JUDICIAL COUNCIL OF CALIFORNIA

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# INVITATION TO COMMENT

**CALCRIM-2021-02**

**Title**
Criminal Jury Instructions: Revisions and Additions

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

**Proposed by**
Advisory Committee on Criminal Jury Instructions
Hon. Patricia Guerrero, Chair

**Action Requested**
Review and submit comments by Monday, December 27, 2021

**Proposed Effective Date**
March 11, 2022

**Contact**
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## Summary

New and revised jury instructions reflecting recent developments in the law and user suggestions.

*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 It is circulated for comment purposes only.*

# CALCRIM Proposed Changes: Invitation to Comment

# November 22-December 27, 2021

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# Guide

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

The Judicial Council jury instructions are accurate, designed to be easy to understand, and easy to use. This guide provides an introduction to the instructions and explains conventions and features that will assist in their use.

In order to fulfill its mandate pursuant to Rule 10.59 of the California Rules of Court[1] to maintain the criminal jury instructions, members of the advisory committee meet several times a year to consider changes in statutes, appellate opinions, and suggestions from practitioners. *It bears emphasis that when the committee proposes changing a jury instruction, that does not necessarily mean the previous version of the instruction was incorrect.* Often the committee proposes changes for reasons of style, consistency among similar instructions, and to improve clarity.

**Judicial Council Instructions Endorsed by Rule of Court**

Rule 2.1050 of the California Rules of Court provides:

> The California jury instructions approved by the Judicial Council are the official instructions for use in the state of California …
>
> The Judicial Council endorses these instructions for use and makes every effort to ensure that they accurately state existing law …
>
> Use of the Judicial Council instructions is strongly encouraged.

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

### *Using the Instructions*

**Bench Notes**

The text of each instruction is followed by a section in the Bench Notes titled "Instructional Duty," which alerts the user to any *sua sponte* duties to instruct and special circumstances raised by the instruction. It may also include references to other instructions that should or should not be used. In some instances, the directions include suggestions for modification. In the "Authority" section, all of the pertinent sources for the instruction are listed. Some of the instructions also have sections containing "Related Issues" and "Commentary." The Bench Notes also refer to any relevant lesser included offenses. Secondary sources appear at the end of instructions. The official publisher, and not the Judicial Council, is responsible for updating the citations for secondary sources. Users should consult the Bench Notes before using an instruction. Italicized notes between angle brackets in the language of the instruction itself signal important issues or choices. For example, in instruction 1750, Receiving Stolen Property, optional element 3 is introduced thus: <*Give element 3 when instructing on knowledge of presence of property; see Bench Notes*>.

**Multiple-Defendant and Multiple-Count Cases**

These instructions were drafted for the common case in which a single defendant is on trial. The HotDocs document assembly program from the Judicial Council's official publisher, LexisNexis, will modify the

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

instructions for use in multi-defendant cases. It will also allow the user to name the defendants charged in a particular instruction if the instruction applies only to some of the defendants on trial in the case.
It is impossible to predict the possible fact combinations that may be present when a crime is charged multiple times or committed by different defendants against different victims involving different facts. Thus, when an instruction is being used for more than one count and the factual basis for the instruction is different for the different counts, the user will need to modify the instruction as appropriate.

**Related California Jury Instructions, Criminal (CALJIC)**

The CALJIC and CALCRIM instructions should *never* be used together. While the legal principles are obviously the same, the organization of concepts is approached differently. Mixing the two sets of instructions into a unified whole cannot be done and may result in omissions or confusion that could severely compromise clarity and accuracy. Nevertheless, for convenient reference this publication includes tables of related CALJIC instructions.

**Titles and Definitions**

The titles of the instructions are directed to lawyers and sometimes use words and phrases not used in the instructions themselves. The title is not a part of the instruction. The titles may be removed before presentation to the jury.
The instructions avoid separate definitions of legal terms whenever possible. Instead, definitions have been incorporated into the language of the instructions in which the terms appear. When a definition is lengthy, a cross-reference to that definition is provided.
Defined terms are printed in italics in the text of the definition.

