiracy. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1117–1118 [108 Cal.Rptr.2d 188, 24 P.3d 1210]; *People v. Bernhardt, supra,* 222 Cal.App.2d at pp. 586–587.)

If the defendant is also charged with a criminal negligence or strict liability offense, insert the name of the offense where indicated in the first sentence. The court may also give CALCRIM No. 253, *Union of Act and Intent: Criminal Negligence*, or CALCRIM No. 254, *Union of Act and Intent: Strict-Liability Crime*.

Defenses—Instructional Duty

"A person who commits a prohibited act 'through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence' has not committed a crime." (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 [49 Cal.Rptr.2d 86] [quoting Pen. Code, § 26].) Similarly, an honest and reasonable mistake of fact may negate general criminal intent. (*People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673].) If there is sufficient evidence of these or other defenses, such as unconsciousness, the court has a **sua sponte** duty to give the appropriate defense instructions. (See Defenses and Insanity, CALCRIM No. 3400 et seq.)

AUTHORITY

- Statutory Authority. Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
- Instructional Requirements. *People v. Hill* (1967) 67 Cal.2d 105, 117 [60 Cal.Rptr. 234, 429 P.2d 586]; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 586–587 [35 Cal.Rptr. 401]; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].
- History of General-Intent Requirement. *Morissette v. United States* (1952) 342 U.S. 246 [72 S.Ct. 240, 96 L.Ed. 288]; see also *People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590].

This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1189 [67 Cal.Rptr.3d 871].

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Elements, §§ 1–5.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02[1], [2] (Matthew Bender).

251. Union of Act and Intent: Specific Intent or Mental State

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The crime[s] [(and/or) other allegation[s]] charged in this case require[s] proof of the union, or joint operation, of act and wrongful intent.

For you to find a person guilty of the crime[s] (in this case/ of _____ *<insert name[s] of alleged offense[s] and count[s], e.g., burglary, as charged in Count 1>* **[or to find the allegation[s] of** _____ *<insert name[s] of enhancement[s]>* **true]), that person must not only intentionally commit the prohibited act [or intentionally fail to do the required act], but must do so with a specific (intent/ [and/or] mental state). The act and the specific (intent/ [and/or] mental state) required are explained in the instruction for that crime [or allegation].**

<*Repeat next paragraph as needed***>**
[The specific (intent/ [and/or] mental state) required for the crime of _____ *<insert name[s] of alleged offense[s] e.g., burglary>* **is** _____*<insert specific intent>*.**]**

New January 2006; Revised August 2006, June 2007, April 2008, Revoked February 2026

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the union of act and specific intent or mental state. (*People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365].) This instruction **must** be given if the crime requires a specific mental state, such as knowledge or malice, even if the crime is classified as a general intent offense.

Do not give this instruction if the case involves only general-intent offenses that do not require any specific mental state. (See CALCRIM No. 250, *Union of Act and Intent: General Intent*.) If the case involves both offenses requiring a specific intent or mental state and offenses that do not, the court may give CALCRIM No. 252, *Union of Act and Intent: General and Specific Intent Together*, in place of this instruction.

The court should specify for the jury which offenses are specific-intent offenses by inserting the names of the offenses and count numbers where indicated in the second paragraph of the instruction. (See *People v. Hill* (1967) 67 Cal.2d 105, 118

[60 Cal.Rptr. 234, 429 P.2d 586].) The court may use the final optional paragraph if it deems it helpful, particularly in cases with multiple counts.

If the defendant is charged with aiding and abetting or conspiracy to commit a general-intent offense, the court must instruct on the specific intent required for aiding and abetting or conspiracy. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1117–1118 [108 Cal.Rptr.2d 188, 24 P.3d 1210]; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 586–587 [35 Cal.Rptr. 401].)

This instruction does not apply to criminal negligence or strict liability. If the defendant is also charged with a criminal negligence or strict liability offense, the court should give the appropriate Union of Act and Intent instruction: CALCRIM No. 253, *Union of Act and Intent: Criminal Negligence*, or CALCRIM No. 254, *Union of Act and Intent: Strict-Liability Crime*.

Defenses—Instructional Duty

Evidence of voluntary intoxication or mental impairment may be admitted to show that the defendant did not form the required mental state. (See *People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364].) The court has no sua sponte duty to instruct on these defenses; however, the trial court must give these instructions on request if supported by the evidence. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588]; see Defenses and Insanity, CALCRIM No. 3400 et seq.)

AUTHORITY

- Statutory Authority. Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
- Instructional Requirements. *People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365]; *People v. Ford* (1964) 60 Cal.2d 772, 792–793 [36 Cal.Rptr. 620, 388 P.2d 892]; *People v. Turner* (1971) 22 Cal.App.3d 174, 184 [99 Cal.Rptr. 186]; *People v. Hill* (1967) 67 Cal.2d 105, 117 [60 Cal.Rptr. 234, 429 P.2d 586].

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Elements, §§ 1–6.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.03 (Matthew Bender).

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02[1], [3] (Matthew Bender).

252. Joint Operation~~Union~~ of Act and ~~Intent~~Mental State~~: General and Specific Intent Together~~

The crime[s] [(and/or) other allegation[s]] charged in this case~~Count[s] __~~ require[s] proof of the ~~union, or~~ joint operation~~,~~ of act and wrongful ~~intent~~mental state.

<Give for crimes not requiring specific mental states.>
~~**The following crime[s] [and allegation[s]] require[s] general criminal intent:**~~ ~~_____ <insert name[s] of alleged offense[s] and enhancement[s] and count[s], e.g., battery, as charged in Count 1>.~~ **[For you to find a person guilty of ~~(this/these)~~the crime[s] (in this case/of _____ <insert name[s] of alleged offense[s] and count[s], e.g., battery, as charged in Count 1>), [or to find the allegation[s] of _____ <insert name[s] of enhancement[s]>true], that person must not only commit the prohibited act [or fail to do the required act], but must do so with a wrongful mental state~~intent~~. A person acts with a wrongful mental state~~intent~~ when he or she intentionally does a prohibited act [or fails to do a required act]; however, it is not required that he or she intend to break the law. The act required is explained in the instruction[s] for (that/those) crime[s] [or allegation[s]].]**

<Give for crimes requiring one or more specific mental states.>
~~**The following crime[s] [and allegation[s]] require[s] a specific intent or mental state:**~~ ~~_____ <insert name[s] of alleged offense[s] and count[s], e.g., burglary, as charged in Count 1> _____ <insert name[s] of enhancement[s]>.~~ **[For you to find a person guilty of the crime[s] (in this case/of _____ <insert offense(s)>~~(this/these) crimes~~ [or to find _____ <insert allegation(s)>~~the allegation[s]~~ true], that person must not only intentionally commit the prohibited act [or intentionally fail to do the required act], but must do so with a specific ~~(intent/ [and/or]~~ mental state~~)~~. The act and ~~the specific (intent/ [and/or]~~ mental state~~)~~ required are explained in the instruction[s] for (that/those) crime[s] [or allegation[s]].]**

~~*<Repeat next paragraph as needed>*~~

~~**[The specific (intent/ [and/or] mental state) required for the crime of _____ <insert name[s] of alleged offense[s] e.g., burglary> is _____ <insert specific intent>.**~~

New January 2006; Revised June 2007, April 2010, April 2011, March 2017, February 2026

BENCH NOTES

Instructional Duty

For general and specific intent crimes, ~~T~~the court has a **sua sponte** duty to instruct on the joint union of act and wrongful mental state~~intent~~. (*People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365]; ~~*People v. Ford* (1964) 60 Cal.2d 772, 792–793 [36 Cal.Rptr. 620, 388 P.2d 892];~~ *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].) ~~The court may give this instruction in cases involving both offenses requiring a specific intent or mental state and offenses that do not, rather than giving both CALCRIM No. 250 and CALCRIM No. 251.~~

~~**Do not** give this instruction if the case involves only offenses requiring a specific intent or mental state or involves only offenses that do not. (See CALCRIM No. 250, *Union of Act and Intent: General Intent*, and CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*.)~~

The court should specify for the jury which offenses do and do not require ~~general criminal intent and which require~~ a specific ~~intent or~~ mental state by inserting the names of the offenses where indicated in the instruction. (See *People v. Hill* (1967) 67 Cal.2d 105, 118 [60 Cal.Rptr. 234, 429 P.2d 586].) If the crime requires a specific mental state, such as knowledge or malice, the court **must** insert the name of the offense in the third paragraph, explaining the mental state requirement, even if the crime is classified as a general intent offense.

If the defendant is charged with aiding and abetting or conspiracy to commit a general~~-~~ intent offense, the court **must** instruct on the specific mental state~~intent~~ required for aiding and abetting or conspiracy. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1117–1118 [108 Cal.Rptr.2d 188, 24 P.3d 1210]; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 586–587 [35 Cal.Rptr. 401].)

If the defendant is also charged with a criminal negligence or strict~~-~~ liability offense, insert the name of the offense where indicated in the first sentence. The court may also give CALCRIM No. 253, *Union of Act and Mental State~~Intent~~: Criminal Negligence*, or CALCRIM No. 254, ~~*Union of Act and Intent: Strict-Liability Crime*~~.

Defenses—Instructional Duty

"A person who commits a prohibited act 'through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence' has not committed a crime." (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 [49 Cal.Rptr.2d 86] [quoting Pen. Code, § 26].) Similarly, an honest and reasonable mistake of fact may negate general criminal intent. (*People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673].) If there is sufficient evidence of these or other defenses, such as unconsciousness, the court has a **sua**

sponte duty to give the appropriate defense instructions. (See Defenses and Insanity, CALCRIM No. 3400 et seq.)

Evidence of voluntary intoxication or mental impairment may be admitted to show that the defendant did not form the required mental state. (See *People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364].) The court has no sua sponte duty to instruct on these defenses; however, the trial court must give these instructions on request if supported by the evidence. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588]; see Defenses and Insanity, CALCRIM No. 3400 et seq.)

AUTHORITY

- Statutory Authority. Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
- Instructional Requirements. *People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365]; ~~*People v. Hill* (1967) 67 Cal.2d 105, 117 [60 Cal.Rptr. 234, 429 P.2d 586]; *People v. Ford* (1964) 60 Cal.2d 772, 792–793 [36 Cal.Rptr. 620, 388 P.2d 892];~~ *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].
- ~~History of General Intent Requirement. *Morissette v. United States* (1952) 342 U.S. 246 [72 S.Ct. 240, 96 L.Ed. 288]; see also *People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590].~~
- Prior Version of This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1189 [67 Cal.Rptr.3d 871].
- Instruction on Both General and Specific Intent May Be Necessary for Voluntary Manslaughter. *People v. Martinez* (2007) 154 Cal.App.4th 314, 334-336 [64 Cal.Rptr.3d 580].
- Instruction on Both General and Specific Intent May Be Necessary for Continuous Sexual Abuse. *People v. Canales* (2024) 106 Cal.App.5th 1230, 1249–1251 [327 Cal.Rptr.3d 678] [some predicate acts require specific intent].

COMMENTARY

In *People v. Canales, supra,* 106 Cal.App.5th at p. 1238, the court noted that the use of the terms "general intent" and "specific intent" in former CALCRIM No. 252 "was unnecessary and can be mischievous." The court endorsed the position that "'[t]he distinction between specific and general intent has limited application' and that these terms are "'superfluous as long as the instruction describing the defense tells the jury exactly what the required mens rea consists of.'" (*Id.* at pp. 1251–1252.) The court suggested "CALCRIM No. 252, if it is retained, could be improved by eliminating the ambiguous and widely criticized terms 'specific

intent' and 'general intent.'" (*Id.* at p. 1252.) In response, this instruction has been revised to incorporate language from former CALCRIM Nos. 250 and 251. The committee also removed the terms "general intent" and "specific intent" from the jury's consideration.

~~RELATED ISSUES~~

~~See the Bench Notes and Related Issues sections of CALCRIM No. 250, *Union of Act and Intent: General Intent*, and CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*.~~

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4~~1~~5th ed. 20~~12~~24) Elements, §§ 1–~~6~~7.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02[1]–[3] (Matthew Bender).

253. Union of Act and Mental State~~Intent~~: Criminal Negligence

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For you to find a person guilty of the crime[s] of _____ *<insert name[s] of alleged offense[s]>* **[or to find the allegation[s] of _____** *<insert name[s] of enhancement[s]>* **true], a person must do an act [or fail to do an act] with (criminal/gross/ordinary) negligence.**

[(Criminal/Gross/Ordinary) negligence is defined in the instructions on that crime.]

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

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

AND

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

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

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

New January 2006; Revised June 2007, March 2022, February 2026

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use when instructing on an offense for which criminal, gross, or ordinary negligence is an element. **Do not** give this instruction if only general or specific~~-~~ intent offenses are presented to the jury.

(*People v. Lara* (1996) 44 Cal.App.4th 102, 110 [51 Cal.Rptr.2d 402].) Although no case has held that the court has a sua sponte duty to give this instruction, the committee recommends that the instruction be given, if applicable, as a matter of caution.

The court must specify for the jury which offenses require criminal negligence by inserting the names of the offenses where indicated in the instruction. (See *People v. Hill* (1967) 67 Cal.2d 105, 118 [60 Cal.Rptr. 234, 429 P.2d 586].)

The court should select "criminal," "gross" or "ordinary" based on the words used in the instruction on the elements of the underlying offense. (See *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1175–1176 [214 Cal.Rptr.3d 467].)

Give the bracketed definition of criminal, gross, or ordinary negligence unless the court has already given the definition in another instruction. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

AUTHORITY

- Statutory Authority. Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
- Criminal or Gross Negligence Defined. *People v. Penny* (1955) 44 Cal.2d 861, 879 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- "Ordinary Negligence" Defined. Pen. Code, § 7, subd. 2; *People v. Nicolas, supra,* ~~(2017)~~ 8 Cal.App.5th ~~1165,~~at pp. 1174–1175 ~~[214 Cal.Rptr.3d 467]~~.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (~~4~~5th ed. 2024~~12~~) Elements, § 2~~1~~3.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02[1], [4] (Matthew Bender).

254. ~~Union of Act and Intent:~~ Strict-~~ ~~Liability Crime

For you to find a person guilty of the crime[s] of _____ *<insert name[s] of alleged offense[s]>* **[or to find the allegation[s] of** _____ *<insert name[s] of enhancement[s]>* **true], a person only needs to do the prohibited act [or to fail to do the required act]. The People do not need to prove any ~~intent or other~~ particular mental state.**

New January 2006; Revised June 2007, February 2026

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use when instructing on a strict-liability offense. The committee does not believe that the instruction is required. However, the instruction may be useful when the case also involves general-intent, specific- intent, or criminal negligence offenses. **Do not** give this instruction unless the court is completely certain that the offense is a strict-liability offense. For a discussion of the rarity of strict- liability offenses in modern criminal law, see *People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590], and *People v. Simon* (1995) 9 Cal.4th 493, 519–522 [37 Cal.Rptr.2d 278, 886 P.2d 1271].

The court must specify for the jury which offenses are strict- liability offenses by inserting the names of the offenses where indicated in the instruction. (See *People v. Hill* (1967) 67 Cal.2d 105, 118 [60 Cal.Rptr. 234, 429 P.2d 586].)

AUTHORITY

- Strict- Liability Offenses Discussed. *People v. Garcia, supra,* ~~(2001)~~ 25 Cal.4th at p.~~744,~~ 754 ~~[107 Cal.Rptr.2d 355, 23 P.3d 590]~~; *People v. Simon, supra,* ~~(1995)~~ 9 Cal.4th ~~493,~~at pp. 519–522 ~~[37 Cal.Rptr.2d 278, 886 P.2d 1271]~~.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (5~~1~~4th ed. 20~~12~~24) Elements, §§ ~~18~~20–2~~02~~.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02[5] (Matthew Bender).

355. Defendant's Right Not to Testify

A defendant has an absolute constitutional right not to testify. He or she may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt. Do not consider, for any reason at all, the fact that the defendant did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way.

*New January 2006; Revised February 2026**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

This instruction should only be given on request. (*Carter v. Kentucky* (1981) 450 U.S. 288, 300 [101 S.Ct. 1112, 67 L.Ed.2d 241]; *People v. Evans* (1998) 62 Cal.App.4th 186, 191 [72 Cal.Rptr.2d 543].)

The court has no sua sponte duty to seek a personal waiver of the instruction from the defendant. (*People v. Towey* (2001) 92 Cal.App.4th 880, 884 [112 Cal.Rptr.2d 326].)

The United States Supreme Court has held that the court may give this instruction over the defendant's objection (*Lakeside v. Oregon* (1978) 435 U.S. 333, 340–341 [98 S.Ct. 1091, 55 L.Ed.2d 319]), but as a matter of state judicial policy, the California Supreme Court has found otherwise. (*People v. Roberts* (1992) 2 Cal.4th 271, 314 [6 Cal.Rptr.2d 276, 826 P.2d 274] ["[T]he purpose of the instruction is to protect the defendant, and if the defendant does not want it given the trial court should accede to that request, notwithstanding the lack of a constitutional requirement to do so."].)

AUTHORITY

- Instructional Requirements. *People v. Lewis* (1990) 50 Cal.3d 262, 282 [266 Cal.Rptr. 834, 786 P.2d 892] [no sua sponte duty to instruct].
- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1191–1192 [67 Cal.Rptr.3d 871].
- Reasons Not to Testify Unrelated to Guilt or Innocence. *Griffin v. California* (1965) 380 U.S. 609, 613 [85 S.Ct. 1229, 14 L.Ed.2d 106].

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (45th ed. 2012024) Criminal Trial, §§ 72556, 74273.

2 Witkin, California Evidence (56th ed. 2012024) Witnesses, § 458502.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 80, *Defendant's Trial Rights*, § 80.08, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[1A][a], 85.04[2][b] (Matthew Bender).

373. Other Perpetrator

The evidence shows that (another person/other persons) may have been involved in the commission of the crime[s] charged against the defendant. There may be many reasons why someone who appears to have been involved might not be a codefendant in this particular trial. You must not speculate about whether (that other person has/those other persons have) been or will be prosecuted. Your duty is to decide whether the defendant on trial here committed the crime[s] charged.

[This instruction does not apply to the testimony of _____ <*insert names of testifying coparticipants*>**.]**

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*New January 2006; Revised February 2026**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction on unjoined co-participants; however, it must be given on request if there is substantial evidence that another person or persons were involved in the charged offense(s). (See *People v. Sanders* (1990) 221 Cal.App.3d 350, 359 [271 Cal.Rptr. 534].)

If other alleged participants in the crime are testifying, this instruction should not be given or the bracketed portion should be given exempting the testimony of those witnesses. (*People v. Carrera* (1989) 49 Cal.3d 291, 312 [261 Cal.Rptr. 348, 777 P.2d 121]; *People v. Sully* (1991) 53 Cal.3d 1195, 1218 [283 Cal.Rptr. 144, 812 P.2d 163]; *People v. Williams* (1997) 16 Cal.4th 153, 226–227 [66 Cal.Rptr.2d 123, 940 P.2d 710].) It is not error to give the first paragraph of this instruction if a reasonable juror would understand from all the instructions that evidence of criminal activity by a witness not being prosecuted in the current trial should be considered in assessing the witness's credibility. (*People v. Fonseca* (2003) 105 Cal.App.4th 543, 549–550 [129 Cal.Rptr.2d 513].)

AUTHORITY

- Instructional Requirements. *People v. Farmer* (1989) 47 Cal.3d 888, 918–919 [254 Cal.Rptr. 508, 765 P.2d 940], disapproved on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6 [94 Cal.Rptr.2d 396, 996 P.2d 46];

People v. Sanders, *supra*, (1990) 221 Cal.App.3d 350, at p. 359 [271 Cal.Rptr. 534].

RELATED ISSUES

Jury Can Still Consider Evidence That Someone Else Was the Perpetrator

"The instruction does not tell the jury it cannot consider evidence that someone else was the perpetrator. It merely says the jury is not to speculate on whether someone else might or might not be prosecuted." (*People v. Farmer*, *supra*, (1989) 47 Cal.3d 888, at pp. 918–919 [254 Cal.Rptr. 508, 765 P.2d 940], disapproved on other grounds in *People v. Waidla*, *supra*, (2000) 22 Cal.4th 690, at p. 724, fn. 6 [94 Cal.Rptr.2d 396, 996 P.2d 46].)

SECONDARY SOURCES

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

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

<Introductory Sentence Alternative A—evidence of other offense admitted>
[The People presented evidence that the defendant [may have] committed ((another/other) offense[s]/the offense[s] of _____ *<insert description of alleged offense[s]>***) that (was/were) not charged in this case.]**

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

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

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

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

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

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

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

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

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

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

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

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

<H. Other Purpose>
[The defendant _____ *<insert description of other permissible purpose; see Evid. Code, § 1101(b)>***.]**

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

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

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

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

New January 2006; Revised April 2008, February 2016, August 2016, March 2023, February 2026

BENCH NOTES

Instructional Duty

The court must give this instruction on request when evidence of other offenses has been introduced. (Evid. Code, § 1101(b); *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708], abrogated on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176 [185 Cal.Rptr.3d 431, 345 P.3d 62]; *People v. Collie* (1981) 30 Cal.3d 43, 63–64 [177 Cal.Rptr. 458, 634 P.2d 534].) The court is only required to give this instruction **sua sponte** in the "occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose." (*People v. Collie, supra,* 30 Cal.3d at pp. 63–64.)

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

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

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

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

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

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

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

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

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

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

AUTHORITY

- Evidence Admissible for Limited Purposes. Evid. Code, § 1101(b); *People v. Ewoldt, supra,* 7 Cal.4th at pp. 393–394; *People v. Balcom, supra,* 7 Cal.4th at p. 422.
- Degree of Similarity Required. *People v. Ewoldt, supra,* 7 Cal.4th at pp. 402–404; *People v. Balcom, supra,* 7 Cal.4th at p. 424.
- Analysis Under Evidence Code Section 352 Required. *People v. Ewoldt, supra,* 7 Cal.4th at p. 404; *People v. Balcom, supra,* 7 Cal.4th at pp. 426–427.
- Instructional Requirements. *People v. Collie, supra,* 30 Cal.3d at pp. 63–64; *People v. Morrisson* (1979) 92 Cal.App.3d 787, 790 [155 Cal.Rptr. 152].

- Other Crimes Proved by Preponderance of Evidence. *People v. Carpenter, supra,* 15 Cal.4th at p. 382.
- Two Burdens of Proof Pose No Problem for Properly Instructed Jury. *People v. Virgil* (2011) 51 Cal.4th 1210, 1258-1259 [126 Cal.Rptr.3d 465, 253 P.3d 553].

RELATED ISSUES

Circumstantial Evidence—Burden of Proof

The California Supreme Court has upheld CALJIC Nos. 2.50, 2.50.1, and 2.50.2 on the burden of proof for uncharged crimes and CALJIC No. 2.01 on sufficiency of circumstantial evidence. (*People v. Virgil, supra,* 51 Cal.4th at pp. 1258–1259.) *Virgil* explained it was not error to permit consideration of evidence by two different evidentiary standards: "If the jury finds the facts sufficiently proven [by a preponderance of the evidence] for consideration, it must still decide whether the facts are sufficient, taken with all the other evidence, to prove the defendant's guilt beyond a reasonable doubt." (*Id.* at pp. 1259–1260.) Jury instructions on the People's burden of proof and circumstantial evidence eliminate any danger that the jury might use the preponderance of evidence standard to decide elemental facts or issues because together those instructions make clear that ultimate facts must be proved beyond a reasonable doubt. (*Ibid*.)

Issue in Dispute

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

Subsequent Offenses Admissible

Evidence of a subsequent as well as a prior offense is admissible. (*People v. Balcom, supra,* 7 Cal.4th at pp. 422–423, 425.)

Offenses Not Connected to Defendant

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

SECONDARY SOURCES

1 Witkin, California Evidence (65th ed. 20242) Circumstantial Evidence, §§ 85–109 ~~76–97~~.

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

400. Aiding and Abetting: General Principles

A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime.

A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator.

~~**[Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime.]**~~

New January 2006; Revised June 2007, August 2009, April 2010, February 2026

BENCH NOTES

Instructional Duty

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].)

When the prosecution is relying on aiding and abetting, give this instruction before other instructions on aiding and abetting to introduce this theory of culpability to the jury.

An aider and abettor may be found guilty of a different crime or degree of crime than the perpetrator if the aider and abettor and the perpetrator do not have the same mental state. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1166 [91 Cal.Rptr.3d 874]; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1577-1578 [11 Cal.Rptr.2d 231]; *People v. McCoy* (2001) 25 Cal.4th 1111, 1115–1116 [108 Cal.Rptr.2d 188, 24 P.3d 1210].)

~~If the prosecution is also relying on the natural and probable consequences doctrine, the court should also instruct with the last bracketed paragraph.~~
Depending on which theories are relied on by the prosecution, the court should then instruct as follows.

Intended Crimes (Target Crimes)

If the prosecution's theory is that the defendant intended to aid and abet the crime or crimes charged (target crimes), give CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

Natural & Probable Consequences Doctrine (Non-Target Crimes)

If the prosecution's theory is that any of the nonhomicide crimes charged were committed as a natural and probable consequence of the target crime, CALCRIM No. 402 or 403 should also be given. If both the target and non-target crimes are charged, give CALCRIM No. 402, *Natural and Probable Consequences Doctrine (Target and Non-Target Offenses Charged)*. In some cases, the prosecution may not charge the target crime but only the non-target crime. In that case, give CALCRIM No. 403, *Natural and Probable Consequences (Only Non-Target Offense Charged)*.

AUTHORITY

- "Aiding and Abetting" Defined. *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].
- Murder Not Complete Until Victim Dies. *People v. Celis* (2006) 141 Cal.App.4th 466, 471-474 [46 Cal.Rptr.3d 139].

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (54th ed. 202412) Introduction to Crimes, §§ 984-10297.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.10 (Matthew Bender).

416. Evidence of Uncharged Conspiracy

The People have presented evidence of a conspiracy. A member of a conspiracy is criminally responsible for the acts or statements of any other member of the conspiracy done to help accomplish the goal of the conspiracy.

To prove that (the/a) defendant was a member of a conspiracy in this case, the People must prove that:

1. **The defendant intended to agree and did agree with [one or more of] (the other defendant[s]/ [or] _____** *<insert name[s] or description[s] of coparticipant[s]>***) to commit _____** *<insert alleged crime[s]>***;**

2. **At the time of the agreement, the defendant and [one or more of] the other alleged member[s] of the conspiracy intended that one or more of them would commit _____** *<insert alleged crime[s]>***;**

3. **(The/One of the) defendant[s][,] [or _____** *<insert name[s] or description[s] of coparticipant[s]>***][,] [or (both/all) of them] committed [at least one of] the following overt act[s] to accomplish _____** *<insert alleged crime[s]>*: **_____***<insert the alleged overt acts>***;**

AND

4. **[At least one of these/This] overt act[s] was committed in California.**

To decide whether (the/a) defendant or another member of the conspiracy committed (this/these) overt act[s], consider all of the evidence presented about the act[s].

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

The People must prove that the members of the alleged conspiracy had an agreement and intent to commit _____ *<insert alleged crime[s]>***. The People do not have to prove that any of the members of the alleged conspiracy**

actually met or came to a detailed or formal agreement to commit (that/one or more of those) crime[s]. An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime.

An *overt act* is an act by one or more of the members of the conspiracy that is done to help accomplish the agreed upon crime. The overt act must happen after the defendant has agreed to commit the crime. The overt act must be more than the act of agreeing or planning to commit the crime, but it does not have to be a criminal act itself.

[You must all agree that at least one overt act was committed in California by at least one alleged member of the conspiracy, but you do not have to all agree on which specific overt act or acts were committed or who committed the overt act or acts.]

[You must decide as to each defendant whether he or she was a member of the alleged conspiracy.]

[The People contend that the defendant[s] conspired to commit one of the following crimes: _____ *<insert alleged crime[s]>***. You may not find (the/a) defendant guilty under a conspiracy theory unless all of you agree that the People have proved that the defendant conspired to commit at least one of these crimes, and you all agree which crime (he/she) conspired to commit.] [You must also all agree on the degree of the crime.]**

[A member of a conspiracy does not have to personally know the identity or roles of all the other members.]

[Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the crime is not a member of the conspiracy.]

[Evidence that a person did an act or made a statement that helped accomplish the goal of the conspiracy is not enough, by itself, to prove that the person was a member of the conspiracy.]

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*New January 2006; Revised August 2006, August 2016, February 2026**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction when the prosecution has not charged the crime of conspiracy but has introduced evidence of a conspiracy to prove liability for other offenses or to introduce hearsay statements of coconspirators. (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].)

The court has a **sua sponte** duty to instruct on the elements of the offense alleged to be the target of the conspiracy. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239 [77 Cal.Rptr.2d 733, 960 P.2d 537]; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608].) Give all appropriate instructions defining the elements of the offense or offenses alleged as targets of the conspiracy.

The court has a **sua sponte** duty to give a unanimity instruction if "the evidence suggested two discrete crimes, i.e., two discrete conspiracies . . . ." (*People v. Russo* (2001) 25 Cal.4th 1124, 1135 [108 Cal.Rptr.2d 436, 25 P.3d 641]; see also *People v. Diedrich* (1982) 31 Cal.3d 263, 285–286 [182 Cal.Rptr. 354, 643 P.2d 971].) See the Bench Notes to CALCRIM No. 415, *Conspiracy*, on when the court is required to give a unanimity instruction.

In elements 1 and 3, insert the names or descriptions of alleged coconspirators if they are not defendants in the trial. (See *People v. Liu* (1996) 46 Cal.App.4th 1119, 1131 [54 Cal.Rptr.2d 578].) See also the Commentary section to CALCRIM No. 415, *Conspiracy*.

Give the bracketed sentence that begins with "You must decide as to each defendant~~make a separate decision,~~" if the prosecution alleges that more than one defendant was a member of the conspiracy. (See *People v. Fulton* (1984) 155 Cal.App.3d 91, 101 [201 Cal.Rptr. 879]; *People v. Crain* (1951) 102 Cal.App.2d 566, 581–582 [228 P.2d 307].)

Give the bracketed sentence that begins with "A member of a conspiracy does not have to personally know," on request if there is evidence that the defendant did not personally know all the alleged coconspirators. (See *People v. Van Eyk* (1961) 56 Cal.2d 471, 479 [15 Cal.Rptr. 150, 364 P.2d 326].)

Give the two final bracketed sentences on request. (See *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820 [345 P.2d 529].)

Defenses—Instructional Duty

If there is sufficient evidence that the defendant withdrew from the alleged conspiracy, the court has a **sua sponte** duty to give CALCRIM No. 420, *Withdrawal from Conspiracy*.

Related Instructions

CALCRIM No. 417, *Liability for Coconspirators' Acts*.

CALCRIM No. 418, *Coconspirator's Statements*.

CALCRIM No. 419, *Acts Committed or Statements Made Before Joining Conspiracy*.

AUTHORITY

- "Overt Act" Defined. Pen. Code, § 184; *People v. Saugstad* (1962) 203 Cal.App.2d 536, 549–550 [21 Cal.Rptr. 740]; *People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8 [134 Cal.Rptr. 784, 557 P.2d 75]; see *People v. Brown* (1991) 226 Cal.App.3d 1361, 1368 [277 Cal.Rptr. 309]; *People v. Tatman* (1993) 20 Cal.App.4th 1, 10–11 [24 Cal.Rptr.2d 480].
- Association Alone Not a Conspiracy. *People v. Drolet* (1973) 30 Cal.App.3d 207, 218 [105 Cal.Rptr. 824]; *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820 [345 P.2d 529].
- Elements of Underlying Offense. *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608]; *People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239 [77 Cal.Rptr.2d 733, 960 P.2d 537].
- Two Specific Intents. *People v. Miller* (1996) 46 Cal.App.4th 412, 423–426 [53 Cal.Rptr.2d 773], disapproved on other grounds in *People v. Cortez* (1998) 18 Cal.4th 1223, 1240 [77 Cal.Rptr.2d 733, 960 P.2d 537].

RELATED ISSUES

See the Related Issues section to CALCRIM No. 415, *Conspiracy*.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (54th ed. 20241~~2~~) Elements, §§ 752-1082.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, §§ 141.01, 141.02 (Matthew Bender).

417. Liability for Coconspirators' Acts

A member of a conspiracy is criminally responsible for the crimes that he or she conspires to commit, no matter which member of the conspiracy commits the crime.

A member of a conspiracy is also criminally responsible for any act of any member of the conspiracy if that act is done to further the conspiracy and that act is a natural and probable consequence of the common plan or design of the conspiracy. This rule applies even if the act was not intended as part of the original plan. [Under this rule, a defendant who is a member of the conspiracy does not need to be present at the time of the act.] [A member of a conspiracy cannot be held criminally responsible for (murder/[or] attempted murder) solely because the (murder/[or] attempted murder) was the natural and probable consequence of the conspiracy.]

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

A member of a conspiracy is not criminally responsible for the act of another member if that act does not further the common plan or is not a natural and probable consequence of the common plan.

To prove that the defendant is guilty of the crime[s] charged in Count[s] __, the People must prove that:

1. **The defendant conspired to commit one of the following crimes:** _____ *<insert target crime[s]>***;**

2. **A member of the conspiracy committed** _____ *<insert nontarget offense[s]>* **to further the conspiracy;**

AND

3. _____ *<insert nontarget offense[s]>* **(was/were) [a] natural and probable consequence[s] of the common plan or design of the crime that the defendant conspired to commit.**

[The defendant is not responsible for the acts of another person who was not a member of the conspiracy even if the acts of the other person helped accomplish the goal of the conspiracy.]

[A conspiracy member is not responsible for the acts of other conspiracy members that are done after the goal of the conspiracy had been accomplished.]

New January 2006; Revised October 2021, September 2023, February 2026

BENCH NOTES

Instructional Duty

Give this instruction when there is an issue whether the defendant is liable for the acts of coconspirators. (See *People v. Flores* (1992) 7 Cal.App.4th 1350, 1363 [9 Cal.Rptr.2d 754] [no sua sponte duty when no issue of independent criminal act by coconspirator].)

The court **must** also give either CALCRIM No. 415, *Conspiracy*, or CALCRIM No. 416, *Evidence of Uncharged Conspiracy*, with this instruction. The court **must** also give all appropriate instructions on the offense or offenses alleged to be the target of the conspiracy. (*People v. Prettyman* (1996) 14 Cal.4th 248, 254 [58 Cal.Rptr.2d 827, 926 P.2d 1013].)

Give the bracketed sentence that begins "A member of a conspiracy cannot be held criminally responsible" if murder or attempted murder are charged. (See *People v. Richee* (2025) 111 Cal.App.5th 281, 292–295 [332 Cal.Rptr.3d 722].)

Give the bracketed sentence that begins with "Under this rule," if there is evidence that the defendant was not present at the time of the act. (See *People v. Benenato* (1946) 77 Cal.App.2d 350, 356 [175 P.2d 296]; *People v. King* (1938) 30 Cal.App.2d 185, 203 [85 P.2d 928].)

Although no published case to date gives a clear definition of the terms "natural" and "probable," nor holds that there is a sua sponte duty to define them, a suggested definition is included. (See *People v. Prettyman, supra,* 14 Cal.4th at p. 291 (conc. & dis. opn. of Brown, J.).)

Give either of the last two bracketed paragraphs on request, when supported by the evidence.

Related Instructions

CALCRIM No. 418, *Coconspirator's Statements*.

AUTHORITY

- Natural and Probable Consequences; Reasonable Person Standard. *People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 842–843 [68 Cal.Rptr.2d 388]; see *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [26 Cal.Rptr.2d 323] [in context of aiding and abetting].
- Vicarious Liability of Conspirators. *People v. Hardy* (1992) 2 Cal.4th 86, 188 [5 Cal.Rptr.2d 796, 825 P.2d 781].
- Must Identify and Describe Target Offense. *People v. Prettyman, supra,* 14 Cal.4th at p. 254.

RELATED ISSUES

Murder and Attempted Murder

A verdict of murder or attempted murder may not be based on the natural and probable consequences doctrine. (Pen. Code, § 188(a)(3); *People v. Gentile* (2020) 10 Cal.5th 830, 849 [272 Cal.Rptr.3d 814, 477 P.3d 539] [murder]; *People v. Sanchez* (2022) 75 Cal.App.5th 191, 196 [290 Cal.Rptr.3d 390] [attempted murder].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (54th ed. 20241~~2~~) Elements, §§ 1059~~8~~-1069~~9~~.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, §§ 141.01[6], 141.02 (Matthew Bender).

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

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

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] _____** *<insert felony or felonies from Pen. Code, § 189>***;**

2. **The defendant intended to commit _____** *<insert felony or felonies from Pen. Code, § 189>***;**

AND

3. **While committing [or attempting to commit] _____***<insert felony or felonies from Pen. Code, § 189>***, the defendant personally committed (an/the) act[s] that directly caused the death of another person.**

A person [who was the actual killer] may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether the defendant 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]. You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder.** *<Make certain that all appropriate instructions on all underlying felonies are given.>*

[The defendant must have intended to commit the (felony/felonies) of _____ *<insert felony or felonies from Pen. Code, § 189>* **before or at the time that (he/she) caused the death.]**

<If the facts raise an issue whether the commission of the felony continued while a defendant was fleeing the scene, give the following sentence instead of CALCRIM No. 3261, While Committing a Felony: Defined—Escape Rule.>

[The crime of _____ <*insert felony or felonies from Pen. Code, § 189*> continues until a defendant has reached a place of temporary safety.]

[It is not required that the person die immediately, as long as the act[s] 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).]

_____

*New January 2006; Revised April 2010, August 2013, September 2019, March 2023, February 2026**

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. 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].) Give all appropriate instructions on all 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 facts raise an issue whether the homicidal act caused the death, the court has a **sua sponte** duty to give CALCRIM No. 240, *Causation*.

When giving this instruction with CALCRIM No. 540B or with CALCRIM No. 540C, give the bracketed phrase [who was the actual killer].

The felonies that support a charge of first degree felony murder are listed in Penal Code section 189(a).~~arson, rape, carjacking, robbery, burglary, kidnapping, mayhem, train wrecking, sodomy, lewd or lascivious acts on a child, oral copulation, and sexual penetration. (See Pen. Code, § 189(a).)~~

If there is evidence that the defendant did not form the intent to commit 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 the felony." 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.

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].

If the prosecutor is proceeding under both malice and felony-murder theories, also 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, supra,* 10 Cal.4th at pp. 35–37 [error to instruct on malice when felony murder only theory].)

Drive-By Shooting

The drive-by shooting clause in Penal Code section 189 is not an enumerated felony for purposes of the felony-murder rule. (*People v. Chavez* (2004) 118 Cal.App.4th 379, 386–387 [12 Cal.Rptr.3d 837].) A finding of a specific intent to kill is required in order to find first degree murder under this clause. (*Ibid.*)

Related Instructions—Other Causes of Death

This instruction should be used only when the prosecution alleges that the defendant committed the act causing the death.

If the prosecution alleges that another coparticipant in the felony committed the fatal act, give CALCRIM No. 540B, *Felony Murder: First Degree—Coparticipant*

Allegedly Committed Fatal Act. If the evidence indicates that either the defendant or a coparticipant may have committed the fatal act, give both instructions.

