



Judicial Council of California

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INVITATION TO COMMENT

CALCRIM 2026-02

Criminal Jury Instructions: Revisions and Additions to the *Judicial Council of California Criminal Jury Instructions*

Invitation to Comment Details

Proposed Rules, Forms, Standards, or Statutes

Jury Instructions

Action Requested

Review and Submit Comments by November 13, 2026 to invitations@jud.ca.gov

Proposed by

Advisory Committee on Criminal Jury Instructions

Hon. Lisa B. Lench, Chair

Proposed Effective Date

February 19, 2027

Contact

Kara Portnow, 415-865-4961

kara.portnow@jud.ca.gov

(This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules Committee, or its Legislation Committee. It is circulated for comment purposes only.)

Executive Summary and Origin

The Advisory Committee on Criminal Jury Instructions seeks public comment on proposed revisions and additions to the Judicial Council of California Criminal Jury Instructions (CALCRIM). Under California Rules of Court, rule 10.59, the advisory committee is responsible for regularly reviewing case law and statutes affecting jury instructions and making recommendations to the Judicial Council for updating, revising, and adding topics to the council's criminal jury instructions. On approval by the Judicial Council, all changes will be published in the 2027 edition of the official CALCRIM publication.

Attachments and Links

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2. Proposed new and revised instructions, at pages 4–149

CALCRIM Proposed Changes: Invitation to Comment October 12–November 13, 2026

Instruction Number	Instruction Title
101 & 3550	Cautionary Admonitions: Jury Conduct (Before, During, or After Jury Is Selected); Pre-Deliberation Instructions
103 & 220	Reasonable Doubt
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540B & 540C	Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act; Felony Murder: First Degree—Other Acts Allegedly Caused Death
561	Homicide: Provocative Act by Accomplice
571 & 604	Voluntary Manslaughter: Imperfect Self-Defense or Imperfect Defense of Another—Lesser Included Offense; Attempted Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense
926	Battery Against Specified Victim Not a Peace Officer
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1240	Felony False Imprisonment
1551	Arson Enhancements
2100 & 2110	Driving a Vehicle or Operating a Vessel Under the Influence Causing Injury; Driving Under the Influence
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New 2504	Bringing or Possessing Weapon on School Grounds
2576	Explosion of Explosive or Destructive Device With Intent to Murder
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Instruction Number	Instruction Title
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3131	Personally Armed With Firearm
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101. Cautionary Admonitions: Jury Conduct (Before, During, or After Jury Is Selected)

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

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

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

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

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

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

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

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

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

You must not let bias, sympathy, prejudice, or public opinion influence your assessment of the evidence or your decision. Bias can affect what we notice and pay attention to, what we see and hear, what we remember, how we perceive people, and how we make decisions. We may favor or be more likely to believe people whom we see as similar to us or with whom we identify. Conversely, we may disfavor or be less likely to believe people whom we see as different.

Although we are aware of some of our biases, we may not be aware of all of them. We refer to those biases as “implicit” or “unconscious.” They may be based on stereotypes we would reject if they were brought to our attention. Implicit or unconscious biases can affect how we perceive others and how we make decisions, without our being aware of their effect.

You must not be biased in favor of or against any party, witness, attorney, defendant[s], or alleged victim because of his or her disability, gender, nationality, national origin, race or ethnicity, religion, gender identity, sexual orientation, [or] age (./) [or socioeconomic status] (./) [or _____ *<insert any other impermissible form of bias>.*]

You must reach your verdict without any consideration of punishment.

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

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

New January 2006; Revised June 2007, April 2008, December 2008, April 2010, October 2010, April 2011, February 2012, August 2012, August 2014, September 2019, April 2020, September 2023, February 2027

BENCH NOTES

Instructional Duty

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

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

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

AUTHORITY

- Statutory Admonitions. Pen. Code, § 1122.
- Avoid Discussing the Case. *People v. Pierce* (1979) 24 Cal.3d 199 [155 Cal.Rptr. 657, 595 P.2d 91]; *In re Hitchings* (1993) 6 Cal.4th 97 [24 Cal.Rptr.2d 74, 860 P.2d 466]; *In re Carpenter* (1995) 9 Cal.4th 634, 646–658 [38 Cal.Rptr.2d 665, 889 P.2d 985].
- Avoid News Reports. *People v. Holloway* (1990) 50 Cal.3d 1098, 1108–1111 [269 Cal.Rptr. 530, 790 P.2d 1327], disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830 [38 Cal.Rptr.2d. 394, 889 P.2d 588].

- Judge’s Conduct as Indication of Verdict. *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].
- No Bias, Sympathy, or Prejudice. *People v. Hawthorne* (1992) 4 Cal.4th 43, 73 [14 Cal.Rptr.2d 133, 841 P.2d 118].
- No Independent Research. *People v. Karis* (1988) 46 Cal.3d 612, 642 [250 Cal.Rptr. 659, 758 P.2d 1189]; *People v. Castro* (1986) 184 Cal.App.3d 849, 853 [229 Cal.Rptr. 280]; *People v. Sutter* (1982) 134 Cal.App.3d 806, 820 [184 Cal.Rptr. 829].
- Prior Version of This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1182–1183 [67 Cal.Rptr.3d 871].
- Court’s Contempt Power for Violations of Admonitions. Pen. Code, § 1122(a)(1); Code Civ. Proc., § 1209(a)(6) ~~(effective January 1, 2012)~~.

RELATED ISSUES

Admonition Not to Discuss Case With Anyone

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

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

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

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

Jury Misconduct

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

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (~~54~~²⁴¹²th ed. 20~~2412~~²⁶) Criminal Trial § ~~75726~~.

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

3550. Pre-Deliberation Instructions

When you go to the jury room, the first thing you should do is choose a foreperson. The foreperson should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard.

It is your duty to talk with one another and to deliberate in the jury room. You should try to agree on a verdict if you can. Each of you must decide the case for yourself, but only after you have discussed the evidence with the other jurors. Do not hesitate to change your mind if you become convinced that you are wrong. But do not change your mind just because other jurors disagree with you.

Keep an open mind and openly exchange your thoughts and ideas about this case. Stating your opinions too strongly at the beginning or immediately announcing how you plan to vote may interfere with an open discussion. Please treat one another courteously. Your role is to be an impartial judge of the facts, not to act as an advocate for one side or the other.

As I told you at the beginning of the trial, do not talk about the case or about any of the people or any subject involved in it with anyone, including, but not limited to, your spouse or other family, or friends, spiritual leaders or advisors, or therapists. You must discuss the case only in the jury room and only when all jurors are present. Do not discuss your deliberations with anyone. Do not communicate using: _____ *<insert currently popular social media>* during your deliberations.

It is very important that you not use the Internet, or (a dictionary, or _____ *<insert other relevant source of information>*) in any way in connection with this case during your deliberations.

[During the trial, several items were received into evidence as exhibits. You may examine whatever exhibits you think will help you in your deliberations. (These exhibits will be sent into the jury room with you when you begin to deliberate./ If you wish to see any exhibits, please request them in writing.)]

If you need to communicate with me while you are deliberating, send a note through the bailiff, signed by the foreperson or by one or more members of the jury. To have a complete record of this trial, it is important that you not communicate with me except by a written note. If you have questions, I will talk with the attorneys before I answer so it may take some time. You should

continue your deliberations while you wait for my answer. I will answer any questions in writing or orally here in open court.

Do not reveal to me or anyone else how the vote stands on the (question of guilt/[or] issues in this case) unless I ask you to do so.

Your verdict [on each count and any special findings] must be unanimous. This means that, to return a verdict, all of you must agree to it. [Do not reach a decision by the flip of a coin or by any similar act.]

<During a retrial, give the following paragraph on request to inform jury about prior proceedings without introducing extraneous matters>

[Sometimes issues are tried in separate trials. The only issue in this trial is whether the People have proved the charge[s] of _____ *<insert description of charge[s]>* [in Count[s] ____]. Do not speculate about whether the defendant was already found guilty for (his/her) conduct or may be found guilty in the future in another trial. Do not consider any potential punishment.]

It is not my role to tell you what your verdict should be. [Do not take anything I said or did during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be.]

You must reach your verdict without any consideration of punishment.

You will be given [a] verdict form[s]. As soon as all jurors have agreed on a verdict, the foreperson must date and sign the appropriate verdict form[s] and notify the bailiff. [If you are able to reach a unanimous decision on only one or only some of the (charges/ [or] defendants), fill in (that/those) verdict form[s] only, and notify the bailiff.] Return any unsigned verdict form.

New January 2006; Revised April 2008, October 2010, April 2011, September 2018, February 2027

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct that the jury's verdict must be unanimous. Although there is no sua sponte duty to instruct on the other topics relating to deliberations, there is authority approving such instructions. (See *People v. Gainer* (1977) 19 Cal.3d 835, 856 [139 Cal.Rptr. 861, 566 P.2d 997]; *People v. Selby* (1926) 198 Cal. 426, 439 [245 P. 426]; *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].)

If the court automatically sends exhibits into the jury room, give the bracketed sentence that begins with “These exhibits will be sent into the jury room.” If not, give the bracketed phrase that begins with “You may examine whatever exhibits you think.”

Give the bracketed sentence that begins with “Do not take anything I said or did during the trial” unless the court will be commenting on the evidence. (See Pen. Code, §§ 1127, 1093(f).)

Give the bracketed paragraph that begins with “Sometimes issues are tried in separate trials” if requested. (*People v. Hicks* (2017) 4 Cal.5th 203, 205 [226 Cal.Rptr.3d 565, 407 P.3d 409].)

AUTHORITY

- Exhibits. Pen. Code, § 1137.
- Questions. Pen. Code, § 1138.
- Verdict Forms. Pen. Code, § 1140.
- Unanimous Verdict. Cal. Const., art. I, § 16; *People v. Howard* (1930) 211 Cal. 322, 325 [295 P. 333]; *People v. Kelso* (1945) 25 Cal.2d 848, 853–854 [155 P.2d 819]; *People v. Collins* (1976) 17 Cal.3d 687, 692 [131 Cal.Rptr. 782, 552 P.2d 742].
- Duty to Deliberate. *People v. Gainer*, *supra*, (1977) 19 Cal.3d at p.835, 856 [~~139 Cal.Rptr. 861, 566 P.2d 997~~].
- Judge’s Conduct as Indication of Verdict. *People v. Hunt*, *supra*, (1915) 26 Cal.App. at p.514, 517 [~~147 P. 476~~].
- Keep an Open Mind. *People v. Selby*, *supra*, (1926) 198 Cal. at p.426, 439 [~~245 P. 426~~].
- Do Not Consider Punishment. *People v. Nichols* (1997) 54 Cal.App.4th 21, 24 [62 Cal.Rptr.2d 433].
- Hung Jury. *People v. Gainer*, *supra*, (1977) 19 Cal.3d 835, at pp. 850–852 [~~139 Cal.Rptr. 861, 566 P.2d 997~~]; *People v. Moore* (2002) 96 Cal.App.4th 1105, 1118–1121 [117 Cal.Rptr.2d 715].
- This Instruction Upheld. *People v. Santiago* (2010) 178 Cal.App.4th 1471, 1475–1476 [101 Cal.Rptr.3d 257].
- Special Instruction for Retrial Jury. *People v. Hicks*, *supra*, (2017) 4 Cal.5th 203, at p. 205 [~~226 Cal.Rptr.3d 565, 407 P.3d 409~~].

RELATED ISSUES

Admonition Not to Discuss Case with Anyone

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

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

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

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

SECONDARY SOURCES

⁴⁵ Witkin & Epstein, California Criminal Law (~~54~~²⁰²⁴th ed. 20~~24~~¹²) Criminal Trial §§ ~~75726–75827~~.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02, 85.03[1], 85.05[1] (Matthew Bender).

220. Reasonable Doubt

The fact that a criminal charge has been filed against the defendant[s] is not evidence that the charge is true. You must not be biased against the defendant[s] just because (he/she/they) (has/have) been arrested, charged with a crime, or brought to trial.

A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. 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].

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether the People have proved their ~~case~~ charge[s] beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant[s] guilty beyond a reasonable doubt, (he/she/they) (is/are) entitled to an acquittal and you must find (him/her/them) not guilty.

New January 2006; Revised August 2006, February 2013, February 2027

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the presumption of innocence and the state's burden of proof. (*People v. Vann* (1974) 12 Cal.3d 220, 225–227 [115 Cal.Rptr. 352, 524 P.2d 824]; *People v. Soldavini* (1941) 45 Cal.App.2d 460, 463 [114 P.2d 415]; *People v. Phillips* (1997) 59 Cal.App.4th 952, 956–958 [69 Cal.Rptr.2d 532].)

If the court will be instructing that the prosecution has a different burden of proof, give the bracketed phrase “unless I specifically tell you otherwise.”

AUTHORITY

- Instructional Requirements. Pen. Code, §§ 1096, 1096a; *People v. Freeman* (1994) 8 Cal.4th 450, 503–504 [34 Cal.Rptr.2d 558, 882 P.2d 249]; *Victor v.*

Nebraska (1994) 511 U.S. 1, 16–17 [114 S.Ct. 1239, 127 L.Ed.2d 583];
Lisenbee v. Henry (9th Cir. 1999) 166 F.3d 997, 999.

- This Instruction Upheld. *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088–1089 [78 Cal.Rptr.3d 186].
- This Instruction Does Not Suggest That Bias Against Defendant Is Permissible. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1185–1186 [67 Cal.Rptr.3d 871].
- Cited With Approval. *People v. Aranda* (2012) 55 Cal.4th 342, 353 [145 Cal.Rptr.3d 855].

COMMENTARY

This instruction is based directly on Penal Code section 1096. The primary changes are a reordering of concepts and a definition of reasonable doubt stated in the affirmative rather than in the negative. The instruction also refers to the jury's duty to impartially compare and consider all the evidence. (See *Victor v. Nebraska* (1994) 511 U.S. 1, 16–17 [114 S.Ct. 1239, 127 L.Ed.2d 583].) The appellate courts have urged the trial courts to exercise caution in modifying the language of section 1096 to avoid error in defining reasonable doubt. (See *People v. Freeman* (1994) 8 Cal.4th 450, 503–504 [34 Cal.Rptr.2d 558, 882 P.2d 249]; *People v. Garcia* (1975) 54 Cal.App.3d 61, 63 [126 Cal.Rptr. 275].) The instruction includes all the concepts contained in section 1096 and substantially tracks the statutory language. ~~For an alternate view of instructing on reasonable doubt, see Committee on Standard Jury Instructions—Criminal, Minority Report to CALJIC "Reasonable Doubt" Report, in Alternative Definitions of Reasonable Doubt: A Report to the California Legislature (May 22, 1987; repr., San Francisco: Daily Journal, 1987) pp. 51–53.~~

RELATED ISSUES

Pinpoint Instruction on Reasonable Doubt

A defendant is entitled, on request, to a nonargumentative instruction that directs attention to the defense's theory of the case and relates it to the state's burden of proof. (*People v. Sears* (1970) 2 Cal.3d 180, 190 [84 Cal.Rptr. 711, 465 P.2d 847] [error to deny requested instruction relating defense evidence to the element of premeditation and deliberation].) Such an instruction is sometimes called a pinpoint instruction. "What is pinpointed is not specific evidence as such, but the theory of the defendant's case. It is the specific evidence on which the theory of the defense 'focuses' which is related to reasonable doubt." (*People v. Adrian* (1982) 135 Cal.App.3d 335, 338 [185 Cal.Rptr. 506] [court erred in refusing to give requested instruction relating self-defense to burden of proof]; see also *People v. Granados* (1957) 49 Cal.2d 490, 496 [319 P.2d 346] [error to refuse

instruction relating reasonable doubt to commission of felony in felony-murder case]; *People v. Brown* (1984) 152 Cal.App.3d 674, 677–678 [199 Cal.Rptr. 680] [error to refuse instruction relating reasonable doubt to identification].)

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (~~54~~²⁴¹²th ed. 20~~2412~~) Criminal Trial, §§ ~~65424~~, ~~74716–74817~~, ~~75120–75322~~.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, Evidence, § 83.03[1], Ch. 85, *Submission to Jury and Verdict*, §§ -85.02[1A][a], [2][a][i], 85.04[2][a] (Matthew Bender).

103. Reasonable Doubt

I will now explain the presumption of innocence and the People’s burden of proof. The defendant[s] (has/have) pleaded not guilty to the charge[s]. The fact that a criminal charge has been filed against the defendant[s] is not evidence that the charge is true. You must not be biased against the defendant[s] just because (he/she/they) (has/have) been arrested, charged with a crime, or brought to trial.

A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. 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].

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether the People have proved their ~~case~~ charge[s] beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant[s] guilty beyond a reasonable doubt, (he/she/they) (is/are) entitled to an acquittal and you must find (him/her/them) not guilty.