**Alternatives vs. Options**

When the user must choose one of two or more options in order to complete the instruction, the choice of necessary alternatives is presented in parentheses thus: *When the defendant acted, George Jones was performing (his/her) duties as a school employee.*
The instructions use brackets to provide optional choices that may be necessary or appropriate, depending on the individual circumstances of the case: *[If you find that George Jones threatened or harmed the defendant [or others] in the past, you may consider that information in evaluating the defendant's beliefs.]*
Finally, both parentheses and brackets may appear in the same sentence to indicate options that arise depending on which necessary alternatives are selected: *[It is not required that the person killed be the (victim/intended victim) of the (felony/ [or] felonies).].*

**General and Specific Intent**

The instructions do not use the terms general and specific intent because while these terms are very familiar to judges and lawyers, they are novel and often confusing to many jurors. Instead, if the defendant must specifically intend to commit an act, the particular intent required is expressed without using the term of art "specific intent." Instructions 250–254 provide jurors with additional guidance on specific vs. general intent crimes and the union of act and intent.

**Organization of the Instructions**

The instructions are organized into 24 series, which reflect broad categories of crime (e.g., Homicide) and other components of the trial (e.g., Evidence). The series, and the instructions within each series, are presented in the order in which they are likely to be given in an actual trial. As a result, greater offenses (like DUI with injury) come before lesser offenses (DUI). All of the defenses are grouped together at the end of the instructions, rather than dispersed throughout. The misdemeanors are placed within the category of instructions to which they belong, so simple battery is found with the other battery instructions rather than in a stand-alone misdemeanor section.

**Lesser Included Offenses**

Users may wish to modify instructions used to explain lesser included offenses by replacing the standard introductory sentence, **"The defendant is charged with À ."** with **"The crime of** _____ (e.g., false imprisonment) **is a lesser offense than the crime of** _____ (e.g., kidnapping)**"** to amplify the explanation provided in instructions 3517–3519: **"**_____ <*insert crime*> **is a lesser crime of** _____ <*insert crime*> **[charged in Count _____]."**

When giving the lesser included offense instructions 640 and 641 (homicide) or instructions 3517–3519 (non-homicide), no further modification of the corresponding instructions on lesser crimes is necessary to comply with the requirements of *People v. Dewberry* (1959) 51 Cal.2d 548.

**Burden of Production/Burden of Proof**

The instructions never refer to the "burden of producing evidence." The drafters concluded that it is the court's decision whether the party has met the burden of production. If the burden is not met, no further instruction is necessary. The question for the jury is whether a party has met its properly allocated burden based on the evidence received.

Instruction 103 on Reasonable Doubt states, "Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise]." Thus, when the concept of reasonable doubt is explained and defined, the jury is told that it is the standard that applies to every issue the People must prove, unless the court specifically informs the jury otherwise.

**Sentencing Factors and Enhancements**

Because the law is rapidly evolving regarding when sentencing factors and enhancements must be submitted to the jury, we have provided "template" instructions 3250 and 3251 so that the court may tailor an appropriate instruction that corresponds to this emerging body of law.

**Personal pronouns**

Many instructions include an option to insert the personal pronouns "he/she," "his/her," or "him/her." The committee does not intend these options to be limiting. It is the policy of the State of California that nonbinary people are entitled to full legal recognition and equal treatment under the law. In accordance with this policy, attorneys and courts should ensure that they are using preferred personal pronouns.

## 224. Circumstantial Evidence: Sufficiency of Evidence

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**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.**

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

## 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. 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*

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*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].~~; see *People v. Wade* (1995) 39 Cal.App.4th 1487, 1492 [46 Cal.Rptr.2d 645].~~
- "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~~2~~ [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* (1955) 45 Cal.2d 46, 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. Bloyd* (1987) 43 Cal.3d 333, 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].

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## 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 (4th ed. 2012) Elements, § 3.

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 737.

1 Witkin, California Evidence (5th ed. 2012) Circumstantial Evidence, § 121.

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).

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## 250. Union of Act and Intent: General Intent

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

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

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*New January 2006; Revised June 2007, April 2008, April 2011, March 2022*

## BENCH NOTES

***Instructional Duty***

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

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

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

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

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

***Defenses—Instructional Duty***

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

## AUTHORITY

- Statutory Authority. ▸ Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
- Instructional Requirements. ▸ *People v. Hill* (1967) 67 Cal.2d 105, 117 [60 Cal.Rptr. 234, 429 P.2d 586]; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 586–587 [35 Cal.Rptr. 401]; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].
- History of General-Intent Requirement. ▸ *Morissette v. United States* (1952) 342 U.S. 246 [72 S.Ct. 240, 96 L.Ed. 288]; see also *People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590].
- This Instruction Upheld. ▸ *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1189 [67 Cal.Rptr.3d 871].