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. Garcia* (2022) 82 Cal.App.5th 956, 966–971 [299 Cal.Rptr.3d 131] [defendant liable as actual killer for robbing elderly victim who died of heart attack an hour later]; *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a 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* (1978) 21 Cal.3d 128, 134 [145 Cal.Rptr. 524, 577 P.2d 659]; see CALCRIM No. 560, *Homicide: Provocative Act by Defendant*.)

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].
- 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].
- Meaning of "Actual Killer." *People v. Garcia* (2020) 46 Cal.App.5th 123, 151 [259 Cal.Rptr.3d 600]; *People v. Lopez* (2022) 78 Cal.App.5th 1, 4 [293 Cal.Rptr.3d 272]; *People v. Vang* (2022) 82 Cal.App.5th 64, 88 [297 Cal.Rptr.3d 806]; *People v. Garcia* (2022) 82 Cal.App.5th 956, 966–971 [299 Cal.Rptr.3d 131].

RELATED ISSUES

Does Not Apply Where Felony Committed Only to Facilitate Murder

If a felony, such as robbery, is committed merely to facilitate an intentional murder, then the felony-murder rule does not apply. (*People v. Green* (1980) 27 Cal.3d 1, 61 [164 Cal.Rptr. 1, 609 P.2d 468], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99] [robbery committed to facilitate murder did not satisfy felony-murder special circumstance].) If the defense requests a special instruction on this point, see CALCRIM No. 730, *Special Circumstances: Murder in Commission of Felony*.

No Duty to Instruct on Lesser Included Offenses of Uncharged Predicate Felony

"Although a trial court on its own initiative must instruct the jury on lesser included offenses of *charged* offenses, this duty does not extend to *uncharged* offenses relevant only as predicate offenses under the felony-murder doctrine." (*People v. Silva, supra,* 25 Cal.4th at p. 371 [original italics]; see *People v. Cash* (2002) 28 Cal.4th 703, 736–737 [122 Cal.Rptr.2d 545] [no duty to instruct on theft as lesser included offense of uncharged predicate offense of robbery].)

Auto Burglary

Auto burglary may form the basis for a first degree felony-murder conviction. (*People v. Fuller* (1978) 86 Cal.App.3d 618, 622–623, 628 [150 Cal.Rptr. 515] [noting problems of applying felony-murder rule to nondangerous daytime auto burglary].)

Duress

"[D]uress can, in effect, provide a defense to murder on a felony-murder theory by negating the underlying felony." (*People v. Anderson* (2002) 28 Cal.4th 767, 784 [122 Cal.Rptr.2d 587, 50 P.3d 368] [dictum]; see also CALCRIM No. 3402, *Duress or Threats*.)

Imperfect Self-Defense

Imperfect self-defense is not a defense to felony murder because malice aforethought, which imperfect self-defense negates, is not an element of felony murder. (See *People v. Tabios* (1998) 67 Cal.App.4th 1, 6–9 [78 Cal.Rptr.2d 753], disapproved on another ground in *People v. Chun* (2009) 45 Cal.4th 1172, 1198-1199 [91 Cal.Rptr.3d 106, 203 P.3d 425].)

Actual Killer vs. Aider and Abettor

The meaning of *actual killer* is literal. It is not enough that the defendant's act formed part of a series of events that resulted in the death, if the act itself would not cause death. (*People v. Garcia, supra,* ~~(2020)~~ 46 Cal.App.5th ~~123,~~at pp. 149–155 ~~[259 Cal.Rptr.3d 600]~~.)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4<u>5</u>th ed. 20~~12~~<u>24</u>) Crimes Against the Person, §§ 57~~151~~-81~~168~~.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* § 87.13[7] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[1][e], [2][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 engages in criminal activity that a reasonable person would know involves a grave risk of death and he or she knows that the activity 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?]
[● How old was the defendant?]
[● _____<*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:

[● What was the defendant's role in planning the crime that led to the death[s]?]
[● What was the defendant's role in supplying or using lethal weapons?]
[● What did the defendant know about dangers posed by the crime, any weapons used, or past experience or conduct of the other participant[s]?]
[● Was the defendant in a position to facilitate or to prevent the death?]
[● Did the defendant's action or inaction play a role in the death?]
[● What did the defendant do after lethal force was used?]
[● _____ __<*insert any other relevant factors*>]]

<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, April 2020, September 2020, September 2023, February 2025, * *February 2026**
* *Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. 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, supra,* 10 Cal.4th at pp. 35–37 [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, supra, 33 Cal.4th at pp. 203–204; *People v. Wilkins, supra,* 56 Cal.4th at p. 347.

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.

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, supra,* 33 Cal.4th at pp. 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. Emanuel* (2025) 17 Cal.5th 867, 881–885 [333 Cal.Rptr.3d 1, 569 P.3d 372]; *In re Scoggins* (2020) 9 Cal.5th 667, 676–677 [264 Cal.Rptr.3d 804, 467 P.3d 198]; *People v. Clark, supra,* 63 Cal.4th at pp. 614–620; *People v. Banks, supra,* 61 Cal.4th at pp. 807–811 [189 Cal.Rptr.3d 208, 351 P.3d 330]; ~~*People v. Estrada, supra,* 11 Cal.4th at p. 578;~~ *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127].
- Major Participant. *People v. Banks, supra,* 61 Cal.4th at pp. 803–808.
- Objective Criminal Negligence Standard for Peace Officer Exception. *People v. Sifuentes* (2022) 83 Cal.App.5th 217, 229–230 [299 Cal.Rptr.3d 320].
- Defendant's Youth Can Be Relevant Factor When Determining Reckless Indifference. *People v. Jimenez* (2024) 103 Cal.App.5th 994, 1001–1008 [323 Cal.Rptr.3d 549]; *People v. Oliver* (2023) 90 Cal.App.5th 466, 485–488 [307 Cal.Rptr.3d 6]; *People v. Jones* (2022) 86 Cal.App.5th 1076, 1091–1093 [302 Cal.Rptr.3d 847] [20-year-old defendant]; *People v. Keel* (2022) 84 Cal.App.5th 546, 558–559 [300 Cal.Rptr.3d 483] [juvenile defendant]; *People v. Mitchell* (2022) 81 Cal.App.5th 575, 591–595 [297 Cal.Rptr.3d 223]; *In re Harper* (2022) 76 Cal.App.5th 450, 466–470 [291 Cal.Rptr.3d 543]; *People v. Ramirez* (2021) 71 Cal.App.5th 970, 987 [286 Cal.Rptr.3d 771] [juvenile defendant]; *In re Moore* (2021) 68 Cal.App.5th 434, 454 [283 Cal.Rptr.3d 584] [juvenile defendant].

RELATED ISSUES

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 (54th ed. 2024~~12~~) Introduction to Crimes, §§ 9~~8~~, 116~~09~~.

1 Witkin & Epstein, California Criminal Law (54th ed. 2024~~12~~) Crimes Against the Person, §§ 57~~151~~–72~~168~~, 81~~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 engages in criminal activity that a reasonable person would know involves a grave risk of death and he or she knows that the activity 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?]
[● How old was the defendant?]
[● _____<*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:

[● What was the defendant's role in planning the crime that led to the death[s]?]
[● What was the defendant's role in supplying or using lethal weapons?]
[● What did the defendant know about dangers posed by the crime, any weapons used, or past experience or conduct of the other participant[s]?]
[● Was the defendant in a position to facilitate or to prevent the death?]
[● Did the defendant's action or inaction play a role in the death?]
[● What did the defendant do after lethal force was used?]
[● _____<*insert any other relevant factors.*>]]

<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, April 2020, September 2023, February 2025, February 2026**
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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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> **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.]**

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Related Instructions—Other Causes of Death

This instruction should be used only when the alleged victim dies during the course of the felony as a result of a heart attack, 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 in the felony. (Cf. *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].)

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].
- 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].
- Death Caused by Felony but Not by Act of Force or Violence Against Victim. *People v. Billa, supra,* 31 Cal.4th at p. 1072 [arson causing death of accomplice]; *People v. Stamp, supra,* 2 Cal.App.3d at pp. 209–211 [heart attack caused by robbery]; *People v. Hernandez, supra,* 169 Cal.App.3d at p. 287[same]; but see *People v. Gunnerson, supra,* 74 Cal.App.3d at pp. 378–381 [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, supra,* 33 Cal.4th at pp. 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. Emanuel* (2025) 17 Cal.5th 867, 881–885 [333 Cal.Rptr.3d 1, 569 P.3d 372]; *In re Scoggins* (2020) 9 Cal.5th 667, 676–677 [264 Cal.Rptr.3d 804, 467 P.3d 198]; *People v. Clark, supra,* 63 Cal.4th at pp. 614–620; *People v. Banks, supra,* 61 Cal.4th at pp. 807–811; ~~*People v. Estrada, supra,* 11 Cal.4th at p. 578;~~ *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127].
- Major Participant. *People v. Banks, supra,* 61 Cal.4th at pp. 803–808.
- Objective Criminal Negligence Standard for Peace Officer Exception. *People v. Sifuentes* (2022) 83 Cal.App.5th 217, 229–230 [299 Cal.Rptr.3d 320].
- Defendant's Youth Can Be Relevant Factor When Determining Reckless Indifference. *People v. Jimenez* (2024) 103 Cal.App.5th 994, 1001–1008 [323 Cal.Rptr.3d 549]; *People v. Oliver* (2023) 90 Cal.App.5th 466, 485–488 [307 Cal.Rptr.3d 6]; *People v. Jones* (2022) 86 Cal.App.5th 1076, 1091–1093 [302 Cal.Rptr.3d 847] [20-year-old defendant]; *People v. Keel* (2022) 84 Cal.App.5th 546, 558–559 [300 Cal.Rptr.3d 483] [juvenile defendant]; *People v. Mitchell* (2022) 81 Cal.App.5th 575, 591–595 [297 Cal.Rptr.3d 223]; *In re Harper* (2022) 76 Cal.App.5th 450, 466–470 [291 Cal.Rptr.3d 543]; *People v. Ramirez* (2021) 71 Cal.App.5th 970, 987 [286 Cal.Rptr.3d 771] [juvenile defendant]; *In re Moore* (2021) 68 Cal.App.5th 434, 454 [283 Cal.Rptr.3d 584] [juvenile defendant].

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 (45th ed. 2024) Crimes Against the Person, §§ 26–72, 81–168.

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

561. Homicide: Provocative Act by Accomplice

[The defendant is charged [in Count __] with _____ *<insert underlying crime>***.] The defendant is [also] charged [in Count __] with murder. A person can be guilty of murder under the provocative act doctrine even if someone else did the actual killing.**

To prove that the defendant is guilty of murder under the provocative act doctrine, the People must prove that:

1. **The defendant was an accomplice of _____** *<insert name[s] or description[s] of alleged provocateur[s]>* **in (committing/ [or] attempting to commit) _____** *<insert underlying crime>*

2. **In (committing/ [or] attempting to commit) _____** *<insert underlying crime>***, _____** *<insert name[s] or description[s] of alleged provocateur[s]>* **intentionally did a provocative act;**

3. **The defendant~~_____ <insert name[s] or description[s] of alleged provocateur[s]>~~ knew that the natural and probable consequences of the provocative act were dangerous to human life and then acted with conscious disregard for life;**

4. **In response to _____'s** *<insert name[s] or description[s] of alleged provocateur[s]>* **provocative act, _____** *<insert name or description of third party>* **killed _____** *<insert name of decedent>***;**

AND

5. **_____'s** *<insert name of decedent>* **death was the natural and probable consequence of _____'s** *<insert name[s] or description[s] of alleged provocateur[s]>* **provocative act.**

A *provocative act* is an act:

1. [That goes beyond what is necessary to accomplish the _____ *<insert underlying crime>***;]**

[AND

2.] Whose natural and probable consequences are dangerous to human life, because there is a high probability that the act will provoke a deadly response.

An act is *dangerous to human life* if it involved a high degree of probability that it would result in death.

The defendant is an *accomplice* of _____ *<insert name[s] or description[s] of alleged provocateur[s]>* **if the defendant is subject to prosecution for the identical offense that you conclude** _____ *<insert name[s] or description[s] of alleged provocateur[s]>* **(committed/ [or] attempted to commit). The defendant is subject to prosecution if (he/she) (committed/ [or] attempted to commit) the crime or if:**

1. **(He/She) knew of** _____**'s** *<insert name[s] or description[s] of alleged provocateur[s]>* **criminal purpose to commit** _____ **<***insert underlying crime*>**;**

AND

2. **The defendant intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of** _____ *<insert underlying crime>*/ **[or] participate in a criminal conspiracy to commit** _____ *<insert underlying crime>***).**

[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 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.]

In order to prove that _____**'s** *<insert name of decedent>* **death was the *natural and probable consequence* of** _____**'s** *<insert name[s] or description[s] of alleged provocateur[s]>* **provocative act, the People must prove that:**

1. **A reasonable person in** _____**'s** *<insert name[s] or description[s] of alleged provocateur[s]>* **position would have foreseen that there was a high probability that (his/her/their) act could begin a chain of events resulting in someone's death;**

2. _____**'s** *<insert name[s] or description[s] of alleged provocateur[s]>* **act was a direct and substantial factor in causing** _____**'s** *<insert name of decedent>* **death;**

AND

3. **_____'s** *<insert name or description of decedent>* **death would not have happened if _____** *<insert name[s] or description[s] of alleged provocateur[s]>* **had not committed the provocative act.**

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

<Multiple Provocative Acts>
[The People alleged the following provocative acts: _____ *<insert acts alleged>***. You may not find the defendant guilty unless you all agree that the People have proved that:**

1. **_____** *<insert name[s] or description[s] of alleged provocateur[s]>* **committed at least one provocative act;**

AND

2. **At least one of the provocative acts committed by _____** *<insert name[s] or description[s] of alleged provocateur[s]>* **was a direct and substantial factor that caused the killing.**

However, you do not all need to agree on which provocative act has been proved.]

<Accomplice Deceased>
[If you decide that the only provocative act that caused _____'s *<insert name of deceased accomplice>* **death was committed by _____** *<insert name of deceased accomplice>***, then the defendant is not guilty of _____'s** *<insert name of deceased accomplice>* **murder.]**

<Independent Criminal Act>
[A defendant is not guilty of murder if the killing of _____ *<insert name or description of decedent>* **was caused solely by the independent criminal act of someone other than the defendant or _____** *<insert name[s] or description[s] of all alleged accomplice[s]>***. An *independent criminal act* is a free, deliberate, and informed criminal act by a person who is not acting with the defendant.]**

<Degree of Murder>
[If you decide that the defendant is guilty of murder, you must decide

whether the murder is first or second degree.

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

1. **As a result of _____'s** *<insert name[s] or description[s] of alleged provocateur[s]>* **provocative act, _____** *<insert name of decedent>* **was killed while _____** *<insert name[s] or description[s] of alleged provocateur[s]>* **(was/were) committing _____** *<insert Pen. Code, § 189 felony>***;**

AND

2. **_____** *<insert name[s] or description[s] of alleged provocateur[s]>* **specifically intended to commit _____** *<insert Pen. Code, § 189 felony>* **when (he/she/they) did the provocative act.**

In deciding whether _____ *<insert name[s] or description[s] of alleged provocateur[s]>* **intended to commit _____** *<insert Pen. Code, § 189 felony>* **and whether the death occurred during the commission of _____** *<insert Pen. Code, § 189 felony>***, you should refer to the instructions I have given you on _____** *<insert Pen. Code, § 189 felony>*.

Any murder that does not meet these requirements for first degree murder is second degree murder.]

[If you decide that the defendant committed murder, that crime is murder in the second degree.]

New January 2006; Revised August 2014, September 2019, February 2026

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if the provocative act doctrine is one of the general principles of law relevant to the issues raised by the evidence. (*People v. Hood* (1969) 1 Cal.3d 444, 449 [82 Cal.Rptr. 618, 462 P.2d 370].) If the prosecution relies on a first degree murder theory based on a Penal Code section 189 felony, the court has a **sua sponte** duty to give instructions relating to the underlying felony, whether or not it is separately charged.

~~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~~

~~continued legality of provocative act murder liability when an accomplice committed the provocative act may be affected by this statutory change.~~

The first bracketed sentence of this instruction should only be given if the underlying felony is separately charged.

In the definition of "provocative act," the court should always give the bracketed phrase that begins, "that goes beyond what is necessary," unless the court determines that this element is not required because the underlying felony includes malice as an element. (*In re Aurelio R.* (1985) 167 Cal.App.3d 52, 59–60 [212 Cal.Rptr. 868].) See discussion in the Related Issues section to CALCRIM No. 560, *Homicide: Provocative Act by Defendant*.

In the paragraph that begins with "An accomplice does not need to be present," use the bracketed phrase "will be committed or" if appropriate under the facts of the case.

If a deceased accomplice participated in provocative acts leading to his or her own death, give the bracketed sentence that begins, "If you decide that the only provocative act that caused . . . ." (See *People v. Garcia* (1999) 69 Cal.App.4th 1324, 1330 [82 Cal.Rptr.2d 254]; *People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 846 [68 Cal.Rptr.2d 388]; *Taylor v. Superior Court* (1970) 3 Cal.3d 578, 583–584 [91 Cal.Rptr. 275, 477 P.2d 131]; *People v. Antick* (1975) 15 Cal.3d 79, 90 [123 Cal.Rptr. 475, 539 P.2d 43], disapproved on other grounds in *People v. McCoy* (2001~~0~~) 25 Cal.4th 1111, 1123 [108 Cal.Rptr.2d 188, 24 P.3d 1210].)

If there is evidence that the actual perpetrator may have committed an *independent criminal act*, give on request the bracketed paragraph that begins, "A defendant is not guilty of murder if . . . ." (See *People v. Cervantes* (2001) 26 Cal.4th 860, 874 [111 Cal.Rptr.2d 148, 29 P.3d 225].)

If the evidence suggests that there is more than one provocative act, give the bracketed section on "Multiple Provocative Acts." (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 591 [112 Cal.Rptr.2d 401].)

If the prosecution is not seeking a first degree murder conviction, omit those bracketed paragraphs relating to first degree murder and simply give the last bracketed sentence of the instruction. As an alternative, the court may omit all instructions relating to the degree and secure a stipulation that if a murder verdict is returned, the degree of murder is set at second degree. If the prosecution is seeking a first degree murder conviction, give the bracketed section on "degree of murder."

AUTHORITY

- Provocative Act Doctrine. *People v. Gallegos* (1997) 54 Cal.App.4th 453, 461

[63 Cal.Rptr.2d 382].

- Felony-Murder Rule Invoked to Determine Degree. *People v. Gilbert* (1965) 63 Cal.2d 690, 705 [47 Cal.Rptr. 909, 408 P.2d 365]; *Pizano v. Superior Court* (1978) 21 Cal.3d 128, 139, fn. 4 [145 Cal.Rptr. 524, 577 P.2d 659]; see *People v. Caldwell* (1984) 36 Cal.3d 210, 216–217, fn. 2 [203 Cal.Rptr. 433, 681 P.2d 274].
- Independent Intervening Act by Third Person. *People v. Cervantes* (2001) 26 Cal.4th 860, 874 [111 Cal.Rptr.2d 148, 29 P.3d 225].
- Natural and Probable Consequences Doctrine. *People v. Gardner* (1995) 37 Cal.App.4th 473, 479 [43 Cal.Rptr.2d 603].
- Response of Third Party Need Not Be Reasonable. *People v. Gardner* (1995) 37 Cal.App.4th 473, 482 [43 Cal.Rptr.2d 603].
- Unanimity on Which Act Constitutes Provocative Act Is Not Required. *People v. Briscoe* (2001) 92 Cal.App.4th 568, 591 [112 Cal.Rptr.2d 401] [multiple provocative acts].
- ~~Implied Malice May Be Imputed to Absent Mastermind. *People v. Johnson* (2013) 221 Cal.App.4th 623, 633 [164 Cal.Rptr.3d 505].~~
- Personal Malice Requirement. *People v. Antonelli* (2025) 17 Cal.5th 719, 728–731 [332 Cal.Rptr.3d 120, 567 P.3d 690]; *People v. Concha* (2009) 47 Cal.4th 653, 660–664 [101 Cal.Rptr.3d 141, 218 P.3d 660]; see also Pen. Code, § 188(a)(3).
- "Dangerous to Human Life" Defined. *People v. Reyes* (2023) 14 Cal.5th 981, 989 [309 Cal.Rptr.3d 832, 531 P.3d 357].

RELATED ISSUES

See the Related Issues section to CALCRIM No. 560, *Homicide: Provocative Act by Defendant*.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (54th ed. 2024~~12~~) Crimes Against the Person, §§ 81~~68~~–88~~77~~.

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

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

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

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

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

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

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

AND

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

BUT

3. **At least one of those beliefs was unreasonable.**

[If the defendant used more force than was reasonable to defend against the defendant's perceived danger, the defendant did not act in (imperfect self-defense/[or] imperfect defense of another).]

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

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

<*The following definition may be given if requested.*>

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

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

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

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

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

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

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

New January 2006; Revised August 2012, February 2015, September 2020, March 2022, September 2022, March 2024, February 2025, October 2025, February 2026*

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

BENCH NOTES

Instructional Duty

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

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

Related Instructions

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

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

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

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

AUTHORITY

- Elements. Pen. Code, § 192(a).
- "Imperfect Self-Defense" Defined. *People v. Flannel* (1979) 25 Cal.3d 668, 680–683 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Barton, supra,* 12 Cal.4th at p. 201; *In re Christian S.* (1994) 7 Cal.4th 768, 773 [30 Cal.Rptr.2d 33, 872 P.2d 574]; see *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197–198 [272 Cal.Rptr. 693] [insufficient evidence to support defense of another person].
- Imperfect Defense of Others. *People v. Randle* (2005) 35 Cal.4th 987, 995-1000 [28 Cal.Rptr.3d 725, 111 P.3d 987], overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172 [91 Cal.Rptr.3d 106, 203 P.3d 425].
- Availability of Imperfect Self-Defense. *People v. Enraca* (2012) 53 Cal.4th 735, 761 [137 Cal.Rptr.3d 117, 269 P.3d 543] [not available]; *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179–1180 [39 Cal.Rptr.3d 433] [available].
- Unreasonable Use of Force Can Defeat Imperfect Self-Defense Claim. *People v Temple* (2025) 110 Cal.App.5th 1281, 1295–1297 [332 Cal.Rptr.3d 490] [imperfect self-defense or defense of others unavailable if defendant used more force than reasonably necessary to repel the attack].
- Imperfect Self-Defense Does Not Apply When Defendant's Belief in Need for Self-Defense Is Entirely Delusional. *People v. Elmore* (2014) 59 Cal.4th 121, 145 [172 Cal.Rptr.3d 413, 325 P.3d 951].
- Prior Version of This Instruction Upheld. *People v. Temple, supra,* 110 Cal.App.5th at p. 1293; *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1306 [132 Cal.Rptr.3d 248]; *People v. Genovese* (2008) 168 Cal.App.4th 817, 832 [85 Cal.Rptr.3d 664].

- Defendant Relying on Imperfect Self-Defense Must Actually, Although Not Reasonably, Associate Threat With Victim. *People v. Minifie* (1996) 13 Cal.4th 1055, 1069 [56 Cal.Rptr.2d 133, 920 P.2d 1337] [in dicta].

LESSER INCLUDED OFFENSES

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

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

RELATED ISSUES

Intimate Partner Battering and Its Effects

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

Blakeley *Not Retroactive*

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

Inapplicable to Felony Murder

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

Fetus

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

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

Reasonable Person Standard Not Modified by Evidence of Mental Impairment

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

Reasonable Person Standard and Physical Limitations

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (5th ed. 2024) Crimes Against the Person, §§ 142–144.

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

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

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

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 engages in criminal activity that a reasonable person would know involves a grave risk of death and he or she knows that the activity 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?]**
- **[● How old was the defendant?]**
- **[● _____<*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:

- **[● [What was the defendant's role in planning the crime that led to the death[s]?]**
- **[● What was the defendant's role in supplying or using lethal weapons?]**
- **[● What did the defendant know about dangers posed by the crime, any weapons used, or past experience or conduct of the other participant[s]?]**
- **[● Was the defendant in a position to facilitate or to prevent the death?]**
- **[● Did the defendant's action or inaction play a role in the death?]**
- **[● What did the defendant do after lethal force was used?]**
- **[● _____<*insert any other relevant factors.*>]]**

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, April 2020, September 2023, February 2025, * *February 2026**
* *Denotes changes only to bench notes and other commentaries.*

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, supra,* 30 Cal.4th at p. 1117.) 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 . . . ."

In *People v. Banks, supra,* 61 Cal.4th at pp. 803–808, 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, supra,* 11 Cal.4th at p. 578.) 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. Emanuel* (2025) 17 Cal.5th 867, 881–885 [333 Cal.Rptr.3d 1, 569 P.3d 372]; *In re Scoggins* (2020) 9 Cal.5th 667, 676–677 [264 Cal.Rptr.3d 804, 467 P.3d 198]; *People v. Clark, supra,* 63 Cal.4th at pp. 614–620; *People v. Banks, supra,* 61 Cal.4th at pp.

807–811; ~~*People v. Estrada, supra,* 11 Cal.4th at p. 578;~~ *Tison v. Arizona, supra,* 481 U.S. at pp. 157–158.

- Constitutional Standard for Intent by Accomplice. *Tison v. Arizona, supra,* 481 U.S. at pp. 157–158.
- Major Participant. *People v. Banks, supra,* 61 Cal.4th at pp. 803–808.
- Defendant's Youth Can Be Relevant Factor When Determining Reckless Indifference. *People v. Jimenez* (2024) 103 Cal.App.5th 994, 1001–1008 [323 Cal.Rptr.3d 549]; *People v. Oliver* (2023) 90 Cal.App.5th 466, 485–488 [307 Cal.Rptr.3d 6]; *People v. Jones* (2022) 86 Cal.App.5th 1076, 1091–1093 [302 Cal.Rptr.3d 847] [20-year-old defendant]; *People v. Keel* (2022) 84 Cal.App.5th 546, 558–559 [300 Cal.Rptr.3d 483] [juvenile defendant]; *People v. Mitchell* (2022) 81 Cal.App.5th 575, 591–595 [297 Cal.Rptr.3d 223]; *In re Harper* (2022) 76 Cal.App.5th 450, 466–470 [291 Cal.Rptr.3d 543]; *People v. Ramirez* (2021) 71 Cal.App.5th 970, 987 [286 Cal.Rptr.3d 771] [juvenile defendant]; *In re Moore* (2021) 68 Cal.App.5th 434, 454 [283 Cal.Rptr.3d 584] [juvenile defendant].

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (54th ed. 2024~~12~~) Punishment, §§ 644~~536~~, 651 et seq~~543~~.

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

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

The defendant is charged [in Count __] with inflicting an injury on (the/a) [defendant's [former]~~[his/her~~] (~~[former]~~ spouse/~~[former]~~ cohabitant/fiancé/~~the (mother/father~~parent~~)~~ of the defendant's~~(his/her)~~ child/person~~someone~~ with whom the defendant~~(he/she)~~ has~~d~~, or previously had, an engagement or dating relationship) that resulted in a traumatic condition [in violation of Penal Code section 273.5(a)].

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

1. **The defendant willfully [and unlawfully] inflicted a physical injury on (the/a) [defendant's [former]]~~(his/her)~~ (~~[former]~~ spouse/~~[former]~~ cohabitant/fiancé/~~the (mother/father~~parent~~)~~ of the defendant's ~~(his/her)~~ child)/person~~someone~~ with whom the defendant~~(he/she)~~ has~~d~~, or previously had, an engagement or dating relationship);**

[AND]

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

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

[AND

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

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

A *traumatic condition* means a condition of the body—such as a wound, external injury, or internal injury[, including injury as a result of strangulation or suffocation]—whether of a minor or serious nature, caused by a physical force. [*Strangulation* and *suffocation* include impeding the normal breathing or circulation of the blood by applying pressure on the throat or neck.]

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

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

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

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

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

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

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

AND

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

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

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

New January 2006; Revised June 2007, August 2012, August 2014, February 2015, February 2016, March 2018, October 2021, February 2025, February 2026

BENCH NOTES

Instructional Duty

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

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

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

Give CALCRIM No. 3404, *Accident,* on request if there is sufficient evidence that an alleged victim's injuries were caused by an accident. (*People v. Anderson* (2011) 51 Cal.4th 989, 998, fn. 3 [125 Cal.Rptr.3d 408, 252 P.3d 968].).

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

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

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

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

If there is evidence that the traumatic condition resulted from strangulation or suffocation, give the bracketed language about strangulation and suffocation.

AUTHORITY

- Elements. Pen. Code, § 273.5(a).
- "Traumatic Condition" Defined. Pen. Code, § 273.5(d); *People v. Reid* (2024) 105 Cal.App.5th 446, 456–457 [325 Cal.Rptr.3d 820]; *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952 [217 Cal.Rptr. 616].
- "Willful" Defined. Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- "Cohabitant" Defined. *People v. Holifield* (1988) 205 Cal.App.3d 993, 1000 [252 Cal.Rptr. 729]; *People v. Ballard* (1988) 203 Cal.App.3d 311, 318–319 [249 Cal.Rptr. 806].
- Direct Application of Force. *People v. Jackson* (2000) 77 Cal.App.4th 574, 580 [91 Cal.Rptr.2d 805].
- Duty to Define Traumatic Condition. *People v. Burns* (1948) 88 Cal.App.2d 867, 873–874 [200 P.2d 134].
- Strangulation and Suffocation. Pen. Code, § 273.5(d).
- General Intent Crime. See *People v. Thurston* (1999) 71 Cal.App.4th 1050, 1055 [84 Cal.Rptr.2d 221]; *People v. Campbell* (1999) 76 Cal.App.4th 305, 307–309 [90 Cal.Rptr.2d 315]; contra *People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1402 [7 Cal.Rptr.2d 495] [dictum].
- Simultaneous Cohabitation. *People v. Moore, supra,* 44 Cal.App.4th at p. 1335.
- "Dating Relationship" Defined. Pen. Code, § 243(f)(10).

LESSER INCLUDED OFFENSES

- Attempted Infliction of Corporal Injury on Spouse. Pen. Code, §§ 664, 273.5(a); *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1627, 1628 [47 Cal.Rptr.2d 769] [attempt requires intent to cause traumatic condition, but does not require a resulting "traumatic condition"].
- Misdemeanor Battery. Pen. Code, §§ 242, 243(a); see *People v. Gutierrez, supra,* 171 Cal.App.3d at p. 952.
- Battery Against Spouse, Cohabitant, or Fellow Parent. Pen. Code, § 243(e)(1); see *People v. Jackson, supra,* 77 Cal.App.4th at p. 580.
- Simple Assault. Pen. Code, §§ 240, 241(a); *People v. Van Os* (1950) 96 Cal.App.2d 204, 206 [214 P.2d 554].

RELATED ISSUES

Continuous Course of Conduct

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

Multiple Acts of Abuse

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

Prospective Parents of Unborn Children

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

Termination of Parental Rights

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (5~~4~~th ed. 2024~~12~~) Crimes Against the Person, §§ 240~~64~~–243~~67~~.

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

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

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

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

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

[AND]

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

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

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

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

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

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

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

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

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

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

New January 2006; Revised June 2007, February 2016, February 2025, February 2026

BENCH NOTES

Instructional Duty

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

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

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

Give the bracketed paragraph on indirect touching if relevant.

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

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

AUTHORITY

- Elements. Pen. Code, § 243(e)(1).
- "Willfully" Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Contact With Object Held in Another Person's Hand May Constitute Touching. *In re B.L.* (2015) 239 Cal.App.4th 1491, 1495–1497 [192 Cal.Rptr.3d 154].
- Hitting a Vehicle Occupied by Another Person May Constitute Touching. *People v. Dealba* (2015) 242 Cal.App.4th 1142, 1144, 1153 [195 Cal.Rptr.3d 848].
- "Cohabitant" Defined. Pen. Code, § 13700(b); *People v. Holifield* (1988) 205 Cal.App.3d 993, 1000 [252 Cal.Rptr. 729]; *People v. Ballard* (1988) 203 Cal.App.3d 311, 318–319 [249 Cal.Rptr. 806].
- "Dating Relationship" Defined. Pen. Code, § 243(f)(10).
- Simultaneous Cohabitation. *People v. Moore, supra,* 44 Cal.App.4th at p. 1335.

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4<u>5</u>th ed. 20<u>24</u>~~12~~) Crimes Against the Person, § 19<u>2</u>.

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

842–849. Reserved for Future Use

852A. Evidence of Uncharged Domestic Violence

The People presented evidence that the defendant [may have] committed domestic violence that was not charged in this case[, specifically: _____ *<insert other domestic violence alleged>*].

<Alternative A—As defined in Pen. Code, § 13700>
[*Domestic violence* means abuse committed against (an adult/a fully emancipated minor) who is a (spouse[,]/ [or] former spouse[,]/ [or] cohabitant[,]/ [or] former cohabitant[,]/ [or] person with whom the defendant has had a child[,]/ [or] person who dated or is dating the defendant[,]/ [or] person who was or is engaged to the defendant).]

<Alternative B—As defined in Fam. Code, § 6211>
[*Domestic violence* means abuse committed against a (spouse[,]/ [or] former spouse[,]/ [or] cohabitant[,]/ [or] former cohabitant[,]/ [or] person with whom the defendant has had a child[,]/ [or] person who dated or is dating the defendant[,]/ [or] person who was or is engaged to the defendant/ [or] child[,]/ [or] grandchild[,]/ [or] parent[,]/ [or] grandparent[,]/ [or] brother[,]/ [or] sister[,]/ [or] father-in-law[,]/ [or] mother-in-law[,]/ [or] brother-in-law[,]/ [or] sister-in-law[,]/ [or] son-in-law[,]/ [or] daughter-in-law[,]/ [or] _____<*insert relationship of consanguinity or affinity within the second degree*>) of the defendant.]

Abuse* means intentionally or recklessly causing or attempting to cause bodily injury, [or] [committing sexual assault][,] [or] placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else[, or engaging in _____<insert behavior that was or could be enjoined pursuant to Fam. Code, § 6320>*].**

[A *fully emancipated minor* is a person under the age of 18 who has gained certain adult rights by marrying, being on active duty for the United States armed services, or otherwise being declared emancipated under the law.]

<*Definition of cohabitant under Pen. Code, § 13700(b)>*
[The term *cohabitant* means a person who lives with an unrelated person for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of

property, (4) the parties' holding themselves out as spouses, (5) the parties' registering as domestic partners, (6) the continuity of the relationship, and (7) the length of the relationship.]

<*Definition of cohabitant under Fam. Code, § 6209***>**
[The term *cohabitant* means a person who regularly resides in the household. *Former cohabitant* means a person who formerly regularly resided in the household.]

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

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

If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit [and did commit] _____ *<insert charged offense[s] involving domestic violence>***, as charged here. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of _____** *<insert charged offense[s] involving domestic violence>***. The People must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt.**

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

New January 2006; Revised August 2006, June 2007, April 2008, February 2014, March 2017, October 2021, September 2024, February 2026*
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court must give this instruction on request when evidence of other domestic violence has been introduced. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924

[89 Cal.Rptr.2d 847, 986 P.2d 182] [error to refuse limiting instruction on request]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1317–1318 [97 Cal.Rptr.2d 727]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1067 [210 Cal.Rptr. 880] [general limiting instructions should be given when evidence of past offenses would be highly prejudicial without them].)

If the court has admitted evidence that the defendant was convicted of a felony or committed a misdemeanor for the purpose of impeachment in addition to evidence admitted under Evidence Code section 1109, then the court must specify for the jury what evidence it may consider under section 1109. (*People v. Rollo* (1977) 20 Cal.3d 109, 123, fn. 6 [141 Cal.Rptr. 177, 569 P.2d 771] [discussing section 1101(b); superseded in part on other grounds as recognized in *People v. Olmedo* (1985) 167 Cal.App.3d 1085, 1096 [213 Cal.Rptr. 742]].) In the first sentence, insert a description of the uncharged offense allegedly shown by the section 1109 evidence. If the court has not admitted any felony convictions or misdemeanor conduct for impeachment, then, in the first sentence, the court is not required to insert a description of the conduct alleged.

The definition of "domestic violence" contained in Evidence Code section 1109(d) was amended, effective January 1, 2006. The definition is now in subdivision (d)(3), which states that, as used in section 1109:

> "Domestic violence" has the meaning set forth in Section 13700 of the Penal Code. Subject to a hearing conducted pursuant to section 352, which shall include consideration of any corroboration and remoteness in time, 'domestic violence' has the further meaning as set forth in section 6211 of the Family Code, if the act occurred no more than five years before the charged offense.

If the court determines that the evidence is admissible pursuant to the definition of domestic violence contained in Penal Code section 13700, give the definition of domestic violence labeled alternative A. If the court determines that the evidence is admissible pursuant to the definition contained in Family Code section 6211, give the definition labeled alternative B. Give the bracketed portions in the definition of "abuse" if the evidence is admissible pursuant to Family Code section 6211.

Depending on the evidence, give on request the bracketed paragraphs defining "emancipated minor" (see Fam. Code, § 7000 et seq.) and "cohabitant" (see Pen. Code, § 13700(b)).

In the paragraph that begins with "If you decide that the defendant committed," the committee has placed the phrase "and did commit" in brackets. One appellate court has criticized instructing the jury that it may draw an inference about disposition. (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96

Cal.Rptr.2d 823].) The court should review the Commentary section below and give the bracketed phrase at its discretion.

Give the final sentence that begins with "Do not consider" on request.

Related Instructions

CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*

CALCRIM No. 1191A, *Evidence of Uncharged Sex Offense.*

CALCRIM No. 1191B, *Evidence of Charged Sex Offense*.

CALCRIM No. 852B, *Evidence of Charged Domestic Violence.*

CALCRIM No. 853A, *Evidence of Uncharged Abuse of Elder or Dependent Person*.

CALCRIM No. 853B, *Evidence of Charged Abuse of Elder or Dependent Person.*

AUTHORITY

- Instructional Requirement. Evid. Code, § 1109(a)(1); see *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1016 [130 Cal.Rptr.2d 254, 62 P.3d 601]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 37 [107 Cal.Rptr.2d 100]; *People v. Falsetta, supra,* 21 Cal.4th at pp. 923–924 [dictum].
- "Abuse" Defined. Pen. Code, § 13700(a); Fam. Code, § 6203; *People v. Kovacich* (2011) 201 Cal.App.4th 863, 894–895 [133 Cal.Rptr.3d 924].
- "Cohabitant" Defined. Pen. Code, § 13700(b); Fam. Code, § 6209.
- "Dating Relationship" Defined. Fam. Code, § 6210.
- Determining Degree of Consanguinity. Prob. Code, § 13.
- "Affinity" Defined. Fam. Code, § 6205.
- "Domestic Violence" Defined. Evid. Code, § 1109(d)(3); Pen. Code, § 13700(b); Fam. Code, § 6211; see *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1139 [83 Cal.Rptr.2d 320] [spousal rape is higher level of domestic violence].
- Emancipation of Minors Law. Fam. Code, § 7000 et seq.
- Other Crimes Proved by Preponderance of Evidence. *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. James, supra,* 81 Cal.App.4th at p. 1359.
- Propensity Evidence Alone Is Not Sufficient to Support Conviction Beyond a Reasonable Doubt. *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [101

Cal.Rptr.2d 624]; *People v. James, supra,* 81 Cal.App.4th at pp. 1357–1358, fn. 8; see *People v. Hill* (2001) 86 Cal.App.4th 273, 277–278 [103 Cal.Rptr.2d 127] [in context of prior sexual offenses].