New January 2006; Revised June 2007, February 2027

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the presumption of innocence and the state’s burden of proof before deliberations. (*People v. Vann* (1974) 12 Cal.3d 220, 225–227 [115 Cal.Rptr. 352, 524 P.2d 824]; *People v. Soldavini* (1941) 45 Cal.App.2d 460, 463 [114 P.2d 415]; *People v. Phillips* (1997) 59 Cal.App.4th 952, 956–958 [69 Cal.Rptr.2d 532].) This instruction is included in this section for the convenience of judges who wish to instruct on this point during voir dire or before testimony begins.

If the court will be instructing that the prosecution must prove something by a preponderance of the evidence, give the bracketed phrase “unless I specifically tell you otherwise.”

AUTHORITY

- Instructional Requirements. Pen. Code, §§ 1096, 1096a; *People v. Freeman* (1994) 8 Cal.4th 450, 503–504 [34 Cal.Rptr.2d 558, 882 P.2d 249]; *Victor v. Nebraska* (1994) 511 U.S. 1, 16–17 [114 S.Ct. 1239, 127 L.Ed.2d 583]; *Lisenbee v. Henry* (9th Cir. 1999) 166 F.3d 997.
- Previous Version of ~~This Instruction~~ **CALCRIM 103** Upheld. *People v. Reyes* (2007) 151 Cal.App.4th 1491, 1496 [60 Cal.Rptr.3d 777].
- Reference to Elements Not Required. *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088–1089 [78 Cal.Rptr.3d 186].

COMMENTARY

This instruction is based directly on Penal Code section 1096. The primary changes are a reordering of concepts and a definition of reasonable doubt stated in the affirmative rather than in the negative. The instruction also refers to the jury's duty to impartially compare and consider all the evidence. (See *Victor v. Nebraska* (1994) 511 U.S. 1, 16–17 [114 S.Ct. 1239, 127 L.Ed.2d 583].) The appellate courts have urged the trial courts to exercise caution in modifying the language of section 1096 to avoid error in defining reasonable doubt. (See *People v. Freeman* (1994) 8 Cal.4th 450, 503–504 [34 Cal.Rptr.2d 558, 882 P.2d 249]; *People v. Garcia* (1975) 54 Cal.App.3d 61 [126 Cal.Rptr. 275].) The instruction includes all the concepts contained in section 1096 and substantially tracks the statutory language.

SECONDARY SOURCES

- 5 Witkin & Epstein, California Criminal Law (~~54th ed. 2024~~) Criminal Trial, §§ ~~6524, 74716–74817, 75120–75322~~.
- 4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, Evidence, § 83.03[1], Ch. 85, Submission to Jury and Verdict, §§ ~~85.02[2][a][i], 85.04[2][a]~~ (Matthew Bender).

224. Circumstantial Evidence: Sufficiency of Evidence

Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.

*New January 2006; Revised February 2013, March 2022, February 2027**

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on how to evaluate circumstantial evidence if the prosecution substantially relies on circumstantial evidence to establish any element of the case. (*People v. Dunn* (2026) 119 Cal.App.5th 189, 194–195 [342 Cal.Rptr.3d 338]; *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [286 P.2d 1] [duty exists where circumstantial evidence relied on to prove any element, including intent]; see *People v. Bloyd* (1987) 43 Cal.3d 333, 351–352 [233 Cal.Rptr. 368, 729 P.2d 802]; *People v. Heishman* (1988) 45 Cal.3d 147, 167 [246 Cal.Rptr. 673, 753 P.2d 629].)

There is no sua sponte duty to give this instruction when the circumstantial evidence is incidental to and corroborative of direct evidence. (*People v. Malbrough* (1961) 55 Cal.2d 249, 250–251 [10 Cal.Rptr. 632, 359 P.2d 30]; *People v. Watson* (1956) 46 Cal.2d 818, 831 [299 P.2d 243]; *People v. Shea* (1995) 39 Cal.App.4th 1257, 1270–1271 [46 Cal.Rptr.2d 388].) This is so even when the corroborative circumstantial evidence is essential to the prosecution's case, e.g., when corroboration of an accomplice's testimony is required under Penal Code section 1111. (*People v. Williams* (1984) 162 Cal.App.3d 869, 874 [208 Cal.Rptr. 790].)

If intent is the only element proved by circumstantial evidence, do not give this instruction. Give CALCRIM No. 225, *Circumstantial Evidence: Intent or Mental State*. (*People v. Marshall* (1996) 13 Cal.4th 799, 849 [55 Cal.Rptr.2d 347, 919 P.2d 1280].)

AUTHORITY

- “Direct Evidence” Defined. Evid. Code, § 410.
- “Inference” Defined. Evid. Code, § 600(b).
- Between Two Reasonable Interpretations of Circumstantial Evidence, Accept the One That Points to Innocence. *People v. Merkouris* (1956) 46 Cal.2d 540, 560–562 [297 P.2d 999] [error to refuse requested instruction on this point]; *People v. Johnson* (1958) 163 Cal.App.2d 58, 62 [328 P.2d 809] [sua sponte duty to instruct].
- “Innocence” Means Not Guilty of the Charged Crime. *People v. Doane* (2021) 66 Cal.App.5th 965, 976–977 [281 Cal.Rptr.3d 594]; *People v. Wade* (1995) 39 Cal.App.4th 1487, 1493 [46 Cal.Rptr.2d 645].
- Circumstantial Evidence Must Be Entirely Consistent With a Theory of Guilt and Inconsistent With Any Other Rational Conclusion. *People v. Bender* (1945) 27 Cal.2d 164, 175 [163 P.2d 8] [sua sponte duty to instruct]; *People v. Yrigoyen*, supra, ~~(1955)~~ 45 Cal.2d ~~46~~, at p. 49 ~~[286 P.2d 1]~~ [same].
- Difference Between Direct and Circumstantial Evidence. *People v. Lim Foon* (1915) 29 Cal.App. 270, 274 [155 P. 477] [no sua sponte duty to instruct, but court approves definition]; *People v. Goldstein* (1956) 139 Cal.App.2d 146, 152–153 [293 P.2d 495] [sua sponte duty to instruct].
- Each Fact in Chain of Circumstantial Evidence Must Be Proved. *People v. Watson* (1956) 46 Cal.2d 818, 831 [299 P.2d 243] [error to refuse requested instruction on this point].
- Sua Sponte Duty When Prosecutor’s Case Rests Substantially on Circumstantial Evidence. *People v. Dunn*, supra, 119 Cal.App.5th at pp. 194–195; *People v. Bloyd*, supra, ~~(1987)~~ 43 Cal.3d ~~333~~, at pp. 351–352 ~~[233 Cal.Rptr. 368, 729 P.2d 802]~~.
- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1186–1187 [67 Cal.Rptr.3d 871].
- This Instruction Cited With Approval. *People v. Livingston* (2012) 53 Cal.4th 1145, 1166 [140 Cal.Rptr.3d 139, 274 P.3d 1132].

RELATED ISSUES

Extrajudicial Admissions

Extrajudicial admissions are not the type of indirect evidence requiring instruction on circumstantial evidence. (*People v. Wiley* (1976) 18 Cal.3d 162, 174–175 [133 Cal.Rptr. 135, 554 P.2d 881].)

SECONDARY SOURCES

- 1 Witkin & Epstein, California Criminal Law (~~54~~th ed. 20~~24~~~~12~~) Elements, § 3.
- 5 Witkin & Epstein, California Criminal Law (~~54~~th ed. 20~~24~~~~12~~) Criminal Trial, § ~~76837~~.
- 1 Witkin, California Evidence (~~65~~th ed. 20~~25~~~~12~~) Circumstantial Evidence, § ~~13921~~.
- 4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.01[2], Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][a] (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 ~~fatal act~~**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, * February 2027*

** 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].)

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

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.Rptr.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 nons shooter 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.
- Penal Code Section 189(e)(2) Requires Nonkiller Aid Fatal Act, Not Just Underlying Felony. *People v. Morris* (2026) 19 Cal.5th 671, 693 [343 Cal.Rptr.3d 711, 587 P.3d 1231].
- 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]; *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 (5th ed. 2024) Introduction to Crimes, §§ 99, 116.

1 Witkin & Epstein, California Criminal Law (5th ed. 2024) Crimes Against the Person, §§ 57–72, 81.

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 **fatal act 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, * February 2027*

** 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].)

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].)

This instruction should be used 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].)

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].

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 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.Rptr.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 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 nons shooter 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 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.
- Penal Code Section 189(e)(2) Requires Nonkiller Aid Fatal Act, Not Just Underlying Felony. *People v. Morris* (2026) 19 Cal.5th 671, 693 [343 Cal.Rptr.3d 711, 587 P.3d 1231].
- 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; *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 (5th ed. 2024) Crimes Against the Person, §§ 26–72, 81.

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 f(s) or description f(s) of alleged provocateur f(s)> in (committing/ [or] attempting to commit) _____ <insert underlying crime>
2. In (committing/ [or] attempting to commit) _____ <insert underlying crime>, _____ <insert name f(s) or description f(s) of alleged provocateur f(s)> intentionally did [a] provocative act[s];
3. The defendant knew that _____ <insert name(s) or description(s) of alleged provocateur(s)> intended to commit the provocative act[s];
4. Before or during the commission of the provocative act[s], the defendant intended to aid _____ <insert name(s) or description(s) of alleged provocateur(s)> in committing the provocative act[s];
- 3.5. The defendant knew that the natural and probable consequences of the provocative act were dangerous to human life and then acted with conscious disregard for life;
6. The defendant's words or conduct did in fact aid the provocative act[s];
- 4.7. In response to _____'s <insert name f(s) or description f(s) of alleged provocateur f(s)> provocative act, _____ <insert name or description of third party> killed _____ <insert name of decedent>;

AND

- 5.8. _____'s <insert name of decedent> death was the natural and probable consequence of _____'s <insert name f(s) or description f(s) of alleged provocateur f(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 f(s) or description f(s) of alleged provocateur f(s)> if the defendant is subject to prosecution for the identical offense that you conclude _____ <insert name f(s) or description f(s) of alleged provocateur f(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 f(s) or description f(s) of alleged provocateur f(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 f(s) or description f(s) of alleged provocateur f(s)> *provocative act*, the People must prove that:

1. A reasonable person in _____'s <insert name f(s) or description f(s) of alleged provocateur f(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 f(s)>* of alleged provocateur *f(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 f(s)>* or *description f(s)>* of alleged provocateur *f(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 f(s)>* or *description f(s)>* of alleged provocateur *f(s)>* committed at least one provocative act;

AND

2. **At least one of the provocative acts committed by _____ *<insert name f(s)>* or *description f(s)>* of alleged provocateur *f(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 f(s)>* or *description f(s)>* of all alleged accomplice *f(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, February 2027

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.

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) 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].
- Personal Malice Requirement. *People v. Antonelli* (2025) 17 Cal.5th 719, 728–731 [332 Cal.Rptr.3d 120, 567 P.3d 690]; [*People v. Taylor* \(2025\) 108 Cal.App.5th 849, 867–868 \[329 Cal.Rptr.3d 767\]](#); *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 (5th ed. 2024) Crimes Against the Person, §§ 81–88.

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, February 2027**

** 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].
- If Defendant’s Belief in Need for Self-Defense is Entirely Delusional, 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]; *People v. Chang* (2026) 119 Cal.App.5th 532, 546 [342 Cal.Rptr.3d 709]; *People v. Ocegueda* (2016) 247 Cal.App.4th 1393, 1409–1410 [203 Cal.Rptr.3d 233].
- 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. Loustau* (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).

**604. Attempted Voluntary Manslaughter: Imperfect Self-Defense—
Lesser Included Offense (Pen. Code, §§ 21a, 192, 664)**

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

- 1. The defendant took at least one direct but ineffective step toward killing a person.**
- 2. The defendant intended to kill when (he/she) acted.**
- 3. The defendant 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

- 4. The defendant believed that the immediate use of deadly force was necessary to defend against the danger.**

BUT

- 5. At least one of the defendant's beliefs was unreasonable.**

[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.]

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

Belief in future harm is not sufficient, no matter how great or how likely the

harm is believed to be. The defendant must have actually believed there was imminent danger of death or great bodily injury to (himself/herself/ [or] someone else).

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

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

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

The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of attempted murder.

*New January 2006; Revised August 2009, October 2010, February 2012, February 2013, September 2020, September 2023, October 2025, February 2027**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on attempted 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. (See *People v. Breverman* (1998) 19 Cal.4th 142, 153–163 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [discussing charge of completed murder]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531] [same].)

Perfect Self-Defense

Most courts hold that an instruction on imperfect self-defense **is required** in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant's belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. (See *People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86 [31 Cal.Rptr.2d 475], overruled in part in *People v.*

Blakeley (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675]; see also *People v. De Leon* (1992) 10 Cal.App.4th 815, 824 [12 Cal.Rptr.2d 825].) The court in *People v. Rodriguez* disagreed, however, and found that an imperfect self-defense instruction was not required sua sponte on the facts of the case where the defendant’s version of the crime “could only lead to an acquittal based on justifiable homicide,” and when the prosecutor’s version of the crime could only lead to a conviction of first degree murder. (*People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1275 [62 Cal.Rptr.2d 345]; see also *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961] [in a rape prosecution, the court was not required to give a mistake-of-fact instruction where the two sides gave wholly divergent accounts with no middle ground to support a mistake-of-fact instruction].)

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

Related Instructions

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

CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense*.

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

AUTHORITY

- “Attempt” Defined. Pen. Code, §§ 21a, 664.
- “Manslaughter” Defined. Pen. Code, § 192.
- Attempted Voluntary Manslaughter. *People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824–825 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].
- “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].

- 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].
- If Defendant’s Belief in Need for Self-Defense is Entirely Delusional, Imperfect Self-Defense Does Not Apply. *People v. Elmore* (2014) 59 Cal.4th 121, 145 [172 Cal.Rptr.3d 413, 325 P.3d 951]; *People v. Chang* (2026) 119 Cal.App.5th 532, 546 [342 Cal.Rptr.3d 709]; *People v. Ocegueda* (2016) 247 Cal.App.4th 1393, 1409–1410 [203 Cal.Rptr.3d 233].
- This Instruction Upheld. *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1307 [132 Cal.Rptr.3d 248].

RELATED ISSUES

See the Related Issues section to CALCRIM No. 603, *Attempted Voluntary Manslaughter: Heat of Passion—Lesser Included Offense* and CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense*.

SECONDARY SOURCES

1 Witkin & Epstein, *California Criminal Law* (5th ed. 2024) Crimes Against the Person, § 124.

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

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 141, *Conspiracy, Solicitation, and Attempt*, §§ 141.20[2], 141.21; Ch. 142, *Crimes Against the Person*, §§ 142.01[3][e], 142.02[2][a] (Matthew Bender).

605–619. Reserved for Future Use

926. Battery Against Specified Victim Not a Peace Officer (Pen. Code, §§ 242, 243(b)–(c)(1))

The defendant is charged [in Count __] with battery against (a/an) _____ *<insert title specified in Pen. Code, § 243(c)(1)>* [in violation of Penal Code section 243].

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

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

<Alternative 2A—specified person performing duties>

- [2. When the defendant acted, _____ *<insert name>* was a _____ *<insert title specified in Pen. Code, § 243(c)(1)>* and was performing the duties of (a/an) _____ *<insert title specified in Pen. Code, § 243(c)(1)>*;]

<Alternative 2B—nurse or doctor>

- [2. When the defendant used that force, _____ *<insert name>* was a (nurse/medical doctor) who was giving emergency medical care outside of a hospital, clinic, or other health care facility;]

[AND]

3. When the defendant acted, (he/she) knew or reasonably should have known, that _____ *<insert name>* was (a/an) _____ *<insert title specified in Pen. Code, § 243(c)(1)>* who was performing (his/her) duties(;/.)

<Give element 4 when the defendant is charged with Pen. Code, § 243(c)(1).>

[AND]

4. _____ *<insert name>* suffered injury as a result of the force used(;/.)]

<Give element 5 when instructing on self-defense or defense of another.>

[AND]

(4/5). 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.

Making contact with another person, including through his or her clothing, is enough to commit a battery.

[The duties of (a/an) _____ <insert title specified in Pen. Code, § 243(c)(1)> include _____ <insert appropriate list of job duties from statutory definition of professions, if available>.]

[It does not matter whether _____ <insert name> was actually on duty at the time.]

[An *injury* is any physical injury that requires professional medical treatment. The question whether an injury requires such treatment cannot be answered simply by deciding whether or not a person sought or received treatment. You may consider those facts, but you must decide this question based on the nature, extent, and seriousness of the injury itself.]

[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).]

New January 2006; Revised February 2025, February 2027*

* 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. This instruction should be used when the alleged victim is not a peace officer. If the alleged victim is a peace officer, use CALCRIM No. 945, *Battery Against Peace Officer*.

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 2, the bracketed words “and unlawfully” in element 1, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

If the alleged victim is a doctor or nurse, give element 2B. Otherwise give element 2A.

If the defendant is charged under Penal Code section 243(c)(1), give bracketed element 4 and the definition of “injury.” If the defendant is charged with misdemeanor battery under Penal Code section 243(b), do not give element 4 or the definition of “injury.”