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## ~~RELATED ISSUES~~

~~***Sex Registration and Knowledge of Legal Duty***~~
~~The offense of failure to register as a sex offender requires proof that the defendant actually knew of his or her duty to register. (*People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590].) For the charge of failure to register, it is error to give an instruction on general criminal intent that informs the jury that a person is "acting with general criminal intent, even though he may not know that his act or conduct is unlawful." (*People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rtpr.3d 260]; *People v. Edgar* (2002) 104 Cal.App.4th 210, 219 [127 Cal.Rptr.2d 662].) In such cases, the court should give CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*, instead of this instruction.~~

## SECONDARY SOURCES

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

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

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

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## 253. Union of Act and Intent: Criminal Negligence

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

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

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

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

**AND**

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

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

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

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*New January 2006; Revised June 2007, March 2022*

## BENCH NOTES

***Instructional Duty***

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

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

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

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

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

## AUTHORITY

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

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Elements, § 21.

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

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## 315. Eyewitness Identification

**You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony.**

**In evaluating identification testimony, consider the following questions:**

- **Did the witness know or have contact with the defendant before the event?**
- **How well could the witness see the perpetrator?**
- **What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, [and] duration of observation[, and _____** *<insert any other relevant circumstances>***]?**
- **How closely was the witness paying attention?**
- **Was the witness under stress when he or she made the observation?**
- **Did the witness give a description and how does that description compare to the defendant?**
- **How much time passed between the event and the time when the witness identified the defendant?**
- **Was the witness asked to pick the perpetrator out of a group?**
- **Did the witness ever fail to identify the defendant?**
- **Did the witness ever change his or her mind about the identification?**
- ~~**How certain was the witness when he or she made an identification?**~~
- **Are the witness and the defendant of different races?**
- **[Was the witness able to identify other participants in the crime?]**

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- **[Was the witness able to identify the defendant in a photographic or physical lineup?]**

- **[ _____** *<insert other relevant factors raised by the evidence>***.]**

- **Were there any other circumstances affecting the witness's ability to make an accurate identification?**

- **[How certain was the witness when he or she made an identification?]**

**[A witness's expression of certainty about an identification, whether the identification was made before or at the trial, may not be a reliable indicator of accuracy. Among the factors you may consider when evaluating the witness's certainty in the identification are the following:**

**[• How soon after the event did the witness express certainty about the identification?]**
**[• If the witness made an identification before trial, did the witness express certainty at the time of that identification?]**
**[• Before the identification, did the witness express confidence in being able to make an identification?]**
**[• How confident was the witness in making the identification?]**
**[• Did the witness receive information before or after the identification that increased the witness's level of confidence?]**
**[• Did the police use procedures that increased the witness's level of confidence about the identification?]**
**[•** *_____ <insert other relevant factors raised by the evidence>***.]]**

**The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty.**

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*New January 2006; Revised June 2007, March 2022*

## BENCH NOTES

***Instructional Duty***

The court has no sua sponte duty to give an instruction on eyewitness testimony. (*People v. Richardson* (1978) 83 Cal.App.3d 853, 863 [148 Cal.Rptr. 120], disapproved on other grounds by *People v. Saddler* (1979) 24 Cal.3d 671, 682 [156 Cal.Rptr. 871, 597 P.2d 130].) An instruction relating eyewitness identification to reasonable doubt, including any relevant "pinpoint" factors, must

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be given by the trial court on request "[w]hen an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability." (*People v. Wright* (1988) 45 Cal.3d 1126, 1143–1144 [248 Cal.Rptr. 600, 755 P.2d 1049], quoting *People v. McDonald* (1984) 37 Cal.3d 351, 377 [208 Cal.Rptr. 236, 690 P.2d 709], overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914 [98 Cal.Rptr.2d 431, 4 P.3d 265]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1110 [31 Cal.Rptr.2d 321, 875 P.2d 36]; *People v. Palmer* (1984) 154 Cal.App.3d 79, 89 [203 Cal.Rptr. 474] [error to refuse defendant's requested instruction on eyewitness testimony].)