- Charged Sex Offenses Proved Beyond a Reasonable Doubt May Be Evidence of Propensity. *People v. Cruz* (2016) 2 Cal.App.5th 1178, 1184–1186 [206 Cal.Rptr.3d 835]; *People v. Villatoro* (2012) 54 Cal.4th 1152, 1161 [144 Cal.Rptr.3d 401, 281 P.3d 390].
- This Instruction Upheld. *People v. Panighetti* (2023) 95 Cal.App.5th 978, 1000 [313 Cal.Rptr.3d 798].
- No Sua Sponte Duty to Give Similar Instruction. *People v. Cottone* (2013) 57 Cal.4th 269, 293, fn. 15 [159 Cal.Rptr.3d 385, 303 P.3d 1163].

COMMENTARY

The paragraph that begins with "If you decide that the defendant committed" tells the jury that they may draw an inference of disposition. (See *People v. Hill, supra,* 86 Cal.App.4th at pp. 275–279; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334–1335 [92 Cal.Rptr.2d 433].) One appellate court, however, suggests using more general terms to instruct the jury how they may use evidence of other domestic violence offenses, "leaving particular inferences for the argument of counsel and the jury's common sense." (*People v. James, supra,* 81 Cal.App.4th at p. 1357, fn. 8 [includes suggested instruction].) If the trial court adopts this approach, the paragraph that begins with "If you decide that the defendant committed the uncharged domestic violence" may be replaced with the following:

> If you decide that the defendant committed the uncharged domestic violence, you may consider that evidence and weigh it together with all the other evidence received during the trial to help you determine whether the defendant committed _____ <*insert charged offense involving domestic violence*>. Remember, however, that evidence of uncharged domestic violence is not sufficient alone to find the defendant guilty of _____ <*insert charged offense involving domestic violence*>. The People must still prove (the/each) (charge/ [and] allegation) of _____ <*insert charged offense involving domestic violence*> beyond a reasonable doubt.

RELATED ISSUES

Constitutional Challenges

Evidence Code section 1109 does not violate a defendant's rights to due process (*People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095–1096 [98 Cal.Rptr.2d 696];

People v. Hoover (2000) 77 Cal.App.4th 1020, 1028–1029 [92 Cal.Rptr.2d 208]; *People v. Johnson* (2000) 77 Cal.App.4th 410, 420 [91 Cal.Rptr.2d 596]; see *People v. Falsetta, supra,* 21 Cal.4th at pp. 915–922 (construing Evid. Code, § 1108, a parallel statute to Evid. Code, § 1109); *People v. Branch* (2001) 91 Cal.App.4th 274, 281 [109 Cal.Rptr.2d 870] (construing Evid. Code, § 1108) or equal protection (*People v. Jennings, supra,* 81 Cal.App.4th at pp. 1310–1313; see *People v. Fitch* (1997) 55 Cal.App.4th 172, 184–185 [63 Cal.Rptr.2d 753] (construing Evid. Code, § 1108).

Exceptions

Evidence of domestic violence occurring more than 10 years before the charged offense is inadmissible under section 1109 of the Evidence Code, unless the court determines that the admission of this evidence is in the interest of justice. (Evid. Code, § 1109(e).) Evidence of the findings and determinations of administrative agencies regulating health facilities is also inadmissible under section 1109. (*Id.*, § 1109(f).)

See the Related Issues sections of CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*, and CALCRIM No. 1191, *Evidence of Uncharged Sex Offense*.

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4<u>5</u>th ed. 20<u>24</u>~~12~~) Criminal Trial, §§ 75<u>1</u>~~20~~-75<u>3</u>~~22~~.

1 Witkin, California Evidence (6~~5~~th ed. 20<u>24</u>~~12~~) Circumstantial Evidence, §§ <u>118–120</u>~~101, 102~~.

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

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

852B. Evidence of Charged Domestic Violence

The People have charged ~~presented evidence that~~ the defendant with ~~committed~~ the crime[s] of _____ *<insert description of offense[s]>* **~~charged~~ in Count[s]____** *<insert count[s] of domestic violence offense[s] charged in this case >*.

If the People have proved beyond a reasonable doubt that the defendant committed one or more of these crimes, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence offenses, and based on that decision, also conclude that the defendant was likely to commit [and did commit] the other domestic violence offenses charged in this case.

If you find that the defendant committed one or more of these crimes, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of another crime. The People must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt.

New March 2017; Revised February 2026

BENCH NOTES

Instructional Duty

The court must give this instruction on request if the People rely on charged offenses as evidence of predisposition to commit similar crimes charged in the same case. (Evid. Code, § 355.)

Related Instructions

CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*

CALCRIM No. 1191A, *Evidence of Uncharged Sex Offense.*

CALCRIM No. 1191B, *Evidence of Charged Sex Offense*.

CALCRIM No. 852A, *Evidence of Uncharged Domestic Violence.*
CALCRIM No. 853A, *Evidence of Uncharged Abuse of Elder or Dependent Person*.

CALCRIM No. 853B, *Evidence of Charged Abuse of Elder or Dependent Person.*

AUTHORITY

- Charged Offenses Proved Beyond a Reasonable Doubt May Be Evidence of Propensity. *People v. Cruz* (2016) 2 Cal.App.5th 1178, 1186-1186 [206 Cal.Rptr.3d 835]; *People v. Villatoro* (2012) 54 Cal.4th 1152, 1161 [144 Cal.Rptr.3d 401, 281 P.3d 390].

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (54th ed. 2024~~12~~) Criminal Trial, §§ 7512~~0~~-7532~~2~~.

1 Witkin, California Evidence (65th ed. 2024~~12~~) Circumstantial Evidence, §§ 118– 120~~101, 102~~.

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

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

853A. Evidence of Uncharged Abuse of Elder or Dependent Person

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The People presented evidence that the defendant [may have] committed abuse of (an elder/a dependent person) that was not charged in this case[, specifically: _____ *<insert other abuse alleged>*.] ***Abuse of* (*an elder*/*a dependent person*) means (physical abuse[,] [or] sexual abuse[,]/ [or] neglect[,]/ [or] financial abuse[,]/ [or] abandonment[,]/ [or] isolation[,]/ [or] abduction[,]/[or] the act by a care custodian of not providing goods or services that are necessary to avoid physical harm or mental suffering[,]/ [or] [other] treatment that results in physical harm or pain or mental suffering).**

[An *elder* is a person residing in California who is age 65 or older.]

[A *dependent person* is a person who has physical or mental impairments that substantially restrict his or her ability to carry out normal activities or to protect his or her rights. This definition includes, but is not limited to, those who have developmental disabilities or whose physical or mental abilities have significantly diminished because of age.]

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged abuse of (an elder/a dependent person). Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

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

If you decide that the defendant committed the uncharged abuse of (an elder/a dependent person), you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit abuse of (an elder/a dependent person), and based on that decision, also conclude that the defendant was likely to commit [and did commit] _____ *<insert charged offense[s] involving abuse of elder or dependent person>*, **as charged here. If you conclude that the defendant committed the uncharged abuse of (an elder/a dependent person), that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of _____** *<insert charged offense[s] involving abuse of elder or dependent person>*. **The People must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt.**

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

New January 2006; Revised April 2008, February 2014, March 2017, February 2026

BENCH NOTES

Instructional Duty

The court must give this instruction on request when evidence of other abuse of an elder or dependent person has been introduced. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [error to refuse limiting instruction on request]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1317–1318 [97 Cal.Rptr.2d 727]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1067 [210 Cal.Rptr. 880] [general limiting instructions should be given when evidence of past offenses would be highly prejudicial without them].)

If the court has admitted evidence that the defendant was convicted of a felony or committed a misdemeanor for the purpose of impeachment in addition to evidence admitted under Evidence Code section 1109, then the court must specify for the jury what evidence it may consider under section 1109. (*People v. Rollo* (1977) 20 Cal.3d 109, 123, fn. 6 [141 Cal.Rptr. 177, 569 P.2d 771] [discussing section 1101(b); superseded in part on other grounds as recognized in *People v. Olmedo* (1985) 167 Cal.App.3d 1085, 1096 [213 Cal.Rptr. 742]].) In the first sentence, insert a description of the uncharged offense allegedly shown by the section 1109 evidence. If the court has not admitted any felony convictions or misdemeanor conduct for impeachment, then, in the first sentence, the court is not required to insert a description of the conduct alleged.

Depending on the evidence, give on request the bracketed definition of an elder or dependent person. (See Welf. & Inst. Code, §§ 15610.23 [dependent adult], 15610.27 [elder].) Other terms may be defined on request depending on the evidence. See the Authority section below for references to selected definitions from the Elder Abuse and Dependent Adult Civil Protection Act. (See Welf. & Inst. Code, § 15600 et seq.)

In the paragraph that begins with "If you decide that the defendant committed," the committee has placed the phrase "and did commit" in brackets. One appellate court has criticized instructing the jury that it may draw an inference about disposition. (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823].) The court should review the Commentary section below and give the bracketed phrase at its discretion.

Give the bracketed sentence that begins with "Do not consider" on request.

Related Instructions

CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, or Common Plan, etc.*

CALCRIM No. 852A, *Evidence of Uncharged Domestic Violence*.

CALCRIM No. 852B, *Evidence of Charged Domestic Violence.*

CALCRIM No. 853B, *Evidence of Charged Abuse of Elder or Dependent Person.*

CALCRIM No. 1191A, *Evidence of Uncharged Sex Offense*.

CALCRIM No. 1191B, *Evidence of Charged Sex Offense.*

AUTHORITY

- Instructional Requirement. Evid. Code, § 1109(a)(2).
- "Abandonment" Defined. Welf. & Inst. Code, § 15610.05.
- "Abduction" Defined. Welf. & Inst. Code, § 15610.06.
- "Abuse of Elder or Dependent Person" Defined. Evid. Code, § 1109(d)(1).
- "Care Custodian" Defined. Welf. & Inst. Code, § 15610.17.
- "Dependent Person" Defined. Evid. Code, § 177.
- "Elder" Defined. Welf. & Inst. Code, § 15610.27.
- "Financial Abuse" Defined. Welf. & Inst. Code, § 15610.30.
- "Goods and Services" Defined. Welf. & Inst. Code, § 15610.35.
- "Isolation" Defined. Welf. & Inst. Code, § 15610.43.
- "Mental Suffering" Defined. Welf. & Inst. Code, § 15610.53.
- "Neglect" Defined. Welf. & Inst. Code, § 15610.57.
- "Physical Abuse" Defined. Welf. & Inst. Code, § 15610.63.
- Other Crimes Proved by Preponderance of Evidence. *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. James* (2000) 81 Cal.App.4th 1343, 1359 [96 Cal.Rptr.2d 823].
- Propensity Evidence Alone Is Not Sufficient to Support Conviction Beyond a Reasonable Doubt. *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [101 Cal.Rptr.2d 624]; *People v. James, supra,* 81 Cal.App.4th at pp. 1357–1358, fn. 8 [96 Cal.Rptr.2d 823] [in context of prior domestic violence offenses]; see

People v. Hill (2001) 86 Cal.App.4th 273, 277–278 [103 Cal.Rptr.2d 127] [in context of prior sexual offenses].

- Charged Sex Offenses Proved Beyond a Reasonable Doubt May Be Evidence of Propensity. *People v. Cruz* (2016) 2 Cal.App.5th 1178, 1186-1186 [206 Cal.Rptr.3d 835]; *People v. Villatoro* (2012) 54 Cal.4th 1152, 1161 [144 Cal.Rptr.3d 401, 281 P.3d 390].No Sua Sponte Duty To Give Similar Instruction ▸ *People v. Cottone* (2013) 57 Cal.4th 269, 293, fn. 15 [159 Cal.Rptr.3d 385, 303 P.3d 1163].

COMMENTARY

The paragraph that begins with "If you decide that the defendant committed" tells the jury that they may draw an inference of disposition. (See *People v. Hill, supra,* 86 Cal.App.4th at pp. 275–279; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334–1335 [92 Cal.Rptr.2d 433].) One appellate court, however, suggests using more general terms to instruct the jury how they may use evidence of other domestic violence offenses, "leaving particular inferences for the argument of counsel and the jury's common sense." (*People v. James, supra,* 81 Cal.App.4th at p. 1357, fn. 8 [96 Cal.Rptr.2d 823] [includes suggested instruction].) If the trial court adopts this approach, the paragraph that begins with "If you decide that the defendant committed the uncharged abuse of (an elder/a dependent person)" may be replaced with the following:

> If you decide that the defendant committed the uncharged abuse of (an elder/a dependent person), you may consider that evidence and weigh it together with all the other evidence received during the trial to help you determine whether the defendant committed _____ <*insert charged offense involving abuse of elder or dependent person*>. Remember, however, that evidence of uncharged abuse of (an elder/a dependent person) is not sufficient alone to find the defendant guilty of _____ <*insert charged offense involving abuse of elder or dependent person*>. The People must still prove (the/each) (charge/ [and] allegation) of _____ <*insert charged offense involving abuse of elder or dependent person*> beyond a reasonable doubt.

RELATED ISSUES

Exceptions

Evidence of abuse of an elder or dependent person occurring more than 10 years before the charged offense is inadmissible under Evidence Code section 1109, unless the court determines that the admission of this evidence is in the interest of justice. (Evid. Code, § 1109(e).) Evidence of the findings and determinations of

administrative agencies regulating health facilities is also inadmissible under section 1109. (Evid. Code, § 1109(f).)

See the Related Issues sections of CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*, CALCRIM No. 852, *Evidence of Uncharged Domestic Violence*, and CALCRIM No. 1191, *Evidence of Uncharged Sex Offense*.

SECONDARY SOURCES

1 Witkin, California Evidence (65th ed. 2024) Circumstantial Evidence, §§ 118–120101, 102.

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

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

853B. Evidence of Charged Abuse of Elder or Dependent Person

The People have charged ~~presented evidence that~~ the defendant with~~committed~~ the crime[s] of _____ *<insert description of offense[s]>* **~~charged~~ in Count[s]____** *<insert count[s] of elder or dependent person abuse charged in this case >*.

If the People have proved beyond a reasonable doubt that the defendant committed one or more of these crimes, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit abuse of (elders/ [or] dependent persons), and based on that decision, also conclude that the defendant was likely to commit [and did commit] the other (elder/ [or] dependent person) abuse offense[s] charged in this case.

If you find that the defendant committed one or more of these crimes, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of another crime. The People must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt.

New March 2017; Revised February 2026

BENCH NOTES

Instructional Duty

The court must give this instruction on request if the People rely on charged offenses as evidence of predisposition to commit similar crimes charged in the same case. (Evid. Code § 355.)

Related Instructions

CALCRIM No. 1191A, *Evidence of Uncharged Sex Offense.*

CALCRIM No. 1191B, *Evidence of Charged Sex Offense.*

CALCRIM No. 852A, *Evidence of Domestic Violence.*

CALCRIM No. 852B, *Evidence of Domestic Violence.*

CALCRIM No. 853A, *Evidence of Elder or Dependent Person Abuse.*

AUTHORITY

- Charged Offenses Proved Beyond a Reasonable Doubt May Be Evidence of Propensity. *People v. Cruz* (2016) 2 Cal.App.5th 1178, 1186-1186 [206

Cal.Rptr.3d 835]; *People v. Villatoro* (2012) 54 Cal.4th 1152, 1161 [144 Cal.Rptr.3d 401, 281 P.3d 390].

SECONDARY SOURCES

1 Witkin, California Evidence (~~5~~6th ed. 202~~4~~12) Circumstantial Evidence, §§ 118–120~~101, 102~~.

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

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

854–859. Reserved for Future Use

965. Shooting at Inhabited House or Occupied Motor Vehicle (Pen. Code, § 246)

The defendant is charged [in Count __] with shooting at an (inhabited house/inhabited house car/inhabited camper/occupied building/occupied motor vehicle/occupied aircraft) [in violation of Penal Code section 246].

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

1. **The defendant willfully and maliciously shot a firearm;**

[AND]

2. **The defendant shot the firearm at an (inhabited house/inhabited house car/inhabited camper/occupied building/occupied motor vehicle/occupied aircraft)(;/.)**

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

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

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

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to disturb, annoy, or injure someone else.
[A (house/house car/camper) is *inhabited* if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged shooting.]

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

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

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

[A *house car* is a motor vehicle originally designed, or permanently altered, and equipped for human habitation, or to which a camper has been permanently attached.]

[A *camper* is a structure designed to be mounted upon a motor vehicle and to provide facilities for human habitation or camping purposes.]

[An *aircraft* is an airplane or other craft intended for and capable of transporting persons through the air.]

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

[The term[s] (*firearm/*_____ <*insert other term*>*)* (is/are) defined in another instruction to which you should refer.]

New January 2006; Revised February 2012, August 2012, September 2017, February 2026

BENCH NOTES

Instructional Duty

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

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

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

Related Instructions

CALCRIM No. 966, *Shooting at Uninhabited House or Unoccupied Motor Vehicle*.

CALCRIM No. 967, *Shooting at Unoccupied Aircraft*.

AUTHORITY

- Elements. Pen. Code, § 246.
- Meaning of "at" in Pen. Code, § 246. *People v. Cruz* (1995) 38 Cal.App.4th 427, 431-433 [45 Cal.Rptr.2d 148].
- "Aircraft" Defined. Pen. Code, § 247.
- "Camper" Defined. Veh. Code, § 243.
- "Firearm" Defined. Pen. Code, § 16520.
- "House Car" Defined. Veh. Code, § 362.
- "Malicious" Defined. Pen. Code, § 7(4); *People v. Watie* (2002) 100 Cal.App.4th 866, 879 [124 Cal.Rptr.2d 258].
- "Motor Vehicle" Defined. Veh. Code, § 415.
- "Willful" Defined. Pen. Code, § 7(1); *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438 [35 Cal.Rptr.2d 155].
- General Intent Crime. *People v. Jischke* (1996) 51 Cal.App.4th 552, 556 [59 Cal.Rptr.2d 269]; *People v. Cruz* (1995) 38 Cal.App.4th 427, 431–433 [45 Cal.Rptr.2d 148] [intent to strike building not required].
- Occupied Building. *People v. Adams* (1982) 137 Cal.App.3d 346, 354–355 [187 Cal.Rptr. 505] [attached garage].
- Occupied Motor Vehicle. *People v. Buttles* (1990) 223 Cal.App.3d 1631, 1638 [273 Cal.Rptr. 397] [tractor/trailer rig being operated on a road].
- House Not Inhabited Means Former Residents Not Returning. *People v. Cardona* (1983) 142 Cal.App.3d 481, 483 [191 Cal.Rptr. 109].
- Offense of Discharging Firearm at Occupied Vehicle Can Be Committed When Gun Is Inside Vehicle. *People v. Manzo* (2012) 53 Cal.4th 880, 889-890 [138 Cal.Rptr. 16, 270 P.3d 711].

LESSER INCLUDED OFFENSES

Assault with a deadly weapon (Pen. Code, § 245) is not necessarily included in the offense of discharging a firearm at an occupied vehicle. (*In re Daniel R.* (1993) 20 Cal.App.4th 239, 244, 247 [24 Cal.Rptr.2d 414].)

Grossly negligent discharge of a firearm pursuant to Penal Code section 246.3(a) is a lesser included offense of discharging a firearm at an occupied building.

(*People v. Ramirez* (2009) 45 Cal.4th 980, 990 [89 Cal.Rptr.3d 586, 201 P.3d 466].)

RELATED ISSUES

Concurrent Sentence for Firearm Possession

If a prior felon arrives at the scene already in possession of a firearm and then shoots at an inhabited dwelling, Penal Code section 654 does not preclude imposing sentences for both offenses. (*People v. Jones* (2002) 103 Cal.App.4th 1139 [127 Cal.Rptr.2d 319].)

Shooting Weapon Inside Dwelling

"[T]he firing of a pistol within a dwelling house does not constitute a violation of Penal Code section 246." (*People v. Stepney* (1981) 120 Cal.App.3d 1016, 1021 [175 Cal.Rptr. 102] [shooting television inside dwelling].) However, shooting from "inside [an] apartment . . . in the direction of the apartment below" is a violation of section 246. (*People v. Jischke, supra,* ~~(1996)~~ 51 Cal.App.4th ~~552,~~at p. 556 ~~[59 Cal.Rptr.2d 269]~~.)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (5~~4~~th ed. 2024~~12~~) Crimes Against the Person, §§ 225~~49~~, 226~~50~~.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, §§ 144.01[1][i], 144.03[2], [4] (Matthew Bender).

967. Shooting at Unoccupied Aircraft (Pen. Code, § 247(a)

The defendant is charged [in Count __] with shooting at an unoccupied aircraft [in violation of Penal Code section 247(a)].

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

1. **The defendant willfully and maliciously shot a firearm;**

[AND]

2. **The defendant shot the firearm at an unoccupied aircraft(;/.)**

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

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

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

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.

[An *aircraft* is an airplane or other craft intended for and capable of transporting persons through the air.]

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

[The term[s] (*firearm/*_____ *<insert other term>)* (is/are) defined in another instruction to which you should refer.]

New January 2006; Revised February 2012, February 2026

BENCH NOTES

Instructional Duty

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

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

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

Related Instructions

CALCRIM No. 965, *Shooting at Inhabited House or Occupied Motor Vehicle*.

CALCRIM No. 966, *Shooting at Uninhabited House or Unoccupied Motor Vehicle*.

AUTHORITY

- Elements. Pen. Code, § 247(a).
- "Firearm" Defined. Pen. Code, § 16520.
- "Malicious" Defined. Pen. Code, § 7(4).
- "Aircraft" Defined. Pen. Code, § 247.
- "Willful" Defined. Pen. Code, § 7(1); *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438 [35 Cal.Rptr.2d 155] [in context of Pen. Code, § 246].

RELATED ISSUES

Laser

Willfully and maliciously discharging a laser at an occupied aircraft that is in motion or flight is a separate crime. (See Pen. Code, § 247.5.) It is also a crime to willfully shine a light or other bright device at an aircraft with the intent to interfere with the aircraft's operation. (See Pen. Code, § 248.)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (54th ed. 2024~~12~~) Crimes Against the Person, § 228~~52~~.

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

968. Shooting From Motor Vehicle (Pen. Code, § 26100(c) & (d))

The defendant is charged [in Count __] with shooting from a motor vehicle [at another person] [in violation of Penal Code section 26100].

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

1. **The defendant willfully and maliciously shot a firearm from a motor vehicle(;/.)**

<Give element 2 when defendant charged with Pen. Code, § 26100(c).>
[AND]

[2. The defendant shot the firearm at another person who was not in a motor vehicle(;/.)]

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

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

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

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.

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

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

[The term[s] (*firearm/_____ <insert other term>)* (is/are) defined in another instruction to which you should refer.]

New January 2006; Revised February 2012, March 2024, * *February 2026*
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

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

Give the bracketed phrase "at another person" in the first sentence plus bracketed element 2 if the defendant is charged with shooting at someone who was not in a motor vehicle. (See Pen. Code, § 26100(c).) If the defendant is only charged with shooting from a motor vehicle (see Pen. Code, § 26100(d)), give element 1 but not element 2.

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.

Related Instructions

CALCRIM No. 969, *Permitting Someone to Shoot From Vehicle*.

AUTHORITY

- Elements. Pen. Code, § 26100(c) & (d).
- "Firearm" Defined. Pen. Code, § 16520.
- "Malicious" Defined. Pen. Code, § 7(4).
- "Willful" Defined. Pen. Code, § 7(1); *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438 [35 Cal.Rptr.2d 155] [in context of Pen. Code, § 246].
- General Intent Crime. *People v. Laster* (1997) 52 Cal.App.4th 1450, 1468 [61 Cal.Rptr.2d 680] [dictum].
- Assault With a Firearm is not a Lesser Included Offense. *People v. Licas* (2007) 41 Cal.4th 362 [60 Cal.Rptr.3d 31].
- "From a Vehicle" Includes Standing at Open Door. *People v. Gaines* (2023) 93 Cal.App.5th 91, 120 [310 Cal.Rptr.3d 203].

RELATED ISSUES

Shooting at Animal

It is a separate crime to shoot from a motor vehicle at any game bird or mammal. (See Fish & G. Code, § 3002.)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4<u>5</u>th ed. 20<u>24</u>~~12~~) Crimes Against the Person, § 227~~51~~.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, §§ 144.01[1][i], 144.03[2], [4] (Matthew Bender).

1000. Rape by Force, Fear, or Threats (Pen. Code, § 261(a)(2), (6) & (7))

The defendant is charged [in Count _____] with rape by force [in violation of Penal Code section 261(a)].

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

1. **The defendant had sexual intercourse with another person ~~woman~~;**

2. **The other person~~woman~~ did not consent to the intercourse;**

AND

3. **The defendant accomplished the intercourse by**

<Alternative 3A—force or fear>
[force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the person~~woman~~ or to someone else.]

<Alternative 3B—future threats of bodily harm>
[threatening to retaliate in the future against the person~~woman~~ or someone else when there was a reasonable possibility that the defendant would carry out the threat. A *threat to retaliate* is a threat to kidnap, falsely imprison, or inflict extreme pain, serious bodily injury, or death.]

<Alternative 3C—threat of official action>
[threatening to use the authority of a public office to incarcerate, arrest, or deport someone. A *public official* is a person employed by federal, state, or local government who has authority to incarcerate, arrest, or deport. _____ *<insert name of alleged victim>* ~~The woman~~ must have reasonably believed that the defendant was a public official even if the defendant~~he~~ was not.]

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

[To *consent,* a person~~woman~~ must know the nature of the act or transaction involved, act freely and voluntarily, and positively cooperate by act or attitude ~~and know the nature of the act~~.]

[A person~~woman~~ who initially consents to an act of intercourse may change (his/her) mind during the act. If (he/she) does so, under the law, the act of intercourse is then committed without (his/her) consent if:

1. **(He/She) communicated through words or acts to the defendant that (he/she) no longer consented to the act of intercourse;**

2. **A reasonable person would have understood that (his/her) words or acts expressed (his/her) lack of consent;**

AND

3. **The defendant forcibly continued the act of intercourse despite (his/her) objection.]**

[It is not required that (he/she) physically resist or fight back in order to communicate (his/her) lack of consent.]

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

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

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

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

[Intercourse is *accomplished by fear* if the other person~~woman~~ is actually and reasonably afraid [or ~~she~~ is actually but unreasonably afraid and the defendant knows of the other person's~~her~~ fear and takes advantage of it].]

[~~A~~The other person~~woman~~ must be alive at the time of the sexual intercourse for the crime of rape to occur.]

<Defense: Reasonable Belief in Consent>
[The defendant is not guilty of rape if he actually and reasonably believed that the other person~~woman~~ consented to the intercourse [and actually and reasonably believed that (he/she) consented throughout the act of intercourse]. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the other person~~woman~~ consented. If the People have not met this burden, you must find the defendant not guilty.]

New January 2006; Revised February 2013, February 2014, March 2022, February 2026

BENCH NOTES

Instructional Duty

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

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

The court should select the appropriate alternative in element 3 describing how the sexual intercourse was allegedly accomplished.

Rape requires that the victim be alive at the moment of intercourse. (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1175–1177 [270 Cal.Rptr. 286, 791 P.2d 965]; *People v. Carpenter* (1997) 15 Cal.4th 312, 391 [63 Cal.Rptr.2d 1, 935 P.2d 708].) Intercourse with a deceased victim may constitute attempted rape if the defendant intended to rape a live victim. (*People v. Kelly* (1992) 1 Cal.4th 495, 524–526 [3 Cal.Rptr.2d 677, 822 P.2d 385].) If this is an issue in the case, give the bracketed sentence that begins with "The other person~~A woman~~ must be alive . . ."

The defendant must continue to actually and reasonably believe in the victim's consent throughout the act. ~~-~~If the act of intercourse begins consensually and the victim then changes his or her mind, the victim must clearly and unequivocally communicate to the defendant his or her withdrawal of consent to the act.~~-~~ If, however, the defendant initiates the use of nonconsensual duress, menace, or force during the act, the victim's subsequent withdrawal of consent to the act may be inferred from the circumstances and need not be expressed. (*People v. Ireland*

(2010) 188 Cal.App.4th 328, 338 [114 Cal.Rptr.3d 915]). If there is an issue regarding the defendant's continued belief in the victim's consent, give the second optional first sentence in the definition of "*Defense: Reasonable Belief in Consent*."

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].)

Related Instructions

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

AUTHORITY

- Elements. Pen. Code, § 261(a)(2), (6) & (7).
- "Consent" Defined. Pen. Code, §§ 261.6, 261.7.
- "Duress" Defined. Pen. Code, § 261(b).
- "Menace" Defined. Pen. Code, § 261(c).
- "Penetration" Defined. Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].
- "Fear" Defined. *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [level of fear].
- "Force" Defined. *People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089].
- Reasonable Person Standard for Duress Includes Victim's Religious Indoctrination. *People v. Townes* (2025) 108 Cal.App.5th 603 [329 Cal.Rptr.3d 427].
- Mistake of Fact Regarding Consent. *People v. Mayberry, supra,* 15 Cal.3d at pp. 153–158; *People v. May* (1989) 213 Cal.App.3d 118, 124 [261 Cal.Rptr. 502].
- Circumstances Requiring *Mayberry* Instruction. *People v. Dominguez* (2006) 39 Cal.4th 1141 [47 Cal.Rptr.3d 575, 140 P.3d 866].

- Withdrawal of Consent. *In re John Z.* (2003) 29 Cal.4th 756, 760 [128 Cal.Rptr.2d 783, 60 P.3d 183].
- Inferring Lack of Consent From Circumstances. *People v. Ireland* (2010) 188 Cal.App.4th 328, 338 [114 Cal.Rptr.3d 915].
- Victim Need Not Resist. *People v. Barnes* (1986) 42 Cal.3d 284, 297-302 [228 Cal.Rptr. 228, 721 P.2d 110].

COMMENTARY

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

"[T]he offense of 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. . . . '[I]t is immaterial at what point the victim withdraws her consent, so long as that withdrawal is communicated to the male and he thereafter ignores it.' " (*In re John Z., supra,* 29 Cal.4th at p. 760.)

The instruction includes definitions of "duress," "menace," and the sufficiency of "fear" because those terms have meanings in the context of rape that are technical and may not be readily apparent to jurors. (See Pen. Code, §§ 262(b) [duress] and (c) [menace]; *People v. Iniguez, supra,* 7 Cal.4th at pp. 856–857 [fear].)

The term "force" as used in the rape statutes does not have a specialized meaning and court is not required to define the term sua sponte. (*People v. Griffin, supra,* 33 Cal.4th at pp. 1023–1024.) In *People v. Griffin,* 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.* [emphasis in original].)

The committee has provided a bracketed definition of "force," consistent with *People v. Griffin, supra,* 33 Cal.4th at pp. 1023-1024, that the court may give on request.

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Assault With Intent to Commit Rape. Pen. Code, § 220; *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible rape is charged].
- Attempted Rape. Pen. Code, §§ 663, 261.
- Battery. Pen. Code, § 242; *People v. Guiterrez* (1991) 232 Cal.App.3d 1624, 1636 [284 Cal.Rptr. 230], disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 [103 Cal.Rptr.2d 23, 15 P.3d 243]; but see *People v. Marshall* (1997) 15 Cal.4th 1, 38–39 [61 Cal.Rptr.2d 84, 931 P.2d 262] [battery not a lesser included of attempted rape].

RELATED ISSUES

Consent Obtained by Fraudulent Representation

A person may also induce someone else to consent to engage in sexual intercourse 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.) 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].)

Minor Victim and Unanimity

"Generic testimony" by a victim who was 15 and 16 years old does not deprive a defendant of a due process right to defend against the charges. If the victim "specifies the type of conduct involved, its frequency, and that the conduct occurred during the limitation period, nothing more is required to establish the substantiality of the victim's testimony." (*People v. Matute* (2002) 103 Cal.App.4th 1437, 1446 [127 Cal.Rptr.2d 472] [affirming conviction for multiple counts of rape under Pen. Code, § 261(a)(2); citing *People v. Jones* (1990) 51 Cal.3d 294, 316 [270 Cal.Rptr. 611, 792 P.2d 643]].)

When there is no reasonable likelihood the jury will disagree on particular acts of molestation, and the only question is whether or not the defendant in fact

committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim. (*People v. Matute, supra,* 103 Cal.App.4th at p. 1448; *People v. Jones, supra,* 51 Cal.3d at pp. 321–322; see CALCRIM No. 3501, *Unanimity: When Generic Testimony of Offense Presented*.)

Mistake-of-Fact Defense and Developmental Disability

A defendant cannot base a reasonable-belief-of-consent defense on the fact that he is developmentally disabled and, as a result, did not act as a reasonable person would have acted. (*People v. Castillo* (1987) 193 Cal.App.3d 119, 124–125 [238 Cal.Rptr. 207].)

Multiple Rapes

A penetration, however slight, completes the crime of rape; therefore a separate conviction is proper for each penetration that occurs. (*People v. Harrison* (1989) 48 Cal.3d 321, 329–334 [256 Cal.Rptr. 401, 768 P.2d 1078].)

Resistance Is Not Required

Resistance by the victim is not required for rape; any instruction to that effect is erroneous. (*People v. Barnes, supra,* 42 Cal.3d at pp. 292, 302.)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4~~1~~5th ed. 20~~1~~24~~2~~) Sex Offenses and Crimes Against Decency, §§ 1–1~~5~~8, ~~20, 178~~229.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ -142.20[1][a], [2], 142.23[1][e] (Matthew Bender).

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

1015. Oral Copulation by Force, Fear, or Threats (Pen. Code, § 287(c)(2) & (3), (k))

The defendant is charged [in Count __] with oral copulation by force [in violation of Penal Code section 287].

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

1. **The defendant committed an act of oral copulation with someone else;**

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

AND

3. **The defendant accomplished the act by**

<Alternative 3A—force or fear>
[force, violence, duress, menace, or fear of immediate and unlawful bodily injury to someone.]

<Alternative 3B—future threats of bodily harm>
[threatening to retaliate against someone when there was a reasonable possibility that the threat would be carried out. A *threat to retaliate* is a threat to kidnap, unlawfully restrain or confine, or inflict extreme pain, serious bodily injury, or death.]

<Alternative 3C—threat of official action>
[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 the 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.]

***Oral copulation* is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.**

[~~In order t~~To *consent,* a person must know the nature of the act or transaction involved, act freely and voluntarily, and ~~know the nature of the act~~positively cooperate by act or attitude.]

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

[Evidence that the 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 causes a reasonable person 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].]

[The defendant is not guilty of forcible oral copulation if he or 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 person consented. If the People have not met this burden, you must find the defendant not guilty.]

New January 2006; Revised August 2006, October 2021, March 2022, February 2026

BENCH NOTES

Instructional Duty

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

Select the appropriate alternative in element 3 to instruct how the act was allegedly accomplished.

Related Instructions

CALCRIM No. 3185, *Sex Offenses: Sentencing Factor—Using Force or Fear Against Minor Under 14 Years/14 Years or Older*.

AUTHORITY

- Elements. Pen. Code, § 287(c)(2) & (3), (k).
- "Consent" Defined. Pen. Code, §§ 261.6, 261.7.
- "Duress" Defined. *People v. Guenther* (2024) 104 Cal.App.5th 483, 513–521 [324 Cal.Rptr.3d 765]; *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].
- "Menace" Defined. Pen. Code, § 261(c) [in context of rape].
- "Oral Copulation" Defined. Pen. Code, § 287(a); *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].
- "Threatening to Retaliate" Defined. Pen. Code, § 287(l).
- "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]; *People v. Guido* (2005) 125 Cal.App.4th 566, 574–576 [22 Cal.Rptr.3d 826].
- Threatening to Retaliate. *People v. White* (2005) 133 Cal.App.4th 473, 484–485 [34 Cal.Rptr.3d 848]; *People v. Ward* (1986) 188 Cal.App.3d 459, 468 [233 Cal.Rptr. 477].
- Duress Caused by Threats of Retribution. *People v. Guenther, supra,* 104 Cal.App.5th at pp. 516–521.
- This Instruction Upheld. *People v. Guenther, supra,* 104 Cal.App.5th at p. 521.

COMMENTARY

Penal Code section 287 requires that the oral copulation be "against the will" of the other person. (Pen. Code, § 287(c)(2) & (3), (k).) "Against the will" has been defined as "without consent." (*People v. Key* (1984) 153 Cal.App.3d 888, 895 [203 Cal.Rptr. 144]; see also *People v. Young* (1987) 190 Cal.App.3d 248, 257 [235 Cal.Rptr. 361].)

The instruction includes a definition of the sufficiency of "fear" because that term has meaning in the context of forcible oral copulation that is technical and may not be readily apparent to jurors. (See *People v. Iniguez, supra,* ~~(1994)~~ 7 Cal.4th ~~847,~~at pp. 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 287 does not define either term. (*People v. Pitmon, supra,* ~~(1985)~~ 170 Cal.App.3d ~~38,~~at p. 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, supra,* ~~(2004)~~ 33 Cal.4th ~~999,~~at pp. 1004–1010 ~~[16 Cal.Rptr.3d 869, 94 P.3d 1071],~~ and *People v. Pitmon, supra,* ~~(1985)~~ 170 Cal.App.3d ~~38,~~at p. 50 ~~[216 Cal.Rptr. 221]~~. The definition of "menace" is based on the statutory definition contained in Penal Code section 261 (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 former 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, supra,* ~~(2004)~~ 33 Cal.4th ~~1015,~~at pp. 1023–1024; *People v. Guido, supra,* ~~(2005)~~ 125 Cal.App.4th ~~566,~~at pp. 574–576 ~~[22 Cal.Rptr.3d 826]~~). 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].)

(*People v. Griffin, supra*, 33 Cal.4th at pp. 1023–1024 [emphasis in original]; see also *People v. Guido*, *supra,* ~~(2005)~~ 125 Cal.App.4th ~~566,~~at pp. 574–576 ~~[22 Cal.Rptr.3d 826]~~ [*Griffin* reasoning applies to violation of Pen. Code, § 287(c)(2)].)

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 Oral Copulation. Pen. Code, § 220; see *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible crime is charged].
- Attempted Oral Copulation. Pen. Code, §§ 663, 287.
- Battery. Pen. Code, § 242.

RELATED ISSUES

Consent Obtained by Fraudulent Representation

A person may also induce someone else to consent to engage in oral copulation 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.) 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 oral copulation was withdrawn, see CALCRIM No. 1000, *Rape by Force, Fear, or Threats*, for language that may be adapted for use in this instruction.

Multiple Acts of Oral Copulation

An accused may be convicted for multiple, nonconsensual sex acts of an identical nature that follow one another in quick, uninterrupted succession. (*People v. Catelli* (1991) 227 Cal.App.3d 1434, 1446–1447 [278 Cal.Rptr. 452] [defendant properly convicted of multiple violations of former Pen. Code, § 288a where he interrupted the acts of copulation and forced victims to change positions].)

Sexual Organ

A man's "sexual organ" for purposes of Penal Code section 287 includes the penis and the scrotum. (Pen. Code, § 287; *People v. Catelli* (1991) 227 Cal.App.3d 1434, 1448–1449 [278 Cal.Rptr. 452].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4~~1~~5th ed. 20~~1~~24) Sex Offenses and Crimes Against Decency, §§ 3~~5~~7–~~38~~41, 229~~178~~.

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

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

1030. Sodomy by Force, Fear, or Threats (Pen. Code, § 286(c)(2) & (3), (k))

The defendant is charged [in Count __] with sodomy by force [in violation of Penal Code section 286].