Give the appropriate list of job duties for the alleged victim’s profession from the current Penal Code section, if one is provided. Emergency medical technician, nurse, custodial officer, lifeguard, traffic officer, and animal control officer are defined in Penal Code section 243(f). Firefighter is defined in Penal Code section 245.1. If a definition is provided in the statute, it should be given. (See *People v. Lara* (1994) 30 Cal.App.4th 658, 669 [35 Cal.Rptr.2d 886].)

Give the bracketed paragraph on indirect touching if relevant.

AUTHORITY

- Elements. Pen. Code, §§ 242, 243(b)–(c)(1); see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- “Willfully” Defined. Pen. Code, § 7(b)(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- “Injury” Defined. Pen. Code, § 243(f)(56); *People v. Longoria* (1995) 34 Cal.App.4th 12, 17 [40 Cal.Rptr.2d 213].
- 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].

COMMENTARY

People v. Longoria, supra, 34 Cal.App.4th at p. 17, explains the meaning of injury as defined in the statute:

It is the nature, extent, and seriousness of the injury — not the inclination or disinclination of the victim to seek medical treatment — which is determinative. A peace officer who obtains “medical treatment” when none is required, has not sustained an “injury” within the meaning of section 243, subdivision (c). And a peace officer who does not obtain “medical treatment” when such treatment is required, has sustained an “injury” within the meaning of section 243, subdivision (c). The test is objective and factual.

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Assault on Specified Victim. Pen. Code, § 241(b).
- Battery. Pen. Code, § 242.
- Misdemeanor Battery on Specified Victim. Pen. Code, § 243(b).
- Resisting Officer. Pen. Code, § 148.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (~~54~~²⁰²⁴th ed. 20~~24~~¹²) Crimes Against the Person, §§ ~~18713–18915~~, ~~19421–19623~~, ~~24670–25074~~.

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

927–934. Reserved for Future Use

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,
February 2027*

* 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).
- “Willfully” Defined. Pen. Code, § 7(b)(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].

LESSER INCLUDED OFFENSES

- Willful Discharge of Firearm in Grossly Negligent Manner. Pen. Code, § 246.3(a); *People v. Uceda* (2026) 118 Cal.App.5th 1131, 1145–1146 [342 Cal.Rptr.3d 210] [Penal Code section 26100(c)].

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 (5th ed. 2024) Crimes Against the Person, § 227.

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

1240. Felony False Imprisonment (Pen. Code, §§ 236, 237)

The defendant is charged [in Count __] with false imprisonment by violence, menace, fraud, or deceit [in violation of Penal Code sections 236 and 237(a)].

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

1. The defendant intentionally [and unlawfully] (restrained[,]/[or] confined[,]/[or] detained) someone [or caused that person to be (restrained[,]/[or] confined[,]/[or] detained)] by (violence[,]/[or] menace/[or] fraud[,]/[or] deceit);

AND

2. The defendant made the other person stay or go somewhere against that person's will.

Violence means using physical force that is greater than the force reasonably necessary to restrain someone.

Menace means a verbal or physical threat of harm[, including use of a deadly weapon]. The threat of harm may be express or implied.

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

[False imprisonment does not require that the person restrained be confined in jail or prison.]

*New January 2006; Revised October 2025, February 2027**

** 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. (*People v. Haney* (1977) 75 Cal.App.3d 308, 312–313 [142 Cal.Rptr. 186] [failure to instruct on elements of violence, menace, fraud, or deceit necessary to establish felony false imprisonment requires reversal].)

Give the bracketed words “and unlawfully” in element 1 on request if there is evidence that the defendant acted lawfully. The court will need to further define for the jury when a restraint, detention, or confinement is legal.

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

Give the final paragraph on request to inform jurors that false “imprisonment” is not limited to confinement in jail or prison. (*People v. Agnew* (1940) 16 Cal.2d 655, 659 [107 P.2d 601]; *People v. Haney*, supra, ~~(1977)~~ 75 Cal.App.3d ~~308~~, at p. 313 ~~[142 Cal.Rptr. 186]~~.)

Related Instructions

CALCRIM No. 1242, *Misdemeanor False Imprisonment*.

If the defendant is charged with false imprisonment for purposes of protection from arrest or use as a shield (Pen. Code, § 210.5), see CALCRIM No. 1241, *False Imprisonment: Hostage*.

AUTHORITY

- Elements. Pen. Code, §§ 236, 237; *People v. Agnew* (1940) 16 Cal.2d 655, 659–660 [107 P.2d 601].
- Confinement in Jail or Prison Not Required. *People v. Agnew*, supra, ~~(1940)~~ 16 Cal.2d ~~655~~, at p. 659 ~~[107 P.2d 601]~~; *People v. Haney*, supra, ~~(1977)~~ 75 Cal.App.3d ~~308~~, at p. 313 ~~[142 Cal.Rptr. 186]~~.
- General Intent Crime. *People v. Fernandez* (1994) 26 Cal.App.4th 710, 717–718 [31 Cal.Rptr.2d 677]; *People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1399–1400 [251 Cal.Rptr. 880]; *People v. Swanson* (1983) 142 Cal.App.3d 104, 109 [190 Cal.Rptr. 768].
- “Menace” Defined. *People v. Dominguez* (2010) 180 Cal.App.4th 1351, 1359 [103 Cal.Rptr.3d 864]; *People v. Matian* (1995) 35 Cal.App.4th 480, 484–486 [41 Cal.Rptr.2d 459].
- “Violence” Defined. *People v. Babich* (1993) 14 Cal.App.4th 801, 806 [18 Cal.Rptr.2d 60].
- Fraud and Deceit. *People v. Dominguez*, supra, 180 Cal.App.4th at pp. 1359–1360; *People v. Rios* (1986) 177 Cal.App.3d 445, 450–451 [222 Cal.Rptr. 913]; *Parnell v. Superior Court* (1981) 119 Cal.App.3d 392, 409–410 [173 Cal.Rptr. 906].
- This Instruction Upheld. *People v. Berch* (2026) 120 Cal.App.5th 401, 410 [343 Cal.Rptr.3d 893].

COMMENTARY

The instruction includes a definition of “violence” because it has a specific meaning in the context of felony false imprisonment. In addition, force and violence are separate elements with different meanings that must be made clear to the jury. (*People v. Babich* (1993) 14 Cal.App.4th 801, 806–807 [18 Cal.Rptr.2d 60].) Force is required for a finding of both misdemeanor and felony false imprisonment, while violence is only required for the felony. “Violence” is a force greater than that reasonably necessary to effect the restraint. (*People v. Hendrix* (1992) 8 Cal.App.4th 1458, 1462 [10 Cal.Rptr.2d 922].)

A definition of “menace” is also included. Menace has a specific meaning in the context of felony false imprisonment. (*People v. Babich, supra*, 14 Cal.App.4th at p. 806.) Two categories of menace include a threat involving either the use of a deadly weapon or verbal threats of harm. (*People v. Matian* (1995) 35 Cal.App.4th 480, 485–486 [41 Cal.Rptr.2d 459].) “Menace” is not a mere modifier of “violence.” (*People v. Arvanites* (1971) 17 Cal.App.3d 1052, 1060 [95 Cal.Rptr. 493].)

LESSER INCLUDED OFFENSES

- Attempted False Imprisonment. Pen. Code, §§ 664, 236, 237; *People v. Ross* (1988) 205 Cal.App.3d 1548, 1554–1555 [253 Cal.Rptr. 178] [present ability not prerequisite to attempted false imprisonment].
- Misdemeanor False Imprisonment. Pen. Code, § 236; *People v. Matian* (1995) 35 Cal.App.4th 480, 484, fn. 4, 487 [41 Cal.Rptr.2d 459]; *People v. Babich* (1993) 14 Cal.App.4th 801, 807 [18 Cal.Rptr.2d 60].

RELATED ISSUES

Elder or Dependent Adult Victim

False imprisonment of an elder or dependent adult by use of violence, menace, fraud, or deceit is punishable by imprisonment for two, three, or four years. (Pen. Code, §§ 237(b), 368(f).) An elder is any person who is 65 years of age or older. (Pen. Code, § 368(g).) A dependent adult is any person between the ages of 18 and 64 with specified physical or mental limitations. (Pen. Code, § 368(h).)

Parent Confining Child

A parent who confines his or her child with the intent to endanger the health and safety of the child or for an unlawful purpose can be prosecuted for false imprisonment. (*People v. Checketts* (1999) 71 Cal.App.4th 1190, 1195 [84 Cal.Rptr.2d 491] [unlawful purpose of avoiding prosecution].) A parent asserting the defense of parental authority may introduce evidence of his or her intent in confining or restraining the child and of the reasonableness of the restraint or

confinement. (*Id.* at p. 1196.) There is no sua sponte duty to instruct on the defense absent substantial evidence supporting the defense or reliance on it during the trial. (*Id.* at p. 1197.)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (5th ed. 2024) Crimes Against the Person, §§ 275–281, 283.

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

**1551. Arson Enhancements (Pen. Code, §§ 451.1, 454(a)(2),
456(b))**

If you find the defendant guilty of arson [as charged in Count[s] __], you must then decide whether[, for each crime of arson,] the People have proved (the additional allegation that/one or more of the following additional allegations):

<Alternative A—prior felony violation(s) of Pen. Code, § 451 or § 452>

- [The defendant was convicted of (felony arson/ [(and/or)] felony unlawfully causing a fire) on _____ *<insert date of conviction>*.
<Repeat for each prior felony conviction alleged.>]

<Alternative B—injury to firefighter, peace officer, or EMT>

- [(A/An) (firefighter[,]/ peace officer[,]/ [or] emergency worker) suffered great bodily injury as a result of the arson.]

<Alternative C—great bodily injury to more than one person>

- [The defendant caused great bodily injury to more than one person during the commission of the arson.]

<Alternative D—multiple structures burned>

- [The defendant caused multiple structures to burn during the commission of the arson.]

<Alternative E—device designed to accelerate fire>

- 1. The arson (caused great bodily injury[,]/ [or] caused an inhabited structure or inhabited property to burn[,]/ [or] burned a structure or forest land); ~~and~~

AND

2. The arson was caused by use of a device designed to accelerate the fire or delay ignition.]

<Alternative F—monetary gain, Pen. Code, § 456(b)>

- [The defendant committed the arson for monetary gain.]

<Alternative G—state of emergency, Pen. Code, § 454(a)(2)>

- **[The defendant committed the arson:**

1. During a state of emergency declared by the governor;

AND

2. Within an area proclaimed by the governor to be subject to the state of emergency.]

[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”>.]

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

[An **emergency worker** includes an emergency medical technician. An **emergency medical technician** is someone who holds a valid certificate under the Health and Safety Code as an emergency medical technician.]

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

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

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

[A **device designed to accelerate the fire** means a piece of equipment or a mechanism intended, or devised, to hasten or increase the fire’s progress.]

[In order to prove that the defendant *caused* (great bodily injury to more than one person/ [or] more than one structure to burn), the People must prove that:

1. A reasonable person in the defendant's position would have foreseen that committing arson could begin a chain of events likely to result in (great bodily injury to more than one person/ [or] the burning of more than one structure);
2. The commission of arson was a direct and substantial factor in causing (great bodily injury to more than one person/ [or] the burning of more than one structure);

AND

3. The (great bodily injury to more than one person/ [or the] burning of more than one structure) would not have happened if the defendant had not committed arson.]

[You must decide whether the People have proved this allegation for each crime of arson and return a separate finding for each crime of arson.]

The People have the burden of proving (this/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 September 2020, March 2024, October 2025, February 2027

BENCH NOTES

Instructional Duty

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

The reference to “arson” in the first paragraph refers to all crimes charged under Penal Code section 451, including arson of a structure, forest land, or property (see CALCRIM No. 1515), arson causing great bodily injury (see CALCRIM No. 1501), and arson of an inhabited structure (see CALCRIM No. 1502). It does not refer to aggravated arson under Penal Code section 451.5 (see CALCRIM No. 1500).

Give one of the bracketed alternatives, A through E, depending on the enhancement alleged under Penal Code section 451.1. Give all relevant bracketed definitions based on the enhancement alleged.

Give alternative F if monetary gain is alleged under Penal Code section 456(b). (See *Southern Union Co. v. U.S.* (2012) 567 U.S. 343 [132 S.Ct. 2344, 183 L.Ed.2d 318] [holding that the jury trial right prescribed by *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] applies to the imposition of criminal fines not statutorily authorized by the elements of the crime]; cf. *People v. Kramis* (2012) 209 Cal.App.4th 346, 351–352 [147 Cal.Rptr.3d 84] [*Apprendi* not implicated when trial court exercised discretion to impose fine within statutory range that did not require additional factual findings].)

Give alternative G if a state of emergency enhancement is alleged under Penal Code section 454(a)(2).

Under alternative B, 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.”

Give the bracketed paragraph that begins with “In order to prove that the defendant *caused*” if the prosecution alleges that the defendant caused great bodily injury to multiple people or caused multiple structures to burn. (Pen. Code, § 451.1(a)(5); see Pen. Code, § 451(a)–(c).)

Give the bracketed sentence that begins with “You must decide whether the People have proved” if the same enhancement is alleged for multiple counts of arson.

AUTHORITY

- Enhancements. Pen. Code, §§ 451.1, 454(a)(2), 456(b).
- “Device Designed to Accelerate Fire” Defined. *People v. Johnson* (2022) 86 Cal.App.5th 258, 266–267 [301 Cal.Rptr.3d 814]; *People v. Kurtenbach* (2012) 204 Cal.App.4th 1264, 1278–1280 [139 Cal.Rptr.3d 637]; *People v. Andrade* (2000) 85 Cal.App.4th 579, 587 [102 Cal.Rptr.2d 254].
- “Peace Officer” Defined. Pen. Code, § 830 et seq.
- “Firefighter” Defined. Pen. Code, § 245.1.

- “Emergency Medical Technician” Defined. Health & Saf. Code, §§ 1797.80–1797.84.
- Duty to Define Proximate Cause. See *People v. Bland* (2002) 28 Cal.4th 313, 334–335 [121 Cal.Rptr.2d 546, 48 P.3d 1107] [in context of firearm enhancement].
- Elements of State of Emergency Arson Enhancement. Pen. Code, § 454(a)(2); *People v. Gutierrez* (2026) 118 Cal.App.5th 622, 633–634 [341 Cal.Rptr.3d 691].
- “State of Emergency” Defined. Gov. Code, § 8558(b).

RELATED ISSUES

Discretion to Strike Enhancement

The trial court retains discretion under Penal Code section 1385 to strike an arson sentence enhancement. (*People v. Wilson* (2002) 95 Cal.App.4th 198, 203 [115 Cal.Rptr.2d 355] [enhancement for use of an accelerant under Pen. Code, § 451.1(a)(5)].)

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (5th ed. 2024) Punishment, § 433.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11[3] (Matthew Bender).

1552–1599. Reserved for Future Use

2100. Driving a Vehicle or Operating a Vessel Under the Influence Causing Injury (Veh. Code, § 23153(a), (f), (g))

The defendant is charged [in Count __] with causing injury to another person while (driving a vehicle/operating a vessel) under the [combined] influence of (an alcoholic beverage/ [or] a drug/ [or] an alcoholic beverage and a drug) [in violation of Vehicle Code section 23153(a)/(f)/(g)].

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

1. The defendant (drove a vehicle/operated a vessel);
2. When (he/she) (drove a vehicle/operated a vessel), the defendant was under the [combined] influence of (an alcoholic beverage/ [or] a drug/ [or] an alcoholic beverage and a drug);
3. While (driving a vehicle/operating a vessel) under the influence, the defendant also (committed an illegal act/ [or] neglected to perform a legal duty);

AND

4. The defendant's (illegal act/ [or] failure to perform a legal duty) caused bodily injury to another person.

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/operate a vessel) 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 a vehicle/operate a vessel) as an ordinarily cautious person, in full possession of his or her faculties and using reasonable care, would (drive a vehicle/operate a vessel) 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.]

[If you find that the defendant's blood alcohol level was below 0.05 percent at the time of the chemical analysis, you may, but are not required to, conclude that the defendant was not 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.]

[The People allege that the defendant committed the following illegal act[s]: _____ <list name[s] of offense[s]>.

To decide whether the defendant committed _____ <list name[s] of offense[s]>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

[The People [also] allege that the defendant failed to perform the following legal (duty/duties) while (driving the vehicle/operating the vessel): (the duty to exercise ordinary care at all times and to maintain proper control of the (vehicle/vessel)/_____ <insert other duty or duties alleged>).]

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (committed [at least] one illegal act/[or] failed to perform [at least] one duty).

<Alternative A—unanimity required; see Bench Notes>

[You must all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

<Alternative B—unanimity not required; see Bench Notes>

[But you do not have to all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care 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).]

[An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act and the injury 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 injury. An act causes bodily injury to another person only if it is a substantial factor in causing the injury. A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the injury.]

[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 a vehicle/operate a vessel).]