Whenever there is evidence a witness has expressed certainty about an identification, give the bracketed language beginning with "How certain was the witness" and the bracketed paragraph that begins with "A witness's expression of certainty" along with any applicable bracketed factors.

Whenever there is evidence a witness has expressed doubt about an identification, give the bracketed language beginning with "How certain was the witness" upon request, and do not give the bracketed paragraph that begins with "A witness's expression of certainty" nor any of the factors that follow.

## AUTHORITY

- Factors ▸ *People v. Wright* (1988) 45 Cal.3d 1126, 1139, fn. 9, 1141 [248 Cal.Rptr. 600, 755 P.2d 1049]; *People v. West* (1983) 139 Cal.App.3d 606, 609 [189 Cal.Rptr. 36].
- Certainty Factor ▸ *People v. Lemcke* (2021) 11 Cal.5th 644 [278 Cal.Rtpr.3d 849, 486 P.3d 1077].
- Reasonable Doubt ▸ *People v. Hall* (1980) 28 Cal.3d 143, 159–160 [167 Cal.Rptr. 844, 616 P.2d 826], overruled on other grounds in *People v. Newman* (1999) 21 Cal.4th 413, 422, fn.6 [87 Cal.Rptr.2d 474, 981 P.2d 98].
- ~~This Instruction Upheld ▸ *People v. Golde* (2008) 163 Cal.App.4th 101, 119 [77 Cal.Rptr.3d 120].~~

## COMMENTARY

The court should give the unbracketed factors, if requested, in every case in which identity is disputed. ~~The bracketed factors should be given if requested and factually appropriate.~~ A blank space has also been provided for the court to

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include any factual circumstances relevant to eyewitness identification that have not been addressed in the preceding list of factors.

In *People v. Wright* (1988) 45 Cal.3d 1126, 1139 [248 Cal.Rptr. 600, 755 P.2d 1049], the court suggested that the trial court select factors from an approved list of eyewitness identification factors and then give counsel the opportunity to supplement with any additional relevant factors. (*Id.* at pp. 1126, 1143.) Additional "pinpoint" factors should be neutrally written, brief, and nonargumentative. (*Ibid.*; see also *People v. Gaglione* (1994) 26 Cal.App.4th 1291, 1302–1303 [32 Cal.Rptr.2d 169], overruled on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452 [45 Cal.Rptr.2d 903, 908 P.2d 1037].)

## ~~RELATED ISSUES~~

~~***Unreliability of Eyewitness Identification***~~

~~An instruction to view eyewitness testimony with caution and that "mistaken identification is not uncommon" should not be given because it improperly singles out this testimony as suspect. (*People v. Wright* (1988) 45 Cal.3d 1126, 1153 [248 Cal.Rptr. 600, 755 P.2d 1049] [special cautionary instruction unnecessary as duplicative of required eyewitness "factors" instruction]; see also *People v. Benson* (1990) 52 Cal.3d 754, 805, fn. 12 [276 Cal.Rptr. 827, 802 P.2d 330].) If a defendant wants to present information on the unreliability of eyewitness identifications under a particular set of circumstances, he or she must use means other than a jury instruction, such as expert testimony. (*People v. Wright, supra,* 45 Cal.3d at pp. 1153–1154.)~~

## SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, §§ 720-722.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 31, *Eyewitness Identification*, §§ 31.01–31.07 (Matthew Bender).

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

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## 331. Testimony of Person With Developmental, Cognitive, or Mental Disability

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**In evaluating the testimony of a person with a (developmental disability[,]/ [or] [a] (cognitive[,]/ [or] mental[,]/ [or] communication) impairment), consider all of the factors surrounding that person's testimony, including his or her level of cognitive development.**

**Even though a person with a (developmental disability[,]/ [or] [a] (cognitive[,]/ [or] mental[,]/ [or] communication) impairment)[,] may perform differently as a witness because of his or her level of cognitive development, that does not mean he or she is any more or less credible than another witness.**

**You should not discount or distrust the testimony of a person with a (developmental disability[,]/ [or] [a] (cognitive[,]/ [or] mental [,]/ [or] communication) impairment)[,] solely because he or she has such a (disability/ [or] impairment).**

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*New January 2006; Revised March 2022*

## BENCH NOTES

***Instructional Duty***

This instruction must be given on request in any case "in which a person with a developmental disability, or cognitive, mental, or communication impairment testifies as a witness . . . ." (Pen. Code, § 1127g.)