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

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

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

AND

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

<Alternative 3A—force or fear>
[by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to another person.]

<Alternative 3B—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 3C—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.]

***Sodomy* is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.]**

[~~In order t~~To *consent,* a person must know the nature of the act or transaction involved, act freely and voluntarily, and positively cooperate by act or attitude~~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 causes a reasonable person 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 or she is actually but unreasonably afraid and the defendant knows of his or her fear and takes advantage of it].]

[The other person must be alive at the time of the act for the crime of sodomy to occur.]

<Defense: Reasonable Belief in Consent>
[The defendant is not guilty of forcible sodomy 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 2006, February 2012, October 2021, March 2022, February 2026

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of sodomy. (Pen. Code, § 286(c)(2), (3), (k); *People v. Martinez* (1986) 188 Cal.App.3d 19, 24–26 [232 Cal.Rptr. 736]; *People v. Moore* (1989) 211 Cal.App.3d 1400, 1407 [260 Cal.Rptr. 134].)

The court should select the appropriate alternative in element 3 to instruct how the sodomy was accomplished.

Sodomy requires that the victim be alive at the moment of the act. (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1175–1177 [270 Cal.Rptr. 286, 791 P.2d 965]; If this is an issue in the case, give the bracketed sentence that begins with "The other person must be alive . . ."

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].)

Related Instructions

CALCRIM No. 3185, *Sex Offenses: Sentencing Factor—Using Force or Fear Against Minor Under 14 Years/14 Years or Older*.

AUTHORITY

- Elements. Pen. Code, § 286(c)(2), (3), (k).
- "Consent" Defined. Pen. Code, §§ 261.6, 261.7.
- "Duress" Defined. *People v. Guenther* (2024) 104 Cal.App.5th 483, 513–521 [324 Cal.Rptr.3d 765]; *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].
- "Menace" Defined. Pen. Code, § 261(c) [in context of rape].
- "Sodomy" Defined. Pen. Code, § 286(a); see *People v. Singh* (1923) 62 Cal.App. 450, 452 [217 P. 121] [ejaculation is not required].
- "Threatening to Retaliate" Defined. Pen. Code, § 286(*l*).
- "Fear" Defined. *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856 [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]; see also *People v. Guido* (2005) 125 Cal.App.4th 566, 574 [22 Cal.Rptr.3d 826].
- Duress Caused by Threats of Retribution. *People v. Guenther, supra,* 104 Cal.App.5th at pp. 516–521 [324 Cal.Rptr.3d 765].
- Prior Version of This Instruction Upheld. *People v. Guenther, supra,* 104 Cal.App.5th at p. 521.

COMMENTARY

Penal Code section 286 requires that the sodomy be "against the will" of the other person. (Pen. Code, § 286(c)(2), (3), (k).) "Against the will" has been defined as "without consent." (*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 includes a definition of the sufficiency of "fear" because that term has meaning in the context of forcible sodomy that is technical and may not be readily apparent to jurors. (See *People v. Reyes, supra,* ~~(1984)~~ 153 Cal.App.3d ~~803,~~at p. 810 ~~[200 Cal.Rptr. 651]~~ [fear]; *People v. Iniguez, supra,* ~~(1994)~~ 7 Cal.4th ~~847,~~at pp. 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 286 does not define either term. (*People v. Pitmon, supra,* ~~(1985)~~ 170 Cal.App.3d ~~38,~~at p. 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, supra,* ~~(2004)~~ 33 Cal.4th ~~999,~~at pp. 1004–1010 ~~[16 Cal.Rptr.3d 869, 94 P.3d 1071],~~ and *People v. Pitmon*, *supra*, 170 Cal.App.3d at 50. The definition of "menace" is based on the statutory definition contained in Penal Code section 261 (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 former 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, supra,* ~~(2004)~~ 33 Cal.4th ~~1015,~~at pp. 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, [former] 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, supra,* ~~(1987)~~ 190 Cal.App.3d ~~248,~~at pp. 257–258 ~~[235 Cal.Rptr. 361]~~.)

(*Ibid.* [emphasis in original]; see also *People v. Guido* (2005) 125 Cal.App.4th 566, 574 [22 Cal.Rptr.3d 826].)

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 Sodomy. Pen. Code, § 220; see *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible crime is charged].
- Attempted Forcible Sodomy. Pen. Code, §§ 664, 286.
- Battery. Pen. Code, § 242; *People v. Hughes* (2002) 27 Cal.4th 287, 366 [116 Cal.Rptr.2d 401, 39 P.3d 432].

Non-forcible 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 sodomy 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.) 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 sodomy was withdrawn, see CALCRIM No. 1000, *Rape by Force, Fear, or Threats*, for language that may be adapted for use in this instruction.

Victim Must Be Alive

Sodomy requires that the victim be alive at the moment of penetration. (*People v. Davis* (1995) 10 Cal.4th 463, 521, fn. 20 [41 Cal.Rptr.2d 826, 896 P.2d 119]; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1176 [270 Cal.Rptr. 286, 791 P.2d 965].) Sodomy with a deceased victim can constitute attempted sodomy if the defendant attempted an act of forcible sodomy while the victim was alive or with the mistaken belief that the victim was alive. (*People v. Davis, supra,* 10 Cal.4th at p. 521, fn. 20; *People v. Hart* (1999) 20 Cal.4th 546, 611 [85 Cal.Rptr.2d 132, 976 P.2d 683].)

Penetration May Be Through Victim's Clothing

If there is penetration into a victim's anus by a perpetrator's sexual organ, it is sodomy, even if the victim is wearing clothing at the time. (*People v. Ribera* (2005) 133 Cal.App.4th 81, 85–86 [34 Cal.Rptr.3d 538].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (~~4~~5th ed. 20~~1~~2~~2~~4) Sex Offenses and Crimes Against Decency, §§ 2~~79, 28, _~~3~~0~~1, ~~178~~229.

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

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

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 t~~To *consent,* a person must know the nature of the act or transaction involved, act freely and voluntarily, and positively cooperate by act or attitude~~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, April 2020, October 2021, March 2022, February 2026

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].) The statutory presumption that a minor over 14 is incapable of legal consent does not apply to a violation of Penal Code section 289(a)(1)(C). (*People v. Duarte-Lara* (2020) 49 Cal.App.5th 332, 339 [262 Cal.Rptr.3d 774].)

Related Instructions

CALCRIM No. 3185, *Sex Offenses: Sentencing Factor—Using Force or Fear Against Minor Under 14 Years/14 Years or Older*.

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]; *People v. Duarte-Lara*, *supra,* ~~(2020)~~ 49 Cal.App.5th ~~332,~~at p. 339 ~~[262 Cal.Rptr.3d 774]~~ [noting minor over 14].
- "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 includes 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, supra,* ~~(1985)~~ 170 Cal.App.3d ~~38,~~at p. 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, supra,* ~~(2004)~~ 33 Cal.4th ~~999,~~at pp. 1004–1010 ~~[16 Cal.Rptr.3d 869, 94 P.3d 1071]~~, and *People v. Pitmon, supra,* ~~(1985)~~ 170 Cal.App.3d ~~38,~~at p. 50 ~~[216 Cal.Rptr. 221]~~. The definition of "menace" is based on the statutory definition contained in Penal Code section 261 (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 former 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, supra,* ~~(2004)~~ 33 Cal.4th ~~1015,~~at pp. 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 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 (54th ed. 2024~~12~~) Sex Offenses and Crimes Against Decency, §§ 64 et seq.~~56~~, 70–71~~58~~, 229~~178~~.

3 Witkin & Epstein, California Criminal Law (54th ed. 2024~~12~~) Punishment, § 332~~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 §§ 12:18, 12:19 (The Rutter Group).

1170. Failure to Register as Sex Offender (Pen. Code, § 290(b))

The defendant is charged [in Count __] with failing to register as a sex offender [in violation of Penal Code section 290(b)].

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

1. **The defendant was previously (convicted of/found to have committed)** _____ *<specify the offense for which the defendant is allegedly required to register>***;**

2. **The defendant resided (in** _____ *<insert name of city>***, California/in an unincorporated area or a city with no police department in** _____ *<insert name of county>* **County, California/on the campus or in the facilities of** _____ *<insert name of university or college>* **in California);**

3. **The defendant actually knew (he/she) had a duty under Penal Code section 290 to register as a sex offender [living at** _____*<insert specific address or addresses in California>*] **and that (he/she) had to register within five working days of** _____*<insert triggering event specified in Penal Code section 290(b)>***;**

AND

<Alternative 4A—change of residence>

[4. The defendant willfully failed to register as a sex offender with the (police chief of that city/sheriff of that county/the police chief of that campus or its facilities) within five working days of (coming into/ [or] changing (his/her) residence within) that (city/county/campus).]

<Alternative 4B—birthday>

[4. The defendant willfully failed to annually update (his/her) registration as a sex offender with the (police chief of that city/sheriff of that county/the police chief of that campus) within five working days of (his/her) birthday.]

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.

[*Residence* means one or more addresses where someone regularly resides, regardless of the number of days or nights spent there, such as a shelter or structure that can be located by a street address. A *residence* may include, but is not limited to, houses, apartment buildings, motels, hotels, homeless shelters, and recreational and other vehicles.]

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*New January 2006; Revised August 2006, April 2010, October 2010, February 2013, February 2014, August 2014, August 2015, February 2026**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. ~~This instruction is based on the language of the statute effective January 1, 2006. The instruction may not be appropriate for offenses that occurred before that date. Note also that this is an area where case law is developing rapidly. The court should review recent decisions on Penal Code section 290 before instructing.~~

In element 1, if the specific offense triggering the registration requirement is spousal rape (under repealed Penal Code section 262), the instruction must include the requirement that the offense involved the use of "force or violence." (*People v. Mason* (2013) 218 Cal.App.4th 818, 822-827 [160 Cal.Rptr.3d 516].)

In element 3, choose the option "living at _____<*insert specific address in California*> if there is an issue whether the defendant actually knew that a place where he or she spent time was a residence triggering the duty to register. (*People v. Cohens* (2009) 178 Cal.App.4th 1442, 1451 [101 Cal.Rptr.3d 289]; *People v. LeCorno* (2003) 109 Cal.App.4th 1058, 1068-1069 [135 Cal.Rptr.2d 775].

In element 4, give alternative 4A if the defendant is charged with failing to register within five working days of changing his or her residence or becoming homeless. (Pen. Code, § 290(b).) Give alternative 4B if the defendant is charged with failing to update his or her registration within five working days of his or her birthday. (Pen. Code, § 290.012.)

If the defendant is charged with a prior conviction for failing to register, give 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. (See *People v. Merkley* (1996) 51 Cal.App.4th 472, 476 [58 Cal.Rptr. 2d 21]; *People v. Bouzas* (1991) 53 Cal.3d 467, 477–480

[279 Cal.Rptr. 847, 807 P.2d 1076]; *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].)

For the charge of failure to register, it is error to give an instruction on general criminal intent that informs the jury that a person is "acting with general criminal intent, even though he may not know that his act or conduct is unlawful." (*People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rptr.3d 260, 96 P.3d 507]; *People v. Edgar* (2002) 104 Cal.App.4th 210, 219 [127 Cal.Rptr.2d 662].) In CALCRIM No. 252, *Joint Operation of Act and Mental State*, give the instruction "for crimes requiring one or more specific mental states." ~~The court should consider whether it is more appropriate to give CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*, or to give a modified version of CALCRIM No. 250, *Union of Act and Intent: General Intent*, as explained in the Related Issues section to CALCRIM No. 250.~~

AUTHORITY

- Elements. Pen. Code, §§ 290(b) [change in residence], 290.012 [birthday]; *People v. Garcia* (2001) 25 Cal.4th 744, 752 [107 Cal.Rptr.2d 355, 23 P.3d 590].
- Spousal Rape (under Repealed Pen. Code, § 262) Not Registerable Offense Absent Force or Violence. *People v. Mason* (2013) 218 Cal.App.4th 818, 825-826 [160 Cal.Rptr.3d 516].
- Definition of Residence. Pen. Code, § 290.011(g); *People v. Deluca* (2014) 228 Cal.App.4th 1263, 1266–1267 [176 Cal.Rptr.3d 419]; *People v. Gonzales* (2010) 183 Cal.App.4th 24, 35 [107 Cal.Rptr.3d 11].
- "Willfully" Defined. Pen. Code, § 7(1); see *People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rptr.3d 260, 96 P.3d 507].
- Actual Knowledge of Duty Required. *People v. Garcia* (2001) 25 Cal.4th 744, 752 [107 Cal.Rptr.2d 355, 23 P.3d 590].
- Continuing Offense. *Wright v. Superior Court* (1997) 15 Cal.4th 521, 527–528 [63 Cal.Rptr.2d 322, 936 P.2d 101].
- General Intent Crime. *People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rptr.3d 260, 96 P.3d 507]; *People v. Johnson* (1998) 67 Cal.App.4th 67, 72 [78 Cal.Rptr.2d 795].
- No Duty to Define Residence. *People v. McCleod* (1997) 55 Cal.App.4th 1205, 1219 [64 Cal.Rptr.2d 545].
- Registration is Not Punishment. *In re Alva* (2004) 33 Cal.4th 254, 262 [14 Cal.Rptr.3d 811, 92 P.3d 311].

- Jury May Consider Evidence That Significant Involuntary Condition Deprived Defendant of Actual Knowledge. *People v. Sorden* (2005) 36 Cal.4th 65, 72 [29 Cal.Rptr.3d 777, 113 P.3d 565].
- People Must Prove Defendant Was California Resident at Time of Offense. *People v Wallace* (2009) 176 Cal.App.4th 1088, 1102-1104 [98 Cal.Rptr.3d 618].
- Defendant Must Have Actual Knowledge That Location is Residence for Purpose of Duty to Register. (*People v. Aragon* (2012) 207 Cal.App.4th 504, 510 [143 Cal.Rptr.3d 476]; *People v. LeCorno* (2003) 109 Cal.App.4th 1058, 1067-1070 [135 Cal.Rptr.2d 775].

RELATED ISSUES

Other Violations of Section 290

This instruction applies to violations under Penal Code sections 290(b) and 290.012. Section 290 imposes numerous other duties on persons convicted of sex offenses. For example, a registered sex offender must:

1. Notify the agency where he or she was *last* registered of any new address or location, whether inside or outside California, or any name change. (See Pen. Code, §§ 290.013–290.014; *People v. Smith* (2004) 32 Cal.4th 792, 800–802 [11 Cal.Rptr.3d 290, 86 P.3d 348] [under former Pen. Code, § 290(f), which allowed notice of change of address in writing, there is sufficient notice if defendant mails change of address form even if agency does not receive it]; *People v. Annin* (2004) 116 Cal.App.4th 725, 737–740 [10 Cal.Rptr.3d 712] [discussing meaning of "changed" residence]; *People v. Davis* (2002) 102 Cal.App.4th 377, 385 [125 Cal.Rptr.2d 519] [must instruct on requirement of actual knowledge of duty to notify law enforcement when moving out of jurisdiction]; see also *People v. Franklin* (1999) 20 Cal.4th 249, 255–256 [84 Cal.Rptr.2d 241, 975 P.2d 30] [construing former Pen. Code, § 290(f), which did not specifically require registration when registrant moved outside California].)
2. Register multiple residences wherever he or she regularly resides. (See Pen. Code, § 290.010; *People v. Edgar* (2002) 104 Cal.App.4th 210, 219–222 [127 Cal.Rptr.2d 662] [court failed to instruct that jury must find that defendant actually knew of duty to register multiple residences; opinion cites former section 290(a)(1)(B)]; *People v. Vigil* (2001) 94 Cal.App.4th 485, 501 [114 Cal.Rptr.2d 331].)
3. Update his or her registration at least once every 30 days if he or she is "a transient." (See Pen. Code, § 290.011.)

A sexually violent predator who is released from custody must verify his or her address at least once every 90 days and verify any place of employment. (See Pen. Code, § 290.012.) Other special requirements govern:

1. Residents of other states who must register in their home state but are working or attending school in California. (See Pen. Code, § 290.002.)
2. Sex offenders enrolled at, employed by, or carrying on a vocation at any university, college, community college, or other institution of higher learning. (See Pen. Code, § 290.01.)

In addition, providing false information on the registration form is a violation of section 290.018. (See also *People v. Chan* (2005) 128 Cal.App.4th 408 [26 Cal.Rptr.3d 878].)

Forgetting to Register

If a person actually knows of his or her duty to register, "just forgetting" is not a defense. (*People v. Barker* (2004) 34 Cal.4th 345, 356–357 [18 Cal.Rptr.3d 260, 96 P.3d 507].) In reaching this conclusion, the court stated, "[w]e do not here express an opinion as to whether forgetfulness resulting from, for example, an *acute psychological condition*, or a *chronic deficit of memory or intelligence*, might negate the willfulness required for a section 290 violation." (*Id.* at p. 358 [italics in original].)

Registration Requirement for Consensual Oral Copulation With Minor

Penal Code section 290 requires lifetime registration for a person convicted of consensual oral copulation with a minor but does not require such registration for a person convicted of consensual sexual intercourse with a minor. (Pen. Code, § 290(c).) The mandatory registration requirement for consensual oral copulation with a minor does not deny equal protection of laws. (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871 [183 Cal.Rptr.3d 96, 341 P.3d 1075] [overruling *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1191, 1205–1206 [39 Cal.Rptr.3d 821, 129 P.3d 29]].)

Moving Between Counties—Failure to Notify County Leaving and County Moving To Can Only Be Punished as One Offense

A person who changes residences a single time, failing to notify both the jurisdiction he or she is departing from and the jurisdiction he or she is entering, commits two violations of Penal Code section 290 but can only be punished for one. (*People v. Britt* (2004) 32 Cal.4th 944, 953–954 [12 Cal.Rptr.3d 66, 87 P.3d 812].) Further, if the defendant has been prosecuted in one county for the violation, and the prosecutor in the second county is aware of the previous prosecution, the second county cannot subsequently prosecute the defendant. (*Id.* at pp. 955–956.)

Notice of Duty to Register on Release From Confinement

No reported case has held that the technical notice requirements are elements of the offense, especially when the jury is told that they must find the defendant had actual knowledge. (See former Pen. Code, § 290(b), after October 13, 2007, section 290.017; *People v. Garcia* (2001) 25 Cal.4th 744, 754, 755–756 [107 Cal.Rptr.2d 355, 23 P.3d 590] [if defendant willfully and knowingly failed to register, *Buford* does not require reversal merely because authorities failed to comply with technical requirements]; see also *People v. Buford* (1974) 42 Cal.App.3d 975, 987 [117 Cal.Rptr. 333] [revoking probation for noncompliance with section 290, an abuse of discretion when court and jail officials also failed to comply]; *People v. Tol*oy (2015) 239 Cal.App.4th 1116, 1119 [191 Cal.Rptr.3d 801] [failure to notify defendant of requirement to reregister did not preclude conviction in light of defendant's actual knowledge of duty to reregister].) The court in *Garcia* did state, however, that the "court's instructions on 'willfulness' should have required proof that, in addition to being formally notified by the appropriate officers as required by section 290, in order to willfully violate section 290 the defendant must actually know of his duty to register." (*People v. Garcia, supra,* 25 Cal.4th at p. 754.)

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (54th ed. 20241~~2~~) Punishment §§ 15736-17649.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction*, § 93.04[2] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.20[1][a], Ch. 142, *Crimes Against the Person*, § 142.21 (Matthew Bender).

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

1191A. Evidence of Uncharged Sex Offense

The People presented evidence that the defendant [may have] committed the crime[s] of _____ <*insert description of offense[s]*> that (was/were) not charged in this case. (This/These) crime[s] (is/are) defined for you in these instructions.

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

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

If you decide that the defendant committed the uncharged offense[s], you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit [and did commit] _____ <*insert charged sex offense[s]*>, as charged here. If you conclude that the defendant committed the uncharged offense[s], that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of _____ <*insert charged sex offense[s]*>. The People must still prove (the/each) _____ (charge/ [and] allegation) beyond a reasonable doubt.

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

New January 2006; Revised April 2008, February 2013, February 2014, March 2017, September 2019, September 2024, * *February 2026*
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

Although there is ordinarily no sua sponte duty (*People v. Cottone* (2013) 57 Cal.4th 269, 293, fn. 15 [159 Cal.Rptr.3d 385, 303 P.3d 1163]), the court must

give this instruction on request when evidence of other sexual offenses has been introduced. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [error to refuse limiting instruction on request]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1317–1318 [97 Cal.Rptr.2d 727] [in context of prior acts of domestic violence].)

Evidence Code section 1108(a) provides that "evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101." Subdivision (d)(1) defines "sexual offense" as "a crime under the law of a state or of the United States that involved any of the following[,]" listing specific sections of the Penal Code as well as specified sexual conduct. In the first sentence, the court must insert the name of the offense or offenses allegedly shown by the evidence. The court **must** also instruct the jury on elements of the offense or offenses.

In the fourth paragraph, the committee has placed the phrase "and did commit" in brackets. One appellate court has criticized instructing the jury that it may draw an inference about disposition. (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823].) The court should review the Commentary section below and give the bracketed phrase at its discretion.

Give the bracketed sentence that begins with "Do not consider" on request.

Related Instructions

CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*

CALCRIM No. 1191B, *Evidence of Charged Sex Offense*.

CALCRIM No. 852A, *Evidence of Uncharged Domestic Violence.*

CALCRIM No. 852B, *Evidence of Charged Domestic Violence.*

CALCRIM No. 853A, *Evidence of Uncharged Abuse of Elder or Dependent Person*.

CALCRIM No. 853B, *Evidence of Charged Abuse of Elder or Dependent Person.*

AUTHORITY

- Instructional Requirement. Evid. Code, § 1108(a); see *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1016 [130 Cal.Rptr.2d 254, 62 P.3d 601]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 37 [107 Cal.Rptr.2d 100]; *People v. Falsetta, supra,* 21 Cal.4th at pp. 923–924 [dictum].
- This Instruction Upheld. *People v. Panighetti* (2023) 95 Cal.App.5th 978, 999–1000 [313 Cal.Rptr.3d 798]; *People v. Phea* (2018) 29 Cal.App.5th 583, 614 [240 Cal.Rptr.3d 526].

- "Sexual Offense" Defined. Evid. Code, § 1108(d)(1).
- Other Crimes Proved by Preponderance of Evidence. *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. James, supra,* 81 Cal.App.4th at p. 1359; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 146 [89 Cal.Rptr.2d 28].
- Propensity Evidence Alone Is Not Sufficient to Support Conviction Beyond a Reasonable Doubt. *People v. Hill* (2001) 86 Cal.App.4th 273, 277–278 [103 Cal.Rptr.2d 127]; see *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [101 Cal.Rptr.2d 624] [in context of prior acts of domestic violence]; *People v. James, supra,* 81 Cal.App.4th at pp. 1357–1358, fn. 8 [same].
- Charged Offenses Proved Beyond a Reasonable Doubt May Be Evidence of Propensity. *People v. Cruz* (2016) 2 Cal.App.5th 1178, 1184–1186 [206 Cal.Rptr.3d 835]; *People v. Villatoro* (2012) 54 Cal.4th 1152, 1161 [144 Cal.Rptr.3d 401, 281 P.3d 390].

COMMENTARY

The fourth paragraph of this instruction tells the jury that they may draw an inference of disposition. (See *People v. Hill, supra,* 86 Cal.App.4th at pp. 275–279; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334–1335 [92 Cal.Rptr.2d 433] [in context of prior acts of domestic violence].) One appellate court, however, suggests using more general terms to instruct the jury how they may use evidence of other sexual offenses, "leaving particular inferences for the argument of counsel and the jury's common sense." (*People v. James, supra,* 81 Cal.App.4th at p. 1357, fn. 8 [includes suggested instruction].) If the trial court adopts this approach, the fourth paragraph may be replaced with the following:

> If you decide that the defendant committed the other sexual offense[s], you may consider that evidence and weigh it together with all the other evidence received during the trial to help you determine whether the defendant committed _____ <*insert charged sex offense*>. Remember, however, that evidence of another sexual offense is not sufficient alone to find the defendant guilty of _____ <*insert charged sex offense*>. The People must still prove (the/each) _____(charge/ [and] allegation) of _____ <*insert charged sex offense*> beyond a reasonable doubt.

RELATED ISSUES

Constitutional Challenges

Evidence Code section 1108 does not violate a defendant's rights to due process (*People v. Falsetta, supra,* 21 Cal.4th at pp. 915–922; *People v. Branch* (2001) 91 Cal.App.4th 274, 281 [109 Cal.Rptr.2d 870]; *People v. Fitch* (1997) 55 Cal.App.4th 172, 184 [63 Cal.Rptr.2d 753]) or equal protection (*People v. Jennings, supra,* 81 Cal.App.4th at pp. 1310–1313; *People v. Fitch, supra,* 55 Cal.App.4th at pp. 184–185).

Expert Testimony

Evidence Code section 1108 does not authorize expert opinion evidence of sexual propensity during the prosecution's case-in-chief. (*People v. McFarland* (2000) 78 Cal.App.4th 489, 495–496 [92 Cal.Rptr.2d 884] [expert testified on ultimate issue of abnormal sexual interest in child].)

Rebuttal Evidence

When the prosecution has introduced evidence of other sexual offenses under Evidence Code section 1108(a), the defendant may introduce rebuttal character evidence in the form of opinion evidence, reputation evidence, and evidence of specific incidents of conduct under similar circumstances. (*People v. Callahan* (1999) 74 Cal.App.4th 356, 378–379 [87 Cal.Rptr.2d 838].)

Subsequent Offenses Admissible

"[E]vidence of subsequently committed sexual offenses may be admitted pursuant to Evidence Code section 1108." (*People v. Medina* (2003) 114 Cal.App.4th 897, 903 [8 Cal.Rptr.3d 158].)

Evidence of Acquittal

If the court admits evidence that the defendant committed a sexual offense that the defendant was previously acquitted of, the court must also admit evidence of the acquittal. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 663 [14 Cal.Rptr.3d 534].)

See also the Related Issues section of CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc*.

SECONDARY SOURCES

1 Witkin, California Evidence (6~~5~~th ed. 2024~~12~~) Circumstantial Evidence, §§ 110–117~~98–100~~.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.23[3][e][ii], [4] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure § 12:9 (The Rutter Group).

1191B. Evidence of Charged Sex Offense

The People have chargedpresented evidence that the defendant withcommitted the crime[s] of _____<*insert description of offense[s]*> **charged in Count[s]____** <*insert count[s] of sex offense[s] charged in this case* >**.**

If the People have proved beyond a reasonable doubt that the defendant committed one or more of these crimes, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit [and did commit] the other sex offense[s] charged in this case.

If you find that the defendant committed one or more of these crimes, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of another crime. The People must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt.

New March 2017; Revised September 2020, February 2026

BENCH NOTES

Instructional Duty

The court must give this instruction on request if the People rely on charged offenses as evidence of predisposition to commit similar crimes charged in the same case, Evid. Code section 355.

Related Instructions

CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*

CALCRIM No. 1191A, *Evidence of Uncharged Sex Offense.*

CALCRIM No. 852A, *Evidence of Uncharged Domestic Violence.*

CALCRIM No. 852B, *Evidence of Charged Domestic Violence.*

CALCRIM No. 853A, *Evidence of Uncharged Abuse of Elder or Dependent Person*.

CALCRIM No. 853B, *Evidence of Charged Abuse of Elder or Dependent Person.*

AUTHORITY

- Charged Offenses Proved Beyond a Reasonable Doubt May Be Evidence of Propensity. *People v. Cruz* (2016) 2 Cal.App.5th 1178, 1186-1187 [206 Cal.Rptr.3d 835]; *People v. Villatoro* (2012) 54 Cal.4th 1152, 1161 [144 Cal.Rptr.3d 401, 281 P.3d 390].
- This Instruction Upheld. *People v. Meneses* (2019) 41 Cal.App.5th 63, 68 [253 Cal.Rptr.3d 859]

SECONDARY SOURCES

1 Witkin, California Evidence (65th ed. 20241~~2~~) Circumstantial Evidence, §§ 110–117~~98–100~~.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.23[3][e][ii], [4] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure § 12:9 (The Rutter Group).

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

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

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

1. **The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to _____**<*insert name of complaining witness or member[s] of complaining witness's immediate family*>**;**

2. **The defendant made the threat (orally/in writing/by electronic communication device);**

3. **The defendant intended that (his/her) statement be understood as a threat [and intended that it be communicated to _____**<*insert name of complaining witness*>**];**

4. **Under the circumstances, the threat was so clear, immediate, unconditional, and specific that it communicated to _____**<*insert name of complaining witness*> **a serious intention and the immediate prospect that the threat would be carried out;**

5. **The threat actually caused _____**<*insert name of complaining witness*>**to be in sustained fear for (his/her) own safety [or for the safety of (his/her) immediate family];**

AND

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

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

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

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

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

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

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

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

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

<sentencing factor under Pen. Code, § 422(b)>
[If you find the defendant guilty of having made a criminal threat, you must then decide whether the People have proved the additional allegation that the defendant willfully threatened to commit a crime that would result in the death or great bodily injury of a person whom the defendant knew was a (state constitutional officer[,]/member of the legislature[,]/[state administrative law] judge [of a federally recognized Indian tribe/[or] court commissioner).

[A *state constitutional officer* is an elected or appointed official who occupies a position established by the California constitution. (The/A) _____ <*insert description, i.e, governor, attorney general, etc.*> is a state constitutional officer.]

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

New January 2006; Revised August 2006, June 2007, February 2015, February 2016, March 2018, September 2020, September 2022, October 2025, February 2026

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

AUTHORITY

- Elements. Pen. Code, § 422; *In re George T.* (2004) 33 Cal.4th 620, 630 [16 Cal.Rptr.3d 61, 93 P.3d 1007]; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536 [70 Cal.Rptr.2d 878].
- "Great Bodily Injury" Defined. Pen. Code, § 12022.7(f).
- "Willfully" Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Sufficiency of Threat Based on All Surrounding Circumstances. *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340 [69 Cal.Rptr.2d 728]; *People v. Butler, supra,* 85 Cal.App.4th at pp. 752–753; *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1218–1221 [62 Cal.Rptr.2d 303]; *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137–1138 [105 Cal.Rptr.2d 165]; *People v. Solis* (2001) 90

Cal.App.4th 1002, 1013–1014 [109 Cal.Rptr.2d 464]; see *People v. Garrett* (1994) 30 Cal.App.4th 962, 966–967 [36 Cal.Rptr.2d 33].

- Crime That Will Result in Great Bodily Injury Judged on Objective Standard. *People v. Maciel* (2003) 113 Cal.App.4th 679, 685 [6 Cal.Rptr.3d 628].
- Threatening Hand Gestures Not Verbal Threats Under Penal Code Section 422. *People v. Gonzalez* (2017) 2 Cal.5th 1138, 1147 [218 Cal.Rptr.3d 150, 394 P.3d 1074].
- Threat Not Required to Be Unconditional On Its Face. *People v. Bolin* (1998) 18 Cal.4th 297, 339–340 [75 Cal.Rptr.2d 412, 956 P.2d 374], disapproving *People v. Brown* (1993) 20 Cal.App.4th 1251, 1256 [25 Cal.Rptr.2d 76]; *People v. Melhado, supra,* 60 Cal.App.4th at p. 1540; *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1162 [38 Cal.Rptr.2d 328].
- Immediate Ability to Carry Out Threat Not Required. *People v. Lopez* (1999) 74 Cal.App.4th 675, 679 [88 Cal.Rptr.2d 252].
- Sustained Fear. *In re Ricky T., supra,* 87 Cal.App.4th at pp. 1139–1140; *People v. Solis, supra,* 90 Cal.App.4th at p. 1024; *People v. Allen* (1995) 33 Cal.App.4th 1149, 1155–1156 [40 Cal.Rptr.2d 7].
- Verbal Statement, Not Mere Conduct, Is Required. *People v. Franz* (2001) 88 Cal.App.4th 1426, 1441–1442 [106 Cal.Rptr.2d 773].
- Statute Not Unconstitutionally Vague. *People v. Maciel, supra,* 113 Cal.App.4th at pp. 684–686.
- Attempted Criminal Threats. *People v. Chandler, supra,* 60 Cal.4th at p. 525.
- Statute Authorizes Only One Conviction and One Punishment Per Victim, Per Threatening Encounter. *People v. Wilson* (2015) 234 Cal.App.4th 193, 202 [183 Cal.Rptr.3d 541].
- First Amendment Requires Recklessness as to Threat. *Counterman v. Colorado* (2023) 600 U.S. 66, 69 [143 S.Ct. 2106, 216 L.Ed.2d 775].
- "State Constitutional Officer" Defined. Gov. Code, § 75030.5(b).

COMMENTARY

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

Because a threat need only be "so … unconditional," a conditional threat may nonetheless violate Penal Code section 422 if it conveys a gravity of purpose and

the immediate prospect of execution. (See *People v. Bolin, supra,* 18 Cal.4th at pp. 339–340, disapproving *People v. Brown, supra,* 20 Cal.App.4th at p. 1256.)

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Ambiguous and Equivocal Poem Insufficient to Establish Criminal Threat

In *In re George T., supra,* 33 Cal.4th at pp. 628–629, a minor gave two classmates a poem containing language that referenced school shootings. The court held that "the text of the poem, understood in light of the surrounding circumstances, was not 'as unequivocal, unconditional, immediate, and specific as to convey to [the two students] a gravity of purpose and an immediate prospect of execution of the threat.' " (*Id.* at p. 638.)

Related Statutes

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

Unanimity Instruction

If the evidence discloses a greater number of threats than those charged, the prosecutor must make an election of the events relied on in the charges. When no election is made, the jury must be given a unanimity instruction. (*People v. Butler, supra,* 85 Cal.App.4th at p. 755, fn. 4; *People v. Melhado, supra,* 60 Cal.App.4th at pp. 1534, 1539.)

Whether Threat Actually Received

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

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (5th ed. 2024) Crimes Against Public Peace and Welfare, §§ 26–32.

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

1520. Attempted Arson (Pen. Code, § 455)

The defendant is charged [in Count __] with the crime of attempted arson [in violation of Penal Code section 455].

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

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

AND

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

A person *attempts to set fire to or burn* (a structure/forest land/property) when he or she places any flammable, explosive, or combustible material or device in or around it with the intent to set fire to it.

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.

As used here, someone acts *maliciously* when he or she intentionally does a wrongful act under circumstances that the direct, natural, and highly probable consequences would be the burning of the (structure/ [or] property/ [or] forest land) 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* is any brush-covered land, cut-over land, forest, grasslands, or woods.]

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

New January 2006; Revised September 2018, March 2023, February 2025, February 2026

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. Attempted arson is governed by Penal Code section 455, not the general attempt statute found in section 664. (*People v. Alberts* (1995) 32 Cal.App.4th 1424, 1427–1428 [37 Cal.Rptr.2d 401] [defendant was convicted under §§ 451 and 664; the higher sentence was reversed because § 455 governs attempted arson].)

AUTHORITY

- Elements. Pen. Code, § 455.
- "Structure" and "Forest Land" Defined. Pen. Code, § 450.
- "Maliciously" Defined. Pen. Code, § 450(e); *People v. Atkins* (2001) 25 Cal.4th 76, 88 [104 Cal.Rptr.2d 738, 18 P.3d 660]; *In re V.V.* (2011) 51 Cal.4th 1020, 1031, fn. 6 [125 Cal.Rptr.3d 421, 252 P.3d 979].
- "Willfully" Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- This Instruction Upheld. *People v. Rubino* (2017) 18 Cal.App.5th 407, 412–413 [227 Cal.Rptr.3d 75].

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (54th ed. 2024~~12~~) Crimes Against Property, §§ ~~2~~86~~8~~–297~~6~~.

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

1521–1529. Reserved for Future Use

1700. Burglary (Pen. Code, § 459)

The defendant is charged [in Count __] with burglary [in violation of Penal Code section 459].

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

1. **The defendant entered (a/an) (building/room within a building/locked vehicle/structure/**_____ *<insert other statutory target>*__);__**]**

[AND]

2. **When (he/she) entered (a/an) (building/room within the building/locked vehicle/structure/**_____ *<insert other statutory target>*__), (he/she) intended to commit (theft/ [or]__ _____ *<insert one or more felonies>*__).__

<If the evidence supports a defense theory that the crime was shoplifting as defined by Penal Code section 459.5, give paragraph 3A and the appropriate following optional paragraphs>

[AND]

[3A. The value of the property taken or intended to be taken was more than $950.00](;/.)]

[OR]

[3B. The structure that the defendant entered was a noncommercial establishment(;/,)]

[OR]

[3C. The structure was a commercial establishment that the defendant entered during non- business hours.]]

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

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

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

A burglary was committed if the defendant entered with the intent to commit (theft/ [or] _____ <*insert one or more felonies***). The defendant does not need to have actually committed (theft/ [or] _____ <***insert one or more felonies***>) as long as (he/she) entered with the intent to do so. [The People do not have to prove that the defendant actually committed (theft/ [or] _____ <***insert one or more felonies***>).]**

[Under the law of burglary, a person *enters a building* if some part of his or her body [or some object under his or her control] penetrates the area inside the building's outer boundary.]

[A building's *outer boundary* includes the area inside a window screen.] [An attached balcony designed to be entered only from inside of a private, residential apartment on the second or higher floor of a building is inside a building's *outer boundary*.]

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

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*New January 2006; Revised October 2010, February 2012, February 2013, August 2015, February 2026**

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

BENCH NOTES

Instructional Duty

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

If the crime charged is shoplifting, give CALCRIM No. 1703, *Shoplifting*, instead of this instruction.

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 second degree burglary is the only possible degree of burglary that the jury may return as their verdict, do not give CALCRIM No. 1701, *Burglary: Degrees*.

Although actual commission of the underlying theft or felony is not an element of burglary (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041–1042 [31 Cal.Rptr.2d 128, 874 P.2d 903]), the court has a **sua sponte** duty to instruct that the defendant must have intended to commit a felony and has a **sua sponte** duty to define the elements of the underlying felony. (*People v. Smith* (1978) 78 Cal.App.3d 698, 706 [144 Cal.Rptr. 330]; see also *People v. Hughes* (2002) 27 Cal.4th 287, 349 [116 Cal.Rptr.2d 401, 39 P.3d 432].) Give all appropriate instructions on theft or the felony alleged.

If the area alleged to have been entered is something other than a building or locked vehicle, insert the appropriate statutory target in the blanks in elements 1 and 2. Penal Code section 459 specifies the structures and places that may be the targets of burglary. The list includes a house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, floating home as defined in Health and Safety Code section 18075.55(d), railroad car, locked or sealed cargo container whether or not mounted on a vehicle, trailer coach as defined in Vehicle Code section 635, house car as defined in Vehicle Code section 362, inhabited camper as defined in Vehicle Code section 243, locked vehicle as defined by the Vehicle Code, aircraft as defined in Public Utilities Code section 21012, or mine or any underground portion thereof. (See Pen. Code, § 459.)

On request, give the bracketed paragraph that begins with "Under the law of burglary," if there is evidence that only a portion of the defendant's body, or an instrument, tool, or other object under his or control, entered the building. (See *People v. Valencia* (2002) 28 Cal.4th 1, 7–8 [120 Cal.Rptr.2d 131, 46 P.3d 920]; *People v. Davis* (1998) 18 Cal.4th 712, 717–722 [76 Cal.Rptr.2d 770, 958 P.2d 1083].)