New January 2006; Revised June 2007, April 2008, December 2008, August 2015, September 2017, March 2018, September 2019, October 2021, October 2025,
February 2027*

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

BENCH NOTES

Instructional Duty

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

If the prosecution alleges under element 3 that the defendant committed an act forbidden by law, the court has a **sua sponte** duty to specify the predicate offense alleged and to instruct on the elements of that offense. (*People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].)

If the prosecution alleges under element 3 that the defendant neglected to perform a duty imposed by law, the court has a **sua sponte** duty to instruct on the duty allegedly neglected. (See *People v. Minor*, *supra*, 28 Cal.App.4th at pp. 438–439.) If the prosecution alleges that the defendant neglected the general duty of every driver to exercise ordinary care (see *People v. Oyaas* (1985) 173 Cal.App.3d 663,

669 [219 Cal.Rptr. 243]), the court should give the bracketed definition of “ordinary care.”

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

The court has a **sua sponte** duty to give a unanimity instruction when the prosecution presents evidence of multiple acts to prove a single count, if the prosecution has not elected the specific act relied upon to prove the charge and if the continuous course of conduct exception does not apply. (See *People v. Jennings* (2010) 50 Cal.4th 616, 679 [114 Cal.Rptr.3d 133, 188, 237 P.3d 474, 520–521].) See the Bench Notes to CALCRIM No. 3500, *Unanimity*, for an extensive discussion of the sua sponte duty to instruct on unanimity. If the court concludes that a unanimity instruction is appropriate, give the unanimity alternative A. If the court concludes that unanimity is not required, give the unanimity alternative B.

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 the bracketed language that begins “If you find 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. Esayan* (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.

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].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

Defenses—Instructional Duty

On request, if supported by the evidence, the court must instruct on the “imminent peril/sudden emergency” doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) The court may use the bracketed instruction on sudden emergency in CALCRIM No. 590, *Gross Vehicular Manslaughter While Intoxicated*.

Related Instructions

CALCRIM No. 2101, *Driving With 0.08 Percent Blood Alcohol Causing Injury*.

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*.

CALCRIM No. 595, *Vehicular Manslaughter: Speeding Laws Defined*.

AUTHORITY

- Elements. Veh. Code, § 23153(a), (f), (g); *People v. Minor*, supra, ~~(1994)~~ 28 Cal.App.4th ~~431~~, at p. 438 ~~[33 Cal.Rptr.2d 641]~~.
- “Alcoholic Beverage” Defined. Veh. Code, § 109, Bus. & Prof. Code, § 23004.
- “Drug” Defined. Veh. Code, § 312.
- Presumptions. Veh. Code, § 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- “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. Stockman* (2020) 56 Cal.App.5th 1093, 1099–1101 [270 Cal.Rptr.3d 812]; *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].
- Must Instruct on Elements of Predicate Offense. *People v. Minor*, supra, ~~(1994)~~ 28 Cal.App.4th ~~431~~, t pp. 438–439 ~~[33 Cal.Rptr.2d 641]~~; *People v. Ellis*, supra, ~~(1999)~~ 69 Cal.App.4th ~~1334~~, at p. 1339 ~~[82 Cal.Rptr.2d 409]~~.
- Negligence—Ordinary Care. Pen. Code, § 7, subd. 2; Restatement Second of Torts, § 282; *People v. Oyaas*, supra, ~~(1985)~~ 173 Cal.App.3d ~~663~~, at p. 669 ~~[219 Cal.Rptr. 243]~~ [ordinary negligence standard applies to driving under the influence causing injury].
- Causation. *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- 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

- Misdemeanor Driving Under the Influence or With 0.08 Percent. Veh. Code, § 23152(a) & (b); *People v. Capetillo* (1990) 220 Cal.App.3d 211, 220 [269 Cal.Rptr. 250].

- Driving Under the Influence Causing Injury is not a lesser included offense of vehicular manslaughter without gross negligence. *People v. Binkerd* (2007) 155 Cal.App.4th 1143, 1148–1149 [66 Cal.Rptr.3d 675].
- Violations of Vehicle Code section 23153(a) are not lesser included offenses of Vehicle Code section 23153(f) [now 23153(g)]. *People v. Cady* (2016) 7 Cal.App.5th 134, 145-146 [212 Cal.Rptr.3d 319].

RELATED ISSUES

DUI Cannot Serve as Predicate Unlawful Act

“[T]he evidence must show an unlawful act or neglect of duty *in addition* to driving under the influence.” (*People v. Minor*, ~~*supra*, (1994)~~ 28 Cal.App.4th 431, ~~at p. 438~~ ~~[33 Cal.Rptr.2d 641]~~ [italics in original]; *People v. Oyaas*, ~~*supra*, (1985)~~ 173 Cal.App.3d 663, ~~at p. 668~~ ~~[219 Cal.Rptr. 243]~~.)

Act Forbidden by Law

The term “ ‘any act forbidden by law’ . . . refers to acts forbidden by the Vehicle Code . . . ” (*People v. Clenney* (1958) 165 Cal.App.2d 241, 253 [331 P.2d 696].) The defendant must commit the act when driving the vehicle. (*People v. Capetillo*, ~~*supra*, (1990)~~ 220 Cal.App.3d 211, ~~at p. 217~~ ~~[269 Cal.Rptr. 250]~~ [violation of Veh. Code, § 10851 not sufficient because offense not committed “when” defendant was driving the vehicle but by mere fact that defendant was driving the vehicle].)

Neglect of Duty Imposed by Law

“In proving the person neglected any duty imposed by law in driving the vehicle, it is not necessary to prove that any specific section of [the Vehicle Code] was violated.” (Veh. Code, § 23153(c); *People v. Oyaas*, ~~*supra*, (1985)~~ 173 Cal.App.3d 663, ~~at p. 669~~ ~~[219 Cal.Rptr. 243]~~.) “[The] neglect of duty element . . . is satisfied by evidence which establishes that the defendant’s conduct amounts to no more than ordinary negligence.” (~~*Id.* *People v. Oyaas*, *supra*, 173 Cal.App.3d at p. 669.~~) “[T]he law imposes on any driver [the duty] to exercise ordinary care at all times and to maintain a proper control of his or her vehicle.” (*Id.* at p. 670.)

Multiple Victims to One Drunk Driving Accident

“In *Wilkoff v. Superior Court* [(1985) 38 Cal.3d 345, 352 [211 Cal.Rptr. 742, 696 P.2d 134]] we held that a defendant cannot be charged with multiple counts of felony drunk driving under Vehicle Code section 23153, subdivision (a), where injuries to several people result from one act of drunk driving.” (*People v. McFarland* (1989) 47 Cal.3d 798, 802 [254 Cal.Rptr. 331, 765 P.2d 493].) However, when “a defendant commits vehicular manslaughter with gross negligence[,]. . . he may properly be punished for [both the vehicular manslaughter and] injury to a separate individual that results from the same incident.” (*Id.* at p. 804.) The prosecution may also charge an enhancement for multiple victims under Vehicle Code section 23558.

See also the Related Issues section in CALCRIM No. 2110, *Driving Under the Influence*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (5th ed. 2024) Crimes Against Public Peace and Welfare, §§ 330–339.

2 Witkin, California Evidence (6th ed. 2024) Demonstrative, Experimental, and Scientific Evidence, § 56.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.36 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02 (Matthew Bender).

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.]

[If you find that the defendant's blood alcohol level was below 0.05 percent at the time of the chemical analysis, you may, but are not required to, conclude that the defendant was not 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.]

*New January 2006; Revised June 2007, April 2008, August 2015, September 2017, March 2018, February 2026. * February 2027*

** 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 the bracketed language that begins “If you find 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. Esayan* (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*, 33 Cal.3d at pp. 497–505.
- “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*, 231 Cal.App.3d at p. 84; *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*, 231 Cal.App.3d at p. 90.

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 (5th ed. 2024) Crimes Against Public Peace and Welfare §§ 330–335 et seq.

2 Witkin, California Evidence (6th 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).

2181. Evading Peace Officer (Veh. Code, §§ 2800.1(a), 2800.2)

The defendant is charged [in Count __] with evading a peace officer [in violation of Vehicle Code section[s] (2800.1(a)/ [or] 2800.2)].

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

1. A peace officer driving a motor vehicle was pursuing the defendant;
2. The defendant, who was also driving a motor vehicle, willfully fled from, or tried to elude, the officer, intending to evade the officer;

<Give ~~the appropriate paragraph[s] of~~ element 3 when the defendant is charged with a violation of Vehicle Code section 2800.2>

~~{3A. During the pursuit, the defendant drove with willful or wanton disregard for the safety of persons or property;}~~

~~{OR}~~

~~{3B. During the pursuit, the defendant caused damage to property while driving;}~~

~~{OR}~~

~~{3C. During the pursuit, the defendant committed three or more violations, each of which would make the defendant eligible for a traffic violation point;}~~

AND

~~{(3/4). All of the following were true:~~

- ~~(a) There was at least one lighted red lamp visible from the front of the peace officer's vehicle;~~
- ~~(b) The defendant either saw or reasonably should have seen the lamp;~~
- ~~(c) The peace officer's vehicle was sounding a siren as reasonably necessary;~~

(d) The peace officer's vehicle was distinctively marked;

AND

(e) The peace officer was wearing a distinctive uniform.

[A person 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">.]

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 acts with *wanton disregard for safety* when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk of harm, and (2) he or she intentionally ignores that risk. The person does not, however, have to intend to cause damage.]

[Willful or wanton disregard for safety includes causing damage to property.]

[Willful or wanton disregard for safety [also] includes the commission of three or more violations, each of which would make the defendant eligible for a traffic violation point.]

[_____ <insert traffic violations alleged> are each assigned a traffic violation point.]

[The traffic violation of _____ means _____ <insert statutory definition>.]

A vehicle is *distinctively marked* if it has features that are reasonably noticeable to other drivers, including a red lamp, siren, and at least one other feature that makes it look different from vehicles that are not used for law enforcement purposes.

A *distinctive uniform* means clothing adopted by a law enforcement agency to identify or distinguish members of its force. The uniform does not have to be complete or of any particular level of formality. However, a badge, without more, is not enough.

[You may not find the defendant guilty of a violation of Vehicle Code section 2800.2 unless all of you agree that the People have proved, beyond a reasonable doubt, that the defendant committed each element of this offense. However, you need not all agree on which act[s] or conduct constitute[s] willful or wanton disregard for safety.]

New January 2006; Revised August 2006, September 2018, March 2023, February 2027

BENCH NOTES

Instructional Duty

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

The jury must determine whether a peace officer was pursuing the defendant. (*People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].) The court must instruct the jury in the appropriate definition of “peace officer” from the statute. (*Ibid.*) It is an error for the court to instruct that the witness is a peace officer as a matter of law. (*Ibid.* [instruction that “Officer Bridgeman and Officer Gurney are peace officers” was error].) If the witness is a police officer, give the bracketed sentence that begins with “A person employed as a police officer.” If the witness is another type of peace officer, give the bracketed sentence that begins with “A person employed by.”

If the prosecution relies on three or more point violations as the basis for felony evading, the court may need to instruct the jury with the specific violation definitions within the vehicle code. (See *People v. Kazarian* (2026) 122 Cal.App.5th 57, 65 [347 Cal.Rptr.3d 291].)

On request, the court must give CALCRIM No. 3426, *Voluntary Intoxication*, if there is sufficient evidence of voluntary intoxication to negate the intent to evade. (*People v. Finney* (1980) 110 Cal.App.3d 705, 712 [168 Cal.Rptr. 80].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

AUTHORITY

- Elements. Veh. Code, §§ 2800.1(a), 2800.2.
- Willful or Wanton Disregard. *People v. Schumacher* (1961) 194 Cal.App.2d 335, 339–340 [14 Cal.Rptr. 924].
- Three Violations or Property Damage as Wanton Disregard—Definitional. *People v. Taylor* (2018) 19 Cal.App.5th 1195, 1202-1203 [228 Cal.Rptr.3d 575]; *People v. Pinkston* (2003) 112 Cal.App.4th 387, 392–393 [5 Cal.Rptr.3d 274].

- Distinctively Marked Vehicle. *People v. Hudson* (2006) 38 Cal.4th 1002, 1010–1011 [44 Cal.Rptr.3d 632, 136 P.3d 168].
- Distinctive Uniform. *People v. Estrella* (1995) 31 Cal.App.4th 716, 724 [37 Cal.Rptr.2d 383]; *People v. Mathews* (1998) 64 Cal.App.4th 485, 491 [75 Cal.Rptr.2d 289].
- Jury Must Determine Status as Peace Officer. *People v. Flood, supra*, 18 Cal.4th at p. 482.
- Red Lamp, Siren, Additional Distinctive Feature of Car, and Distinctive Uniform Must Be Proved. *People v. Hudson, supra*, 38 Cal.4th at p. 1013; *People v. Acevedo* (2003) 105 Cal.App.4th 195, 199 [129 Cal.Rptr.2d 270]; *People v. Brown* (1989) 216 Cal.App.3d 596, 599–600 [264 Cal.Rptr. 908].
- Defendant Need Not Receive Violation Points for Conduct. *People v. Leonard* (2017) 15 Cal.App.5th 275, 281 [222 Cal.Rptr.3d 868].
- Statute Does Not Require Lawful Performance of a Duty. *People v. Fuentes* (2022) 78 Cal.App.5th 670, 679–680 [294 Cal.Rptr.3d 43].
- Unanimity Not Required for Underlying Facts of Willful or Wanton Disregard. *People v. Datt* (2010) 185 Cal.App.4th 942, 949–951 [111 Cal.Rptr.3d 132].

LESSER INCLUDED OFFENSES

- Misdemeanor Evading a Pursuing Peace Officer. Veh. Code, § 2800.1; *People v. Springfield* (1993) 13 Cal.App.4th 1674, 1680–1681 [17 Cal.Rptr.2d 278].
- Failure to Yield. Veh. Code, § 21806; *People v. Diaz* (2005) 125 Cal.App.4th 1484, 1491 [23 Cal.Rptr.3d 653]. (Lesser included offenses may not be used for the requisite “three or more violations.”)

RELATED ISSUES

Inherently Dangerous Felony

A violation of Vehicle Code section 2800.2 is not an inherently dangerous felony supporting a felony murder conviction. (*People v. Howard* (2005) 34 Cal.4th 1129, 1139 [23 Cal.Rptr.3d 306, 104 P.3d 107].)

See the Related Issues section to CALCRIM No. 2182, *Evading Peace Officer: Misdemeanor*.

SECONDARY SOURCES

7 Witkin & Epstein, California Criminal Law (54th ed. 2024) Crimes Against Public Peace and Welfare, § 37706.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.22[1][a][iv] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.01[2][b][ii][B], 142.02[2][c] (Matthew Bender).

2500. Illegal Possession, Etc. of Weapon

The defendant is charged [in Count __] with unlawfully (possessing/manufacturing/causing to be manufactured/importing/keeping for sale/offering or exposing for sale/giving/lending/buying/receiving) a weapon, specifically (a/an) _____ *<insert type of weapon >* [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 (possessed/manufactured/caused to be manufactured/imported into California/kept for sale/offered or exposed for sale/gave/lent/bought/received) (a/an) _____ *<insert type of weapon>*;
2. The defendant knew that (he/she) (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the _____ *<insert type of weapon>*;

[AND]

<Alternative 3A—object capable of innocent uses>

- [3. The defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the object as a weapon (;/.)]

<Alternative 3B—object designed solely for use as weapon>

- [3. The defendant knew that the object (was (a/an) _____ *<insert characteristics of weapon, e.g., “unusually short shotgun, penknife containing stabbing instrument”>/could be used _____ <insert description of weapon, e.g., “as a stabbing weapon,” or “for purposes of offense or defense”>*)(;/.)]

<Give element 4 only if defendant is charged with offering or exposing for sale.>

[AND]

4. The defendant intended to sell it.]

[The People do not have to prove that the defendant intended to use the object as a weapon.]

<Give only if alternative 3A is given.>

[When deciding whether the defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the object *as a weapon*, consider all the surrounding circumstances relating to that question, including when and where the object was (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received)[,] [and] [where the defendant was going][,] [and] [whether the object was changed from its standard form][,] and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.]

<Give only if alternative 3B is given.>

[(A/An) _____ *<insert type of weapon>* means _____ *<insert appropriate definition>*].]

<Give only if the weapon used has specific characteristics of which the defendant must have been aware.>

[A _____ *<insert type of weapon specified in element 3B>* is _____ *<insert defining characteristics of weapon>*].]

[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/visible)).]

[(A/An) _____ *<insert prohibited 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 (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) 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/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) at least one of these weapons and you all agree

on which weapon (he/she) (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received).]

<Defense: Statutory Exemptions>

[The defendant did not unlawfully (possess/manufacture/cause to be manufactured/import/keep for sale/offers or expose for sale/give/lend/buy/receive) (a/an) _____ <insert type of weapon> if _____ <insert exception>. The People have the burden of proving beyond a reasonable doubt that the defendant unlawfully (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) (a/an) _____ <insert type of weapon>. If the People have not met this burden, you must find the defendant not guilty of this crime.]