The court should consider whether this instruction is appropriate if the witness has a communication impairment that is not related to a deficiency in cognitive functioning. Compare *People v. Byers* (2021) 61 Cal.App.5th 447, 457–458 [275 Cal.Rptr.3d 661] [approving use of instruction for a nondependent witness] with *People v. Keeper* (2011) 192 Cal.App.4th 511, 521 [121 Cal.Rptr.3d 451] [holding that Penal Code section 1127g is limited to a dependent person].

## AUTHORITY

- Statutory Authority ▸ Pen. Code, § 1127g.
- This Instruction Upheld ▸ *People v. Catley* (2007) 148 Cal.App.4th 500, 506–508 [55 Cal.Rptr.3d 786].

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## SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 725.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, §§ 82.05[2][a], 82.07, 82.22[3][c] (Matthew Bender).

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## 372. Defendant's Flight

**If the defendant fled [or tried to flee] (immediately after the crime was committed/ [or] after (he/she) was accused of committing the crime), that conduct may show that (he/she) was aware of (his/her) guilt. If you conclude that the defendant fled [or tried to flee], it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled [or tried to flee] cannot prove guilt by itself.**

*New January 2006; Revised March 2022*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to instruct on flight whenever the prosecution relies on evidence of flight to show consciousness of guilt. (*People v. Williams* (1960) 179 Cal.App.2d 487, 491 [3 Cal.Rptr. 782].) There is, however, no reciprocal duty to instruct on the significance of the absence of flight, even on request. (*People v. Staten* (2000) 24 Cal.4th 434, 459 [101 Cal.Rptr.2d 213, 11 P.3d 968]; *People v. Williams* (1997) 55 Cal.App.4th 648, 651 [64 Cal.Rptr.2d 203].)

If the defendant's flight did not occur immediately after the crime was committed, the trial court should give the second option in the parenthetical. (*People v. Carrera* (1989) 49 Cal.3d 291, 313 [261 Cal.Rptr. 348, 777 P.2d 121] [flight from county jail]; *People v. Farley* (1996) 45 Cal.App.4th 1697, 1712 [53 Cal.Rptr.2d 702] [when flight was from custody, the instructional language "immediately after the commission of a crime" was irrelevant but harmless].)

## AUTHORITY

- Instructional Requirements ▸ Pen. Code, § 1127c; *People v. Williams* (1960) 179 Cal.App.2d 487, 491 [3 Cal.Rptr. 782]; *People v. Bradford* (1997) 14 Cal.4th 1005, 1054–1055 [60 Cal.Rptr.2d 225, 929 P.2d 544]; see *People v. Mendoza* (2000) 24 Cal.4th 130, 179–180 [99 Cal.Rptr.2d 485, 6 P.3d 150].

- This Instruction Upheld ▸ *People v. Paysinger* (2009) 174 Cal.App.4th 26, 29-32 [93 Cal.Rptr.3d 901]; *People v. Rios* (2007) 151 Cal.App.4th 1154, 1159–1160 [60 Cal.Rptr.3d 591].

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## RELATED ISSUES

***Flight, Meaning***

Flight does not require a person to physically run from the scene or make an escape. What is required is acting with the purpose of avoiding observation or arrest. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055 [60 Cal.Rptr.2d 225, 929 P.2d 544] [defendant fled when he left victim's apartment after killing her, told the assistant manager, "I really got to get the hell out of here," returned to his apartment, packed his belongings, asked a former girlfriend who lived out of the area if he could stay with her, and repeatedly pleaded with his roommate to drive him out of town].) However, a suicide attempt that does not involve a departure from the crime scene is not flight. (*People v. Pettigrew* (2021) 62 Cal.App.5th 477, 499 [276 Cal.Rptr.3d 694].)

***Identity at Issue***

If evidence identifies the defendant as the person who fled, and this evidence is relied on as tending to show guilt, then it is not error to instruct the jury on flight. (*People v. Mason* (1991) 52 Cal.3d 909, 943 [277 Cal.Rptr. 166, 802 P.2d 950].)

## SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, §§ 723-724.

1 Witkin, California Evidence (5th ed. 2012) Hearsay, §§ 107–110.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][a][ii], 85.03[2][c] (Matthew Bender).