On request, give the bracketed sentence defining "outer boundary" if there is evidence that the outer boundary of a building for purposes of burglary was a window screen. (See *People v. Valencia, supra,* ~~(2002)~~ 28 Cal.4th ~~1,~~at pp. 12–13 ~~[120 Cal.Rptr.2d 131, 46 P.3d 920]~~.)

Whenever a private, residential apartment and its balcony are on the second or higher floor of a building, and the balcony is designed to be entered only from inside the apartment, that balcony is part of the apartment and its railing constitutes the apartment's "outer boundary." (*People v. Yarbrough* (2012) 54 Cal.4th 889, 894 [144 Cal.Rptr.3d 164, 281 P.3d 68].)

If multiple underlying felonies are charged, give the bracketed paragraph that begins with "The People allege that the defendant intended to commit ~~either~~." (*People v. Failla* (1966) 64 Cal.2d 560, 569 [51 Cal.Rptr. 103, 414 P.2d 39]; *People v. Griffin* (2001) 90 Cal.App.4th 741, 750 [109 Cal.Rptr.2d 273].)

If the defendant is charged with first degree burglary, give CALCRIM No. 1701, *Burglary: Degrees*.

AUTHORITY

- Elements. Pen. Code, §§ 459, 459.5.
- Instructional Requirements. *People v. Failla*, *supra*, ~~(1966)~~ 64 Cal.2d ~~560,~~at pp. 564, 568–569 ~~[51 Cal.Rptr. 103, 414 P.2d 39]~~; *People v. Smith*, *supra*, ~~(1978)~~ 78 Cal.App.3d ~~698,~~at pp. 706–711 ~~[144 Cal.Rptr. 330]~~; *People v. Montoya*, *supra*, ~~(1994)~~ 7 Cal.4th ~~1027,~~at pp. 1041–1042 ~~[31 Cal.Rptr.2d 128, 874 P.2d 903]~~.
- Burden for Consent Defense Is to Raise Reasonable Doubt. *People v. Sherow* (2011) 196 Cal.App.4th 1296, 1308–1309 [128 Cal.Rptr.3d 255].

LESSER INCLUDED OFFENSES

- Attempted Burglary. Pen. Code, §§ 663, 459.
- Tampering With a Vehicle. Veh. Code, § 10852; *People v. Mooney* (1983) 145 Cal.App.3d 502, 504–507 [193 Cal.Rptr. 381] [if burglary of automobile charged].

RELATED ISSUES

Auto Burglary–Entry of Locked Vehicle

Under Penal Code section 459, forced entry of a locked vehicle constitutes burglary. (*People v. Young K.* (1996) 49 Cal.App.4th 861, 863 [57 Cal.Rptr.2d 12].) However, there must be evidence of forced entry. (See *People v. Woods* (1980) 112 Cal.App.3d 226, 228–231 [169 Cal.Rptr. 179] [if entry occurs through window deliberately left open, some evidence of forced entry must exist for burglary conviction]; *People v. Malcolm* (1975) 47 Cal.App.3d 217, 220–223 [120 Cal.Rptr. 667] [pushing open broken wing lock on window, reaching one's arm inside vehicle, and unlocking car door evidence of forced entry]; *People v. Gray* (2025) 109 Cal.App.5th 680, 686 [330 Cal.Rptr.3d 604] [cutting gate latch and lock of truck's enclosed cargo area evidence of forced entry].) Opening an unlocked passenger door and lifting a trunk latch to gain access to the trunk is not an auto burglary. (*People v. Allen* (2001) 86 Cal.App.4th 909, 917–918 [103 Cal.Rptr.2d 626].)

Auto Burglary–Definition of Locked

To lock, for purposes of auto burglary, is "to make fast by interlinking or interlacing of parts … [such that] some force [is] required to break the seal to permit entry . . . ." (*In re Lamont R.* (1988) 200 Cal.App.3d 244, 247 [245 Cal.Rptr. 870], quoting *People v. Massie* (1966) 241 Cal.App.2d 812, 817 [51 Cal.Rptr. 18] [vehicle was not locked where chains were wrapped around the doors and hooked together]; compare *People v. Malcolm*, *supra,* ~~(1975)~~ 47 Cal.App.3d ~~217,~~at pp. 220–223 ~~[120 Cal.Rptr. 667]~~ [vehicle with locked doors but broken wing lock that prevented window from being locked, was for all intents and purposes a locked vehicle].)

Auto Burglary–Intent to Steal

Breaking into a locked car with the intent to steal the vehicle constitutes auto burglary. (*People v. Teamer* (1993) 20 Cal.App.4th 1454, 1457–1461 [25 Cal.Rptr.2d 296]; see also *People v. Blalock* (1971) 20 Cal.App.3d 1078, 1082 [98 Cal.Rptr. 231] [auto burglary includes entry into locked trunk of vehicle].) However, breaking into the headlamp housings of an automobile with the intent to steal the headlamps is not auto burglary. (*People v. Young K.*, *supra,* ~~(1996)~~ 49 Cal.App.4th ~~861,~~at p. 864 ~~[57 Cal.Rptr.2d 12]~~ [stealing headlamps, windshield wipers, or hubcaps are thefts, or attempted thefts, auto tampering, or acts of vandalism, not burglaries].)

Building

A building has been defined for purposes of burglary as "any structure which has walls on all sides and is covered by a roof." (*In re Amber S.* (1995) 33 Cal.App.4th 185, 187 [39 Cal.Rptr.2d 672].) Courts have construed "building" broadly and found the following structures sufficient for purposes of burglary: a telephone booth, a popcorn stand on wheels, a powder magazine dug out of a hillside, a wire chicken coop, and a loading dock constructed of chain link fence. (*People v. Brooks* (1982) 133 Cal.App.3d 200, 204–205 [183 Cal.Rptr. 773].) However, the definition of building is not without limits and courts have focused on "whether the nature of a structure's composition is such that a reasonable person would expect some protection from unauthorized intrusions." (*In re Amber S.*, *supra,* ~~(1995)~~ 33 Cal.App.4th ~~185,~~at p. 187 ~~[39 Cal.Rptr.2d 672]~~ [open pole barn is not a building]; see *People v. Knight* (1988) 204 Cal.App.3d 1420, 1423–1424 [252 Cal.Rptr. 17] [electric company's "gang box," a container large enough to hold people, is not a building; such property is protected by Penal Code sections governing theft].)

Outer Boundary

A building's outer boundary includes any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization. Under this test, a window screen is part of the outer boundary of a building for purposes of burglary. (*People v. Valencia*, *supra,* ~~(2002)~~ 28 Cal.4th ~~1,~~at pp. 12–13 ~~[120 Cal.Rptr.2d 131, 46 P.3d 920]~~.) Whether penetration into an area behind a window screen amounts to an entry of a building

within the meaning of the burglary statute is a question of law. The instructions must resolve such a legal issue for the jury. (*Id*. at p. 16.)

Attached Residential Balconies

An attached residential balcony is part of an inhabited dwelling. (*People v. Jackson* (2010) 190 Cal.App.4th 918, 924-–925 [118 Cal.Rptr.3d 623] [balcony was "functionally interconnected to and immediately contiguous to . . . [part of] the apartment . . . used for 'residential activities'"]; but see dictum in *People v. Valencia, supra,* ~~(2002)~~ 28 Cal.4th ~~1,~~at p. 11, fn. 5 ~~[120 Cal.Rptr.2d 131, 46 P.3d 920]~~ ["unenclosed balcony" is not structure satisfying "reasonable belief test"].)

Theft

Any one of the different theories of theft will satisfy the larcenous intent required for burglary. (*People v. Dingle* (1985) 174 Cal.App.3d 21, 29–30 [219 Cal.Rptr. 707] [entry into building to use person's telephone fraudulently]; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 30–31 [46 Cal.Rptr.2d 840].)

Burglarizing One's Own Home—Possessory Interest

A person cannot burglarize his or her own home as long as he or she has an unconditional possessory right of entry. (*People v. Gauze* (1975) 15 Cal.3d 709, 714 [125 Cal.Rptr. 773, 542 P.2d 1365].) However, a family member who has moved out of the family home commits burglary if he or she makes an unauthorized entry with a felonious intent, since he or she has no claim of a right to enter that residence. (*In re Richard M.* (1988) 205 Cal.App.3d 7, 15–16 [252 Cal.Rptr. 36] [defendant, who lived at youth rehabilitation center, properly convicted of burglary for entering his parent's home and taking property]; *People v. Davenport* (1990) 219 Cal.App.3d 885, 889–893 [268 Cal.Rptr. 501] [defendant convicted of burglarizing cabin owned and occupied by his estranged wife and her parents]; *People v. Sears* (1965) 62 Cal.2d 737, 746 [44 Cal.Rptr. 330, 401 P.2d 938], overruled on other grounds by *People v. Cahill* (1993) 5 Cal.4th 478, 494, 510 [20 Cal.Rptr.2d 582, 853 P.2d 1037] [burglary conviction proper where husband had moved out of family home three weeks before and had no right to enter without permission]; compare *Fortes v. Municipal Court* (1980) 113 Cal.App.3d 704, 712–714 [170 Cal.Rptr. 292] [husband had unconditional possessory interest in jointly owned home; his access to the house was not limited and strictly permissive, as in *Sears*].)

Consent

While lack of consent is not an element of burglary, consent by the owner or occupant of property may constitute a defense to burglary. (*People v. Sherow, supra,* ~~(2011)~~ 196 Cal.App.4th ~~1296,~~at p. 1302 ~~[128 Cal.Rptr.3d 255]~~; *People v. Felix* (1994) 23 Cal.App.4th 1385, 1397–1398 [28 Cal.Rptr.2d 860]; *People v. Superior Court (Granillo)* (1988) 205 Cal.App.3d 1478, 1485 [253 Cal.Rptr. 316] [when an undercover officer invites a potential buyer of stolen property into his warehouse of stolen goods, in order to catch would-be buyers, no burglary occurred].) The consent must be express and clear; the owner/occupant must both expressly permit the person to enter and know of the felonious or larcenous intent

of the invitee. (*People v. Felix, supra,* (1994) 23 Cal.App.4th 1385,at pp. 1397–1398 [28 Cal.Rptr.2d 860].) A person who enters for a felonious purpose, however, may be found guilty of burglary even if he or she enters with the owner's or occupant's consent. (*People v. Frye* (1998) 18 Cal.4th 894, 954 [77 Cal.Rptr.2d 25, 959 P.2d 183] [no evidence of unconditional possessory right to enter].) A joint property owner/occupant cannot give consent to a third party to enter and commit a felony on the other owner/occupant. (*People v. Clayton* (1998) 65 Cal.App.4th 418, 420–423 [76 Cal.Rptr.2d 536] [husband's consent did not preclude a burglary conviction based upon defendant's entry of premises with the intent to murder wife].) The defense of consent is established when the evidence raises a reasonable doubt of consent by the owner or occupant. (*People v. Sherow, supra,* (2011) 196 Cal.App.4th 1296,at p. 1309 [128 Cal.Rptr.3d 255]).

Entry by Instrument

When an entry is made by an instrument, a burglary occurs if the instrument passes the boundary of the building and if the entry is the type that the burglary statute intended to prohibit. (*People v. Davis* (1998) 18 Cal.4th 712, 717–722 [76 Cal.Rptr.2d 770, 958 P.2d 1083] [placing forged check in chute of walk-up window of check-cashing facility was not entry for purposes of burglary] disapproving of *People v. Ravenscroft* (1988) 198 Cal.App.3d 639, 643–644 [243 Cal.Rptr. 827] [insertion of ATM card into machine was burglary].)

Multiple Convictions

Courts have adopted different tests for multi-entry burglary cases. In *In re William S.* (1989) 208 Cal.App.3d 313, 316–318 [256 Cal.Rptr. 64], the court analogized burglary to sex crimes and adopted the following test formulated in *People v. Hammon* (1987) 191 Cal.App.3d 1084, 1099 [236 Cal.Rptr. 822] [multiple penetration case]: " '[W]hen there is a pause . . . sufficient to give defendant a reasonable opportunity to reflect upon his conduct, and the [action by the defendant] is nevertheless renewed, a new and separate crime is committed.' " (*In re William S., supra,* 208 Cal.App.3d at p. 317.) The court in *In re William S.* adopted this test because it was concerned that under certain circumstances, allowing separate convictions for every entry could produce "absurd results." The court gave this example: where "a thief reaches into a window twice attempting, unsuccessfully, to steal the same potted geranium, he could potentially be convicted of two separate counts." (*Ibid.*) The *In re William S.* test has been called into serious doubt by *People v. Harrison* (1989) 48 Cal.3d 321, 332–334 [256 Cal.Rptr. 401, 768 P.2d 1078], which disapproved of *Hammon*. *Harrison* held that for sex crimes each penetration equals a new offense. (*People v. Harrison, supra,* 48 Cal.3d at p. 329.)

The court in *People v. Washington* (1996) 50 Cal.App.4th 568 [57 Cal.Rptr.2d 774], a burglary case, agreed with *In re William S.* to the extent that burglary is analogous to crimes of sexual penetration. Following *Harrison*, the court held that each separate entry into a building or structure with the requisite intent is a burglary even if multiple entries are made into the same building or as part of the same plan. (*People v. Washington*, *supra*, 50 Cal.App.4th at pp. 574–579; see also

2 Witkin and Epstein, Cal. Criminal Law (2d. ed. 1999 Supp.) "Multiple Entries," § 662A, p. 38.) The court further stated that any "concern about absurd results are [sic] better resolved under [Penal Code] section 654, which limits the punishment for separate offenses committed during a single transaction, than by [adopting] a rule that, in effect, creates the new crime of continuous burglary." (*People v. Washington, supra,* 50 Cal.App.4th at p. 578.)

Room

Penal Code section 459 includes "room" as one of the areas that may be entered for purposes of burglary. (Pen. Code, § 459.) An area within a building or structure is considered a room if there is some designated boundary, such as a partition or counter, separating it from the rest of the building. It is not necessary for the walls or partition to touch the ceiling of the building. (*People v. Mackabee* (1989) 214 Cal.App.3d 1250, 1257–1258 [263 Cal.Rptr. 183] [office area set off by counters was a room for purposes of burglary].) Each unit within a structure may constitute a separate "room" for which a defendant can be convicted on separate counts of burglary. (*People v. O'Keefe* (1990) 222 Cal.App.3d 517, 521 [271 Cal.Rptr. 769] [individual dormitory rooms]; *People v. Church* (1989) 215 Cal.App.3d 1151, 1159 [264 Cal.Rptr. 49] [separate business offices in same building].)

Entry into a bedroom within a single-family house with the requisite intent can support a burglary conviction if that intent was formed only after entry into the house. (*People v. Sparks* (2002) 28 Cal.4th 71, 86–87 [120 Cal.Rptr.2d 508, 47 P.3d 289] ["the unadorned word 'room' in section 459 reasonably must be given its ordinary meaning"]; see *People v. McCormack* (1991) 234 Cal.App.3d 253, 255–257 [285 Cal.Rptr. 504]; *People v. Young* (1884) 65 Cal. 225, 226 [3 P. 813].) However, entry into multiple rooms within one apartment or house cannot support multiple burglary convictions unless it is established that each room is a separate dwelling space, whose occupant has a separate, reasonable expectation of privacy. (*People v. Richardson* (2004) 117 Cal.App.4th 570, 575 [11 Cal.Rptr.3d 802]; see also *People v. Thomas* (1991) 235 Cal.App.3d 899, 906, fn. 2 [1 Cal.Rptr.2d 434].)

Temporal or Physical Proximity—Intent to Commit the Felony

According to some cases, a burglary occurs "if the intent at the time of entry is to commit the offense in the immediate vicinity of the place entered by defendant; if the entry is made as a means of facilitating the commission of the theft or felony; and if the two places are so closely connected that intent and consummation of the crime would constitute a single and practically continuous transaction." (*People v. Wright* (1962) 206 Cal.App.2d 184, 191 [23 Cal.Rptr. 734] [defendant entered office with intent to steal tires from attached open-air shed].) This test was followed in *People v. Nance* (1972) 25 Cal.App.3d 925, 931–932 [102 Cal.Rptr. 266] [defendant entered a gas station to turn on outside pumps in order to steal gas]; *People v. Nunley* (1985) 168 Cal.App.3d 225, 230–232 [214 Cal.Rptr. 82] [defendant entered lobby of apartment building, intending to burglarize one of the

units]; and *People v. Ortega* (1992) 11 Cal.App.4th 691, 695–696 [14 Cal.Rptr.2d 246] [defendant entered a home to facilitate the crime of extortion].

However, in *People v. Kwok* (1998) 63 Cal.App.4th 1236 [75 Cal.Rptr.2d 40], the court applied a less restrictive test, focusing on just the facilitation factor. A burglary is committed if the defendant enters a building in order to facilitate commission of theft or a felony. The defendant need not intend to commit the target crime in the same building or on the same occasion as the entry. (*People v. Kwok, supra,* 63 Cal.App.4th at pp. 1246–1248 [defendant entered building to copy a key in order to facilitate later assault on victim].) The court commented that "the 'continuous transaction test' and the 'immediate vicinity test' . . . are artifacts of the particular factual contexts of *Wright*, *Nance*, and *Nunley*." (*Id*. at p. 1247.) With regards to the *Ortega* case, the *Kwok* court noted that even though the *Ortega* court "purported to rely on the 'continuous transaction' factor of *Wright*, [the decision] rested principally on the 'facilitation' factor." (*Id*. at pp. 1247–1248.) While *Kwok* and *Ortega* dispensed with the elemental requirements of spatial and temporal proximity, they did so only where the subject entry is "closely connected" with, and is made in order to facilitate, the intended crime. (*People v. Griffin* (2001) 90 Cal.App.4th 741, 749 [109 Cal.Rptr.2d 273].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4~~1~~5th ed. 20~~1~~24) Crimes Against Property, §§ 141~~128~~, 142, 144~~–129~~.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.10 (Matthew Bender).

1751. Defense to Receiving Stolen Property: Innocent Intent

The defendant is not guilty of receiving (stolen/extorted) property if (he/she) intended to (return the property to its owner/ [or] deliver the property to law enforcement) when (he/she) (bought/received/concealed/withheld) the property.

If you have a reasonable doubt about whether the defendant intended to (return the property to its owner/ [or] deliver the property to law enforcement) when (he/she) (bought/received/concealed/withheld) the property, you must find (him/her) not guilty of receiving (stolen/extorted) property.

[This defense does not apply if the defendant decided to (return the property to its owner/ [or] deliver the property to law enforcement) only after (he/she) wrongfully (bought/received/concealed/withheld) the property.] [The defense [also] does not apply if the defendant intended to (return the property to its owner/ [or] deliver the property to law enforcement) when (he/she) (bought/received/concealed/withheld) it, but later decided to (sell/conceal/withhold) the property.]

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*New January 2006; Revised February 2026**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on this defense if there is substantial evidence supporting the defense and the defendant is relying on the defense or the defense is not inconsistent with the defendant's theory of the case. (*People v. Osborne* (1978) 77 Cal.App.3d 472, 477 [143 Cal.Rptr. 582]; see *People v. Sedeno* (1974) 10 Cal.3d 703, 716–717 [112 Cal.Rptr. 1, 518 P.2d 913], disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684–685, fn. 12 [160 Cal. Rptr. 84, 603 P.2d 1] and in *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn. 10, 164–178 [77 Cal.Rptr.2d 870, 960 P.2d 1094]; *People v. Burnham* (1986) 176 Cal.App.3d 1134, 1139, fn. 3 [222 Cal.Rptr. 630.)

Related Instructions

For the general requirement of a union between an act and intent (Pen. Code, § 20), see CALCRIM No. 252~~0~~, *Joint Operation~~Union~~ of Act and Mental State~~Intent: General Intent~~*.

AUTHORITY

- Instructional Requirements. *People v. Osborne* (1978) 77 Cal.App.3d 472, 476 [143 Cal.Rptr. 582].
- Burden of Proof. *People v. Dishman* (1982) 128 Cal.App.3d 717, 721–722 [180 Cal.Rptr. 467]; *People v. Wielograf* (1980) 101 Cal.App.3d 488, 494 [161 Cal.Rptr. 680].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (54th ed. 2024~~12~~) Crimes Against Property, §§ 78~~2~~, 79, 91.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.03[1][d], [2][a] (Matthew Bender).

1808. Organized Retail Theft (Pen. Code, § 490.4)

The defendant is charged [in Count __] with organized retail theft [in violation of Penal Code section 490.4].

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

<Alternative A—acted in concert to steal merchandise>

[1. The defendant acted together with one or more persons to steal merchandise from (a merchant's premises/[or] an online marketplace);

AND

2. When the defendant acted, (he/she) intended to (sell[,]/[or] exchange[,]/[or] return) the merchandise for value.]

<Alternative B— acted in concert to receive, purchase, or possess>

[1. The defendant acted together with two or more persons to (receive[,]/ purchase[,]/[or] possess) merchandise from (a merchant's premises/[or] an online marketplace);

AND

2. When the defendant acted, (he/she) knew or believed the merchandise was stolen.)]

<Alternative C— acted as agent to steal>

[1. The defendant acted as an agent of (another individual/[or] a group of individuals) to steal merchandise from one or more (merchant's premises/[or] online marketplaces);

AND

2. When the defendant acted as an agent, the defendant knew that (he/she) was representing [an]other[s] as part of an organized plan to commit theft.]

[An *agent* is a person who represents someone else in dealing with other people.]

<Alternative D— recruited, coordinated, organized, etc.>

[1. The defendant (recruited[,]/[or] coordinated[,]/[or] organized[,]/[or] supervised[,]/[or] directed[,]/[or] managed[,]/[or] financed) another person;

AND

2. When the defendant acted, the defendant intended that the other person[:]

[steal merchandise from [(a/an)] ((merchant's/merchants') premises/[or] online marketplace[s]) with the intent to (sell[,]/[or] exchange[,][or] return) the merchandise for value(;/.)]

[OR]

[(receive/purchase/possess) merchandise knowing or believing that the merchandise was stolen(;/.)]

[OR]

[_____ *<insert description of applicable statute defining theft of merchandise>***).]]**

[In deciding whether the defendant acted with [an]other person[s] to commit theft, you may consider whether the defendant previously acted with [an]other person[s] to commit theft [or any related offense[s].]

[In deciding whether the defendant acted with [an]other person[s] to commit theft, you may [also] consider whether the defendant used or possessed (a/an) (artifice/[,] instrument/[,] container/[,] device/[,] [or other] article) capable of helping to remove merchandise from a retail establishment without paying the purchase price and the use of the (artifice/[,] instrument/[,] container/[,] device/ [or other] article) was part of an organized plan to commit theft.]

[In deciding whether the defendant acted with [an]other person[s] to commit theft, you may [also] consider whether the property involved in the offense was a type or quantity that would not normally be purchased for personal use or consumption and that the property is intended for resale.]

<Sentencing factor: aggregated value of two or more separate violations of (a)(1), (a)(2), or (a)(3) within a 12-month period.>

[If you find the defendant guilty of organized retail theft in Counts _____, *<list counts charged under (a)(1), (a)(2), and (a)(3)>***, you must then decide whether the People have proved the additional allegation that the combined value of the stolen merchandise was more than $950. To prove this allegation, the People must prove that:**

1. **The defendant committed organized retail theft on two or more separate occasions;**

2. **Those separate occasions all occurred within a 12-month period of (one/each) [an]other;**

   AND

3. **The combined value of the merchandise stolen was more than $950.]**

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

New February 2026

BENCH NOTES

Instructional Duty

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

AUTHORITY

- Elements. Pen. Code, § 490.4.
- "Agent" Defined. Civ. Code, § 2295.

2110. Driving Under the Influence (Veh. Code, § 23152(a), (f), (g))

The defendant is charged [in Count] with driving under the [combined] influence of (an alcoholic beverage/ [or] a drug/ [or] an alcoholic beverage and a drug) [in violation of Vehicle Code section 23152(a)/(f)/(g)].

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

1. **The defendant drove a vehicle;**

   AND

2. **When (he/she) drove, the defendant was under the [combined] influence of (an alcoholic beverage/ [or] a drug/ [or] an alcoholic beverage and a drug).**

A person is *under the influence* if, as a result of (drinking [or consuming] an alcoholic beverage/ [and/or] taking a drug), his or her mental or physical abilities are so impaired that he or she is no longer able to drive a vehicle with the caution of a sober person, using ordinary care, under similar circumstances.

The manner in which a person drives is not enough by itself to establish whether the person is or is not under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug]. However, it is a factor to be considered, in light of all the surrounding circumstances, in deciding whether the person was under the influence.

[An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains ethanol. Ethanol is also known as ethyl alcohol, drinking alcohol, or alcohol. [An *alcoholic beverage* includes _____ <*insert type[s] of beverage[s] from Veh. Code, § 109 or Bus. & Prof. Code, § 23004, e.g., wine, beer*>.]]

[A *drug* is a substance or combination of substances, other than alcohol, that could so affect the nervous system, brain, or muscles of a person that it would appreciably impair his or her ability to drive as an ordinarily cautious person, in full possession of his or her faculties and using reasonable care, would drive under similar circumstances.]

[If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent or more at the time of the chemical analysis, you may, but are not required to, conclude that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Public Health.]

[It is not a defense that the defendant was legally entitled to use the drug.]

[If the defendant was under the influence of (an alcoholic beverage/ [and/or] a drug), then it is not a defense that something else also impaired (his/her) ability to drive.]

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*New January 2006; Revised June 2007, April 2008, August 2015, September 2017, March 2018, February 2026**

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with a misdemeanor or a felony based on prior convictions.

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra,* 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal. Rptr. 2d 690].)

The bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent" explains a rebuttable presumption created by statute. (See Veh. Code, § 23610; Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences.

The court **must not** give the bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent" if there is no substantial evidence that the defendant's blood alcohol level was at or above 0.08 percent at the time of the test. In addition, if the test falls within the range in which no presumption applies, 0.05 percent to just below 0.08 percent, do not give this bracketed sentence. (*People v. Wood* (1989) 207 Cal.App.3d Supp. 11, 15 [255 Cal.Rptr. 537].) The court should also consider whether there is sufficient evidence to establish that the test result exceeds the margin of error before giving this instruction for test results of 0.08 percent. (Compare *People v. Campos* (1982) 138 Cal.App.3d Supp. 1, 4–5 [188 Cal.Rptr. 366], with *People v. Randolph* (1989) 213 Cal.App.3d Supp. 1, 11 262 Cal.Rptr. 378].)

The statute also creates a rebuttable presumption that the defendant was not under the influence if his or her blood alcohol level was less than 0.05 percent. (*People v. Gallardo* (1994) 22 Cal.App.4th 489, 496 [27 Cal.Rptr.2d 502].) Depending on the facts of the case, the defendant may be entitled to a pinpoint instruction on this presumption. It is not error to refuse an instruction on this presumption if the prosecution's theory is that the defendant was under the combined influence of drugs and alcohol. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250 [32 Cal.Rptr.2d 442].)

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with "In evaluating any test results in this case." (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

Give the bracketed sentence stating that "it is not a defense that something else also impaired (his/her) ability to drive" if there is evidence of an additional source of impairment such as an epileptic seizure, inattention, or falling asleep.

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

Related Instructions

CALCRIM No. 2111, *Driving With 0.08 Percent Blood Alcohol*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

AUTHORITY

- Elements. Veh. Code, § 23152(a), (f), (g).
- "Alcoholic Beverage" Defined. Veh. Code, § 109; Bus. & Prof. Code, § 23004.
- "Drug" Defined. Veh. Code, § 312.
- "Vehicle" Defined. Veh. Code, § 670.
- Driving. *Mercer v. Dept. of Motor Vehicles* (1991) 53 Cal.3d 753, 768 [280 Cal.Rptr. 745, 809 P.2d 404].
- Presumptions. Veh. Code, § 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Mandatory Presumption Unconstitutional Unless Instructed as Permissive Inference. *People v. Roder, supra,* ~~(1983)~~ 33 Cal.3d ~~491,~~at pp. 497–505 ~~[189 Cal.Rptr. 501, 658 P.2d 1302]~~.
- "Under the Influence" Defined. *People v. Schoonover* (1970) 5 Cal.App.3d 101, 105–107 [85 Cal.Rptr. 69]; *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665–666 [49 Cal.Rptr.2d 710].
- Manner of Driving. *People v. Weathington, supra,* ~~(1991)~~ 231 Cal.App.3d ~~69,~~at p. 84 ~~[282 Cal.Rptr. 170]~~; *People v. McGrath* (1928) 94 Cal.App. 520, 524 [271 P. 549].
- Legal Entitlement to Use Drug Not a Defense. Veh. Code, § 23630.
- Prior Convictions. *People v. Weathington, supra,* ~~(1991)~~ 231 Cal.App.3d ~~69,~~at p. 90 ~~[282 Cal.Rptr. 170]~~.

LESSER INCLUDED OFFENSES

If the defendant is charged with felony driving under the influence based on prior convictions, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the prior convictions have been proved. If the jury finds that the prior convictions have not been proved, then the offense should be set at a misdemeanor

- Attempted Driving Under the Influence. Pen. Code, § 664; Veh. Code, § 23152(a); *People v. Garcia* (1989) 214 Cal.App.3d Supp.1, 3–4 [262 Cal.Rptr. 915].

RELATED ISSUES

Driving

"[S]ection 23152 requires proof of volitional movement of a vehicle." (*Mercer v. Dept. of Motor Vehicles* (1991) 53 Cal.3d 753, 768 [280 Cal.Rptr. 745, 809 P.2d 404].) However, the movement may be slight. (*Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1029 [229 Cal.Rptr. 310]; *Henslee v. Dept. of Motor Vehicles* (1985) 168 Cal.App.3d 445, 450–453 [214 Cal.Rptr. 249].) Further, driving may be established through circumstantial evidence. (*Mercer, supra,* 53 Cal.3d at p. 770; *People v. Wilson* (1985) 176 Cal.App.3d Supp. 1, 9 [222 Cal.Rptr. 540] [sufficient evidence of driving where the vehicle was parked on the freeway, over a mile from the on-ramp, and the defendant, the sole occupant of the vehicle, was found in the driver's seat with the vehicle's engine running].) See CALCRIM No. 2241, *Driver and Driving Defined*.

PAS Test Results

The results of a preliminary alcohol screening (PAS) test "are admissible upon a showing of either compliance with title 17 or the foundational elements of (1) properly functioning equipment, (2) a properly administered test, and (3) a qualified operator . . . ." (*People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203].)

Presumption Arising From Test Results—Timing

Unlike the statute on driving with a blood alcohol level of 0.08 percent or more, the statute permitting the jury to presume that the defendant was under the influence if he or she had a blood alcohol level of 0.08 percent or more does not contain a time limit for administering the test. (Veh. Code, § 23610; *People v. Schrieber* (1975) 45 Cal.App.3d 917, 922 [119 Cal.Rptr. 812].) However, the court in *Schrieber, supra,* noted that the mandatory testing statute provides that "the test must be incidental to both the offense and to the arrest and . . . no substantial time [should] elapse . . . between the offense and the arrest." (*Id.* at p. 921.)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (45th ed. 20241~~2~~) Crimes Against Public Peace and Welfare §§ 330~~272–~~ 335~~277~~ et seq.

2 Witkin, California Evidence (65th ed. 2023) Demonstrative, Experimental, and Scientific Evidence § 56.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1] (Matthew Bender).

2111. Driving With 0.08 Percent Blood Alcohol (Veh. Code, § 23152(b))

The defendant is charged [in Count __] with driving with a blood alcohol level of 0.08 percent or more [in violation of Vehicle Code section 23152(b)].

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

1. **The defendant drove a vehicle;**

   AND

2. **When (he/she) drove, the defendant's blood alcohol level was 0.08 percent or more by weight.**

[If the People have proved beyond a reasonable doubt that a sample of the defendant's (blood/breath) was taken within three hours of the defendant's [alleged] driving and that a chemical analysis of the sample showed a blood alcohol level of 0.08 percent or more, you may, but are not required to, conclude that the defendant's blood alcohol level was 0.08 percent or more at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Public Health.]

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*New January 2006; Revised August 2006, June 2007, April 2008, August 2015, March 2018, February 2026**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with a misdemeanor or a felony based on prior convictions.

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v.*

Calderon (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra,* 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].)

The bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that a sample of" explains a rebuttable presumption created by statute. (See Veh. Code, § 23152(b); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences.

The court **must not** give the bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that a sample of" if there is no substantial evidence that the defendant's blood alcohol level was at or above 0.08 percent at the time of the test.

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with "In evaluating any test results in this case." (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

Related Instructions

CALCRIM No. 2110, *Driving Under the Influence*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

AUTHORITY

- Elements. Veh. Code, § 23152(b); *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266 [198 Cal.Rptr. 145, 673 P.2d 732].
- Partition Ratio. Veh. Code, § 23152(b); *People v. Bransford* (1994) 8 Cal.4th 885, 890 [35 Cal.Rptr.2d 613, 884 P.2d 70].
- Presumptions. Veh. Code, §§ 23152(b), 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- "Vehicle" Defined. Veh. Code, § 670.
- Driving. *Mercer v. Dept. of Motor Vehicles* (1991) 53 Cal.3d 753, 768 [280 Cal.Rptr. 745, 809 P.2d 404].
- Statute Constitutional. *Burg v. Municipal Court, supra,* ~~(1983)~~ 35 Cal.3d ~~257,~~at p. 273 ~~[198 Cal.Rptr. 145, 673 P.2d 732]~~.
- Prior Convictions. *People v. Weathington, supra,* ~~(1991)~~ 231 Cal.App.3d ~~69,~~at p. 90 ~~[282 Cal.Rptr. 170]~~.

LESSER INCLUDED OFFENSES

If the defendant is charged with felony driving under the influence based on prior convictions, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the prior convictions have been proved. If the jury finds that the prior convictions have not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

Partition Ratio

In 1990, the Legislature amended Vehicle Code section 23152(b) to state that the "percent, by weight, of alcohol in a person's blood is based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath." Following this amendment, the Supreme Court held that evidence of variability of breath-alcohol partition ratios was not relevant and properly excluded. (*People v. Bransford* (1994) 8 Cal.4th 885, 890–893 [35 Cal.Rptr.2d 613, 884 P.2d 70].)

See the Related Issues section in CALCRIM No. 2110, *Driving Under the Influence*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (54th ed. 20241~~2~~) Crimes Against Public Peace and Welfare §§ 330~~272 - 335277~~ et seq.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1] (Matthew Bender).

2112. Driving While Addicted to a Drug (Veh. Code, § 23152(c))

The defendant is charged [in Count __] with driving while addicted to a drug [in violation of Vehicle Code section 23152(c)].

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

1. **The defendant drove a vehicle;**

AND

2. **When (he/she) drove, the defendant was addicted to a drug.**

A *drug* is a substance or combination of substances, other than alcohol, that could so affect the nervous system, brain, or muscles of a person that it would appreciably impair his or her ability to drive as an ordinarily cautious person, in full possession of his or her faculties and using reasonable care, would drive under similar circumstances.

A person is *addicted* to a drug if he or she:

1. **Has become physically dependent on the drug, suffering withdrawal symptoms if he or she is deprived of it;**

2. **Has developed a tolerance to the drug's effects and therefore requires larger and more potent doses;**

AND

3. **Has become emotionally dependent on the drug, experiencing a compulsive need to continue its use.**

[It is not a defense that the defendant was legally entitled to use the drug.]

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*New January 2006; Revised March 2018, February 2026**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with a misdemeanor a felony based on prior convictions.

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 36 Cal.Rptr.2d 333]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336; *People v. Weathington, supra,* 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].)

Vehicle Code section 23630 states that the fact that the defendant was legally entitled to use the drug is not a defense to a charge of driving under the influence. (Veh. Code, § 23630.) It is unclear whether this provision applies to the charge of driving while addicted. If the court concludes that the statute does apply, the court may add the bracketed sentence at the end of the instruction: "It is not a defense that the defendant was legally entitled to use the drug."

In addition, Vehicle Code section 23152(c) states "[t]his subdivision shall not apply to a person who is participating in a narcotic treatment program approved pursuant to Article 3 (commencing with Section 11875) of Chapter 1 of Part 3 of Division 10.5 of the Health and Safety Code." If there is evidence that the defendant is participating in an approved treatment program, the court has a **sua sponte** duty to instruct on this defense.

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

Related Instructions

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

AUTHORITY

- Elements. Veh. Code, § 23152(c).
- "Drug" Defined. Veh. Code, § 312.
- "Addict" Defined. *People v. O'Neil* (1965) 62 Cal.2d 748, 754 [44 Cal.Rptr. 320, 401 P.2d 928].
- "Vehicle" Defined. Veh. Code, § 670.
- Driving. *Mercer v. Dept. of Motor Vehicles* (1991) 53 Cal.3d 753, 768 [280 Cal.Rptr. 745, 809 P.2d 404].
- Prior Convictions. *People v. Weathington, supra,* ~~(1991)~~ 231 Cal.App.3d ~~69,~~at p. 90 ~~[282 Cal.Rptr. 170]~~.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (5~~4~~th ed. 2024~~12~~) Crimes Against Public Peace and Welfare, §§ 330~~272~~ 335~~277~~ et seq.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1][a] (Matthew Bender).

2113 Driving With 0.05 Percent Blood Alcohol When Under 21 (Veh. Code, § 23140(a))

The defendant is charged [in Count __] with driving when under the age of 21 years with a blood alcohol level of 0.05 percent or more [in violation of Vehicle Code section 23140(a)].

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

1. **The defendant drove a vehicle;**

2. **When (he/she) drove, the defendant's blood alcohol level was 0.05 percent or more by weight;**

   AND

3. **At that time, the defendant was under 21 years old.**

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Public Health.]

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

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*New January 2006; Revised August 2015, February 2026**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Note that this offense is an infraction. (Veh. Code, §§ 40000.1, 40000.15.) However, this instruction has been included because this offense may serve as a predicate offense for gross vehicular manslaughter while intoxicated or vehicular manslaughter while intoxicated. (Pen. Code, §§ 191.5, 192(c)(3); see *People v. Goslar* (1999) 70 Cal.App.4th 270, 275–276 [82 Cal.Rptr.2d 558].)

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with "In evaluating any test results in this case." (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

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].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

AUTHORITY

- Elements. Veh. Code, § 23140(a); *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266 [198 Cal.Rptr. 145, 673 P.2d 732].
- "Vehicle" Defined. Veh. Code, § 670.
- Driving. *Mercer v. Dept. of Motor Vehicles* (1991) 53 Cal.3d 753, 768 [280 Cal.Rptr. 745, 809 P.2d 404].
- Statute Constitutional. See *Burg v. Municipal Court, supra,* ~~(1983)~~ 35 Cal.3d ~~257,~~at p. 273 ~~[198 Cal.Rptr. 145, 673 P.2d 732]~~; *People v. Goslar, supra,* ~~(1999)~~ 70 Cal.App.4th ~~270,~~at pp. 275–276 ~~[82 Cal.Rptr.2d 558]~~.

RELATED ISSUES

See the Related Issues section in CALCRIM No. 2111, *Driving With 0.08 Percent Blood Alcohol*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (54th ed. 2024~~12~~) Crimes Against Public Peace and Welfare §§ 330~~272~~ – 335~~277~~ et seq.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1A][a] (Matthew Bender).

2114. Driving With 0.04 Percent Blood Alcohol With a Passenger for Hire (Veh. Code, § 23152(e))

The defendant is charged [in Count __] with driving with a blood-alcohol level of 0.04 percent or more with a passenger for hire [in violation of Vehicle Code section 23152(e)].