New January 2006; Revised August 2006, April 2008, February 2012, February 2015, March 2017, March 2019, September 2022, February 2027*

* 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.

~~Penal Code section 12020 has been repealed. In its place, the legislature enacted numerous new statutes that became effective January 1, 2012. Whenever a blank in the instruction calls for inserting a type of weapon, an exception, or a definition, refer to the appropriate new Penal Code section.~~

Element 3 contains the requirement that the defendant know that the object is a weapon. A more complete discussion of this issue is provided in the Commentary section below. Select alternative 3A if the object is capable of innocent uses. In such cases, the court has a **sua sponte** duty to instruct on when an object is possessed “as a weapon.” (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404 [111 Cal.Rptr.2d 496]; *People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. 9 [47 Cal.Rptr. 772, 408 P.2d 100].)

Select alternative 3B if the object “has no conceivable innocent function” (*People v. Fannin, supra*, 91 Cal.App.4th at p. 1405), or when the item is specifically designed to be one of the weapons defined in the Penal Code (see *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885]).

Give element 4 only if the defendant is charged with offering or exposing for sale. (See *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].)

For any of the weapons not defined in the Penal Code, use an appropriate definition from the case law, where available.

For violations of Penal Code section 32310(a), the court may need to modify this instruction to clarify that “receives” is more than mere possession. (See *People v. Newt* (2026) 119 Cal.App.5th 804, 808–814 [342 Cal.Rptr.3d 905] [“there must be some evidence as to the provenance of the high-capacity magazine—e.g., that the defendant bought or received it after January 1, 2000, from a person who manufactured the magazine, imported it into the state, kept the magazine for sale, offered it for sale, or who gave or lent it to him”].)

If the prosecution alleges under a single count that the defendant possessed multiple weapons and the possession was “fragmented as to time . . . [or] space,” 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].) Give the bracketed paragraph beginning “The People allege that the defendant possessed the following weapons,” inserting the items alleged. Also make the appropriate adjustments to the language of the instruction to refer to multiple weapons or objects.

Defenses—Instructional Duty

If there is sufficient evidence to raise a reasonable doubt about the existence of one of the statutory exemptions, the court has a **sua sponte** duty to give the bracketed instruction on that defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph beginning, “The defendant did not unlawfully . . .”.

AUTHORITY

- Elements. Pen. Code, §§ 19200, 20310, 20410, 20510, 20610, 20710, 20910, 21110, 21810, 22210, 24310, 24410, 24510, 24610, 24710, 30210, 31500, 32310, 32311, 32900, 33215, 33600.
- Need Not Prove Intent to Use. *People v. Rubalcava* (2000) 23 Cal.4th 322, 328 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Grubb, supra*, 63 Cal.2d at pp. 620–621, fn. 9.
- Knowledge Required. *People v. Rubalcava, supra*, 23 Cal.4th at pp. 331–332; *People v. Gaitan, supra*, 92 Cal.App.4th at p. 547.
- Specific Intent Required for Offer to Sell. *People v. Jackson, supra*, 59 Cal.2d at pp. 469–470.
- Specific Intent Includes Knowledge of Forbidden Characteristics of Weapon. *People v. King* (2006) 38 Cal.4th 617, 627–628 [42 Cal.Rptr.3d 743, 133 P.3d 636].

- Innocent Object—Must Prove Possessed as Weapon. *People v. Grubb, supra*, 63 Cal.2d at pp. 620–621; *People v. Fannin, supra*, 91 Cal.App.4th at p. 1404.
- Definition of Blackjack, etc. *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1402 [111 Cal.Rptr.2d 496]; *People v. Mulherin* (1934) 140 Cal.App. 212, 215 [35 P.2d 174].
- Firearm Need Not Be Operable. *People v. Favalora* (1974) 42 Cal.App.3d 988, 991 [117 Cal.Rptr. 291].
- Measurement of Sawed-Off Shotgun. *People v. Rooney* (1993) 17 Cal.App.4th 1207, 1211–1213 [21 Cal.Rptr.2d 900]; *People v. Stinson* (1970) 8 Cal.App.3d 497, 500 [87 Cal.Rptr. 537].
- Measurement of Fléchette Dart. *People v. Olmsted* (2000) 84 Cal.App.4th 270, 275 [100 Cal.Rptr.2d 755].
- 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].
- Knowledge of Specific Characteristics of Weapon. *People v. King, supra*, 38 Cal.4th at p. 628.
- Intent to Use as a Weapon. *People v. Baugh* (2018) 20 Cal.App.5th 438, 446 [228 Cal.Rptr.3d 898].

COMMENTARY

Element 3—Knowledge

“Intent to use a weapon is not an element of the crime of weapon possession.” (*People v. Fannin, supra*, 91 Cal.App.4th at p. 1404.) However, interpreting now-repealed Penal Code section 12020(a)(4), possession of a concealed dirk or dagger, the Supreme Court stated that “[a] defendant who does not know that he is carrying the weapon or that the concealed instrument may be used as a stabbing weapon is . . . not guilty of violating section 12020.” (*People v. Rubalcava, supra*, 23 Cal.4th at pp. 331–332.) Applying this holding to possession of other weapons prohibited under now-repealed Penal Code section 12020(a), the courts have concluded that the defendant must know that the object is a weapon or may be used as a weapon, or must possess the object “as a weapon.” (*People v. Gaitan, supra*, 92 Cal.App.4th at p. 547; *People v. Taylor* (2001) 93 Cal.App.4th 933, 941 [114 Cal.Rptr.2d 23]; *People v. Fannin, supra*, 91 Cal.App.4th at p. 1404.)

In *People v. Gaitan, supra*, 92 Cal.App.4th at p. 547, for example, the court considered the possession of “metal knuckles,” defined in now-repealed Penal Code section 12020(c)(7) as an object “worn for purposes of offense or defense.” The court held that the prosecution does not have to prove that the defendant

intended to use the object for offense or defense but must prove that the defendant *knew* that “the instrument may be used for purposes of offense or defense.” (*Ibid.*)

Similarly, in *People v. Taylor, supra*, 93 Cal.App.4th at p. 941, involving possession of a cane sword, the court held that “[i]n order to protect against the significant possibility of punishing innocent possession by one who believes he or she simply has an ordinary cane, we infer the Legislature intended a scienter requirement of actual knowledge that the cane conceals a sword.”

Finally, *People v. Fannin, supra*, 91 Cal.App.4th at p. 1404, considered whether a bicycle chain with a lock at the end met the definition of a “slungshot.” The court held that “if the object is not a weapon per se, but an instrument with ordinary innocent uses, the prosecution must prove that the object was possessed *as a weapon*.” (*Ibid.* [emphasis in original]; see also *People v. Grubb, supra*, 63 Cal.2d at pp. 620–621 [possession of modified baseball bat].)

In element 3 of the instruction, the court should give alternative 3B if the object has no innocent uses, inserting the appropriate description of the weapon. If the object has innocent uses, the court should give alternative 3A. The court may choose not to give element 3 if the court concludes that a previous case holding that the prosecution does not need to prove knowledge is still valid authority. However, the committee would caution against this approach in light of *Rubalcava* and *In re Jorge M.* (See *People v. Schaefer* (2004) 118 Cal.App.4th 893, 904–905 [13 Cal.Rptr.3d 442] [observing that, since *In re Jorge M.*, it is unclear if the prosecution must prove that the defendant knew shotgun was “sawed off” but that failure to give instruction was harmless if error].)

~~It is not unlawful to possess a large-capacity magazine or large-capacity conversion kit. It is unlawful, however, to receive or buy these items after January 1, 2014, the effective date of Penal Code sections 32310 and 32311.~~

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (54th ed. 2024) Crimes Against Public Peace and Welfare, §§ 24311–24512.

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. 144, *Crimes Against Order*, § 144.01 (Matthew Bender).

2504. Bringing or Possessing a Weapon on School Grounds (Pen. Code, § 626.10(a)(1))

The defendant is charged [in Count _____] with (bringing/possessing) a weapon on school grounds [in violation of Penal Code section 626.10(a)(1)].

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

1. The defendant [unlawfully] (brought/possessed) (a/an) (dirk[,]/ [or] dagger[,]/ [or] ice pick[,]/ [or] knife having a blade longer than 2 ½ inches[,]/ [or] folding knife with a blade that locks into place[,]/ [or] razor with an unguarded blade[,]/ [or] taser[,]/ [or] stun gun[,]/ [or] any instrument that expels a metallic projectile, such as a BB or a pellet, through the force of air pressure, CO2 pressure, or spring action[,]/ [or] spot marker gun) on school grounds;
2. The defendant knew that (he/she) was (bringing/possessing) the object on school grounds;

AND

3. The defendant knew that the object was (a/an) (dirk[,]/ [or] dagger[,]/ [or] ice pick[,]/ [or] knife having a blade longer than 2 ½ inches[,]/ [or] folding knife with a blade that locks into place[,]/ [or] razor with an unguarded blade[,]/ [or] taser[,]/ [or] stun gun[,]/ [or] any instrument that expels a metallic projectile, such as a BB or a pellet, through the force of air pressure, CO2 pressure, or spring action[,]/ [or] spot marker gun).

[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.]

[A *knife having a blade longer than 2 ½ inches* is measured only by the sharpened portion of the knife.]

[A *stun gun* is anything, except a less lethal weapon, that is used or intended to be used as either an offensive or defensive weapon and is capable of temporarily immobilizing someone by inflicting an electrical charge.]

A person brings or possesses an object *on school grounds* if he or she brings or possesses it upon the grounds of, or within, any public or private school providing instruction in kindergarten or any of grades 1 to 12.

The People do not have to prove that the defendant used or intended to use the object as a weapon.

[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/visible)).]

[The People allege that the defendant (brought/possessed) the following objects on school grounds: _____ <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 (brought/possessed) at least one of these objects on school grounds and you all agree on which object (he/she) (brought/possessed).]

<Defense: Officer or Military Member>

[The defendant is not guilty of this offense if (he/she) (brought/possessed) an object on school grounds while a (duly appointed peace officer[,]/ [or] full-time paid peace officer of another state or the federal government who is carrying out official duties while in this state[,]/ [or] person summoned by any officer to assist in making arrests or preserving the peace while the person is actually engaged in assisting any officer[,]/ [or] a member of the military forces of this state or the United States who is engaged in the performance of his or her duties). The People have the burden of proving beyond a reasonable doubt that the defendant did not (bring/possess) the object on the school grounds while a (duly appointed peace officer[,]/ [or] full-time paid peace officer of another state or the federal government who is carrying out official duties while in this state[,]/ [or] person summoned by any officer to assist in making arrests or preserving the peace while the person is actually engaged in assisting any officer[,]/ [or] a member of the military forces of this state or the United States who is engaged in the performance of his or her duties). If the People have not met this burden, you must find the defendant not guilty of this offense.]

[A sworn member of _____ <insert name of agency that employs peace officer>, authorized by _____ <insert appropriate section from Pen. Code, § 830 et seq.> to _____ <describe statutory authority>, is a peace officer.]

<Defense: School-Sponsored Activity or Class>

[The defendant is not guilty of this offense if (he/she) (brought/possessed) a (knife having a blade longer than 2 ½ inches[,]/ [or] razor with an unguarded blade[,]/ [or] razor blade[,]/ [or] box cutter) on school grounds at the direction of an employee of the school for use in a school-sponsored activity. The People have the burden of proving beyond a reasonable doubt that the defendant did not (bring/possess) the object on the school grounds at the direction of an employee of the school for use in a school-sponsored activity. If the People have not met this burden, you must find the defendant not guilty of this offense.]

<Defense: Lawful Purpose Within Scope of Employment>

[The defendant is not guilty of this offense if (he/she) (brought/possessed) (a/an) (ice pick[,]/ [or] knife having a blade longer than 2 ½ inches/razor with an unguarded blade[,]/ [or] razor blade[,]/ [or] box cutter) on school grounds for a lawful purpose within the scope of (his/her) employment. The People have the burden of proving beyond a reasonable doubt that the defendant did not (bring/possess) the object on the school grounds for a lawful purpose within the scope of (his/her) employment. If the People have not met this burden, you must find the defendant not guilty of this offense.]

<Defense: Written Permission of School Principal>

[The defendant is not guilty of this offense if (he/she) (brought/possessed) (a/an) (instrument that expels a metallic projectile, such as a BB or a pellet, through the force of air pressure, CO2 pressure, or spring action[,]/ [or] spot marker gun[,]/ [or] any razor blade[,]/ [or] box cutter) on school grounds with written permission of the school principal or (his/her) designee. The People have the burden of proving beyond a reasonable doubt that the defendant did not (bring/possess) the object on the school grounds with written permission of the school principal or (his/her) designee. If the People have not met this burden, you must find the defendant not guilty of this offense.]

New February 2027

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 brought or possessed multiple weapons on school grounds, 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 (brought/possessed) the following objects on school grounds,” inserting the items alleged. If there is sufficient evidence of one or more defenses provided in the instruction, give the bracketed word “unlawfully” in element 1 and the bracketed paragraph(s) defining the defense(s).

AUTHORITY

- Elements. Pen. Code, § 626.10(a).
- “Dirk or Dagger” Defined. Pen. Code, § Pen. Code, § 626.10(h).
- “Stun Gun” Defined. Pen. Code, § 244.5(a).
- “Peace Officer” Defined. Pen. Code, § 830 et seq.
- Unanimity. *People v. Wolfe, supra*, 114 Cal.App.4th at pp. 184–185.
- Officer or Military Member Defense. Pen. Code, § 626.10(a).
- School-Sponsored Activity or Class Defense. Pen. Code, § 626.10(c).
- Lawful Purpose Within Scope of Employment Defense. Pen. Code, § 626.10(d).
- Written Permission of School Principal Defense. Pen. Code, § 626.10(f).
- Knowledge of Nature of Object. *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52].
- Prosecution Need Not Prove Intent to Use. *People v. Rubalcava, supra*, 23 Cal.4th at p. 328.
- Requirement That Knife Blade Be Longer Than 2 ½ Inches Only Includes Sharpened Portion. *In re Rosalio S.* (1995) 35 Cal.App.4th 775, 781 [41 Cal.Rptr.2d 534].
- Statute Does Not Apply to Razor Blade Alone. *In re Do Kyung K.* (2001) 88 Cal.App.4th 583, 586 [106 Cal.Rptr.2d 31, 33].
- Pellet Gun Need Not Be in Working Condition. *In re Arturo H.* (1996) 42 Cal.App.4th 1694, 1696–1699 [51 Cal.Rptr.2d 5].
- Multi-Tool Can Qualify as a Folding Knife With Blade That Locks into Place. *In re T.B.* (2009) 172 Cal.App.4th 125, 127 [91 Cal.Rptr.3d 1].
- Whether Box Cutter Qualifies as Razor With Unguarded Blade is Question of Fact. *In re Z.R.* (2008) 168 Cal.App.4th 1510, 1512–1514 [86 Cal.Rptr.3d 495] [box cutter

with exposed blade is a “razor with an unguarded blade”]; *In re Michael R.* (2004) 120 Cal.App.4th 1203, 1205–1207 [16 Cal.Rptr.3d 291] [box cutter with blade retracted into handle is not a “razor with an unguarded blade”].

2576. Explosion of Explosive or Destructive Device With Intent to Murder (Pen. Code, § 18745)

The defendant is charged [in Count __] with (exploding/ [or] igniting/ [or] attempting to (explode/ [or] ignite)) (an explosive/ [or] a destructive device) with intent to commit murder [in violation of Penal Code section 18745].

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

1. The defendant (exploded/ [or] ignited/ [or] attempted to (explode/ [or] ignite)) (an explosive/ [or] a destructive device);

AND

2. When the defendant did so, (he/she) acted with the intent to ~~kill~~**murder** someone.

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

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

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

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

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

[The term[s] (*explosive*/ [and] *destructive device*) (is/are) defined in another instruction.]

New January 2006; Revised February 2012, February 2027

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 that the defendant attempted to explode or ignite the item, the court **must** also give CALCRIM No. 460, *Attempt Other Than Attempted Murder*.

Depending on the device or substance used, give the bracketed definitions of “explosive” or “destructive device,” inserting the appropriate definition from Penal Code section 16460, 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 case involves a specific device listed in Health and Safety Code section 12000 or Penal Code section 16460, the court may instead give the bracketed sentence stating that the listed item “is an explosive” or “is a destructive device.” For example, “A grenade is a destructive device.”

However, the court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that “the defendant used a destructive device, a grenade,” or “the device used by the defendant, a grenade, was a destructive device.” (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

If the device used is a bomb, the court may insert the word “bomb” in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra*, 33 Cal.App.4th at p. 25.) Appellate courts have held that the term “bomb” is not vague and is understood in its “common, accepted, and popular sense.” (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258 [129 Cal.Rptr. 139]; *People v. Dimitrov, supra*, 33 Cal.App.4th at p. 25.) If the court wishes to define the term “bomb,” the court may use the following definition: “A bomb is a device carrying an explosive charge fused to blow up or detonate under certain conditions.” (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8 [3 Cal.Rptr.2d 343].)

Related Instructions

If the jury is not otherwise instructed on murder or attempted murder, give a modified version—excluding reference to implied malice murder—of CALCRIM No. 520, *Murder With Malice Aforethought*.

AUTHORITY

- Elements. Pen. Code, § 18745.
- “Explosive” Defined. Health & Saf. Code, § 12000.

- “Destructive Device” Defined. Pen. Code, § 16460.

LESSER INCLUDED OFFENSES

- Possession of Destructive Device. Pen. Code, § 18710; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795 [134 Cal.Rptr. 97].
- Possession of Explosive. Health & Saf. Code, § 12305; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795 [134 Cal.Rptr. 97].

RELATED ISSUES

Multiple Charges Based on Multiple Victims Appropriate

The defendant may be charged with multiple counts of violating Penal Code section 18745 based on multiple victims, even if he or she used only one explosive device. (*People v. Ramirez* (1992) 6 Cal.App.4th 1762, 1766–1767 [8 Cal.Rptr.2d 624].)

See the Related Issues section to CALCRIM No. 2571, *Carrying or Placing Explosive or Destructive Device on Common Carrier*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (54th ed. 2024) Crimes Against Public Peace and Welfare, §§ 25825–26026, 227.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.01[1][c] (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/or** 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 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.]

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.

Prior to January 1, 2026, Penal Code § 136.1(b)(2) prohibited a person from attempting to prevent or dissuade a witness or victim of crime by: “Causing a complaint, indictment, information, or probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof.” Based on this language, *People v. Reynoza* (2024) 15 Cal.5th 982, 1013 [320 Cal.Rptr.3d 299, 546 P.3d 564] held that postcharging dissuasion alone did not violate this subsection. After *Reynoza*, the legislature amended Penal Code § 136.1(b)(2) by replacing the “and” with an “or” to clarify that postcharging dissuasion alone is sufficient. (See *Assembly Bill No. 535* (Stats. 2025, ch. 373).)

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)].~~
- Attempt to Persuade Witness to Change Statement to Law Enforcement Does Not Violate Subdivisions (a)(2) & (b)(1). *People v. Morones* (2023) 95 Cal.App.5th 721, 737–738 [313 Cal.Rptr.3d 688].

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 (5th ed. 2024) Crimes Against Governmental Authority, §§ 10, 11 et seq.

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).

**2652. Resisting an Executive Officer in Performance of Duty
(Pen. Code, § 69)**

The defendant is charged [in Count __] with resisting an executive officer in the performance of that officer's duty [in violation of Penal Code section 69].

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

1. The defendant [unlawfully] used force [or violence] to resist an executive officer;
2. When the defendant acted, the officer was performing (his/her) lawful duty;
3. When the defendant acted, the defendant knew that the person (he/she) resisted was an executive officer;

AND

4. When the defendant acted, (he/she) knew the executive officer was performing (his/her) duty.

An *executive officer* is a government official within the executive branch who may use his or her own discretion in performing his or her job duties. [(A/An) _____ <insert title, e.g., peace officer, commissioner, etc.> is an *executive officer*.]

[A sworn member of _____ <insert name of agency that employs peace officer>, authorized by _____ <insert appropriate section from Pen. Code, § 830 et seq.> to _____ <describe statutory authority>, is a *peace officer*.]

[The duties of (a/an) _____ <insert title of officer specified in Pen. Code, § 830 et seq.> include _____ <insert job duties>.]

[Taking a photograph or making an audio or video recording of an *executive officer* 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 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).]

New January 2006; Revised August 2014, February 2015, August 2016, September 2019, September 2024, February 2027*

* Denotes changes only to bench notes and other commentaries.

BENCH NOTES

Instructional Duty

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

In order to be “performing a lawful duty,” an executive officer, including a peace officer, must be acting lawfully. (*In re Manuel G.* (1997) 16 Cal.4th 805, 816 [66 Cal.Rptr.2d 701, 941 P.2d 880]; *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 on lawful performance and the defendant’s reliance on self-defense as it relates to the use of excessive force when this is an issue in the case. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].)

If there is an issue in the case as to the lawful performance of a duty by a peace officer, give the last bracketed paragraph and CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

If a different executive officer was the alleged victim, the court will need to draft an appropriate definition of lawful duty if this is an issue in the case.

AUTHORITY

- Elements. Pen. Code, § 69.
- General Intent Offense. *People v. Roberts* (1982) 131 Cal.App.3d Supp. 1, 9 [182 Cal.Rptr. 757].
- Lawful Performance Element to Resisting Officer. *In re Manuel G.*, *supra*, 16 Cal.4th at p. 816.
- Merely Photographing or Recording Officers Not a Crime. Pen. Code, § 69(b).

“Executive Officer” Defined. *People v. Hupp* (2023) 96 Cal.App.5th 946, 950 [314 Cal.Rptr.3d 842]; *People v. Strohl* (1976) 57 Cal.App.3d 347, 361 [129 Cal.Rptr. 224].

LESSER INCLUDED OFFENSES

Penal Code section 148(a) is not a lesser included offense of this crime under the statutory elements test, but may be one under the accusatory pleading test. (*People v. Smith* (2013) 57 Cal.4th 232, 241-242 [159 Cal.Rptr.3d 57, 303 P.3d 368]; see also *People v. Belmares* (2003) 106 Cal.App.4th 19, 26 [130 Cal.Rptr.2d 400] and *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1532 [29 Cal.Rptr.3d 586].

Assault ~~is not may be~~ a lesser included offense of this crime ~~under the accusatory pleading test~~. See *People v. MorganBrown* (2021) 19 Cal.5th 132, 150 [341 Cal.Rptr.3d 783, 583 P.3d 1235] ~~245 Cal.App.4th 140, 153 [199 Cal.Rptr.3d 303]~~.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (54th ed. 2024) Crimes Against Governmental Authority, § 128169 et. seq.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, Arrest, § 11.06[3] (Matthew Bender).

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

2670. Lawful Performance: Peace Officer

The People have the burden of proving beyond a reasonable doubt that _____ *<insert name, excluding title>* was lawfully performing (his/her) duties as a peace officer. If the People have not met this burden, you must find the defendant not guilty of _____ *<insert name[s] of all offense[s] with lawful performance as an element>*.

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 when making or attempting to make an otherwise lawful arrest or detention).

<A. Unlawful Detention>

[A peace officer may legally detain someone if [the person consents to the detention or if]:

- 1. Specific facts known or apparent to the officer lead him or her to suspect that the person to be detained has been, is, or is about to be involved in activity relating to crime;**

AND

- 2. A reasonable officer who knew the same facts would have the same suspicion.**

Any other detention is unlawful.

In deciding whether the detention was lawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he or she detained the person.]

<B. Unlawful Arrest>

[A peace officer may legally arrest someone [either] (on the basis of an arrest warrant/ [or] if he or she has probable cause to make the arrest).

Any other arrest is unlawful.

Probable cause exists when the facts known to the arresting officer at the time of the arrest would persuade someone of reasonable caution that the person to be arrested has committed a crime.

In deciding whether the arrest was lawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he or she arrested the person.]

<Arrest without warrant for most misdemeanors or infractions>

[In order for an officer to lawfully arrest someone without a warrant for a misdemeanor or infraction, the officer must have probable cause to believe that the person to be arrested committed a misdemeanor or infraction in the officer's presence.]

<Arrest without warrant for felony or misdemeanor not requiring commission in officer's presence; see Bench Notes>

[In order for an officer to lawfully arrest someone for (a/an) (felony/ [or] _____ *<insert misdemeanor not requiring commission in officer's presence>*) without a warrant, the officer must have probable cause to believe the person to be arrested committed (a/an) (felony/ [or] _____ *<insert misdemeanor not requiring commission in officer's presence>*). However, it is not required that the offense be committed in the officer's presence.]

_____ *<insert crime that was basis for arrest>* **is (a/an) (felony/misdemeanor/infraction).**

<Entering home without warrant>

[In order for an officer to enter a home to arrest someone without a warrant [and without consent]:

- 1. The officer must have probable cause to believe that the person to be arrested committed a crime and is in the home;**

AND

- 2. Exigent circumstances require the officer to enter the home without a warrant.**

The term *exigent circumstances* describes an emergency situation that requires swift action to prevent (1) imminent danger to life or serious damage to property, or (2) the imminent escape of a suspect or destruction of evidence.]

[The officer must tell that person that the officer intends to arrest him or her, why the arrest is being made, and the authority for the arrest. [The officer does not have to tell the arrested person these things if the officer has probable cause to believe that the person is committing or attempting to commit a crime, is fleeing immediately after having committed a crime, or has escaped from custody.] [The officer must also tell the arrested person the

offense for which he or she is being arrested if he or she asks for that information.]]

<When giving either paragraph A on unlawful detention or paragraph B on unlawful arrest, give the following paragraph also, if applicable>

[Photographing or recording a *peace officer* while the officer is in a public place or while the person photographing or recording is in a place where he or she has the right to be is not, by itself, a crime nor a basis for (reasonable suspicion to detain/ [nor] probable cause to arrest).]

<C. Use of Force by a Peace Officer>

[Special rules control the use of force.]

[A peace officer may use reasonable non-deadly force to arrest or detain someone, to prevent escape, to overcome resistance, or in self-defense. In determining whether the officer's use of non-deadly force was reasonable, consider whether a reasonable officer in the same situation, based on the totality of the circumstances, would have used force.]

[A peace officer may use deadly force if (he/she):

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

OR

- 2. Reasonably believed, based on the totality of the circumstances, that:**

- a. _____ *<insert name of fleeing felon>* was fleeing;**
- b. The force was necessary to arrest or detain _____ *<insert name of fleeing felon >* for the crime of _____ *<insert name of felony >*;**
- c. The commission of the crime of _____ *<insert name of felony>* created a risk of or resulted in death or serious bodily injury to another person;**

AND

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

[Deadly force means any use of force that creates a substantial risk of causing death or serious bodily injury. Deadly force includes, but is not limited to, the discharge of a firearm.]

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

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

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

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

<D. Use of Force by a Person Being Arrested or Detained>

[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. [However, you may not find the defendant guilty of resisting arrest if the arrest was unlawful, even if the defendant knew or reasonably should have known that the officer was arresting him or her.]]

[If a peace officer uses unreasonable or excessive force while (arresting or attempting to arrest/ [or] detaining or attempting to detain) a person, that person may lawfully use reasonable force to defend himself or herself.

A person being arrested or detained uses reasonable force when he or she: (1) uses that degree of force that he or she actually believes is reasonably necessary to protect himself or herself from the officer's use of unreasonable

or excessive force; and (2) uses no more force than a reasonable person in the same situation would believe is necessary for his or her protection.]

New January 2006; Revised August 2016, March 2022, September 2022, October 2025, February 2027

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if there is sufficient evidence that the officer was not lawfully performing his or her duties and lawful performance is an element of the offense. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159] [“disputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element”]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. White* (1980) 101 Cal.App.3d 161, 166–168 [161 Cal.Rptr. 541].)

Give section A if there is an issue as to whether the officer had a legal basis to detain someone. Give section B if there is an issue as to whether the officer had a legal basis to arrest someone. Give section C if there is an issue as to whether the officer used excessive force in arresting or detaining someone. If the issue is whether the officer used excessive force in some other duty, give section C with any necessary modifications. Give section D if there is an issue as to whether the defendant used reasonable force in response to the officer’s use of excessive force.

If this instruction is only relevant to a charge of violating Penal Code section 148, the court **must not give** the first paragraph in bracketed section D that begins with “If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her.” (*People v. White, supra*, 101 Cal.App.3d at pp. 168–169 [court must clarify that Penal Code section 834a does not apply to charge under section 148].) If the case does not involve an alleged violation of Penal Code section 148 (either as a charge offense or as a lesser), the court should give that bracketed sentence. If the case involves an alleged violation of Penal Code section 148 as well as other offenses in which lawful performance is an element, the court may give the bracketed sentence but must also give the sentence that begins with “However, you may not find the defendant guilty of resisting arrest.”

When giving the bracketed section under the heading “A. Unlawful Detention,” if there is a factual issue about whether the person was in fact “detained,” the court should provide the jury with a definition of when a person is detained. Similarly, if there is a factual issue as to whether the person consented to the detention, the court should instruct on consent. (See *People v. Wilkins* (1993) 14 Cal.App.4th 761, 777 [17 Cal.Rptr.2d 743].)

In the section headed “B. Unlawful Arrest,” two options are provided for arrests without a warrant. The general rule is that an officer may not make an arrest for a misdemeanor or infraction unless the offense was committed in the officer’s presence. (See Pen. Code, § 836(a)(1).) Statutes provide exceptions to this requirement for some misdemeanors. (See, e.g., Pen. Code, § 836(c) [violation of domestic violence protective or restraining order]; Veh. Code, § 40300.5 [driving under the influence plus traffic accident or other specified circumstance].) If the officer made the arrest for an infraction or a misdemeanor falling under the general rule, give the bracketed paragraph under the heading “Arrest without warrant for most misdemeanors or infraction.” If the officer made the arrest for a felony or misdemeanor not requiring commission in the officer’s presence give the bracketed paragraph under the heading “Arrest without warrant for felony or misdemeanor not requiring commission in officer’s presence.” The court may also give both bracketed paragraphs, if appropriate.

Give the bracketed section about entering a home without a warrant if the arrest took place in a home. (*People v. Wilkins, supra*, 14 Cal.App.4th at p. 777.) If there is a factual issue about whether the officer had consent to enter the home, the court must also instruct on the legal requirements for consent. (*Ibid.*)

AUTHORITY

- Instructional Duty. *People v. Gonzalez, supra*, 51 Cal.3d at p. 1217; *People v. Olguin, supra*, 119 Cal.App.3d at pp. 46–47; *People v. Castain, supra*, 122 Cal.App.3d at p. 145; *People v. White, supra*, 101 Cal.App.3d at pp. 166–168.
- Lawful Detention. *People v. Celis* (2004) 33 Cal.4th 667, 674-675 [16 Cal.Rptr.3d 85, 93 P.3d 1027].
- Lawful Arrest. Pen. Code, §§ 834–836, 841.
- “Probable Cause” Defined. *People v. Celis, supra*, 33 Cal.4th at p. 673; *People v. Fischer* (1957) 49 Cal.2d 442, 446 [317 P.2d 967].
- Officer’s Training and Experience Relevant. *People v. Lilienthal* (1978) 22 Cal.3d 891, 899 [150 Cal.Rptr. 910, 587 P.2d 706]; *People v. Clayton* (1970) 13 Cal.App.3d 335, 338 [91 Cal.Rptr. 494].
- Duty to Submit to Arrest or Detention. Pen. Code, § 834(a); *People v. Allen* (1980) 109 Cal.App.3d 981, 985 [167 Cal.Rptr. 502]; *People v. Curtis* (1969) 70 Cal.2d 347, 351 [74 Cal.Rptr. 713, 450 P.2d 33].
- Exigent Circumstances to Enter Home. *People v. Wilkins, supra*, 14 Cal.App.4th at p. 777; *People v. Ramey* (1976) 16 Cal.3d 263, 276 [127 Cal.Rptr. 629, 545 P.2d 1333]; *People v. Hoxter* (1999) 75 Cal.App.4th 406, 414, fn. 7 [89 Cal.Rptr.2d 259].
- Reasonable Force. Pen. Code, §§ 692, 693.

- “Deadly Force” Defined. Pen. Code, § 835a(e).
- Excessive Use of Deadly Force. Pen. Code, § 835a.
- Excessive Force Makes Arrest Unlawful. *People v. White, supra*, 101 Cal.App.3d at pp. 166–168.
- Excessive Force Triggers Right to Self-Defense With Reasonable Force. *People v. Curtis, supra*, 70 Cal.2d at p. 356.
- Merely Photographing or Recording Officers Not a Crime. Pen. Code, § 148(g).

COMMENTARY

Graham Factors

In determining reasonableness, the inquiry is whether the officer’s actions are objectively reasonable from the perspective of a reasonable officer on the scene. (*Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) Factors relevant to the totality of the circumstances may include those listed in *Graham*, but those factors are not exclusive. (See *Glenn v. Washington County* (9th Cir. 2011) 673 F.3d 864, 872.) The *Graham* factors may not all apply in a given case. (See *People v. Perry* (2019) 36 Cal.App.5th 444, 473, fn. 18 [248 Cal.Rptr.3d 522].) Conduct and tactical decisions preceding an officer’s use of deadly force are relevant considerations. (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252] [in context of negligence liability].)