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

1. **The defendant drove a vehicle;**

2. **When (he/she) drove, the defendant's blood-alcohol level was 0.04 percent or more by weight;**

AND

3. **When (he/she) drove, there was a passenger for hire in the vehicle.**

A person is a *passenger for hire* when the person or someone else pays, or is expected to pay, for the ride, the payment is or will be with money or something else of value, and the payment is made to, or expected to be made to, the owner, operator, agent or any other person with an interest in the vehicle.

[If the People have proved beyond a reasonable doubt that a sample of the defendant's (blood/breath) was taken within three hours of the defendant's [alleged] driving and that a chemical analysis of the sample showed a blood alcohol level of 0.04 percent or more, you may, but are not required to, conclude that the defendant's blood alcohol level was 0.04 percent or more at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Public Health.]

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*New March 2018~~, effective July 2018~~; Revised February 2026**

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with a misdemeanor or a felony based on prior convictions.

Do **not** give this instruction if the court has bifurcated the trial. Instead, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. See the Bench Notes to CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, for an extensive discussion of bifurcation.

The bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that a sample of" explains a rebuttable presumption created by statute. (See Veh. Code, § 23152(e); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences.

The court **must not** give the bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that a sample of" if there is no substantial evidence that the defendant's blood alcohol level was at or above 0.4 percent at the time of the test.

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with "In evaluating any test results in this case." (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

Related Instructions

CALCRIM No. 2110, *Driving Under the Influence*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

AUTHORITY

- Elements. Veh. Code, § 23152(e).
- Partition Ratio. Veh. Code, § 23152; *People v. Bransford* (1994) 8 Cal.4th 885, 890 [35 Cal.Rptr.2d 613, 884 P.2d 70].
- Presumptions. Veh. Code, §§ 23152(e), 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- "Vehicle" Defined. Veh. Code, § 670.
- Driving. *Mercer v. Dept. of Motor Vehicles* (1991) 53 Cal.3d 753, 768 [280 Cal.Rptr. 745, 809 P.2d 404].
- Prior Convictions. *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

RELATED ISSUES

Defense Stipulation to Prior Convictions

The defendant may stipulate to the truth of the prior convictions. (*People v. Weathington, supra,* ~~(1991)~~ 231 Cal.App.3d ~~69,~~at p. 90~~ [282 Cal.Rptr. 170]~~.) If the defendant stipulates, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].)

Motion for Bifurcated Trial

Either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra,* 231 Cal.App.3d at p. 90.)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (5~~4~~th ed. 2024~~12~~) Crimes Against Public Peace and Welfare §§ 330~~272~~ – 335~~277~~ et seq.

2410. Possession of Controlled Substance Paraphernalia (Health & Saf. Code, § 11364)

The defendant is charged [in Count __] with possessing an object that can be used to unlawfully inject or smoke _____ <*insert controlled substance(s) listed in Health & Saf. Code, § 11364*>, a controlled substance [in violation of Health and Safety Code section 11364].

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

1. **The defendant [unlawfully] possessed an object used for unlawfully injecting or smoking _____ <*insert controlled substance(s) listed in Health & Saf. Code, § 11364*>, a controlled substance;**

2. **The defendant knew of the object's presence;**

AND

3. **The defendant knew it to be an object used for unlawfully injecting or smoking a controlled substance.**

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

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

[The People allege that the defendant possessed the following items: _____ <*insert each specific item of paraphernalia when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant possessed at least one of these items and you all agree on which item (he/she) possessed.]

<*Defense: Authorized Possession for Personal Use*>
[The defendant did not unlawfully possess [a] hypodermic (needle[s]/ [or] syringe[s]) if (he/she) was legally authorized to possess (it/them). The defendant was legally authorized to possess (it/them) if:

1. **(He/She) possessed the (needle[s]/ [or] syringe[s]) for personal use;**

[AND]

2. **(He/She) obtained (it/them) from _____**<*insert source authorized by Health & Safety Code section 11364(c)*> **.]**

The People have the burden of proving beyond a reasonable doubt that the defendant was not legally authorized to possess the hypodermic (needle[s]/ [or] syringe[s]). If the People have not met this burden, you must find the defendant not guilty of this crime.]

New January 2006; Revised October 2010, April 2011, August 2015, September 2018, February 2026

BENCH NOTES

Instructional Duty

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

If the prosecution alleges under a single count that the defendant possessed multiple items, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with "The People allege that the defendant possessed," inserting the items alleged.

Defenses—Instructional Duty

Section 11364 does not apply to possession of hypodermic needles or syringes for personal use if acquired from an authorized source. The defendant need only raise a reasonable doubt about whether his or her possession of these items was lawful. (See *People v. Mower* (2002) 28 Cal.4th 457, 479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If there is sufficient evidence, the court has a **sua sponte** duty to instruct on this defense. (See *People v. Fuentes* (1990) 224 Cal.App.3d 1041, 1045 [274 Cal.Rptr. 17] [authorized possession of hypodermic is an affirmative defense]); *People v. Mower, supra,* 28 Cal.4th at pp. 478–481 [discussing affirmative defenses generally and the burden of proof].) Give the bracketed word "unlawfully" in element 1 and the bracketed paragraph on that defense.

AUTHORITY

- Elements. Health & Saf. Code, § 11364.
- Statute Constitutional. *People v. Chambers* (1989) 209 Cal.App.3d Supp. 1, 4 [257 Cal.Rptr. 289].

- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Unanimity. *People v. Wolfe*, *supra,* ~~(2003)~~ 114 Cal.App.4th ~~177,~~at pp. 184–185 ~~[7 Cal.Rptr.3d 483]~~.
- Authorized Possession Defense. Health & Saf. Code, § 11364(c).

RELATED ISSUES

Cannabis Paraphernalia Excluded

Possession of a device for smoking cannabis, without more, is not a crime. (*In re Johnny O.* (2003) 107 Cal.App.4th 888, 897 [132 Cal.Rptr.2d 471].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (~~4~~5th ed. 202~~4~~12) Crimes Against Public Peace and Welfare § 189~~1~~55.

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

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

2510. Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction (Pen. Code, §§ 29800, 29805, 29820, 29900)

The defendant is charged [in Count __] with unlawfully possessing a firearm [in violation of _____ *<insert appropriate code section[s]>***].**

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

1. **The defendant (owned/purchased/received/possessed) a firearm;**

2. **The defendant knew that (he/she) (owned/purchased/received/ possessed) the firearm;**

[AND]

3. **The defendant had previously been convicted of (a felony/two offenses of brandishing a firearm/the crime of _____** *<insert misdemeanor offense from Pen. Code, § 29805 or Pen. Code, § 23515 (a), (b), or (d), or a juvenile finding from Pen. Code, § 29820>***(;/.)**

[AND]

<Alternative 4A—give only if the defendant is charged under Pen. Code, § 29805 .>

[4. The previous conviction was within 10 years of the date the defendant possessed the firearm.]

<Alternative 4B—give only if the defendant is charged under Pen. Code, § 29820.>

[4. The defendant was under 30 years old at the time (he/she) possessed the firearm.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion. [The frame or receiver of such a *firearm* is also a *firearm* for the purpose of this instruction.]]

<Do not use the language below unless the other instruction defines firearm in the context of a crime charged pursuant to Pen. Code, § 29800.>

[The term *firearm* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.]

[A *juvenile court finding* is the same as a conviction.]

[A conviction of _____ <*insert name of other-state or federal offense*> **is the same as a conviction for a felony.]**

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

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

[You may consider evidence, if any, that the defendant was previously convicted of a crime only in deciding whether the People have proved this element of the crime [or for the limited purpose of _____ <*insert other permitted purpose, e.g., assessing defendant's credibility*>]**. Do not consider such evidence for any other purpose.]**

[The People allege that the defendant (owned/purchased/received/possessed) the following firearms: _____ <*insert description of each firearm when multiple firearms alleged*>**. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (owned/purchased/received/possessed) at least one of the firearms, and you all agree on which firearm (he/she) (owned/purchased/received/possessed).]**

<*Defense: Momentary Possession*>
[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that:

1. **(He/She) possessed the firearm only for a momentary or transitory period;**

2. **(He/She) possessed the firearm in order to (abandon[,]/ [or] dispose of[,]/ [or] destroy) it;**

AND

3. **(He/She) did not intend to prevent law enforcement officials from seizing the firearm**.

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true.]

<Defense: Justifiable Possession>
[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove that (he/she) was justified in possessing the firearm. In order to establish this defense, the defendant must prove that:

1. **(He/She) (found the firearm/took the firearm from a person who was committing a crime against the defendant);**

[AND]

2. **(He/She) possessed the firearm no longer than was necessary to deliver or transport the firearm to a law enforcement agency for that agency to dispose of the weapon(;/.)**

[AND

3. **If the defendant was transporting the firearm to a law enforcement agency, (he/she) gave prior notice to the law enforcement agency that (he/she) would be delivering a firearm to the agency for disposal.]]**

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true.

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*New January 2006; Revised April 2010, February 2012, August 2013, February 2026**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Use this instruction only if the defendant does not stipulate to the prior conviction. (*People v. Sapp* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].) If the defendant stipulates, use CALCRIM No. 2511, *Possession of Firearm by Person Prohibited Due to Conviction—Stipulation to Conviction*. (*People v. Sapp, supra,* 31 Cal.4th at p. 261; *People v. Valentine, supra,* 42 Cal.3d at p. 173.)

The court has a **sua sponte** duty to instruct on the union of act and specific intent or mental state. (*People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365].) Therefore, because of the knowledge requirement in element 2 of this instruction, the court **must give** the instruction "for crimes requiring one or more specific mental states" in CALCRIM No. 252~~1~~, *Joint Operation~~Union~~ of Act and ~~Intent: Specific Intent or~~ Mental State*, together with this instruction. ~~Nevertheless, the knowledge requirement in element 2 does not require any "specific intent."~~

If the prosecution alleges under a single count that the defendant possessed multiple firearms and the possession was "fragmented as to time . . . [or] space," the court has a **sua sponte** duty to instruct on unanimity. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following firearms," inserting the items alleged.

Element 4 should be given only if the defendant is charged under Penal Code section 29805, possession within 10 years of a specified misdemeanor conviction, or Penal Code section 29820, possession by someone under 30 years old with a specified juvenile finding.

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions on crimes based on Penal Code section 29800. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

On request, the court should give the limiting instruction regarding the evidence of the prior conviction that begins, "You may consider . . . ." (*People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913].) There is no sua sponte duty to give the limiting instruction, and the defense may prefer that no limiting instruction be given. (*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].)

Defenses—Instructional Duty

"[T]he defense of transitory possession devised in [*People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115]] applies only to momentary or transitory possession of contraband for the purpose of disposal." (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) The court in *Martin, supra,* approved of *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853], which held that the defense of momentary possession applies to a charge of violating now-repealed Penal Code section 12021. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. (*People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Momentary Possession."

Penal Code section 29850 states that a violation of the statute is "justifiable" if the listed conditions are met. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. *(Ibid.)* If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Justifiable Possession."

If there is sufficient evidence that the defendant possessed the firearm only in self-defense, the court has a **sua sponte** duty to give CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute—Self-Defense*.

AUTHORITY

- Elements. Pen. Code, §§ 23515, 29800, 29805, 29820, 29900; *People v. Snyder* (1982) 32 Cal.3d 590, 592 [186 Cal.Rptr. 485, 652 P.2d 42].
- Defense of Justifiable Possession. Pen. Code, § 29850.
- Presenting Evidence of Prior Conviction to Jury. *People v. Sapp* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].
- Limiting Instruction on Prior Conviction. *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].
- Accidental Possession. *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 [49 Cal.Rptr.2d 86].
- Lack of Knowledge of Nature of Conviction Not a Defense. *People v. Snyder* (1982) 32 Cal.3d 590, 593 [186 Cal.Rptr. 485, 652 P.2d 42].
- Momentary Possession Defense. *People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081]; *People v. Hurtado* (1996) 47

Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853]; *People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115].

- Constructive vs. Actual Possession. *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Possession of Frame or Receiver Sufficient but not Necessary For Crimes Charged Under [Now-Superseded] Section 12021. *People v. Arnold* (2006) 145 Cal.App.4th 1408, 1414 [52 Cal.Rptr.3d 545].
- Statute Constitutional. *People v. Richardson* (2025) 108 Cal.App.5th 1203, 1209–1213 [330 Cal.Rptr.3d 130].

LESSER INCLUDED OFFENSES

Neither possessing firearm after conviction of felony nor possessing firearm after conviction of specified violent offense is a lesser included offense of the other. (*People v. Sanders* (2012) 55 Cal.4th 731, 739-740 [149 Cal.Rptr.3d 26, 288 P.3d 83].

RELATED ISSUES

Proof of Prior Conviction

The trial court "has two options when a prior conviction is a substantive element of a current charge: Either the prosecution proves each element of the offense to the jury, or the defendant stipulates to the conviction and the court 'sanitizes' the prior by telling the jury that the defendant has a prior felony conviction, without specifying the nature of the felony committed." (*People v. Sapp* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].)

Lack of Knowledge of Status of Conviction Not a Defense

"[R]egardless of what she reasonably believed, or what her attorney may have told her, defendant was deemed to know under the law that she was a convicted felon forbidden to possess concealable firearms. Her asserted mistake regarding her correct legal status was a mistake of law, not fact. It does not constitute a defense to [now-superseded] section 12021." (*People v. Snyder* (1982) 32 Cal.3d 590, 593 [186 Cal.Rptr. 485, 652 P.2d 42].)

Out-of-State Convictions

For an out-of-state conviction, it is sufficient if the offense is a felony under the laws of the "convicting jurisdiction." (*People v. Shear* (1999) 71 Cal.App.4th 278, 283 [83 Cal.Rptr.2d 707].) The prosecution does not have to establish that the

offense would be a felony under the laws of California. *(Ibid.)* Even if the convicting jurisdiction has restored the defendant's right to possess a firearm, the defendant may still be convicted of violating [now-superseded] Penal Code section 12021. *(Ibid.)*

Pardons and Penal Code Section 1203.4 Motions

A pardon pursuant to Penal Code section 4852.17 restores a person's right to possess a firearm unless the person was convicted of a "felony involving the use of a dangerous weapon." (Pen. Code, § 4852.17.) The granting of a Penal Code section 1203.4 motion, however, does not restore the person's right to possess any type of firearm. (Pen. Code, § 1203.4(a); *People v. Frawley* (2000) 82 Cal.App.4th 784, 796 [98 Cal.Rptr.2d 555].)

Submitting False Application for Firearm

A defendant who submitted a false application to purchase a firearm may not be prosecuted for "attempted possession of a firearm by a felon." (*People v. Duran* (2004) 124 Cal.App.4th 666, 673 [21 Cal.Rptr.3d 495].) "Instead, the felon may only be prosecuted pursuant to the special statute, [now-repealed Penal Code section] 12076 , which expressly proscribes such false application." *(Ibid.)* [see now Pen. Code, § 28215].

Flare Guns

In *People v. Gomez* (2025) 110 Cal.App.5th 419, 435 [331 Cal.Rptr.3d 674], the court recognized that "[c]ourts from several other jurisdictions have held that flare guns do not constitute 'weapons' under the ordinary meaning of that word." Although *Gomez* did not reach this question, the court held that the evidence "that the flare gun was capable of firing; that it was designed to expel a projectile through the barrel using the force of an explosion or some other form of combustion; and that it had an intact frame or receiver" was insufficient evidence to establish that the flare gun in that case qualified as a weapon under Penal Code section 29800(a)(1). (*Id.* at pp. 435–436.)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (54th ed. 20241~~2~~) Crimes Against Public Peace and Welfare, §§ 2783~~3~~-2833~~7~~.

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

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction,* § 93.06 (Matthew Bender).

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

2511. Possession of Firearm by Person Prohibited Due to Conviction—Stipulation to Conviction (Pen. Code, §§ 29800, 29805, 29820, 29900)

The defendant is charged [in Count __] with unlawfully possessing a firearm [in violation of _____ *<insert appropriate code section[s]>***].**

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

1. **The defendant (owned/purchased/received/possessed) a firearm;**

2. **The defendant knew that (he/she) (owned/purchased/received/possessed) the firearm;**

[AND]

3. **The defendant had previously been convicted of (a/two) (felony/misdemeanor[s])(;/.)**

[AND]

<Alternative 4A—give only if the defendant is charged under Pen. Code, § 29805.>

[4. The previous conviction was within 10 years of the date the defendant possessed the firearm.]

<Alternative 4B—give only if the defendant is charged under Pen. Code, § 29820.>

[4. The defendant was under 30 years old at the time (he/she) possessed the firearm.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion. [The frame or receiver of such a *firearm* is also a *firearm* for the purpose of this instruction.]]

<Do not use the language below unless the other instruction defines firearm in the context of a crime charged pursuant to Pen. Code, § 29800.>

[The term *firearm* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.]

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

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

The defendant and the People have stipulated, or agreed, that the defendant was previously convicted of (a/two) (felony/misdemeanor[s]). This stipulation means that you must accept this fact as proved.

[Do not consider this fact for any other purpose [except for the limited purpose of _____ *<insert other permitted purpose, e.g., determining the defendant's credibility>***]. Do not speculate about or discuss the nature of the conviction.]**

[The People allege that the defendant (owned/purchased/received/possessed) the following firearms: _____ *<insert description of each firearm when multiple firearms alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (owned/purchased/received/possessed) at least one of the firearms, and you all agree on which firearm (he/she) (owned/purchased/received/possessed).]**

<Defense: Momentary Possession>
[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that:

1. **(He/She) possessed the firearm only for a momentary or transitory period;**

2. **(He/She) possessed the firearm in order to (abandon[,]/ [or] dispose of[,]/ [or] destroy) it;**

AND

3. **(He/She) did not intend to prevent law enforcement officials from seizing the firearm**.

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.]

<Defense: Justifiable Possession>
[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove that (he/she) was justified in possessing the firearm. In order to establish this defense, the defendant must prove that:

1. **(He/She) (found the firearm/took the firearm from a person who was committing a crime against the defendant);**

[AND]

2. **(He/She) possessed the firearm no longer than was necessary to deliver or transport the firearm to a law enforcement agency for that agency to dispose of the weapon(;/.)**

[AND

3. **If the defendant was transporting the firearm to a law enforcement agency, (he/she) gave prior notice to the law enforcement agency that (he/she) would be delivering a firearm to the agency for disposal.]]**

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true.

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*New January 2006; Revised April 2010, February 2012, August 2013, February 2026**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Use this instruction only if the defendant stipulates to the prior conviction. (*People v. Sapp* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].) If the defendant does not stipulate, use CALCRIM No. 2510, *Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction*. (*People v. Sapp, supra,* 31 Cal.4th at p. 261; *People v. Valentine, supra,* 42 Cal.3d at p. 173.)

If the defendant has stipulated to the fact of the conviction, the court should sanitize all references to the conviction to prevent disclosure of the nature of the conviction to the jury. (*People v. Sapp, supra,* 31 Cal.4th at p. 261; *People v. Valentine, supra,* 42 Cal.3d at p. 173.) If the defendant agrees, the court should not read the portion of the information describing the nature of the conviction. Likewise, the court should ensure that the verdict forms do not reveal the nature of the conviction.

The court has a **sua sponte** duty to instruct on the union of act and specific intent or mental state. ~~-~~(*People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365].) ~~-~~Therefore, because of the knowledge requirement in element 2 of this instruction, the court **must give** the instruction "for crimes requiring one or more specific mental states" in CALCRIM No. 252~~1~~, *Joint Operation~~Union~~ of Act and ~~Intent: Specific Intent or~~ Mental State*, together with this instruction. ~~Nevertheless, the knowledge requirement in element 2 does not require any "specific intent."~~

If the prosecution alleges under a single count that the defendant possessed multiple firearms and the possession was "fragmented as to time . . . [or] space," the court has a **sua sponte** duty to instruct on unanimity. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following firearms," inserting the items alleged.

Element 4 should be given only if the defendant is charged under Penal Code section 29805, possession within 10 years of a specified misdemeanor conviction, or Penal Code section 29820, possession by someone under 30 years old with a specified juvenile finding.

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

On request, the court should give the limiting instruction regarding the evidence of the prior conviction that begins, "Do not consider this fact for any other purpose. .

. .” (*People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913].) There is no sua sponte duty to give the limiting instruction, and the defense may prefer that no limiting instruction be given. (*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].)

Defenses—Instructional Duty

“[T]he defense of transitory possession devised in [*People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115]] applies only to momentary or transitory possession of contraband for the purpose of disposal.” (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) The court in *Martin, supra,* approved of *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853], which held that the defense of momentary possession applies to a charge of violating now-repealed Penal Code section 12021. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. (*People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, “Defense: Momentary Possession.”

Penal Code section 29850 states that a violation of the statute is “justifiable” if the listed conditions are met. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. *(Ibid.)* If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, “Defense: Justifiable Possession.”

If there is sufficient evidence that the defendant possessed the firearm only in self-defense, the court has a **sua sponte** duty to give CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute—Self-Defense*.

AUTHORITY

- Elements. Pen. Code, §§ 23515, 29800, 29805, 29820, 29900; *People v. Snyder* (1982) 32 Cal.3d 590, 592 [186 Cal.Rptr. 485, 652 P.2d 42].
- Defense of Justifiable Possession. Pen. Code, § 29850.
- Presenting Evidence of Prior Conviction to Jury. *People v. Sapp* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].
- Limiting Instruction on Prior Conviction. *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].
- Accidental Possession. *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 [49 Cal.Rptr.2d 86].

- Lack of Knowledge of Nature of Conviction Not a Defense. *People v. Snyder* (1982) 32 Cal.3d 590, 593 [186 Cal.Rptr. 485, 652 P.2d 42].
- Momentary Possession Defense. *People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081]; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853]; *People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115].
- Constructive vs. Actual Possession. *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Possession of Frame or Receiver Sufficient but not Necessary For Crimes Charged Under [Now-Superseded] Section 12021. *People v. Arnold* (2006) 145 Cal.App.4th 1408, 1414 [52 Cal.Rptr.3d 545].
- Statute Constitutional. *People v. Richardson* (2025) 108 Cal.App.5th 1203, 1209–1213 [330 Cal.Rptr.3d 130].

RELATED ISSUES

See CALCRIM No. 2510, *Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction*.

LESSER INCLUDED OFFENSES

Neither possessing firearm after conviction of felony nor possessing firearm after conviction of specified violent offense is a lesser included offense of the other. (*People v. Sanders* (2012) 55 Cal.4th 731, 739-740 [149 Cal.Rptr.3d 26, 288 P.3d 83].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (45th ed. 202412) Crimes Against Public Peace and Welfare, §§ 27833-28337.

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

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction,* § 93.06 (Matthew Bender).

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

2512. Possession of Firearm by Person Prohibited by Court Order (Pen. Code, §§ 29815, 29825)

The defendant is charged [in Count __] with unlawfully possessing a firearm [in violation of Penal Code section[s] _____<*insert appropriate code section[s]*>**].**

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

1. **The defendant (owned/purchased/received/possessed) a firearm;**

2. **The defendant knew that (he/she) (owned/purchased/received/possessed) the firearm;**

[AND]

3. **A court had ordered that the defendant not (own/purchase/receive/possess) a firearm(;/.)**

<Give element 4 only if the defendant is charged under Pen. Code, § 29825.>
[AND

4. **The defendant knew of the court's order.]**

[A *firearm* is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion. [The frame or receiver of such a *firearm* is also a *firearm* for the purpose of this instruction.]]

<Do not use the language below unless the other instruction defines firearm in the context of a crime charged pursuant to Pen. Code, § 29800.>

[The term *firearm* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.]

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

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

[The defendant and the People have stipulated, or agreed, that a court ordered the defendant not to (own/purchase/receive/possess) a firearm. This stipulation means that you must accept this fact as proved.]
<Alternative A—limiting instruction when stipulation to order>
[Do not consider this fact for any other purpose [except for the limited purpose of _____ *<insert other permitted purpose, e.g., determining the defendant's credibility>***]. Do not speculate about why the court's order was made.]**

<Alternative B—limiting instruction when no stipulation to order>
[You may consider evidence, if any, that a court ordered the defendant not to (own/purchase/receive/possess) a firearm only in deciding whether the People have proved this element of the crime [or for the limited purpose of _____ *<insert other permitted purpose, e.g., assessing defendant's credibility>***]. Do not consider such evidence for any other purpose.]**

[The People allege that the defendant (owned/purchased/received/possessed) the following firearms: _____ *<insert description of each firearm when multiple firearms alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (owned/purchased/received/possessed) at least one of the firearms, and you all agree on which firearm (he/she) (owned/purchased/received/possessed).]**

<Defense: Momentary Possession>
[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that:

1. **(He/She) possessed the firearm only for a momentary or transitory period;**

2. **(He/She) possessed the firearm in order to (abandon[,]/ [or] dispose of[,]/ [or] destroy) it;**

AND

3. **(He/She) did not intend to prevent law enforcement officials from seizing the firearm**.

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.]

<Defense: Justifiable Possession>
[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove that (he/she) was justified in possessing the firearm. In order to establish this defense, the defendant must prove that:

1. **(He/She) (found the firearm/took the firearm from a person who was committing a crime against the defendant);**

[AND]

2. **(He/She) possessed the firearm no longer than was necessary to deliver or transport the firearm to a law enforcement agency for that agency to dispose of the weapon(;/.)**

[AND

3. **If the defendant was transporting the firearm to a law enforcement agency, (he/she) had given prior notice to the agency that (he/she) would be delivering a firearm to the agency for disposal.]]**

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true.

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*New January 2006; Revised April 2010, February 2012, February 2026**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Use this instruction only if the defendant is charged under Penal Code

section 29815, possession by someone prohibited as a condition of probation following conviction for a crime not listed in other provisions of Penal Code section 29800, or Penal Code section29825, possession by someone prohibited by a temporary restraining order or other protective order.

The court has a **sua sponte** duty to instruct on the union of act and specific intent or mental state. (*People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365].) Therefore, because of the knowledge requirement in element 2 of this instruction, the court **must give** the instruction "for crimes requiring one or more specific mental states" in CALCRIM No. 2521, *Joint Operation ~~Union~~ of Act and Mental State~~Intent: Specific Intent or Mental State~~*, together with this instruction. ~~Nevertheless, the knowledge requirement in element 2 does not require any "specific intent."~~

If the prosecution alleges under a single count that the defendant possessed multiple firearms and the possession was "fragmented as to time . . . [or] space," the court has a **sua sponte** duty to instruct on unanimity. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following firearms," inserting the items alleged.

Give element 4 only if the defendant is charged under Penal Code section 29825.

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

If the defendant has not stipulated to the probation order, do not give the bracketed paragraph that begins, "The defendant and the People have stipulated . . . ."

If the defendant does stipulate to the probation order, the court must give the bracketed paragraph that begins, "The defendant and the People have stipulated . . . ." The court must also sanitize all references to the probation order to prevent disclosure of the nature of the conviction to the jury. (*People v. Sapp,* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].) If the defendant agrees, the court must not read the portion of the information describing the nature of the conviction. Likewise, the court must ensure that the verdict forms do not reveal the nature of the conviction.

On request, the court should give the limiting instruction regarding the evidence of the probation condition. (*People v. Valentine, supra,* 42 Cal.3d at 182, fn. 7.) There is no sua sponte duty to give the limiting instruction, and the defense may prefer that no limiting instruction be given. (*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].) If the defendant does not stipulate to the probation condition, give alternative A. If the defendant does stipulate, give alternative B.

Defenses—Instructional Duty

"[T]he defense of transitory possession devised in [*People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115]] applies only to momentary or transitory possession of contraband for the purpose of disposal." (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) The court in *Martin, supra,* approved of *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853], which held that the defense of momentary possession applies to a charge of violating now-repealed Penal Code section 12021. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. (*People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Momentary Possession."

Penal Code section 29850 states that a violation of the statute is "justifiable" if the listed conditions are met. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. *(Ibid.)* If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Justifiable Possession."

If there is sufficient evidence that the defendant possessed the firearm only in self-defense, the court has a **sua sponte** duty to give CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute—Self-Defense*.

AUTHORITY

- Elements. Pen. Code, §§ 29815 & 29825; *People v. Snyder* (1982) 32 Cal.3d 590, 592 [186 Cal.Rptr. 485, 652 P.2d 42].
- Defense of Justifiable Possession. Pen. Code, § 29850.
- Limiting Instruction on Prior Conviction. *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].
- Accidental Possession. *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 [49 Cal.Rptr.2d 86].
- Momentary Possession Defense. *People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081]; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853]; *People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115].
- Constructive vs. Actual Possession. *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].

- Possession of Frame or Receiver Sufficient but not Necessary For Crimes Charged Under [Now-Superseded] Section 12021. *People v. Arnold* (2006) 145 Cal.App.4th 1408, 1414 [52 Cal.Rptr.3d 545].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (~~4~~5th ed. 2024~~12~~) Crimes Against Public Peace and Welfare, § 278~~33~~-283~~37~~.

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

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction,* § 93.06 (Matthew Bender).

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

2513. Possession of Firearm by Person Addicted to a Narcotic Drug (Pen. Code, § 29800)

The defendant is charged [in Count __] with unlawfully possessing a firearm [in violation of Penal Code section 29800].

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

1. **The defendant (owned/purchased/received/possessed) a firearm;**

2. **The defendant knew that (he/she) (owned/purchased/received/ possessed) the firearm;**

AND

3. **At the time the defendant (owned/purchased/received/possessed) the firearm, (he/she) was addicted to the use of a narcotic drug.**

_____ *<insert narcotic drug alleged>* **is a narcotic drug.**

A person is *addicted* to the use of a narcotic drug if:

1. **The person has become emotionally dependent on the drug in the sense that he or she experiences a compulsive need to continue its use;**

2. **The person has developed a tolerance to the drug's effects and therefore requires larger and more potent doses;**

AND

3. **The person has become physically dependent, suffering withdrawal symptoms if he or she is deprived of the drug.**

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

[The term *firearm* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.]

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

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

[The People allege that the defendant (owned/purchased/received/possessed) the following firearms: _____ *<insert description of each firearm when multiple firearms alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (owned/purchased/received/possessed) at least one of the firearms, and you all agree on which firearm (he/she) (owned/purchased/received/possessed).]**

<Defense: Momentary Possession>
[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that:

1. **(He/She) possessed the firearm only for a momentary or transitory period;**

2. **(He/She) possessed the firearm in order to (abandon[,]/ [or] dispose of[,]/ [or] destroy) it;**

AND

3. **(He/She) did not intend to prevent law enforcement officials from seizing the firearm**.

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.]

<Defense: Justifiable Possession>
[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove that (he/she) was justified in possessing the firearm. In order to establish this defense, the defendant must prove that:

1. **(He/She) (found the firearm/took the firearm from a person who was committing a crime against the defendant);**

[AND]

2. **(He/She) possessed the firearm no longer than was necessary to deliver or transport the firearm to a law enforcement agency for that agency to dispose of the weapon(;/.)**

[AND

3. **If the defendant was transporting the firearm to a law enforcement agency, the defendant gave prior notice to the law enforcement agency that (he/she) would be delivering a firearm to the agency for disposal.]]**

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true.

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*New January 2006; Revised February 2012, February 2026**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

The court has a **sua sponte** duty to instruct on the union of general criminal intent and action, CALCRIM No. 252~~1~~, *Joint Operation~~Union~~ of Act and Mental State~~Intent—General Intent~~*. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 924 [49 Cal.Rptr.2d 86].) "Wrongful intent must be shown with regard to the possession and custody elements of the crime of being a felon in possession of a firearm. . . . [A] felon who acquires possession of a firearm through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent." (*Id.* at p. 922.) The defendant is also entitled to a pinpoint instruction on unintentional possession if there is sufficient evidence to support the defense. (*Id.* at pp. 924–925.)

If the prosecution alleges under a single count that the defendant possessed multiple firearms and the possession was "fragmented as to time . . . [or] space,"

the court has a **sua sponte** duty to instruct on unanimity. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following firearms," inserting the items alleged.

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Defenses—Instructional Duty

"[T]he defense of transitory possession devised in [*People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115]] applies only to momentary or transitory possession of contraband for the purpose of disposal." (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) The court in *Martin, supra,* approved of *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853], which held that the defense of momentary possession applies to a charge of violating now-repealed Penal Code section 12021. This is an affirmative defense and the defense bears the burden of establishing it by a preponderance of the evidence. (*People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Momentary Possession."

Penal Code section 29850 states that a violation of the statute is "justifiable" if the listed conditions are met. This is an affirmative defense and the defense bears the burden of establishing it by a preponderance of the evidence. *(Ibid.)* If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Justifiable Possession."

If there is sufficient evidence that the defendant possessed the firearm only in self-defense, the court has a **sua sponte** duty to give CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute—Self-Defense*.

AUTHORITY

- Elements. Pen. Code, § 29800; *People v. Snyder* (1982) 32 Cal.3d 590, 592 [186 Cal.Rptr. 485, 652 P.2d 42].
- Narcotic Addict. *People v. O'Neil* (1965) 62 Cal.2d 748, 754 [44 Cal.Rptr. 320, 401 P.2d 928].
- Defense of Justifiable Possession. Pen. Code, § 29850.
- Accidental Possession. *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 [49 Cal.Rptr.2d 86].

- Momentary Possession Defense. *People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081]; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853]; *People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115].
- Constructive vs. Actual Possession. *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Statute Constitutional. *People v. Richardson* (2025) 108 Cal.App.5th 1203, 1209–1213 [330 Cal.Rptr.3d 130].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (~~4~~5th ed. 2024~~12~~) Crimes Against Public Peace and Welfare, § 278~~33~~-283~~37~~.

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

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction,* § 93.06 (Matthew Bender).

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

2622. Intimidating a Witness (Pen. Code, § 136.1(a) & (b))

The defendant is charged [in Count __] with intimidating a witness [in violation of Penal Code section 136.1].

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

<Alternative 1A—attending or giving testimony>

[1. The defendant maliciously (tried to (prevent/ [or] discourage)/(prevented/ [or] discouraged)) _____ *<insert name/description of person defendant allegedly sought to influence>* **from (attending/ [or] giving testimony at) _____** *<insert type of judicial proceeding or inquiry authorized by law>***;]**

<Alternative 1B—report of victimization>

[1. The defendant (tried to (prevent/ [or] discourage)/(prevented/ [or] discouraged)) _____ *<insert name/description of person defendant allegedly sought to influence>* **from making a report that (he/she/someone else) was a victim of a crime to _____** *<insert type of official specified in Pen. Code, § 136.1(b)(1)>***;]**

<Alternative 1C—causing prosecution>

[1. [Before the charge[s] (was/were) filed,] (T/t)he defendant (tried to (prevent/ [or] discourage)/(prevented/ [or] discouraged)) _____ *<insert name/description of person defendant allegedly sought to influence>* **from cooperating or providing information so that a (complaint/indictment/information/probation violation/parole violation) could be sought and prosecuted, and from helping to prosecute that action;]**

<Alternative 1D—causing arrest>

[1. The defendant (tried to (prevent/ [or] discourage)/(prevented/ [or] discouraged)) _____ *<insert name/description of person defendant allegedly sought to influence>* **from (arresting[,]/ [or] (causing/ [or] seeking) the arrest of [,]) someone in connection with a crime;]**

2. _____ *<insert name/description of person defendant allegedly sought to influence>* **was a (witness/ [or] crime victim);**

AND

3. **The defendant knew (he/she) was (trying to (prevent/ [or] discourage)/(preventing/ [or] discouraging)) _____** *<insert name/description of person defendant allegedly sought to influence>* **from _____** *<insert appropriate description from element 1>* **and intended to do so.**

[A person acts *maliciously* when he or she unlawfully intends to annoy, harm, or injure someone else in any way, or intends to interfere in any way with the orderly administration of justice.]

[As used here, *witness* means someone [or a person the defendant reasonably believed to be someone]:

<Give the appropriate bracketed paragraph[s].>

- **[Who knows about the existence or nonexistence of facts relating to a crime(;/.)]**

  [OR]

- **[Whose declaration under oath has been ~~or may be~~ received as evidence or, but for the defendant's conduct, would have been received as evidence(;/.)]**

  [OR]

- **[Who has reported a crime to a (peace officer[,]/ [or] prosecutor[,]/ [or] probation or parole officer[,]/ [or] correctional officer[,]/ [or] judicial officer)(;/.)]**

  [OR

- **Who has been served with a subpoena issued under the authority of any state or federal court.]]**

[A person is a *victim* if there is reason to believe that a federal or state crime is being or has been committed or attempted against him or her.]

[It is not a defense that the defendant was not successful in preventing or discouraging the (victim/ [or] witness).]

[It is not a defense that no one was actually physically injured or otherwise intimidated.]

New January 2006; Revised September 2020, March 2023, February 2025, February 2026

BENCH NOTES

Instructional Duty

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

In element 1, alternative 1A applies to charges under Penal Code section 136.1(a), which prohibits "knowingly and maliciously" preventing or attempting to prevent a witness or victim from giving testimony. If the court instructs with alternative 1A, the court should also give the bracketed definition of "maliciously." (See *People v. Serrano* (2022) 77 Cal.App.5th 902, 912–913 [292 Cal.Rptr.3d 865].)

Alternatives 1B through 1D apply to charges under Penal Code section 136.1(b). Because the offense always requires specific intent, the committee has included the knowledge requirement with the specific intent requirement in element 3. (*People v. Ford* (1983) 145 Cal.App.3d 985, 990 [193 Cal.Rptr. 684]; see also *People v. Womack* (1995) 40 Cal.App.4th 926, 929–930 [47 Cal.Rptr.2d 76].)

Give the bracketed language at the beginning of Alternative 1C when there is a factual dispute whether the conduct occurred after the filing of charges.

If the defendant is charged with one of the sentencing factors in Penal Code section 136.1(c), give CALCRIM No. 2623, *Intimidating a Witness: Sentencing Factors*. If the defendant is charged with the sentencing factor based on a prior conviction, the court must give both CALCRIM No. 2623 and CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the court has granted a bifurcated trial on the prior conviction or the defendant has stipulated to the conviction.

Note that Penal Code section 136.1(a)(3) states, "For purposes of this section, evidence that the defendant was a family member who interceded in an effort to protect the witness or victim shall create a presumption that the act was without malice." It is unclear whether the court must instruct on this presumption.

AUTHORITY

- Elements. Pen. Code, § 136.1(a) & (b).
- "Malice" Defined. Pen. Code, § 136(1).

- "Witness" Defined. Pen. Code, § 136(2); see also *People v. Copeland* (2025) 109 Cal.App.5th 534, 551 [330 Cal.Rptr.3d 526].
- "Victim" Defined. Pen. Code, § 136(3).
- Specific Intent Required. *People v. Ford, supra,* 145 Cal.App.3d at p. 990; see also *People v. Womack, supra,* 40 Cal.App.4th at pp. 929–930.
- Malice Not Required for Violations of Penal Code Section 136.1(b). *People v. Brackins* (2019) 37 Cal.App.5th 56, 66–67 [249 Cal.Rptr.3d 261].
- Postcharging Dissuasion Alone Does Not Violate Penal Code Section 136.1(a)(2), (b)(1) & (b)(2). *People v. Reynoza* (2024) 15 Cal.5th 982, 1013 [320 Cal.Rptr.3d 299, 546 P.3d 564] [Pen. Code, § 136.1(b)(2)]; *People v. Morones* (2023) 95 Cal.App.5th 721, 738 [313 Cal.Rptr.3d 688] [Pen. Code, § 136.1(a)(2), (b)(1)].