RELATED ISSUES

Service of Warrant

An officer is lawfully engaged in his or her duties if he or she is correctly serving “a facially valid search or arrest warrant, regardless of the legal sufficiency of the facts shown in support of the warrant.” (*People v. Gonzalez, supra*, 51 Cal.3d at p. 1222.) On the other hand, “the proper *service* of a warrant is a jury issue under the engaged-in-duty requirement.” (*Id.* at p. 1223 [emphasis in original].) If there is a factual dispute over the manner in which the warrant was served, the court should instruct the jury on the requirements for legal service of the warrant. (*Ibid.*)

Lawfulness of Officer’s Conduct Based on Objective Standard

The rule “requires that the officer’s lawful conduct be established as an objective fact; it does not establish any requirement with respect to the defendant’s mens rea.” (*People v. Jenkins* (2000) 22 Cal.4th 900, 1020 [95 Cal.Rptr.2d 377, 997 P.2d 1044].) The defendant’s belief about whether the officer was or was not acting lawfully is irrelevant. (*Id.* at p. 1021.)

Photographing or Recording Officers

Penal Code section 148(g) provides that merely photographing or recording a public officer or peace officer under certain conditions is not a crime. The intended scope of this new legislation is unclear. Until the legislature or courts of review provide further guidance, the court will have to determine whether section 148(g) should apply in an individual case.

SECONDARY SOURCES

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest*, §§ 11.01–11.06 (Matthew Bender).

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

3131. Personally Armed With Firearm (Pen. Code, §§ 1203.06(b)(3), 12022(c), 12022.3(b))

If you find the defendant guilty of the crime[s] charged in Count[s] __[,], [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ *<insert name[s] of alleged lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant was personally armed with a firearm in 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.]

[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 *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 firearm does not need to be loaded.]

~~A person is~~ Personally armed with a firearm means ~~when that~~ a person:

1. Carries a firearm or has a firearm available for use in either offense or defense in connection with the crime[s] charged;

AND

2. Knows that he or she is carrying the firearm or has it available for use.

<If there is an issue in the case over whether the defendant was armed with the firearm “in the commission of” the offense, see Bench Notes.>

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

New January 2006; Revised June 2007, December 2008, February 2012, February 2027

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction when the enhancement is charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

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.

~~In the definition of “armed,” the court may give the bracketed phrase “or has a firearm available” on request if the evidence shows that the firearm was at the scene of the alleged crime and “available to the defendant to use in furtherance of the underlying felony.” (*People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; see also *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274] [language of instruction approved; sufficient evidence defendant had firearm available for use]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214] [evidence that firearm was two blocks away from scene of rape insufficient to show available to defendant].)~~

If the case involves an issue of whether the defendant was armed “in the commission of” the offense, the court may give CALCRIM No. 3261, *In Commission of 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].)

If the defendant is charged with being ineligible for probation under Penal Code section 1203.06 for being armed during the commission of the offense and having been convicted of a specified prior crime, the court should also give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, with this instruction unless the defendant has stipulated to the prior conviction or the court has granted a bifurcated trial.

AUTHORITY

- Enhancement. Pen. Code, §§ 1203.06(b)(3), 12022(c), 12022.3(b).
- “Firearm” Defined. Pen. Code, § 16520.
- Armed **Includes Available For Use**. *People v. Pitto* (2008) 43 Cal.4th 228, 236–240 [74 Cal.Rptr.3d 590, 180 P.3d 338]; *People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214]; *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274].
- Personally Armed. *People v. Smith* (1992) 9 Cal.App.4th 196, 203–208 [11 Cal.Rptr.2d 645].

- Must Be Personally Armed for Enhancement Under Penal Code Section 12022.3. *People v. Rener* (1994) 24 Cal.App.4th 258, 267 [29 Cal.Rptr.2d 392]; *People v. Reed* (1982) 135 Cal.App.3d 149, 152–153 [185 Cal.Rptr. 169].
- Defendant Not Present When Drugs and Weapon Found. *People v. Bland* (1995) 10 Cal.4th 991, 995 [43 Cal.Rptr.2d 77, 898 P.2d 391].
- Facilitative Nexus. *People v. Pitto* (2008) 43 Cal.4th 228, 236–240 [74 Cal.Rptr.3d 590, 180 P.3d 338].
- Firearm Need Not Be Operable. *People v. Nelums* (1982) 31 Cal.3d 355, 360 [182 Cal.Rptr. 515, 644 P.2d 201].
- Firearm Need Not Be Loaded. See *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795 [286 Cal.Rptr. 887].
- “In Commission of” Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [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].

RELATED ISSUES

Defendant Not Present When Drugs and Weapon Found

In *People v. Bland* (1995) 10 Cal.4th 991, 995 [43 Cal.Rptr.2d 77, 898 P.2d 391], the defendant was convicted of possession of a controlled substance and an enhancement for being armed during that offense despite the fact that he was not present when the police located the illegal drugs and firearm. The Court held that there was sufficient evidence to support the arming enhancement, stating:

[W]hen the prosecution has proved a charge of felony drug possession, and the evidence at trial shows that a firearm was found in close proximity to the illegal drugs in a place frequented by the defendant, a jury may reasonably infer: (1) that the defendant knew of the firearm’s presence; (2) that its presence together with the drugs was not accidental or coincidental; and (3) that, at some point during the period of illegal drug possession, the defendant had the firearm close at hand and thus available for immediate use to aid in the drug offense. These reasonable inferences, if not refuted by defense evidence, are sufficient to warrant a determination that the defendant was “armed with a firearm in the commission” of a felony within the meaning of section 12022.

(*Ibid.*)

The *Bland* case did not state that the jury should be specifically instructed in these inferences, and it appears that no special instruction was given in *Bland*. If the prosecution requests a special instruction on this issue, the court may consider using the following language:

If the People have proved that a firearm was found close to the _____
<insert type of controlled substance allegedly possessed> in a place where the defendant was frequently present, you may but are not required to conclude that:

1. The defendant knew the firearm was present;
2. It was not accidental or coincidental that the firearm was present together with the drugs;

AND

3. During at least part of the time that the defendant allegedly possessed the illegal drug, (he/she) had the firearm close at hand and available for immediate use to aid in the drug offense.

If you find beyond a reasonable doubt that the evidence supports these conclusions, you may but are not required to conclude that the defendant was personally armed with a firearm in the commission [or attempted commission] of the _____ <insert name of alleged offense> [or the lesser crime of _____ <insert name of alleged lesser offense>].

Multiple Defendants—Single Weapon

Two or more defendants may be personally armed with a single weapon at the same time. (*People v. Smith* (1992) 9 Cal.App.4th 196, 205 [11 Cal.Rptr.2d 645].) It is for the jury to decide if the firearm was readily available to both defendants for use in offense or defense. (*Ibid.*)

For enhancements charged under Penal Code section 12022.3, see also the Related Issues section of CALCRIM No. 3130, *Personally Armed With Deadly Weapon*.

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (54th ed. 2024) Punishment, §§ 400349, 411, 417357, 364, 451388.

5 Witkin & Epstein, California Criminal Law (54th ed. 2024) Criminal Trial, § 75827.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.31 (Matthew Bender).

3217. Felony Committed While Released on Bail or Own Recognizance

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 _____], you must then decide whether the People have proved the additional allegation that the defendant committed (this/these/[an]other) felony offense[s] when the defendant had been released from custody on (bail/own recognizance) in (this case/case number _____).

To prove this allegation, the People must prove that:

<Give when enhancement is alleged with the primary offense.>

1. [The defendant was released from custody on (bail/own recognizance) in this case before the (judgment became final/date for surrender into custody);

AND

2. After being released from custody on (bail/own recognizance) in this case, the defendant committed [a] felony offense[s] in case number _____.]

<Give when enhancement is alleged with the secondary offense.>

1. [The defendant was released from custody on (bail/own recognizance) in case number _____ before the (judgment became final/date for surrender into custody) in that case;

AND

2. After being released from custody on (bail/own recognizance) in case number _____, the defendant committed the felony offense[s] in this case.]

New February 2027

BENCH NOTES

Instructional Duty

The court has a sua sponte duty to give an instruction on the sentencing factor. (See *Erlinger v. United States* (2024) 602 U.S. 821, 834–835 [144 S.Ct. 1840, 219 L.Ed.2d 451]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

AUTHORITY

- Elements. Pen. Code, § 12022.1(b).
- “Primary Offense” and “Secondary Offense” Defined. Pen. Code, § 12022.1(a).
- Felony Conviction of Primary Offense Required Before Imposition in Secondary Offense Case. *People v. Buycks* (2018) 5 Cal.5th 857, 890 [236 Cal.Rptr.3d 84, 422 P.3d 531]; *People v. Reyes* (2016) 3 Cal.App.5th 1222, 1227 [208 Cal.Rptr.3d 222]; *In re Ramey* (1999) 70 Cal.App.4th 508, 512 [82 Cal.Rptr.2d 849].
- Enhancement Applies to Case, Not Individual Counts. *People v. Augborne* (2002) 104 Cal.App.4th 362, 376–377 [128 Cal.Rptr.2d 258].
- Enhancement Applies to Willful Failure to Appear Conviction. *People v. Walker* (2002) 29 Cal.4th 577, 587–588 [128 Cal.Rptr.2d 75, 59 P.3d 150].

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, *
February 2027**

** 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. 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. *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 was not particularly vulnerable]; *People v. Weaver* (2007) 149 Cal.App.4th 1301, 1315–1319 [58 Cal.Rptr.3d 18] [vehicular manslaughter victim was 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 was particularly vulnerable]; *People v. Mendez-Torres* (2025) 113 Cal.App.5th 1007, 1022 [336 Cal.Rptr.3d 298] [advance warning and ability to avoid collision are relevant considerations].
- Victim’s Vulnerability is Question of Fact for the Jury. *People v. Cardenas* (2026) 120 Cal.App.5th 828, 839–840 [344 Cal.Rptr.3d 656].

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].)

3236. Aggravating Factor: Prior Term in Prison or County Jail Under Section 1170(h)

<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>* has served a prior term in (prison/[or] county jail) for _____ *<insert code section of relevant prior conviction>*) in Case Number _____ (;/.)] [AND *<Repeat for each prior conviction alleged.>*.]

<bifurcated trial>

[The People have alleged that _____ *<insert name of defendant>* has served a prior term in (prison/[or] county jail for _____ *<insert code section of relevant prior conviction>*) in Case Number _____ (;/.)] [AND *<Repeat for each prior conviction alleged.>*.]

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 2027

BENCH NOTES

Instructional Duty

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

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

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

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or

enhancement at trial, or it is otherwise authorized by law.” (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

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

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

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than

one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

Prior Terms for Foreign Convictions

In *People v. La Fargue* (1983) 147 Cal.App.3d 878, 889–891 [195 Cal.Rptr. 438], the prosecution introduced evidence of a prior prison term based on a conviction in Cuba to aggravate the sentence. Because “there was no showing that the Cuban proceedings satisfied American constitutional standards” the court remanded the case, with directions not to consider this prior prison term unless the constitutional validity of the prior conviction was established.

3407. Defenses: Mistake of Law

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.

*New January 2006; Revised February 2027**

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

BENCH NOTES

Instructional Duty

There is no sua sponte duty to give this instruction. It is no defense to a crime that the defendant did not realize he or she was breaking the law when he or she acted. (*People v. Vineberg* (1981) 125 Cal.App.3d 127, 137 [177 Cal.Rptr. 819].) This is true even when the defendant claims he or she was acting in good faith on the mistaken advice of counsel. (*People v. Snyder* (1982) 32 Cal.3d 590, 593 [186 Cal.Rptr. 485, 652 P.2d 42] [defendant's mistaken belief, based on attorney's advice, that prior conviction was a misdemeanor no defense to felon in possession of a firearm]; *People v. McCalla* (1923) 63 Cal.App. 783, 795 [220 P. 436], disapproved on other grounds by *People v. Elliot* (1960) 59 Cal.2d 498 [6 Cal.Rptr. 753, 354 P.2d 225]; *People v. Honig* (1996) 48 Cal.App.4th 289, 347–348 [55 Cal.Rptr.2d 555]; *People v. Smith* (1966) 63 Cal.2d 779, 792–793 [48 Cal.Rptr. 382, 409 P.2d 222] [no defense to felony murder that defendant did not know that entering a store intending to pass a forged check constituted burglary in California].)

The court should, however, exercise caution with specific intent crimes. A mistaken belief about legal status or rights may be a defense to a specific intent crime if the mistake is held in good faith. (*People v. Hsuing* (2026) 120 Cal.App.5th 319, 343 [344 Cal.Rptr.3d 210] [defendant's good faith belief in availability of necessity defense for trespass in violation of Penal Code section 602(k) and conspiracy to commit trespass can raise a mistake of law defense]; *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]; ~~see also 1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 37.~~) 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*.)

AUTHORITY

- Instructional Requirements. *People v. Vineberg* (1981) 125 Cal.App.3d 127, 137 [177 Cal.Rptr. 819]; *People v. Stewart* (1976) 16 Cal.3d 133, 140 [127 Cal.Rptr. 117, 544 P.2d 1317]; *People v. Flora* (1991) 228 Cal.App.3d 662, 669–670 [279 Cal.Rptr. 17].

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 (54th ed. 202412) Defenses, § 496.)

Necessity

Good faith belief that necessity was an available defense to trespass in violation of Penal Code section 602(k) and conspiracy to commit trespass may be considered an excusable mistake of law. *People v. Hsiung* (2026) 120 Cal.App.5th 319, 343–345 [344 Cal.Rptr.3d 210]. Necessity and mistake of law are not mutually exclusive defenses. (*Id.* at pp. 342–343.)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (54th ed. 202412) Defenses, §§ 485–496.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.07 (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 (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 (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 (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, February 2027**

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

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*.) But see *People v. Hsuing* (2026) 120 Cal.App.5th 319, 343–345 [344 Cal.Rptr.3d 210] [mistake of law defense available to defendant who relied on legal advice to form good faith but erroneous belief in availability of necessity defense]. 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 (5th ed. 2024) Defenses, § 49.)

Necessity

Good faith belief that necessity was an available defense to trespass in violation of Penal Code section 602(k) and conspiracy to commit trespass may be considered an excusable mistake of law. *People v. Hsiung* (2026) 120 Cal.App.5th 319, 343–345 [344 Cal.Rptr.3d 210]. Necessity and mistake of law are not mutually exclusive defenses. (*Id.* at pp. 342–343.)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (5th ed. 2024) Defenses, §§ 47–48.

**3456. Initial Commitment of Offender With A Mental Health Disorder
as Condition of Parole (Pen. Code, § 296670)**

The petition alleges that _____ *<insert name of respondent>* is an offender with a mental health disorder.

To prove this allegation, the People must prove beyond a reasonable doubt that at the time of (his/her) hearing before the Board of Parole Hearings:

1. (He/She) was convicted of _____ *<specify applicable offense(s) from Penal Code section 2962, subdivision (e)(2)>* **[in which (he/she) (used force or violence/[.] [or] caused serious bodily injury)/expressly or impliedly threatened another with the use of force or violence likely to produce substantial physical harm in a manner that a reasonable person would believe and expect that the force or violence would be used)]** and received a prison sentence for a fixed period of time;
2. (He/She) had a severe mental disorder;
3. The severe mental disorder was one of the causes of the crime for which (he/she) was sentenced to prison or was an aggravating factor in the commission of the crime;
4. (He/She) was treated for the severe mental disorder in a state or federal prison, a county jail, or a state hospital for 90 days or more within the year before (his/her) parole release date;
5. The severe mental disorder either was not in remission, or could not be kept in remission without treatment;

AND

6. Because of (his/her) severe mental disorder, (he/she) represented a substantial danger of physical harm to others.

[A serious bodily injury means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (loss of consciousness[.]/ concussion[.]/

bone fracture[,]/ protracted loss or impairment of function of any bodily member or organ[,]/ a wound requiring extensive suturing[,]/ [or] serious disfigurement).]
[_____ <insert description of injury when appropriate; see Bench Notes> is a serious bodily injury.]

A severe mental disorder is an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or that grossly impairs his or her behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. [It does not include (a personality or adjustment disorder[,]/ [or] epilepsy[,]/ [or] mental retardation or other developmental disabilities[,]/ [or] addiction to or abuse of intoxicating substances).]

Remission means that the external signs and symptoms of the severe mental disorder are controlled by either psychotropic medication or psychosocial support. [A severe mental disorder cannot be *kept in remission without treatment* if during the year before the Board of Parole hearing, [on _____ <insert date of hearing, if desired>], the person:

<Give one or more alternatives, as applicable>

- [1. Was physically violent except in self-defense(;/.) [or]]**
- [2. Made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family(;/.) [or]]**
- [3. Intentionally caused property damage(;/.) [or]]**
- [4. Did not voluntarily follow the treatment plan.]]**

[A person has voluntarily followed the treatment plan if he or she has acted as a reasonable person would in following the treatment plan.]

[A *substantial danger of physical harm* does not require proof of a recent overt act.]

You will receive [a] verdict form[s] on which to indicate your finding of whether the allegation that _____ <insert name of respondent> is an offender with a mental health disorder is true or not true. To find the allegation true or not true, all of you must agree. You may not find it to be true unless all of you agree the People have proved it beyond a reasonable doubt.

New December 2008; Revised August 2014, September 2017, September 2020, September 2022, February 2027

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a respondent is an offender with a mental health disorder.

Give this instruction for an initial commitment as a condition of parole. For recommitments, give CALCRIM No. 3457, *Extension of Commitment as Offender With A Mental Health Disorder*.

In element 1, give the bracketed phrase that begins “in which (he/she)” if the qualifying conviction is based on the catchall provisions in Penal Code section 2962(e)(2)(P)–(Q). Give the relevant language in the phrase “used force or violence/[.] [or] caused serious bodily injury” for convictions that qualify under (e)(2)(P). Give the phrase that begins “expressly or impliedly threatened another” for convictions that qualify under (e)(2)(Q). See *In re Grinder* (2025) 114 Cal.App.5th 845, 857–859 [336 Cal.Rptr.3d 760] and the scope of the catchall provision discussion in the Related Issues section.

Whether the victim suffered a serious bodily injury is a question for the jury to determine. If the defendant disputes that the injury suffered was a serious bodily injury, use the first bracketed paragraph. If the parties stipulate that the injury suffered was a serious bodily injury, use the second bracketed paragraph.

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.

Case law provides no direct guidance about whether a finding of an enumerated act is necessary to show that the disorder cannot be kept in remission without treatment or whether some alternative showing, such as medical opinion or non-enumerated conduct evidencing lack of remission, would suffice. One published case has said in dictum that “the option of ‘cannot be kept in remission without treatment’ requires a further showing that the prisoner, within the preceding year, has engaged in violent or threatening conduct or has not voluntarily followed the treatment plan.” *(People v. Buffington* (1999) 74 Cal.App.4th 1149, 1161, fn. 4 [88 Cal.Rptr.2d 696]). The *Buffington* case involved a sexually violent predator.

AUTHORITY

- Elements and Definitions. Pen. Code, §§ 2962, 2966~~(b)~~; *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2 [54 Cal.Rptr.3d 834].
- “Serious Bodily Injury” Defined. Pen. Code, § 243(f)(4); *People v. Taylor* (2004) 118 Cal.App.4th 11, 25, fn. 4 [12 Cal.Rptr.3d 693].
- Unanimous Verdict, Burden of Proof. Pen. Code, § 2966(b)(10); *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Institutions That May Fulfill the 90-Day Treatment Requirement. Pen. Code, § 2981.
- Treatment Must Be for Serious Mental Disorder Only. *People v. Sheek* (2004) 122 Cal.App.4th 1606, 1611 [19 Cal.Rptr.3d 737].
- Definition of Remission. Pen. Code, § 2962(a).
- Need for Treatment Established by One Enumerated Act. *People v. Burroughs* (2005) 131 Cal.App.4th 1401, 1407 [32 Cal.Rptr.3d 729].
- Evidence of Later Improvement Not Relevant. Pen. Code, § 2966(b)(4); *People v. Tate* (1994) 29 Cal.App.4th 1678, 1683 [35 Cal.Rptr.2d 250].
- Board of Parole Hearings. Pen. Code, § 5075.
- This Instruction Cited As Authority With Implicit Approval. *People v. Harrison* (2013) 57 Cal.4th 1211, 1230 [164 Cal.Rptr.3d 167, 312 P.3d 88].
- Proof of Recent Overt Act Not Required. Pen. Code, § 2962(g).
- 90-Day Treatment Period Includes Extension Under Pen. Code, § 2963. *People v. Parker* (2020) 44 Cal.App.5th 286, 289 [257 Cal.Rptr.3d 493].
- Substantial Danger of Physical Harm to Others. *People v. Jenkins* (2023) 95 Cal.App.5th 142, 154–156 [313 Cal.Rptr.3d 220]; *People v. Johnson* (2020) 55 Cal.App.5th 96, 107–112 [269 Cal.Rptr.3d 253].

RELATED ISSUES

Scope of Catchall Provision

Penal Code section 2962(e)(2) specifies the qualifying offenses for being committed as an offender with a mental health disorder. Subdivision (e)(2)(P) contains a catchall provision that includes any crime “in which the prisoner used force or violence, or caused serious bodily injury....” *People v. Hayes* (2003) 105 Cal.App.4th 1287, 1290 [129

Cal.Rptr.2d 885] examined this language and concluded that the crime of recklessly setting a fire under Penal Code section 452 did not qualify. *In re Grinder* (2025) 114 Cal.App.5th 845, 857–859 [336 Cal.Rptr.3d 760] distinguished the analysis in *Hayes* and adopted a literal interpretation of the statutory language to conclude that “the crime of nonforcible oral copulation is a qualifying offense ... when the People carried their burden of proving the crime actually was one ‘in which the prisoner used force or violence.’”

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (~~54~~th ed. 20~~24~~¹²) Punishment, §§ ~~890–894~~^{763–767}.

**3457. Extension of Commitment as Offender With A Mental Health Disorder
(Pen. Code, § 2970)**

The petition alleges that _____ *<insert name of respondent>* is an offender with a mental health disorder.

To prove this allegation, the People must prove beyond a reasonable doubt that [at the time of (his/her) hearing before the Board of Parole Hearings]:

1. (He/She) (has/had) a severe mental disorder;
2. The severe mental disorder (is/was) not in remission or (cannot/could not) be kept in remission without continued treatment;

AND

3. Because of (his/her) severe mental disorder, (he/she) (presently represents/represented) a substantial danger of physical harm to others.

A severe mental disorder is an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or that grossly impairs his or her behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. [It does not include (a personality or adjustment disorder[,]/ [or] epilepsy[,]/ [or] mental retardation or other developmental disabilities[,]/ [or] addiction to or abuse of intoxicating substances).]

Remission means that the external signs and symptoms of the severe mental disorder are controlled by either psychotropic medication or psychosocial support.

[A severe mental disorder cannot be *kept in remission without treatment* if, during the period of the year prior to _____ *<insert the date the trial commenced>*, the person:

<Give one or more alternatives, as applicable.>

1. Was physically violent except in self-defense(;/.) [or]]

- [2. Made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family(;/.) [or]]
- [3. Intentionally caused property damage(;/.) [or]]
- [4. Did not voluntarily follow the treatment plan.]]

[A person has voluntarily followed the treatment plan if he or she has acted as a reasonable person would in following the treatment plan.]

[A *substantial danger of physical harm* does not require proof of a recent overt act.]

You will receive [a] verdict form[s] on which to indicate your finding of whether the allegation that _____ <insert name of respondent> is an offender with a mental health disorder is true or not true. To find the allegation true or not true, all of you must agree. You may not find it to be true unless all of you agree the People have proved it beyond a reasonable doubt.

New December 2008; Revised September 2017, September 2020, September 2022, February 2027*

* Denotes changes only to bench notes and other commentaries.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a respondent is an offender with a mental health disorder.

Give this instruction for a successive commitment. For an initial commitment as a condition of parole, give CALCRIM No. 3456, *Initial Commitment of Offender With A Mental Health Disorder as Condition of Parole*.

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 post-trial instructions. These instructions may need to be modified.

Give the bracketed language in the sentence beginning with “To prove this allegation” and use the past tense for an on-parole recommitment pursuant to Penal Code section 2966. For a recommitment after the parole period pursuant to Penal Code sections 2970 and 2972, omit the bracketed phrase and use the present tense.

Case law provides no direct guidance about whether a finding of an enumerated act is necessary to show that the disorder cannot be kept in remission without treatment or whether some alternative showing, such as medical opinion or non-enumerated conduct evidencing lack of remission, would suffice. One published case has said in dictum that “the option of ‘cannot be kept in remission without treatment’ requires a further showing that the prisoner, within the preceding year, has engaged in violent or threatening conduct or has not voluntarily followed the treatment plan.” (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1161, fn. 4 [88 Cal.Rptr.2d 696]). The *Buffington* case involved a sexually violent predator.

The committee found no case law addressing the issue of whether or not instruction about an affirmative obligation to provide treatment exists.

AUTHORITY

- Elements and Definitions. Pen. Code, §§ 2966, 2970, 2972; *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2 [54 Cal.Rptr.3d 834].
- Unanimous Verdict, Burden of Proof. Pen. Code, § 2972(a); *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Treatment Must Be for Serious Mental Disorder Only. *People v. Sheek* (2004) 122 Cal.App.4th 1606, 1611 [19 Cal.Rptr.3d 737].
- Definition of Remission. Pen. Code, § 2962(a).
- Recommitment Must Be for the Same Disorder That Was Basis For Initial Commitment. *People v. Torfason* (2019) 38 Cal.App.5th 1062, 1067-68 [252 Cal.Rptr.3d 11]; *People v. Garcia* (2005) 127 Cal.App.4th 558, 565 [25 Cal.Rptr.3d 660].
- Proof of Recent Overt Act Not Required. Pen. Code, § 2962(g).
- Redesignation of Qualifying Conviction to Misdemeanor Under Penal Code Section 1170.18 Does Not Bar Recommitment. *People v. Foster* (2019) 7 Cal.5th 1202, 1211 [251 Cal.Rptr.3d 312, 447 P.3d 228].
- Substantial Danger of Physical Harm to Others. *People v. Jenkins* (2023) 95 Cal.App.5th 142, 154–156 [313 Cal.Rptr.3d 220]; *People v. Johnson* (2020) 55 Cal.App.5th 96, 107–112 [269 Cal.Rptr.3d 253].

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (~~54~~⁴th ed. 20~~24~~¹²) Punishment, § ~~894~~⁷⁶⁷.

3460. Murphy Conservatorship (Welf. & Inst. Code, § 5350)

The petition seeks to [re]establish a conservatorship and alleges that _____ *<insert name of respondent>* is gravely disabled [under a type of conservatorship sometimes called a Murphy conservatorship]. If a conservatorship is established, a conservator is appointed to oversee, under the direction of the court, the placement and care of persons who are gravely disabled.

To prove _____ *<insert name of respondent>* is gravely disabled [for the purposes of a Murphy conservatorship], the petitioner must prove beyond a reasonable doubt that:

1. The (complaint/indictment/information) pending against _____ *<insert name of respondent>* charges a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person;
2. There has been (a finding of probable cause on a complaint pursuant to Penal Code section 1368.1(a)(2)/a preliminary examination pursuant to Penal Code section 859b/a grand jury indictment/an accepted guilty or no-contest plea), and the (complaint/indictment/information) has not been dismissed;

[AND]

3. _____ *<insert name of respondent>* currently represents a substantial danger of physical harm to others by reason of a mental disease, defect, or disorder(;/.)

[AND]

[The People must also prove by a preponderance of the evidence that:

4. As a result of a mental health disorder, _____ *<insert name of respondent>* is unable to understand the nature and purpose of the proceedings taken against (him/her) or to assist counsel in the conduct of (his/her) defense in a rational manner.

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.]

In determining whether _____ <insert name of respondent> is gravely disabled, you must not consider or discuss the type of treatment, care, or supervision that may be ordered if a conservatorship is (established/renewed).

You will receive [a] verdict form[s] on which to indicate your finding of whether the allegation that _____ <insert name of respondent> is gravely disabled 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 the first three elements beyond a reasonable doubt [and the fourth element by a preponderance of the evidence].

New February 2027

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a respondent is gravely disabled due to a mental illness and dangerousness to 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.

Give the bracketed language for “reestablish” in the first sentence of the first paragraph if the case involves a successive petition. (Welf. & Inst. Code, §§ 5350, 5361(b).) A petition to reestablish a Murphy conservatorship requires the same jury findings as an initial commitment petition. (Welf. & Inst. Code, § 5361(b) [reappointment of a conservator requires proof “the conservatee is still gravely disabled”].)

Give the bracketed language referring to a “Murphy conservatorship” in the first two paragraphs only if the petitioner has pled in the alternative the respondent is gravely disabled under both the Murphy conservatorship (Welf. & Inst. Code, § 5008(h)(1)(B)) and the non-Murphy conservatorship (Welf. & Inst. Code, § 5008(h)(1)(A)) definitions of grave disability found in the Lanterman-Petris-Short Act (the LPS Act).

Give the bracketed fourth element, including the definition of “preponderance of the evidence” and the bracketed language in the final paragraph addressing unanimity only if the court has not taken judicial notice of the prior, recent incompetency finding.

At a hearing to establish a Murphy conservatorship for the first time, proof of incompetency to stand trial can be established by judicial notice when the criminal court has recently made a determination of incompetency under Penal Code section 1370. (*Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 179–180 [167 Cal.Rptr. 854, 616 P.2d 836] [“If initial conservatorship proceedings follow within a reasonable time after defendant has been found incompetent in criminal court, the conservatorship adjudicators may by judicial notice rely on the prior finding”]; but see *id.* at p. 180 [“Any renewal of the conservatorship must, of course, be based on updated evidence of the conservatee's incompetence,” so judicial notice not appropriate at a renewal hearing].)

Related Instructions

CACI Series 4000 (LPS Act)

AUTHORITY

- Right to Jury Trial. Welf. & Inst. Code, § 5350(d).
- Unanimous Verdict. *Conservatorship of Hofferber, supra*, 28 Cal.3d at p. 178.
- “Gravely Disabled” Defined. Welf. & Inst. Code, § 5008(h)(1)(B).
- “Incompetent to Stand Trial” Defined. Pen. Code, § 1367(a).
- Murphy Conservatorship Can Be Established Following an Accepted Guilty or No-Contest Plea that Has Not Been Challenged or Set Aside. *Conservatorship of A.A.* (2020) 84 Cal.App.5th 66, 69–71 [300 Cal.Rptr.3d 152].
- Proof of Current Dangerousness Required. *Conservatorship of Hofferber, supra*, 28 Cal.3d at pp. 176–178.
- Proof of Recent Overt Act Not Required. *People v. McKee* (2010) 47 Cal.4th 1172, 1203 [104 Cal.Rptr.3d 427, 223 P.3d 566]; *People v. G.A.* (2023) 93 Cal.App.5th 1126, 1134–1136 [311 Cal.Rptr.3d 525].
- Dangerousness Must Be Proven Beyond a Reasonable Doubt. *Conservatorship of Hofferber, supra*, 28 Cal.3d at p. 178.
- Incompetence Must Be Proven By a Preponderance of Evidence. *Conservatorship of Hofferber, supra*, 28 Cal.3d at p. 179.
- Judicial Notice of Prior Incompetency Finding. *Conservatorship of Hofferber, supra*, 28 Cal.3d at pp. 176–178.

- Jury May Not Consider Consequences of Conservatorship. *Conservatorship of P.D.* (2018) 21 Cal.App.5th 1163, 1168 [231 Cal.Rptr.3d 79]; *Conservatorship of Baber* (1984) 153 Cal.App.3d 542, 553 & fn. 7 [200 Cal.Rptr. 262].

COMMENTARY

In 1967, the LPS Act was enacted to regulate involuntary civil commitment of individuals in mental health institutions. Initially, this act applied to civil conservatorships unrelated to criminal proceedings or dangerousness. In 1974, Assemblymember Frank Murphy Jr. sponsored an amendment to the LPS Act which added an alternative definition of gravely disabled to address individuals committed to mental health institutions based upon a finding of incompetent to stand trial in a criminal proceeding. (Assembly Bill 1529 (Stats. 1974, ch. 1511).) As a result, this type of conservatorship is commonly referred to as a “Murphy conservatorship.” (See *Public Guardian of Contra Costa County v. Eric B.* (2022) 12 Cal.5th 1085, 1096 [293 Cal.Rptr.3d 93, 508 P.3d 1099].) For ease of reference, the committee chose to use this shorthand term for the instruction’s title. If the court includes the instruction’s title for the jury and is not using the bracketed language containing the term “Murphy conservatorship,” the court may want to change the title to “Mental Health Conservatorship.”

3474. Danger No Longer Exists or Attacker Disabled

The right to use force in **[lawful]** (self-defense/ [or] defense of another) continues only as long as the danger exists or reasonably appears to exist. [When the attacker (withdraws/ [or] no longer appears capable of inflicting any injury), then the right to use force ends.]

New January 2006; Revised February 2027

BENCH NOTES

Instructional Duty

The court may give this instruction on request when supported by the evidence. (See *People v. Martin* (1980) 101 Cal.App.3d 1000, 1010 [162 Cal.Rptr. 133].)

This instruction applies to complete self-defense, not to imperfect self-defense. Give the bracketed word “lawful” if the court is instructing with imperfect self-defense. (See *People v. Brim* (2026) 121 Cal.App.5th 168, 183 [345 Cal.Rptr.3d 529].) (See also CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*, CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense or Imperfect Defense of Another—Lesser Included Offense*; CALCRIM No. 604, *Attempted Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense*.)

AUTHORITY

- Instructional Requirements. See *People v. Keys* (1944) 62 Cal.App.2d 903, 916 [145 P.2d 589]; *People v. Perez* (1970) 12 Cal.App.3d 232, 236 [90 Cal.Rptr. 521].

SECONDARY SOURCES

- 1 Witkin & Epstein, California Criminal Law (~~54~~²⁰²⁴th ed. 2024) Defenses, § 881.
- 3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.11[1][b] (Matthew Bender).