LESSER INCLUDED OFFENSES

A violation of Penal Code section 136.1(a) or (b) is a felony-misdemeanor, punishable by a maximum of three years in state prison. If the defendant is also charged with one of the sentencing factors in Penal Code section 136.1(c), then the offense is a felony punishable by two, three, or four years. If the defendant is charged under Penal Code section 131.6(c), then the offenses under subdivisions (a) and (b) are lesser included offenses. The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has proved the sentencing factor alleged. If the jury finds that this allegation has not been proved, then the offense should be set at the level of the lesser offense.

The misdemeanor offense of knowingly inducing a false statement to a law enforcement official in violation of Penal Code section 137(c) is not a lesser included offense of Penal Code section 137(b) because the latter offense lacks the element that the defendant must actually cause a false statement to be made. (*People v. Miles* (1996) 43 Cal.App.4th 575, 580 [51 Cal.Rptr.2d 52].)

RELATED ISSUES

Penal Code Sections 137(b), 136.1, and 138

Because one cannot "influence" the testimony of a witness if the witness does not testify, a conviction under Penal Code section 137(b) is inconsistent with a conviction under Penal Code section 136.1 or 138, which requires that a defendant prevent, rather than influence, testimony. (*People v. Womack, supra,* 40 Cal.App.4th at p. 931.)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4<u>5</u>th ed. 20~~12~~<u>24</u>) Crimes Against Governmental Authority, §§ 10~~5~~, 11~~6~~ <u>et seq</u>.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses,* § 82.07, Ch. 84, *Motions at Trial,* § 84.11 (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.23[6][e], 91.43 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.13[4][b]; Ch. 144, *Crimes Against Order,* § 144.03[2], [4] (Matthew Bender).

2656. Resisting Peace Officer, Public Officer, or EMT (Pen. Code, § 148(a))

The defendant is charged [in Count __] with (resisting[,]/ [or] obstructing[,]/ [or] delaying) a (*peace officer/public officer/emergency medical technician*) in the performance or attempted performance of (his/her) duties [in violation of Penal Code section 148(a)].

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

1. _____<*insert name, excluding title*> **was (a/an) (*peace officer/public officer/emergency medical technician*) lawfully performing or attempting to perform (his/her) duties as a (*peace officer/public officer/emergency medical technician*);**

2. **The defendant willfully (resisted[,]/ [or] obstructed[,]/ [or] delayed) _____<*insert name, excluding title*> in the performance or attempted performance of those duties;**

AND

3. **When the defendant acted, (he/she) knew, or reasonably should have known, that _____ <*insert name, excluding title*> was (a/an) (*peace officer/public officer/emergency medical technician*) performing or attempting to perform (his/her) duties.**

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.

[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"*>**.]**

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

[An *emergency medical technician* is someone who holds a valid certificate as an emergency medical technician.]

[The duties of (a/an) _____ *<insert title of peace officer, public officer, or emergency medical technician>* **include** _____ *<insert job duties>***.]**

[Taking a photograph or making an audio or video recording of a (*peace officer*/*public officer*/*emergency medical technician*) while the officer is in a public place or the person taking the photograph or making the recording is in a place where he or she has the right to be is not, by itself, a crime.]

<When lawful performance is an issue, give the following paragraph and ~~Instruction~~ CALCRIM No. 2670, Lawful Performance: Peace Officer.>
[A *peace officer* is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

[[The People allege that the defendant (resisted[,]/ [or] obstructed[,]/ [or] delayed) _____ *<insert name, excluding title>* **by doing the following:** _____ *<insert description of acts when multiple acts alleged>***.] You may not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of the alleged acts of (resisting[,]/ [or] obstructing[,]/ [or] delaying) a (*peace officer/public officer/emergency medical technician*) who was lawfully performing his or her duties, and you all agree on which act (he/she) committed.]**

[If a person intentionally goes limp, requiring an officer to drag or carry the person in order to accomplish a lawful arrest, that person may have willfully (resisted[,]/ [or] obstructed[,]/ [or] delayed) the officer if all the other requirements are met.]

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*New January 2006; Revised June 2007, August 2016, October 2021, February 2026**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

The court may use the optional bracketed language in the penultimate paragraph to insert a description of the multiple acts alleged if appropriate.

"[I]f a defendant is charged with violating section 148 and the arrest is found to be unlawful, a defendant cannot be convicted of that section." (*People v. White* (1980) 101 Cal.App.3d 161, 166 [161 Cal.Rptr. 541].) An unlawful arrest includes both an arrest made without legal grounds and an arrest made with excessive force. (*Id.* at p. 167.) "[D]isputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) The court has a **sua sponte** duty to instruct that the defendant is not guilty of the offense charged if the arrest was unlawful. (*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 an arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].)

There is a split in authority over the knowledge requirement in Penal Code section 148(a). (Compare *People v. Serna* (2025) 109 Cal.App.5th 563, 569–577 [330 Cal.Rptr.3d 592], *People v. Gresham* (2025) 113 Cal.App.5th 59, 67 [335 Cal.Rptr.3d 176], and *People v. Mackreth* (2020) 58 Cal.App.5th 317, 334 [272 Cal.Rptr.3d 498] [actual knowledge that person is an officer not required] with *In re A.L.* (2019) 38 Cal.App.5th 15, 22 [250 Cal.Rptr.3d 572] [defendant must have actual knowledge he or she is resisting an officer in the performance of duty].) If the trial court agrees with *Serna, Gresham,* and *Mackreth*, give the instruction as written. If the trial court agrees with *A.L.*, modify the instruction to require proof the defendant knew the person was an officer.

If lawful performance is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. When giving the portion of CALCRIM No. 2670 on the "use of force," the court **must** either delete the following sentence or specify that this sentence does not apply to a charge of violating Penal Code section 148: "If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her, the person must not use force or any weapon to resist an officer's use of reasonable force." (*People v. White, supra,* 101 Cal.App.3d at pp. 168–169 [court must clarify that Pen. Code, § 834a does not apply to charge under section 148].)

If the prosecution alleges multiple, distinct acts of resistance, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 9 [108 Cal.Rptr. 338].) Give CALCRIM No. 3500, *Unanimity*, if needed.

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 with "The duties of a _____ <*insert title . . .* > include" on request. The court may insert a description of the alleged victim'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].)

If the facts indicate passive resistance to arrest, give the bracketed sentence that begins with "If a person goes limp." (*In re Bacon* (1966) 240 Cal.App.2d 34, 53 [49 Cal.Rptr. 322].)

~~There is a split in authority over the knowledge requirement in Penal Code section 148(a). (Compare *People v. Mackreth* (2020) 58 Cal.App.5th 317, 334 [272 Cal.Rptr.3d 498] [actual knowledge that person is an officer not required] with *In re A.L.* (2019) 38 Cal.App.5th 15, 22 [250 Cal.Rptr.3d 572] [defendant must have actual knowledge he or she is resisting an officer in the performance of duty].) If the trial court agrees with *Mackreth*, give the instruction as written. If the trial court agrees with *A.L.*, modify the instruction.~~

AUTHORITY

- Elements. Pen. Code, § 148(a); see *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [116 Cal.Rptr.2d 21].
- General- Intent Crime. *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [116 Cal.Rptr.2d 21].
- Knowledge Required. *People v. Lopez* (1986) 188 Cal.App.3d 592, 599–600 [233 Cal.Rptr. 207].
- Multiple Violations Permissible If Multiple Officers. Pen. Code, § 148(e).
- "Peace Officer" Defined. Pen. Code, § 830 et seq.
- "Emergency Medical Technician" Defined. Health & Saf. Code, §§ 1797.80–1797.84.
- Delaying Officer From Performing Duties. *People v. Allen* (1980) 109 Cal.App.3d 981, 985–986, 987 [167 Cal.Rptr. 502].

- Verbal Resistance or Obstruction. *People v. Quiroga* (1993) 16 Cal.App.4th 961, 968, 970–972 [20 Cal.Rptr.2d 446] [nondisclosure of identity following arrest for felony, not misdemeanor]; *People v. Green* (1997) 51 Cal.App.4th 1433, 1438 [59 Cal.Rptr.2d 913] [attempt to intimidate suspected victim into denying offense].
- Passive Resistance to Arrest. *In re Bacon* (1966) 240 Cal.App.2d 34, 53 [49 Cal.Rptr. 322].
- Unanimity. *People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 9 [108 Cal.Rptr. 338].
- Merely Photographing or Recording Officers Not a Crime. Pen. Code, § 148(g).

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (~~4~~5th ed. 2024~~12~~) Crimes Against Governmental Authority, §§ 36–37, 41–42, 44, 47~~18–19~~.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest,* § 11.06[3][b] (Matthew Bender).

2745. Possession or Manufacture of Weapon in Penal Institution (Pen. Code, § 4502)

The defendant is charged [in Count __] with (possessing[,]/ [or] manufacturing[,]/ [or] attempting to manufacture) a weapon, specifically [(a/an)] _____ *<insert type of weapon from Pen. Code, § 4502, e.g., "explosive">*, **while (in a penal institution/being taken to or from a penal institution/under the custody of an (official/officer/employee) of a penal institution) [in violation of Penal Code section 4502].**

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

1. **The defendant was (present at or confined in a penal institution/being taken to or from a penal institution/under the custody of an (official/officer/employee) of a penal institution);**

2. **The defendant (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) [(a/an)]** _____ *<insert type of weapon from Pen. Code, § 4502, e.g., "explosive">*;

3. **The defendant knew that (he/she) (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) the** _____ *<insert type of weapon from Pen. Code, § 4502, e.g., "explosive">*;

AND

4. **The defendant knew that the object (was [(a/an)]** _____ *<insert type of weapon from Pen. Code, § 4502, e.g., "explosive">*/**could be used** _____ *<insert description of weapon's use, e.g., "as a stabbing weapon," or "for purposes of offense or defense">*).

A *penal institution* is a (state prison[,]/ [or] prison camp or farm[,]/ [or] county jail[,]/ [or] county road camp).

[*Metal knuckles* means any device or instrument made wholly or partially of metal that is worn in or on the hand for purposes of offense or defense and

that either protects the wearer's hand while striking a blow or increases the injury or force of impact from the blow. The metal contained in the device may help support the hand or fist, provide a shield to protect it, or consist of projections or studs that would contact the individual receiving a blow.]

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

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

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

[*Fixed ammunition* is a projectile and powder enclosed together in a case ready for loading.]

[A *dirk or dagger* is a knife or other instrument, with or without a handguard, that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death.] [*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than moderate harm.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.] [A firearm need not be in working order if it was designed to shoot and appears capable of shooting.]

[*Tear gas* is a liquid, gaseous, or solid substance intended to produce temporary physical discomfort or permanent injury when vaporized or otherwise dispersed in the air.]

[A *tear gas weapon* is a shell, cartridge, or bomb capable of being discharged or exploded to release or emit tear gas.] [A *tear gas weapon* [also] means a revolver, pistol, fountain pen gun, billy, or other device, portable or fixed, intended specifically to project or release tear gas.] [A *tear gas weapon* does not include a device regularly manufactured and sold for use with firearm ammunition.]

[[(A/An)] _____ *<insert type of weapon from Pen. Code, § 4502, not covered in above definitions>* **(is/means/includes)** _____ *<insert appropriate definition, see Bench Notes>***.]**

The People do not have to prove that the defendant used or intended to use the object as a weapon.

[You may consider evidence that the object could be used in a harmless way in deciding if the object is (a/an) _____ *<insert type of weapon from Pen. Code, § 4502>*, **as defined here.]**

[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/visible)).]

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

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

[The People allege that the defendant (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) the following weapons: _____ *<insert description of each weapon when multiple items alleged>*. **You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) at least one of these weapons and you all agree on which weapon (he/she) (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture).]**_____

_____

*New January 2006; Revised February 2012, September 2020, October 2025, February 2026**

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

BENCH NOTES

Instructional Duty

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

Where indicated in the instruction, insert one or more of the following weapons from Penal Code section 4502, based on the evidence presented:

metal knuckles

explosive substance

fixed ammunition

dirk or dagger

sharp instrument

pistol, revolver, or other firearm

tear gas or tear gas weapon

an instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag

Following the elements, give the appropriate definition of the alleged weapon. If the prosecution alleges that the defendant possessed an "instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, [or] sandbag," the court should give an appropriate definition based on case law. (See *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1402 [111 Cal.Rptr.2d 496] [definition of "slungshot"]; *People v. Mulherin* (1934) 140 Cal.App. 212, 215 [35 P.2d 174] [definition of this class of weapons].)

If the prosecution alleges under a single count that the defendant possessed multiple weapons, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with "The People allege that the defendant possessed," inserting the items alleged.

If there is sufficient evidence of a harmless use for the object possessed, give the bracketed sentence that begins with "You may consider evidence that the object could be used in a harmless way . . . ." (*People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744 [19 Cal.Rptr.2d 115].)

If the prosecution alleges that the defendant attempted to manufacture a weapon, give CALCRIM No. 460, *Attempt Other Than Attempted Murder*.

It is unclear if the defense of momentary possession for disposal applies to a charge of weapons possession in a penal institution. In *People v. Brown* (2000) 82 Cal.App.4th 736, 740 [98 Cal.Rptr.2d 519], the court held that the defense was not available on the facts of the case before it but declined to consider whether "there can *ever* be a circumstance justifying temporary possession in a penal institution." (*Ibid.* [emphasis in original].) The California Supreme Court has reaffirmed that the momentary possession defense is available to a charge of illegal possession of a weapon. (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) However, the Supreme Court has yet to determine whether the defense is available in a penal institution. If the trial court determines that an instruction on momentary possession is warranted on the facts of the case before

it, give a modified version of the instruction on momentary possession contained in CALCRIM No. 2510, *Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction*.

If there is sufficient evidence of imminent death or bodily injury, the defendant may be entitled to an instruction on the defense of duress or threats. (*People v. Otis* (1959) 174 Cal.App.2d 119, 125–126 [344 P.2d 342].) Give CALCRIM No. 3402, *Duress or Threats*, modified as necessary.

AUTHORITY

- Elements. Pen. Code, § 4502.
- "Metal Knuckles" Defined. Pen. Code, § 21810.
- "Explosive" Defined. Health & Saf. Code, § 12000.
- "Dirk or Dagger" Defined. Pen. Code, § 16470.
- "Firearm" Defined. Pen. Code, § 16520.
- "Tear Gas" Defined. Pen. Code, § 17240.
- "Tear Gas Weapon" Defined. Pen. Code, § 17250.
- "Blackjack," etc., Defined. *People v. Fannin, supra,* 91 Cal.App.4th at p. 1402; *People v. Mulherin, supra,* 140 Cal.App. at p. 215.
- Example of Sharp Instrument. *People v. Valle* (2025) 112 Cal.App.5th 1035, 1039 [334 Cal.Rptr.3d 846].
- Knowledge. See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735]; *People v. Reynolds* (1988) 205 Cal.App.3d 776, 779 [252 Cal.Rptr. 637], overruled on other grounds, *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].
- Harmless Use. *People v. Savedra, supra,* 15 Cal.App.4th at pp. 743–744; *People v. Martinez* (1998) 67 Cal.App.4th 905, 910–913 [79 Cal.Rptr.2d 334].
- Unanimity. *People v. Wolfe, supra,* 114 Cal.App.4th at pp. 184–185.
- Constructive vs. Actual Possession. *People v. Reynolds* (1988) 205 Cal.App.3d 776, 782, fn. 5 [252 Cal.Rptr. 637], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].

RELATED ISSUES

Administrative Punishment Does Not Bar Criminal Action

"[P]rison disciplinary measures do not bar subsequent prosecution in a criminal action for violation of a penal statute prohibiting the same act which was the basis of the prison discipline by virtue of the proscription against double punishment provided in section 654 [citation] or by the proscription against double jeopardy provided in the California Constitution (art. I, § 13) and section 1023." (*People v. Vatelli* (1971) 15 Cal.App.3d 54, 58 [92 Cal.Rptr. 763] [citing *People v. Eggleston* (1967) 255 Cal.App.2d 337, 340 [63 Cal.Rptr. 104]].)

Possession of Multiple Weapons at One Time Supports Only One Conviction

"[D]efendant is subject to only one conviction for his simultaneous possession of three sharp wooden sticks in prison." (*People v. Rowland, supra,* 75 Cal.App.4th at p. 65.)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (5th ed. 2024) Crimes Against Public Peace and Welfare, §§ 293, 297.

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

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 94, *Prisoners' Rights,* § 94.04 (Matthew Bender).

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

2840. Evidence of Uncharged Tax Offense: Failed to File Previous Returns

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The People presented evidence that the defendant (may have/did) not file[d] [a] tax return[s] for [a] year[s] not charged in this case.

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant did not file [a] tax return[s] for (that/those) year[s]. Proof by a preponderance of the evidence is a different standard of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

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

If you conclude that the defendant did not file [a] tax return[s] for (that/those) year[s], you may, but are not required to, consider that evidence for the limited purpose of deciding whether:

<A. Intent>
[The defendant acted with the intent to _____ *<insert specific intent required to prove the offense alleged>* **in this case](./;)**

[OR]

<B. Accident or Mistake>
[The defendant's alleged actions were not the result of mistake or accident.]

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

If you conclude that the defendant did not file [a] tax return[s] for (that/those) year[s], that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of _____ *<insert charged offense>***. The People must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt.**

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

New January 2006; Revised April 2008, February 2026

BENCH NOTES

Instructional Duty

The court must give this instruction on request when evidence of other offenses has been introduced under Evidence Code section 1101(b). (Evid. Code, § 1101(b); *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. Collie* (1981) 30 Cal.3d 43, 63–64 [177 Cal.Rptr. 458, 634 P.2d 534].)

Evidence of the failure of the defendant to file tax returns in previous years may be admitted as evidence of prior illegal acts tending to show intent or lack of accident or mistake. (*United States v. Fingado* (10th Cir. 1991) 934 F.2d 1163, 1165–1166.)

The court **must** identify for the jury what issue the evidence has been admitted for: to prove mental state, to prove lack of accident or mistake, or to prove both.

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

Related Instructions

CALCRIM No. 375, *Evidence of Uncharged Offenses to Prove Identity, Intent, or Common Plan, etc*.

AUTHORITY

- Evidence of Prior Uncharged Acts. Evid. Code, § 1101(b).
- Standard of Proof Preponderance of Evidence. *People v. Carpenter*, *supra,* ~~(1997)~~ 15 Cal.4th ~~312,~~at p. 382 ~~[63 Cal.Rptr.2d 1, 935 P.2d 708]~~.
- Previous Failure to File Tax Returns. *United States v. Fingado*, *supra,* ~~(1991)~~ 934 F.2d ~~1163,~~at pp. 1165–1166.

RELATED ISSUES

See Bench Notes and Related Issues section in CALCRIM No. 375, *Evidence of Uncharged Offenses of Prove Identity, Intent, or Common Plan, etc*.

SECONDARY SOURCES

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, §§ 140.02[5], 140.03 (Matthew Bender).

2931. Trespass: Unlawfully Occupying Property (Pen. Code, § 602(m))

The defendant is charged [in Count __] with trespassing [in violation of Penal Code section 602(m)].

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

1. **The defendant willfully entered (land/ [or] a building) belonging to someone else without the consent of the (owner[,]/ [or] owner's agent[,]/ [or] person in lawful possession of the property);**

2. **After the defendant entered, (he/she) occupied the (land/ [or] building) without the consent of the (owner[,]/ [or] owner's agent[,]/ [or] person in lawful possession of the property);**

AND

3. **The defendant occupied some part of the (land/ [or] building) continuously until removed.**

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

[An *agent* is a person who is authorized to act for someone else in dealings with third parties.]

New January 2006; Revised February 2026

BENCH NOTES

Instructional Duty

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

AUTHORITY

- Elements. Pen. Code, § 602(m).

- "Willfully" Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Consent Can Be Express or Implied. *People v. Wilkinson* (1967) 248 Cal.App.2d Supp. 906, 908 [56 Cal.Rptr. 261].
- Entry Must Be Without Consent. *People v. Brown* (1965) 236 Cal.App.2d Supp. 915, 920–921 [47 Cal.Rptr. 662]; *People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 932 [47 Cal.Rptr. 670], disapproved on other grounds in *In re Hayes* (1969) 70 Cal.2d 604, 614, fn. 2 [75 Cal.Rptr. 790, 451 P.2d 430].
- "Occupy" Defined. *People v. Wilkinson* (1967) 248 Cal.App.2d Supp. 906, 909–911 [56 Cal.Rptr. 261].
- "Land" Includes Building on the Land. *People v. Brown* (1965) 236 Cal.App.2d Supp. 915, 917–919 [47 Cal.Rptr. 662] [partially abrogated by statute].
- "Agent" Defined. Civ. Code, § 2295.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (45th ed. 2024) Crimes Against Property, §§ 309–310.

3160. Great Bodily Injury (Pen. Code, §§ 667.5(c)(8), 667.61(d)(6), 1192.7(c)(8), 12022.7, 12022.8)

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ *<insert name[s] of alleged lesser offense[s]>***], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally inflicted great bodily injury on _____** *<insert name of injured person>* **during the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

[The People must also prove that _____ *<insert name of injured person>* **was not an accomplice to the crime.]**

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

[Committing the crime of _____ *<insert sexual offense charged>* **is not by itself the infliction of great bodily injury.]**

[A person inflicts great bodily injury if the person sells, furnishes, administers, or gives a controlled substance to another person who uses the substance and, as a result, suffers a significant or substantial physical injury.]

<Group Assault>

[If you conclude that more than one person assaulted _____ *<insert name of injured person>* **and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily injury on _____** *<insert name of injured person>* **if the People have proved that:**

1. **Two or more people, acting at the same time, assaulted _____** *<insert name of injured person>* **and inflicted great bodily injury on (him/her);**

2. **The defendant personally used physical force on _____** *<insert name of injured person>* **during the group assault;**

AND

[3A. The amount or type of physical force the defendant used on _____ <*insert name of injured person*> was enough that it alone could have caused _____ <*insert name of injured person*> to suffer great bodily injury(;/.)]

[OR]

[3B. The physical force that the defendant used on _____ <*insert name of injured person*> was sufficient in combination with the force used by the others to cause _____ <*insert name of injured person*> to suffer great bodily injury.]

The defendant must have applied substantial force to _____ <*insert name of injured person*>. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]

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

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

AND

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

<If there is an issue in the case over whether the defendant inflicted the injury "during the commission of" the offense, see Bench Notes.>

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

New January 2006; Revised June 2007, February 2015, September 2020, March 2022, March 2024, October 2025, February 2026**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed sentence that begins with "Committing the crime of" if the defendant is charged with a sexual offense. (*People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100] [injury must be more than that which is present in every offense of rape].)

The bracketed section beneath the heading "Group Assault" is designed to be used in cases where the evidence shows a group assault.

If the court gives the bracketed sentence instructing that the People must prove that the person assaulted "was not an accomplice to the crime," the court should also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

The jury must determine whether an injury constitutes "great bodily injury." (*People v. Escobar, supra,* 3 Cal.4th at p. 750; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].) A jury's finding of serious bodily injury is not equivalent to a finding of great bodily injury. (*In re Cabrera* (2023) 14 Cal.5th 476, 491 [304 Cal.Rptr.3d 798, 524 P.3d 784].)

If there is an issue in the case over whether the defendant inflicted the injury "during the commission of" the offense, the court may give CALCRIM No. 3261, *While Committing a Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancements. Pen. Code, §§ 667.5(c)(8), 667.61(d)(6), 12022.7, 12022.8.
- Great Bodily Injury Enhancements Do Not Apply to Conviction for Murder or Manslaughter. *People v. Cook* (2015) 60 Cal.4th 922, 924 [183 Cal.Rptr.3d 502].

- "Great Bodily Injury" Defined. Pen. Code, § 12022.7(f); *In re Cabrera, supra,* 14 Cal.5th at p. 484 [not equivalent to serious bodily injury]; *People v. Escobar, supra,* 3 Cal.4th at pp. 749–750 [greater than minor or moderate harm].
- Personal Infliction by Furnishing Drugs. Pen. Code, § 12022.7(f)(2).
- Great Bodily Injury May Be Established by Pregnancy or Abortion. *People v. Cross* (2008) 45 Cal.4th 58, 68 [82 Cal.Rptr.3d 373, 190 P.3d 706].
- Must Personally Inflict Injury. *People v. Millan* (2025) 111 Cal.App.5th 308, 324–328 [332 Cal.Rptr.3d 706]; *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Failure to Act When Action Required Can Be Sufficient. *People v. Warwick* (2010) 182 Cal.App.4th 788, 793–795 [106 Cal.Rptr.3d 133].
- Sex Offenses—Injury Must Be More Than Incidental to Offense. *People v. Escobar, supra,* 3 Cal.4th at p. 746.
- Group Beating Instruction. *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762, 139 P.3d 136].
- This Instruction Is Correct In Defining Group Beating. *People v. Dunkerson* (2007) 155 Cal.App.4th 1413, 1418 [66 Cal.Rptr.3d 795].
- "Accomplice" Defined. See Pen. Code, § 1111; *People v. Verlinde, supra,* 100 Cal.App.4th at pp. 1167–1168; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- "During Commission of" Felony. *People v. Jones, supra,* 25 Cal.4th at pp. 109–110; *People v. Masbruch, supra,* 13 Cal.4th at p. 1014; *People v. Taylor, supra,* 32 Cal.App.4th at p. 582.
- This Instruction Correctly Omits Requirement of Intent to Inflict GBI. *People v. Poroj* (2010) 190 Cal.App.4th 165, 176 [117 Cal.Rptr.3d 884].

RELATED ISSUES

Specific Intent Not Required

Penal Code section 12022.7 was amended in 1995, deleting the requirement that the defendant act with "the intent to inflict such injury." (Stats. 1995, ch. 341, § 1; see also *People v. Carter* (1998) 60 Cal.App.4th 752, 756 [70 Cal.Rptr.2d 569] [noting amendment].)

Instructions on Aiding and Abetting

In *People v. Magana* (1993) 17 Cal.App.4th 1371, 1378–1379 [22 Cal.Rptr.2d 59], the evidence indicated that the defendant and another person both shot at the victims. The jury asked for clarification of whether the evidence must establish that the bullet from the defendant's gun struck the victim in order to find the enhancement for personally inflicting great bodily injury true. (*Id.* at p. 1379.) The trial court responded by giving the instructions on aiding and abetting. *(Ibid.)* The Court of Appeal reversed, finding the instructions erroneous in light of the requirement that the defendant must personally inflict the injury for the enhancement to be found true. (*Id.* at p. 1381.)

Sex Offenses—Examples of Great Bodily Injury

The following have been held to be sufficient to support a finding of great bodily injury: transmission of a venereal disease (*People v. Johnson* (1986) 181 Cal.App.3d 1137, 1140 [225 Cal.Rptr. 251]); pregnancy (*People v. Sargent* (1978) 86 Cal.App.3d 148, 151 [150 Cal.Rptr. 113]); and a torn hymen (*People v. Williams* (1981) 115 Cal.App.3d 446, 454 [171 Cal.Rptr. 401]).

Enhancement May Be Applied Once Per Victim

The court may impose one enhancement under Penal Code section 12022.7 for each injured victim. (Pen. Code, § 12022.7(h); *People v. Ausbie* (2004) 123 Cal.App.4th 855, 864 [20 Cal.Rptr.3d 371].)

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (5th ed. 2024) Punishment, §§ 401–403.

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

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

3224. Aggravating Factor: Great Violence, Great Bodily Harm, or High Degree of Cruelty, Viciousness, or Callousness

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<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged [in Count[s] __][or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the crime[s][in Count[s] __] involved (great violence[,]/ [or]great bodily harm[,]/ [or]threat[s] of great bodily harm[,]/ [or][(other/an)] act[s] revealing a high degree of cruelty, viciousness, or callousness).]

<Introductory paragraph for bifurcated trial>
[The People have alleged that the crime[s][in Count[s] __] involved (great violence[,]/ [or]great bodily harm[,]/ [or]threat[s] of great bodily harm[,]/ [or][(other/an)] act[s] revealing a high degree of cruelty, viciousness, or callousness).]

To prove this allegation, the People must prove that:

1. **During the commission of the crime[s], the defendant (used great violence[,]/ [or]inflicted great bodily harm[,]/ [or]threatened to inflict great bodily harm[,]/ [or]committed (other/an) act[s] showing a high degree of cruelty, viciousness, or callousness);**

   AND

2. **The (type/level) of (violence[,]/ [or]bodily harm[,]/ [or]threat of bodily harm[,]/ [or]cruelty, viciousness, or callousness) was distinctively worse than what was necessary to commit the crime[s].**

[For the crime to have been committed with (great violence[,]/ [or]cruelty[,]/ [or]viciousness[,]/ [or]callousness), no one needs to actually have been injured by the 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 the crime with (great violence[,]/ [or]cruelty[,]/ [or]viciousness[,]/ [or]callousness).]

[*Great bodily harm* means significant or substantial physical injury~~,~~. It is greater than ~~as opposed to minor or~~ moderate harm.]

[*Threat of great bodily harm* means the threat of significant or substantial physical injury. It is a threatened injury that would result in greater than ~~minor or~~ moderate harm.]

[*Viciousness* means dangerously aggressive or marked by violence or ferocity. *Viciousness* is not the same as violence. For example, some acts which may be described as vicious do not involve violence at all, but rather involve acts such as deceit and slander. On the other hand, many violent acts do not indicate viciousness, but instead show frustration, justifiable rage, or self-defense.]

[An act discloses *cruelty* when it demonstrates the deliberate infliction of physical or mental suffering.]

[An act discloses *callousness* when it demonstrates a lack of sympathy for the suffering of, or harm to, the victim[s].]

You may not find the allegation true unless all of you agree that the People have proved at least one of the following: that the defendant (used great violence[,]/ [or]inflicted great bodily harm[,]/ [or]threatened to inflict great bodily harm[,]/ [or]committed[other] acts showing a high degree of cruelty, viciousness, or callousness). However, you need not all agree on the act[s] or conduct that [constitutes the (use of great violence[,]/ [or]infliction of great bodily harm[,]/ [or]threat to inflict great bodily harm)][or][show a high degree of cruelty, viciousness, or callousness.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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

New March 2023; Revised March 2024, February 2025,* February 2026*
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

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

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(1).
- "Aggravating Fact" Defined. ~~*People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130];~~ *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Force, Violence, or Threat Beyond What Is Necessary to Accomplish Criminal Purpose. *People v. Karsai* (1982) 131 Cal.App.3d 224, 239 [182 Cal.Rptr. 406]; see also *People v. Cortez* (1980) 103 Cal.App.3d 491, 496 [163 Cal.Rptr. 1]; *People v. Harvey* (1984) 163 Cal.App.3d 90, 116 [208 Cal.Rptr. 910]; *People v. Garcia* (1989) 209 Cal.App.3d 790, 793–794 [257 Cal.Rptr. 495].
- Viciousness Not Equivalent to Violence. *People v. Reed* (1984) 157 Cal.App.3d 489, 492 [203 Cal.Rptr. 659].

- Actual Bodily Harm Not Required. *People v. Duran* (1982) 130 Cal.App.3d 987, 990 [182 Cal.Rptr. 17].

COMMENTARY

Distinctively Worse Than the Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* because comparing the defendant's conduct with other ways in which the same offense has been or may be committed "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense" and thus does not raise a constitutional concern. (See *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202].)

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

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

3225. Aggravating Factor: Armed or Used Weapon

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged [in Count[s] __][or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ *<insert lesser offense[s]>***], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the defendant was armed with or used a weapon, to wit: _____** *<insert description of weapon>***, during commission of the crime[s] in Count[s] _____.]**

<Introductory paragraph for bifurcated trial>
[The People have alleged that the defendant was armed with or used a weapon, to wit: _____ *<insert description of weapon>***, during commission of the crime[s][in Count[s] _____].]**

To prove this allegation, the People must prove that the defendant, while committing the crime[s][in Count[s] __], (knowingly carried a weapon[,]/ [or]knowingly had a weapon available for use[,]/ [or]intentionally displayed a weapon in a menacing manner[,]/ [or]intentionally (fired/ [or]attempted to fire) a weapon[,]/ [or]intentionally (struck[,]/ [or]stabbed[,]/ [or]slashed[,]/ [or]hit][,]/ [or]attempted to (strike[,]/ [or]stab[,]/ [or]slash[,]/ [or]hit) another person with a weapon).

[A device, instrument, or object that is capable of being used to inflict injury or death may be a *weapon*. In determining whether _____*<insert description>*** was a *weapon*, you may consider the totality of circumstances, including the manner in which it was used or possessed.]**

You may not find the allegation true unless all of you agree that the People have proved that the defendant was either armed or used a weapon. However, all of you do not need to agree on which act[s] or conduct constitutes the arming or use of a weapon.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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

New March 2023; Revised March 2024, February 2025,* February 2026**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

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

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

Give the bracketed portion that defines weapon if the object is not a weapon as a matter of law and is capable of innocent uses.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(2).
- "Aggravating Fact" Defined. ~~*People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130];~~ *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

- Arming Includes Available for Use. *People v. Garcia* (1986) 183 Cal.App.3d 335, 350 [228 Cal.Rptr. 87].

COMMENTARY

Distinctively Worse Than the Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* because comparing the defendant's conduct with other ways in which the same offense has been or may be committed "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense" and thus does not raise a constitutional concern. (See *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202].)

Penal Code section 12022

Consistent with the language of rule 4.421(a)(2), the instruction has been drafted with the assumption that the defendant is personally armed. The armed enhancement contained in Penal Code section 12022(a)(1) provides: "This additional term shall apply to a person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm." Whether there is a relationship between the rule of court and Penal Code section 12022(a)(1) has not been addressed by case law.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

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

3226. Aggravating Factor: Particularly Vulnerable Victim

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __][or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ *<insert lesser offense[s]>***], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that _____***<insert name of victim>* **was a particularly vulnerable victim.]**

<Introductory paragraph for bifurcated trial>
[The People have alleged[in Count[s] __] that _____*<insert name of victim>* **was a particularly vulnerable victim.]**

To prove this allegation, the People must prove that:

1. **_____** *<insert name of victim>* **suffered/ [or]was threatened with suffering) a loss, injury, or harm as the result of the crime[s];**

AND

2. **_____***<insert name of victim>* **was particularly vulnerable.**

Particularly vulnerable **includes being defenseless, unguarded, unprotected, or otherwise susceptible to the defendant's criminal act to a special or unusual degree.**

In determining whether _____ *<insert name of victim>* **was *particularly vulnerable*, you should consider all of the circumstances surrounding the commission of the crime, including the characteristics of _____** *<insert name of victim>* **and the manner and setting in which the crime was committed.**

[You may not find vulnerability based solely on _____ *<insert element of the offense>***, which is an element of _____***<insert offense>***.]**

You may not find the allegation true unless all of you agree that the People have proved that the victim was particularly vulnerable. However, you do not have to agree on which facts show that the victim was particularly vulnerable.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime[and for each victim].

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

New March 2023; Revised March 2024, February 2025,* February 2026**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

Pen. Code section 1170.85(b) states: "Upon conviction of any felony it shall be considered a circumstance in aggravation in imposing a term under subdivision (b) of Section 1170 if the victim of an offense is particularly vulnerable, or unable to defend himself or herself, due to age or significant disability." If this section is applicable, the instruction should be modified to reflect the victim's alleged inability to defend himself or herself based on age or significant disability.

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

The court should specify which crime and victim the aggravating factor pertains to if it applies to one or more specific counts or victims.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(3).
- "Aggravating Fact" Defined. ~~*People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130];~~ *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- "Victim" Defined. *People v. Simon* (1983) 144 Cal.App.3d 761, 765 [193 Cal.Rptr. 28].
- "Particularly Vulnerable" Defined. *People v. DeHoyos* (2013) 57 Cal.4th 79, 154–155 [158 Cal.Rptr.3d 797, 303 P.3d 1]; *People v. Spencer* (1996) 51 Cal.App.4th 1208, 1223 [59 Cal.Rptr.2d 627]; *People v. Price* (1984) 151 Cal.App.3d 803, 814 [199 Cal.Rptr. 99]; *People v. Ramos* (1980) 106 Cal.App.3d 591, 607 [165 Cal.Rptr. 179]; *People v. Smith* (1979) 94 Cal.App.3d 433, 436 [156 Cal.Rptr. 502].
- Vulnerability Cannot Be Based Solely on Age if Age Is Element of Offense. *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1693–1694 [53 Cal.Rptr.2d 282], disapproved on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123 [65 Cal.Rptr.2d 1, 938 P.2d 986]; *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1159 [249 Cal.Rptr. 435], disapproved on other grounds in *People v. Soto* (2011) 51 Cal.4th 229, 244–245 [119 Cal.Rptr.3d 775, 245 P.3d 410]; *People v. Ginese* (1981) 121 Cal.App.3d 468, 476–477 [175 Cal.Rptr. 383]; *People v. Flores* (1981) 115 Cal.App.3d 924, 927 [171 Cal.Rptr. 777].
- Vulnerability of Victims in Driving Offenses~~Factor in Vehicular Manslaughter~~. *People v. Bloom* (1983) 142 Cal.App.3d 310, 322 [190 Cal.Rptr. 857]; *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1358–1359 [241 Cal.Rptr. 391] [vehicular manslaughter victim cannot be particularly vulnerable]; *People v. Weaver* (2007) 149 Cal.App.4th 1301, 1315–1319 [58 Cal.Rptr.3d 18] [vehicular manslaughter victim can be particularly vulnerable], disapproved on another ground in *People v. Cook* (2015) 60 Cal.4th 922 [183 Cal.Rptr.3d 502, 342 P.3d 404]; *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1182 [214 Cal.Rptr.3d 467] [vehicular manslaughter victim can be particularly vulnerable]; *People v. Mendez-Torres* (2025) 113 Cal.App.5th 1007, 1022 [336 Cal.Rptr.3d 298] [advance warning or ability to avoid collision is determinative factor].~~)~~.

COMMENTARY

Distinctively Worse Than the Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* because comparing the defendant's conduct with other ways in which the same offense has been or may be committed "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense" and thus does not raise a constitutional concern. (See *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202].)

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

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

3227. Aggravating Factor: Induced Others to Participate or Occupied Position of Leadership or Dominance

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<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant induced others to participate in committing the crime[s] or occupied a position of leadership or dominance of other participants in the commission of the crime[s].]

<Introductory paragraph for bifurcated trial>
[The People have alleged[in Count[s] ___] that the defendant induced others to participate in committing the crime[s] or occupied a position of leadership or dominance of other participants in the commission of the crime[s].]

To prove this allegation, the People must prove that:

1. **The defendant induced others to participate in the commission of the crime[s];**

OR

2. **The defendant occupied a position of leadership or dominance over other participants during commission of the crime[s].**

***Induced* means persuaded, convinced, influenced, or instructed.**

You may not find the allegation true unless all of you agree that the People have proved that the defendant either induced others to participate or occupied a position of leadership or dominance. However, all of you do not need to agree on which act[s] or conduct constitutes inducing others to participate or occupying a position of leadership or dominance.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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

New March 2023; Revised March 2024, February 2025,* February 2026**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

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

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(4).
- "Aggravating Fact" Defined. ~~*People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130];~~ *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

- More Than One Participant Required. *People v. Berry* (1981) 117 Cal.App.3d 184, 198 [172 Cal.Rptr. 756, 763–764].
- Leadership Not Equivalent to Dominance. *People v. Kellett* (1982) 134 Cal.App.3d 949, 961 [185 Cal.Rptr. 1].
- Factor Requires More Than Being Willing Participant. *People v. Searle* (1989) 213 Cal.App.3d 1091, 1097 [261 Cal.Rptr. 898].

COMMENTARY

Distinctively Worse Than the Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* because comparing the defendant's conduct with other ways in which the same offense has been or may be committed "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense" and thus does not raise a constitutional concern. (See *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202].)

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

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

3228. Aggravating Factor: Induced Minor to Commit or Assist

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged [in Count[s] __][or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the defendant induced a minor to commit or assist in the commission of the crime[s][in Count[s] __].]

<Introductory paragraph for bifurcated trial>
[The People have alleged[in Count[s] __] that the defendant induced a minor to commit or assist in the commission of the crime[s].]

To prove this allegation, the People must prove that:

1. **The defendant induced a minor to commit the crime[s];**

OR

2. **The defendant induced a minor to assist in the commission of the crime[s].**

Induced **means persuaded, convinced, influenced, or instructed.**

A minor is a person under the age of 18 years.

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

You may not find the allegation true unless all of you agree that the People have proved that the defendant induced a minor either to commit the crime or to assist in the commission of the crime. However, all of you do not need to agree on which act[s] or conduct constitutes the inducement.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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

New March 2023; Revised March 2024, February 2025,* February 2026**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

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

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(5).
- "Aggravating Fact" Defined. ~~*People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130];~~ *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

COMMENTARY

Distinctively Worse Than the Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* because comparing the defendant's conduct with other ways in which the same offense has been or may be committed "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense" and thus does not raise a constitutional concern. (See *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202].)

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

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

3229. Aggravating Factor: Threatened, Prevented, Dissuaded, Etc. Witnesses

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<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ *<insert lesser offense[s]>***], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the defendant[in Count[s] __] (threatened witnesses[,]/ [or]unlawfully prevented or dissuaded witnesses from testifying[,]/ [or]suborned perjury[,]/ [or]_____***<insert other illegal activity that interfered with the judicial process>*****.]**

<Introductory paragraph for bifurcated trial>
[The People have alleged that the defendant[in Count[s] __] (threatened witnesses[,]/ [or]unlawfully prevented or dissuaded witnesses from testifying[,]/ [or]suborned perjury[,]/ [or]_____*<insert other illegal activity that interfered with the judicial process>*****.]**

To prove this allegation, the People must prove that the defendant (threatened [a]witness[es]/ [or]prevented [a]witness[es] from testifying/ [or]dissuaded [a]witness[es] from testifying/ [or]suborned perjury/[or]_____*<insert other illegal activity that interfered with the judicial process>*****.**

[As used here, *witness* means someone[or a person the defendant reasonably believed to be someone]:

<Give the appropriate bracketed paragraph[s].>

- **[Who knows about the existence or nonexistence of facts relating to a crime(;/.)]**

  [OR]

- **[Whose declaration under oath has been or may be received as evidence(;/.)]**

  [OR]

- **[Who has reported a crime to a (peace officer[,]/ [or] prosecutor[,]/ [or] probation or parole officer[,]/ [or] correctional officer[,]/ [or] judicial officer)(;/.)]**

  [OR

- **Who has been served with a subpoena issued under the authority of any state or federal court.]]**

[A threat may be oral or written and may be implied by a pattern of conduct or a combination of statements and conduct.]

[The defendant does not have to communicate the threat directly to the intended victim, but may do so through someone else.]

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

[*Dissuaded* means persuaded or advised not to do something.]

[*Suborned perjury* means encouraged, induced, or assisted witnesses to willfully make [a]false statement[s] under oath. In order to find that the defendant suborned perjury, the People must prove, beyond a reasonable doubt, not only that the sworn statement was actually false, but also that the defendant, at the time (he/she) encouraged, induced, or assisted the witness(es) to make the statement, knew that it was false.]

[*Induced* means persuaded, convinced, influenced, or instructed.]

You may not find the allegation true unless all of you agree that the People have proved that the defendant (threatened [a]witness[es]/ [or]prevented [a]witness[es] from testifying/ [or]dissuaded [a]witness[es] from testifying/ [or]suborned perjury/ [or]_____<*insert other illegal activity that interfered with the judicial process*>**). However, all of you do not need to agree on which act[s] or conduct constitutes (threatening [a]witness[es]/ [or]preventing [a]witness[es] from testifying/ [or]dissuading [a]witness[es] from testifying/ [or]suborning perjury/ [or]_____**<*insert other illegal activity that interfered with the judicial process*>**).**

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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

New March 2023; Revised March 2024, February 2025,* February 2026**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

Penal Code section 1170.85(a) states: "Upon conviction of any felony assault or battery offense, it shall be considered a circumstance in aggravation of the crime in imposing a term under subdivision (b) of Section 1170 if the offense was committed to prevent or dissuade a person who is or may become a witness from attending upon or testifying at any trial, proceeding, or inquiry authorized by law, or if the offense was committed because the person provided assistance or information to a law enforcement officer, or to a public prosecutor in a criminal or juvenile court proceeding." If this section is applicable, the bracketed catch-all provision of the instruction related to other illegal activity should be modified to reflect the defendant's alleged conduct.

If it is alleged the defendant interfered with the judicial process by committing perjury, the bracketed catch-all provision for other illegal activity should be modified and the trial court should also instruct with CALCRIM No. 2640, *Perjury*. (See *People v. Howard* (1993) 17 Cal.App.4th 999, 1002–1004 [21 Cal.Rptr.2d 676].)

The catch-all provision of other illegal activity can include attempts to dissuade or prevent a witness from testifying. (See *People v. Lewis* (1991) 229 Cal.App.3d 259, 266–267 [280 Cal.Rptr. 128].)

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

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(6).
- "Aggravating Fact" Defined. ~~*People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130];~~ *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- "Witness" Defined. Pen. Code, § 136(2).
- "Threat" Defined. Pen. Code, § 76(5).
- Attempted Subornation of Perjury. *People v. Lewis, supra,* 229 Cal.App.3d at pp. 266–267.

COMMENTARY

Distinctively Worse Than the Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* because comparing the defendant's conduct with other ways in which the same offense has been or may be committed "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense" and thus does not raise a constitutional concern. (See *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202].)

Perjury

Perjury committed by the defendant can constitute "an illegal activity that interfered with the judicial process." (See *People v. Howard, supra,* 17 Cal.App.4th at p. 1002.) If it is alleged that the defendant committed perjury, the jury must find all the elements of a perjury violation. *Id.* at p. 1004 [holding that the court is constitutionally required to make findings encompassing the elements of perjury: "a willful statement, under oath, of any material matter which the witness knows to be false"]; see also *United States v. Dunnigan* (1993) 507 U.S. 87, 96 [113 S.Ct. 1111, 122 L.Ed.2d 445].) The concern, essentially, is that a sentence may be aggravated if the defendant actually committed perjury by being untruthful, but not if the defendant merely gave inaccurate testimony because of confusion, mistake, faulty memory, or some other reason besides a willful attempt to impede justice. (*Howard*, *supra*, 17 Cal.App.4th at p.1005; *Dunnigan*, *supra*, 507 U.S. at pp. 95–96.)

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

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

3230. Aggravating Factor: Planning, Sophistication, or Professionalism

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<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the offense was carried out with planning, sophistication, or professionalism.]

<Introductory paragraph for bifurcated trial>
[The People have alleged[in Count[s] __] that the offense was carried out with planning, sophistication, or professionalism.]

To prove this allegation, the People must prove that the defendant's manner of committing the crime involved planning, sophistication, or professionalism.

Whether the manner of committing the crime involves *planning, sophistication, or professionalism* depends on the totality of the circumstances surrounding the offense.

***Planning* refers to conduct before the crime, preparing for its commission.**

***Sophistication* refers to conduct demonstrating knowledge or awareness of the complexities or details involved in committing the crime.**

***Professionalism* refers to conduct demonstrating particular experience or expertise.**

You may not find the allegation true unless all of you agree that the People have proved that the defendant's manner of committing the crime involved planning, sophistication, or professionalism. However, all of you do not need to agree on which act[s] or conduct demonstrates that the manner of committing the crime involves planning, sophistication, or professionalism.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved (this/these) allegation[s] for each crime and return a separate finding for each crime.]

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 March 2023; Revised March 2024, February 2025,* February 2026**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

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

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where the evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factors. California Rules of Court, rule 4.421(a)(8).
- "Aggravating Fact" Defined. ~~*People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130];~~ *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

- "Planning, Sophistication, Professionalism" Defined. *People v. Mathews* (1980) 102 Cal.App.3d 704, 710 [162 Cal.Rptr. 615]; *People v. Stewart* (1983) 140 Cal.App.3d 11, 17 [189 Cal.Rptr. 141]; *People v. Charron* (1987) 193 Cal.App.3d 981, 994–995 [238 Cal.Rptr. 660]; *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1695 [53 Cal.Rptr.2d 282], disapproved on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123 [65 Cal.Rptr.2d 1, 938 P.2d 986].

COMMENTARY

Distinctively Worse Than the Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* because comparing the defendant's conduct with other ways in which the same offense has been or may be committed "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense" and thus does not raise a constitutional concern. (See *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202].)

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

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

3231. Aggravating Factor: Great Monetary Value

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ *<insert lesser offense[s]>***], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the crime[s][in Count[s] __] involved [(a/an)] [attempted] [or] [actual] (taking/ [or] damage) of great monetary value.]**

<Introductory paragraph for bifurcated trial>
[The People have alleged that the crime[s][in Count[s] __] involved[(a/an)][attempted][or][actual] (taking/ [or] damage) of great monetary value.]

To prove this allegation, the People must prove that:

1. **During the commission of the crime[s], the defendant (attempted to take/ [or]actually took/damaged) _____***<insert description of item>***;**

AND

2. **The monetary value of the _____** *<insert description of item or damage to item>* **was great.**

[In determining whether the *monetary value* was *great*, you may consider all evidence presented on the issue of value.]

You may not find the allegation true unless all of you agree that the People have proved that the (item/damage) that the defendant (attempted to take/took / [or] caused) was of great monetary value. However, all of you do not need to agree on a specific monetary value.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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

New March 2023; Revised March 2024, February 2025, * February 2026**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

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

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(9).
- "Aggravating Fact" Defined. ~~*People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130];~~ *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Great Monetary Value. *People v. Wright* (1982) 30 Cal.3d 705, 707 & 714 [180 Cal.Rptr. 196, 639 P.2d 267] [losses of $2,300 and $3,250 qualified];

People v. Berry (1981) 117 Cal.App.3d 184, 197 [172 Cal.Rptr. 756] [damage of $450 did not qualify]; *People v. Bejarano* (1981) 114 Cal.App.3d 693, 705–706 [173 Cal.Rptr. 71] [loss of rifle, shotgun, and television did not qualify].

COMMENTARY

Distinctively Worse Than the Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* because comparing the defendant's conduct with other ways in which the same offense has been or may be committed "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense" and thus does not raise a constitutional concern. (See *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202].)

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

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

3232. Aggravating Factor: Large Quantity of Contraband

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the crime[s][in Count[s] __] involved a large quantity of contraband.]

<Introductory paragraph for bifurcated trial>
[The People have alleged that the crime[s][in Count[s] __] involved a large quantity of contraband.]

To prove this allegation, the People must prove that:

1. **The _____ *<insert description of contraband>* was contraband;**

   AND

2. **The quantity of _____*<insert description of contraband>* was large.**

[*Contraband* means illegal or prohibited items.]

In determining whether the quantity was *large*, you may consider all evidence presented on the issue of amount.

You may not find the allegation true unless all of you agree that the People have proved that the quantity of contraband was large. However, all of you do not need to agree on the specific quantity.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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

New March 2023; Revised March 2024, February 2025,* February 2026*
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

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

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(10).
- "Aggravating Fact" Defined. ~~*People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130];~~ *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

COMMENTARY

Distinctively Worse Than the Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* because comparing the defendant's conduct with other ways in which the same offense has been or may be committed "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense" and thus does not raise a constitutional concern. (See *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202].)

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

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

3233. Aggravating Factor: Position of Trust or Confidence

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __][or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the defendant took advantage of a position of trust or confidence to commit the crime.]

<Introductory paragraph for bifurcated trial>
[The People have alleged[in Count[s]__] that the defendant took advantage of a position of trust or confidence to commit the crime.]

To prove this allegation, the People must prove that:

1. **(Prior to/During) the commission of the crime, the defendant (had/developed) a relationship with _____** *<insert name of victim or other person>***;**

2. **This relationship allowed the defendant to occupy a position of trust or caused _____***<insert name of victim or other person>* **to have confidence in the defendant;**

AND

3. **The defendant took advantage of this position of trust or confidence to commit the crime.**

You may not find the allegation true unless all of you agree that the People have proved that the defendant took advantage of a position of trust or confidence with the victim to commit the crime. However, all of you do not need to agree on which act[s] or conduct constitutes the taking advantage of a position of trust or confidence to commit the crime.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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

New March 2023; Revised March 2024, February 2025,* February 2026**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

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

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(11).
- "Aggravating Fact" Defined. ~~*People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130];~~ *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

- Factor Focuses on Special Status to Victim. *People v. DeHoyos* (2013) 57 Cal.4th 79, 155 [158 Cal.Rptr.3d 797, 303 P.3d 1]; *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1262–1263 [131 Cal.Rptr.2d 628] [quasi-paternal relationship]; *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1694–1695 [53 Cal.Rptr.2d 282] [defendant intentionally cultivated friendship], disapproved on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123 [65 Cal.Rptr.2d 1, 938 P.2d 986]; *People v. Franklin* (1994) 25 Cal.App.4th 328, 337–338 [30 Cal.Rptr.2d 376] [stepfather entrusted with care]; *People v. Clark* (1992) 12 Cal.App.4th 663, 666 [15 Cal.Rptr.2d 709] [stepfather entrusted with care]; *People v. Jones* (1992) 10 Cal.App.4th 1566, 1577 [14 Cal.Rptr.2d 9] [legal parent].

COMMENTARY

Distinctively Worse Than the Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* because comparing the defendant's conduct with other ways in which the same offense has been or may be committed "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense" and thus does not raise a constitutional concern. (See *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202].)

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

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

3234. Aggravating Factor: Serious Danger to Society

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __][or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ *<insert lesser offense[s]>***], you must then decide whether the People have proved the additional allegation that _____***<insert name of defendant>* **has engaged in violent conduct, to wit:_____** *<insert description of conduct>***, which indicates (he/she) is a serious danger to society.]**

<Introductory paragraph for bifurcated trial>
[The People have alleged that _____*<insert name of defendant>* **has engaged in violent conduct, to wit:_____** *<insert description of conduct>***, which indicates (he/she) is a serious danger to society.]**

To prove this allegation, the People must prove that:

1. **The defendant has engaged in violent conduct;**

   AND

2. **The violent conduct, considered in light of all the evidence presented[and the defendant's background], shows that the defendant is a serious danger to society.**

[To determine whether the defendant is a serious danger to society, you may consider the defendant's conduct before or after commission of the crime[as well as evidence about the defendant's background].]

You may not find the allegation true unless all of you agree that the People have proved that the defendant engaged in violent conduct that shows (he/she) is a serious danger to society. However, all of you do not need to agree on which violent conduct shows that the defendant is a serious danger to society.

~~**You may not find the allegation true unless all of you agree that the People have proved that the defendant's violent conduct was distinctively worse than that posed by an ordinary commission of the underlying crime and that the violent conduct, considered in light of all the evidence presented[and the**~~

~~defendant's background], shows that the defendant is a serious danger to society.~~

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

New March 2023; Revised March 2024, February 2025,* February 2026*
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

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

The court should specify the crime(s) to which the aggravating factor pertains.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factors. California Rules of Court, rule 4.421(b)(1).
- ~~"Aggravating Fact" Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].~~
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

- Danger to Society: Subsequent Conduct Can Be Considered. *People v. Gonzales* (1989) 208 Cal.App.3d 1170, 1173 [256 Cal.Rptr. 669].

COMMENTARY

~~***Distinctively Worse Than the Ordinary***~~

~~The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.~~

~~One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* because comparing the defendant's conduct with other ways in which the same offense has been or may be committed "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense" and thus does not raise a constitutional concern. (See *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202].)~~

Aggravating Factors Relating to the Defendant

Each of the instructions for aggravating factors related to the manner in which the defendant committed one or more charged crimes includes language informing the jury that it may not find the aggravating factor allegation true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime. (See CALCRIM Nos. 3224-3233; see also Cal. Rules of Court, rule 4.421(a) [setting forth aggravating factors "relating to the crime"].) This instructional language is derived from case law holding that "[t]he essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary." (*People v. Moreno* (1982) 128 Cal.App.3d 103, 110; see also *People v. Black* (2007) 41 Cal.4th 799, 817, overruled on other grounds by *People v. Wiley* (2025) 17 Cal.5th 1069, 1085.)

California Rules of Court, rule 4.421(b) sets forth additional aggravating factors "relating to the defendant." The published cases addressing the requirement that aggravating factors should only be found true where the defendant's conduct was "distinctively worse than an ordinary commission of the underlying crime" all address aggravating factors "relating to the crime." In the absence of any published case law applying this rule to aggravating factors "related to the

defendant" – which generally involve indicia of recidivism - the committee has not included any instructional language directing the jury to evaluate whether aggravating factors "related to the defendant" render the defendant's conduct "distinctively worse than an ordinary commission of the underlying crime."

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

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

3235. Aggravating Factor: Numerous or Increasingly Serious Prior Convictions or Sustained Juvenile Delinquency Petitions

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<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]][or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ *<insert lesser offense[s]>*], you must then decide whether the People have proved the additional allegation that _____*<insert name of defendant>*'s prior (convictions/[or] sustained juvenile delinquency petitions) are numerous or of increasing seriousness.]

<Introductory paragraph for bifurcated trial>
[The People have alleged that _____*<insert name of defendant>*'s prior (convictions/[or] sustained juvenile delinquency petitions) are numerous or of increasing seriousness.]

To prove this allegation, the People must prove that:

1. **The defendant has numerous prior (criminal convictions/[or] sustained juvenile delinquency petitions);**

   OR

2. **The defendant's prior (criminal convictions/[or] sustained juvenile delinquency petitions) are of increasing seriousness.**

You may not find the allegation true unless all of you agree that the People have proved that the defendant's prior (criminal convictions/[or] sustained juvenile delinquency petitions) are numerous or of increasing seriousness. However, all of you do not need to agree how many (criminal convictions/[or] sustained juvenile delinquency petitions) qualify as numerous or which prior (criminal convictions/[or] sustained juvenile delinquency petitions) were of increasing seriousness.

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

New February 2026

BENCH NOTES

Instructional Duty

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

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

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

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(b)(2).
- Two Prior Convictions Are Not "Numerous." *People v. Quiles* (2009) 177 Cal.App.4th 612, 621 [99 Cal.Rptr.3d 378]; *People v. Fernandez* (1990) 226 Cal.App.3d 669, 681 [276 Cal.Rptr. 631].
- Meaning of "Numerous" Contrasts With Mitigation Factor of No Prior Record or Insignificant Prior Record. *People v. Simpson* (1979) 90 Cal.App.3d 919, 926 [154 Cal.Rptr. 249].
- Present Conviction Is Relevant Whether Priors Are Increasingly Serious. *People v. Clark* (1992) 12 Cal.App.4th 663, 666 [15 Cal.Rptr.2d 709]; *People v. Searle* (1989) 213 Cal.App.3d 1091, 1098 [261 Cal.Rptr. 898].
- Elements of Offense and Statutory Range of Punishment Can Be Considered to Determine Seriousness. *People v. Quiles* (2009) 177 Cal.App.4th 612, 622 [99 Cal.Rptr.3d 378]; *People v Black* (2007) 41 Cal.4th 799, 820 [62 Cal.Rptr.3d 569, 161 P.3d 1130].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

COMMENTARY

Aggravating Factors Relating to the Defendant

Each of the instructions for aggravating factors related to the manner in which the defendant committed one or more charged crimes includes language informing the jury that it may not find the aggravating factor allegation true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime. (See CALCRIM Nos. 3224-3233; see also Cal. Rules of Court, rule 4.421(a) [setting forth aggravating factors "relating to the crime"].) This instructional language is derived from case law holding that "[t]he essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary." (*People v. Moreno* (1982) 128 Cal.App.3d 103, 110; see also *People v. Black* (2007) 41 Cal.4th 799, 817, overruled on other grounds by *People v. Wiley* (2025) 17 Cal.5th 1069, 1085.)

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

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

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

Vehicular Manslaughter Without Gross Negligence

In *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1360–1361 [241 Cal.Rptr. 391], the defendant's juvenile record consisted of seven minor theft and drug related offenses. The court held that, under the facts of the case, the defendant's "juvenile record standing alone is insufficient as a matter of law in a case of vehicular manslaughter without gross negligence to aggravate the sentence."

3238. Aggravating Factor: Unsatisfactory Prior Performance on Probation, Supervision, or Parole

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<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]][or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ *<insert lesser offense[s]>*], you must then decide whether the People have proved the additional allegation that _____*<insert name of defendant>*'s prior performance on (probation[,]/[or] mandatory supervision[,]/[or] postrelease community supervision[,]/[or] parole) was unsatisfactory.]

<Introductory paragraph for bifurcated trial>
[The People have alleged that _____*<insert name of defendant>*'s prior performance on (probation[,]/[or] mandatory supervision[,]/[or] postrelease community supervision[,]/[or] parole) was unsatisfactory.]

To prove this allegation, the People must prove that:

1. **The defendant had previously been placed on (probation[,]/[or] mandatory supervision[,]/[or] postrelease community supervision[,]/[or] parole);**

   AND

2. **The defendant's performance on (probation[,]/[or] mandatory supervision[,]/[or] postrelease community supervision[,]/[or] parole) was unsatisfactory.**

You may not find the allegation true unless all of you agree that the People have proved that the defendant's prior performance on [a specific] (probation[,]/[or] mandatory supervision[,]/[or] postrelease community supervision[,]/[or] parole) was unsatisfactory. However, all of you do not need to agree on which act[s] or conduct demonstrate[s] that the prior performance was unsatisfactory.

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

New February 2026

BENCH NOTES

Instructional Duty

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

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

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

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(b)(5).
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Parole Status and Prior Performance on Parole Are Distinct Aggravating Factors. *People v. Yim* (2007) 152 Cal.App.4th 366, 369 [60 Cal.Rptr.3d 887].
- Proper to Consider Defendant's Drug Addiction that Affected Performance on Probation. *People v. Regalado* (1980) 108 Cal.App.3d 531, 540 [166 Cal.Rptr. 614].
- Satisfactory Not Equivalent to Perfect. *People v. Morton* (2008) 159 Cal.App.4th 239, 252 [70 Cal.Rptr.3d 827].

COMMENTARY

Aggravating Factors Relating to the Defendant

Each of the instructions for aggravating factors related to the manner in which the defendant committed one or more charged crimes includes language informing the jury that it may not find the aggravating factor allegation true unless all of the jurors agree the People proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime. (See CALCRIM Nos. 3224-3233; see also Cal. Rules of Court, rule 4.421(a) [setting forth aggravating factors "relating to the crime"].) This instructional language is derived from case law holding that "[t]he essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary." (*People v. Moreno* (1982) 128 Cal.App.3d 103, 110; see also *People v. Black* (2007) 41 Cal.4th 799, 817, overruled on other grounds by *People v. Wiley* (2025) 17 Cal.5th 1069, 1085.)

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

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

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

Vehicular Manslaughter Without Gross Negligence

In *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1360–1361 [241 Cal.Rptr. 391], the defendant's juvenile record consisted of seven minor theft and drug related offenses. The court held that, under the facts of the case, the defendant's "juvenile record standing alone is insufficient as a matter of law in a case of vehicular manslaughter without gross negligence to aggravate the sentence."

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

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

3260. Duty of Jury: Verdict Form for Enhancement, Sentencing Factor, or Prior Conviction

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You have been given (a/__ <*insert number*>) verdict form[s] for the [additional] allegation[s] that _____ <*insert enhancement, sentencing factor, and/or prior conviction allegation*>. Your verdict must be unanimous. This means that, to return a verdict, all of you must agree. If you reach a verdict on (any/this) [additional] allegation, complete the verdict form for that allegation and notify the bailiff.

New January 2006; Revised February 2026

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction when instructing on any enhancements, sentencing factors, prior convictions, or other special findings.

Do not give this instruction for special circumstances. Give CALCRIM No. 700, *Special Circumstances: Introduction*.

AUTHORITY

- Statutory Authority. Pen. Code, §§ 1158, 1158a.

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (54th ed. 2024~~12~~) Criminal Trial, § 758~~727~~.

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

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.31, 91.102[3] (Matthew Bender).

3406. Mistake of Fact

The defendant is not guilty of _____ *<insert crime[s]>* **if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact.**

If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit _____ *<insert crime[s]>***.**

If you find that the defendant actually believed that _____ *<insert alleged mistaken facts>* **[and if you find that belief was reasonable], (he/she) did not have the ~~specific~~ intent or mental state required for _____** *<insert crime[s]>***.**

If you have a reasonable doubt about whether the defendant had the ~~specific~~ intent or mental state required for _____ *<insert crime[s]>***, you must find (him/her) not guilty of (that crime/those crimes).**

New January 2006; Revised April 2008, December 2008, August 2014, September 2018, September 2022, February 2025, February 2026

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it, there is substantial evidence supporting the defense, and the instruction is legally correct. (*People v. Anderson* (2011) 51 Cal.4th 989, 996–997 [125 Cal.Rptr.3d 408, 252 P.3d 968]; *People v. Speck* (2022) 74 Cal.App.5th 784, 791 [289 Cal.Rptr.3d 816] [No sua sponte duty to instruct on mistake of fact defense].)

The mistake of fact instruction must negate an element of the crime. (*People v. Speck, supra,* 74 Cal.App.5th at p. 791.)

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

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's

guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982–983 [38 Cal.Rptr.3d 624, 127 P.3d 40].)

~~If the defendant is charged with a general intent crime, the trial court must instruct with the bracketed language requiring that defendant's belief be both actual and reasonable.~~

If the mental state element at issue is one that requires a~~either~~ specific ~~criminal~~ intent or knowledge, do not use the bracketed language requiring the belief to be reasonable. (*People v. Hendrix* (2022) 13 Cal.5th 933, 938–939 [297 Cal.Rptr.3d 278, 515 P.3d 22]; *People v. Reyes* (1997) 52 Cal.App.4th 975, 984 & fn. 6 [61 Cal.Rptr.2d 39]; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425–1426 [51 Cal.Rptr.3d 263].) Otherwise, instruct with the bracketed language requiring that defendant's belief be both actual and reasonable.

Mistake of fact is not a defense to the following crimes under the circumstances described below:

1. Involuntary manslaughter (*People v. Velez* (1983) 144 Cal.App.3d 558, 565–566 [192 Cal.Rptr. 686] [mistake of fact re whether gun could be fired]).
2. Furnishing cannabis to a minor (Health & Saf. Code, § 11352; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760–762 [77 Cal.Rptr. 59]).
3. Selling narcotics to a minor (Health & Saf. Code, § 11353; *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454] [specific intent for the crime of selling narcotics to a minor is the intent to sell cocaine, not to sell it to a minor]).
4. Aggravated kidnapping of a child under the age of 14 (Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206]).
5. Unlawful sexual intercourse or oral copulation by person 21 or older with minor under the age of 16 (Pen. Code, §§ 261.5(d), 287(b)(2); *People v. Scott* (2000) 83 Cal.App.4th 784, 800–801 [100 Cal.Rptr.2d 70]).
6. Lewd and lascivious conduct with a child under the age of 14 (Pen. Code, § 288(a); *People v. Olsen* (1984) 36 Cal.3d 638, 645–646 [205 Cal.Rptr. 492, 685 P.2d 52]).

AUTHORITY

- Instructional Requirements. Pen. Code, § 26(3).
- Burden of Proof. *People v. Mayberry* (1975) 15 Cal.3d 143, 157 [125 Cal.Rptr 745, 542 P.2d 1337].

- This Defense Applies to Attempted Lewd and Lascivious Conduct With Minor Under 14. *People v. Hanna* (2013) 218 Cal.App.4th 455, 461 [160 Cal.Rptr.3d 210].

RELATED ISSUES

Mistake of Fact Based on Involuntary Intoxication

A mistake of fact defense can be based on involuntary intoxication. (*People v. Scott* (1983) 146 Cal.App.3d 823, 829–833 [194 Cal.Rptr. 633].) In *Scott*, the court held that the defendant was entitled to an instruction on mistake of fact, as a matter of law, where the evidence established that he unknowingly and involuntarily ingested a hallucinogen. As a result he acted under the delusion that he was a secret agent in a situation where it was necessary to steal vehicles in order to save his own life and possibly that of the President. The court held that although defendant's mistake of fact was irrational, it was reasonable because of his delusional state and had the mistaken facts been true, his actions would have been justified under the doctrine of necessity. The court also stated that mistake of fact would not have been available if defendant's mental state had been caused by voluntary intoxication. (*Ibid.*; see also *People v. Kelly* (1973) 10 Cal.3d 565, 573 [111 Cal.Rptr. 171, 516 P.2d 875] [mistake of fact based on voluntary intoxication is not a defense to a general intent crime].)

Mistake of Fact Based on Mental Disease

Mistake of fact is not a defense to general criminal intent if the mistake is based on mental disease. (*People v. Gutierrez* (1986) 180 Cal.App.3d 1076, 1084 [225 Cal.Rptr. 885]; see *People v. Castillo* (1987) 193 Cal.App.3d 119, 124–125 [238 Cal.Rptr. 207].) In *Gutierrez*, the defendant was charged with inflicting cruel injury on a child, a general intent crime, because she beat her own children under the delusion that they were evil birds she had to kill. The defendant's abnormal mental state was caused in part by mental illness. (*People v. Gutierrez, supra,* 180 Cal.App.3d at pp. 1079–1080.) The court concluded that evidence of her mental illness was properly excluded at trial because mental illness could not form the basis of her mistake of fact defense. (*Id.* at pp. 1083–1084.)

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (54th ed. 2024~~12~~) Defenses, §§ ~~47~~50, 51.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.06 (Matthew Bender).

3411. Mistake of Law As a Defense

[I have already explained that it is not a defense to the crime[s] of _____ <*insert crime[s]*> that the defendant did not know (he/she) was breaking the law or that (he/she) believed (his/her) act was lawful. But when you consider the crime[s] of _____ <*insert crime[s]*>, a different rule applies.]

_____ <*insert crime[s]*> require[s] that a defendant act with a specific (intent/ [and/or] mental state). The act and the ~~specific~~ (intent/ [and/or] mental state) required are explained in the instruction for (that/those) crime[s].

The defendant is not guilty of _____<*insert crime[s]*> if (he/she) made an honest or good faith mistake about the law, if that mistake shows that (he/she) did not have the ~~specific~~ (intent/ [and/or] mental state) required for the crime[s] of _____<*insert crime[s]*>.

If you have a reasonable doubt about whether the defendant had the ~~specific~~ (intent/ [and/or] mental state) required for _____ <*insert crime[s]*>, you must find (him/her) not guilty of (that/those) crime[s].

New August 2013; Revised October 2021, February 2026

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if a defendant charged with a specific intent crime is appropriately relying on this defense or there is substantial evidence that a defendant's good faith mistake of law provides a valid defense to a specific intent crime and the defense is not inconsistent with the defendant's theory of the case. (*People v. Urziceanu* (2005) 132 Cal.App.4th 747, 774-780 [33 Cal.Rptr.3d 859]).

Many defendants seek to rely on the defense of mistake of law, but few are successful, because it is limited to crimes in which a specific intent or mental state is negated by the mistake. (*People v. Koenig* (2020) 58 Cal.App.5th 771, 809 [272 Cal.Rptr.3d 732] [instruction appropriate where defendant relied on advice of counsel to establish mistake of law related to omission of material fact in sale of security]; *People v. Cole* (2007) 156 Cal.App.4th 452, 483-484 [67 Cal.Rptr.3d 526] [no error in instructing jury that mistake of law is no defense when defendant was charged with a general intent crime]; *People v. Vineberg* (1981) 125

Cal.App.3d 127, 137 [177 Cal.Rptr. 819] [defendants' belief that they had a legal right to use clients' gold reserves to buy future contracts could be a defense if held in good faith]; *People v. Stewart* (1976) 16 Cal.3d 133, 140 [127 Cal.Rptr. 117, 544 P.2d 1317] [defendant's good faith belief that he was legally authorized to use property could be defense to embezzlement]; *People v. Flora* (1991) 228 Cal.App.3d 662, 669–670 [279 Cal.Rptr. 17] [defendant's belief, if held in good faith, that out-of-state custody order was not enforceable in California could have been basis for defense to violating a child custody order]).

Although concerned with knowledge of the law, a mistake about legal status or rights is a mistake of fact, not a mistake of law. (See CALCRIM No. 3406, *Mistake of Fact*.) If the defendant is charged with a general intent crime and raises a mistake of law defense, give instead CALCRIM No. 3407, *Defenses: Mistake of Law.* If both general and specific intent crimes are charged, use the bracketed first paragraph of this instruction as necessary.

AUTHORITY

- Instructional Requirements. *People v. Cole* (2007) 156 Cal.App.4th 452, 483-484 [67 Cal.Rptr.3d 526]; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 585-587, 592 [35 Cal.Rptr. 401].

RELATED ISSUES

Good Faith Reliance on Statute or Regulation

Good faith reliance on a facially valid statute or administrative regulation (which turns out to be void) may be considered an excusable mistake of law. Additionally, a good faith mistake-of-law defense may be established by special statute. (See 1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, § 46.)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (5~~4~~th ed. 2012) Defenses, §§ 4~~74~~-4~~85~~.

3459. Commitment of Person With Developmental Disability As Dangerous to Self or Others (Welf. & Inst. Code, § 6500)

The petition alleges that _____ <*insert name of respondent*> is a person with a developmental disability who is dangerous to (him/her)self or others.

To prove this allegation, the People must prove beyond a reasonable doubt that at the time of the hearing:

1. **_____ <*insert name of respondent*> has a developmental disability;**

2. **_____ <*insert name of respondent*> is dangerous to (him/her)self or others;**

AND

3. **_____<*insert name of respondent*>'s developmental disability is a substantial factor causing (him/her) to have serious difficulty controlling dangerous behavior.**

A *developmental disability* is a disability that: 1) originates before the person's 18th birthday; 2) continues, or can be expected to continue, indefinitely; and 3) is a substantial impairment for the person.

[A *developmental disability* includes (intellectual disability/[,] cerebral palsy/[,] epilepsy/[,] [and] autism).] [A developmental disability [also] includes disabling conditions that are closely related to intellectual disability or that require similar treatment for individuals with an intellectual disability.]

[A *developmental disability* does not include other disabling conditions that are solely physical in nature.]

[*Dangerous to self or others* includes a finding of incompetence to stand trial when the person has been charged with _____<*insert felony offense(s) listed in Welf. & Inst. Code, § 6500(a)(1), including any applicable descriptive factor(s)*>.]

[*Dangerous to self or others* requires proof of current dangerousness, and cannot be based solely on the charges filed against the person and the person's incompetence to stand trial.]

[*Dangerous to self or others* does not require proof of a recent overt act while in the care and treatment of a state hospital, developmental facility, or other facility.]

You will receive [a] verdict form[s] on which to indicate your finding of whether the allegation that _____ <*insert name of respondent*> is a person with a developmental disability who is dangerous to (him/her)self or others is true or not true. To find the allegation true or not true, all of you must agree. You may not find the allegation to be true unless all of you agree the People have proved it beyond a reasonable doubt.

New February 2026

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a respondent with a developmental disability is a danger to self or others.

The court also **must give** CALCRIM No. 219, *Reasonable Doubt in Civil Proceedings*, CALCRIM No. 222, *Evidence*, CALCRIM No. 226, *Witnesses*, CALCRIM No. 3550, *Pre-Deliberation Instructions*, and any other relevant posttrial instructions. These instructions may need to be modified.

An extended commitment petition requires the same jury findings as an initial commitment. (Welf. & Inst. Code, § 6500(c)(1).)

AUTHORITY

- Elements. Welf. & Inst. Code, § 6500(b)(1); *People v. Nolasco* (2021) 67 Cal.App.5th 209, 218 [281 Cal.Rptr.3d 880, 885].
- "Developmental Disability" Defined. Welf. & Inst. Code, §§ 4512(a)(1), 6500(a)(2).
- "Dangerous to Self or Others" Defined. Welf. & Inst. Code, § 6500(a)(1); *People v. G.A.* (2023) 93 Cal.App.5th 1126, 1137 [311 Cal.Rptr.3d 525, 536] [to comport with due process, statutory definition of "dangerousness to self or others" in Welfare and Institutions Code section 6500(a)(1) must be interpreted as requiring proof of current dangerousness]; *In re O.P.* (2012) 207 Cal.App.4th 924, 934–935 [143 Cal.Rptr.3d 869, 877] ["section 6500 requires a finding of current dangerousness based on evidence beyond the charges filed against a defendant and the defendant's incompetence to stand trial"].

- State Must Prove Person's Developmental Disability Is Substantial Factor in Causing Serious Difficulty Controlling Dangerous Behavior. *People v. Sweeney* (2009) 175 Cal.App.4th 210, 222–225 [95 Cal.Rptr.3d 557].
- Counsel Controls Respondent's Decision Whether to Demand or Waive Jury Trial. *People v. Barrett* (2012) 54 Cal.4th 1081, 1096–1097, 1105 [144 Cal.Rptr.3d 661, 671, 281 P.3d 753, 761, 767].
- Unanimous Verdict, Burden of Proof. *Money v. Krall* (1982) 128 Cal.App.3d 378, 398 [180 Cal.Rptr. 376, 389] [persons coming within operation of Welfare and Institutions Code section 6500 are entitled to proof beyond a reasonable doubt standard and a unanimous verdict].
- Proof of Recent Overt Act Not Required if Under Care in a Treatment Facility. Welf. & Inst. Code, § 6500(b)(3).
- Petition for Recommitment Follows Same Procedures as Initial Petition for Commitment. Welf. & Inst. Code, § 6500(c)(1).

COMMENTARY

Definition of Dangerousness to Self

What constitutes "dangerousness to self" under Welfare and Institutions Code section 6500 is unsettled, and at least one court of appeal has noted "conflicting indicia of legislative intent" on proper interpretation of the term. (See *People v. G.A., supra*, 93 Cal.App.5th at pp. 1139–1142 [declining to interpret meaning of "dangerousness to self" in moot case due to the "lack of adequate briefing and the seriousness of the civil liberty and safety interests at stake"].) The court of appeal in *People v. G.A.* contemplated, though did not decide, whether Welfare and Institutions Code section 6500 "should be construed as largely precluding the consideration of the symptoms or behaviors constituting a '[d]evelopmental disability' and a '[s]ubstantial disability' ([Welf. & Inst. Code,]§ 4512, subds. (a)(1), (l)(1))) as evidence establishing a person's dangerousness to self" and whether dangerousness to self may be established by showing the person is unable to provide safely for his or her basic personal needs for food, shelter, or clothing. (See *People v. G.A., supra,* 93 Cal.App.5th at pp. 1139–1142 [311 Cal.Rptr.3d 525, 537], some internal quotation marks omitted.)