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## 378. Consciousness of Guilt: General

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**If the defendant _____ [or tried to _____]** <*insert post-offense conduct*>**, that conduct may show that (he/she) was aware of (his/her) guilt. If you conclude that the defendant _____ [or tried to _____]** <*insert post-offense conduct*>**, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant _____ [or tried to _____]** <*insert post-offense conduct*> **cannot prove guilt by itself.**

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*New March 2022*

## BENCH NOTES

***Instructional Duty***
No authority imposes a duty to give this instruction sua sponte.

## AUTHORITY

- Instructional Requirements ▸ Evid. Code, § 355; *People v. Pettigrew* (2021) 62 Cal.App.5th 477, 497–500 [276 Cal.Rptr.3d 694]; *People v. Butler* (1970) 12 Cal.App.3d 189, 193 [90 Cal.Rptr. 497].

## 505. Justifiable Homicide: Self-Defense or Defense of Another

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**The defendant is not guilty of (murder/ [or] manslaughter/attempted murder/ [or] attempted voluntary manslaughter) if (he/she) was justified in (killing/attempting to kill) someone in (self-defense/ [or] defense of another). The defendant acted in lawful (self-defense/ [or] defense of another) if:**

1. **The defendant reasonably believed that (he/she/ [or] someone else/ [or] _____ <*insert name or description of third party*>) was in imminent danger of being killed or suffering great bodily injury [or was in imminent danger of being (raped/maimed/robbed/ _____ <*insert other forcible and atrocious crime*>)];**

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

**AND**

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

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

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

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

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**[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 deciding whether the defendant's conduct and beliefs were reasonable.]**

**[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 deciding whether the defendant's conduct and beliefs were reasonable.]**

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

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

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

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

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

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*New January 2006; Revised February 2012, August 2012, September 2020, March 2022*

## BENCH NOTES

### *Instructional Duty*

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

defendant's theory of the case." (*People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rtpr.2d 870, 960 P.2d 1094] [addressing duty to instruct on voluntary manslaughter as lesser included offense, but also discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [249 Cal.Rptr. 897] [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses].)

If there is substantial evidence of self-defense that is inconsistent with the defendant's testimony, the court must ascertain whether the defendant wants an instruction on self-defense. (*People v. Breverman, supra,* 19 Cal.4th at p. 156.) The court is then required to give the instruction if the defendant so requests. (*People v. Elize* (1999) 71 Cal.App.4th 605, 611–615 [84 Cal.Rptr.2d 35].)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of "antecedent threats and assaults against the defendant on the reasonableness of defendant's conduct." (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488 [1 Cal.Rptr.3d 774].) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475 [198 Cal.Rptr. 819]; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068 [56 Cal.Rptr.2d 133, 920 P.2d 1337].)

Forcible and atrocious crimes are generally those crimes whose character and manner reasonably create a fear of death or serious bodily harm. (*People v. Ceballos* (1974) 12 Cal.3d 470, 479 [116 Cal.Rptr. 233, 526 P.2d 241].) The following crimes have been deemed forcible and atrocious as a matter of law: murder, mayhem, rape, and robbery. (*Id.* at p. 478.) If the defendant is asserting that he or she was resisting the commission of one of these felonies or another specific felony, the court should include the bracketed language at the end of element 1 and select "raped," "maimed," or "robbed," or insert another appropriate forcible and atrocious crime. In all other cases involving death or great bodily injury, the court should use element 1 without the bracketed language.

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

***Related Instructions***

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CALCRIM Nos. 506–511, Justifiable and Excusable Homicides.

CALCRIM Nos. 3470–3477, Defense Instructions: Defense of Self, Another, Property.

CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense or Imperfect Defense of Another–Lesser Included Offense*.

## AUTHORITY

- Justifiable Homicide. ▸ Pen. Code, §§ 197–199.
- Fear. ▸ Pen. Code, § 198.
- Lawful Resistance. ▸ Pen. Code, §§ 692–694.
- Burden of Proof. ▸ Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements. ▸ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Forcible and Atrocious Crimes. ▸ *People v. Ceballos* (1974) 12 Cal.3d 470, 478–479 [116 Cal.Rptr. 233, 526 P.2d 241].
- Imminence. ▸ *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167], overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [56 Cal.Rptr.2d 142].
- No Duty to Retreat. ▸ *People v. Hughes* (1951) 107 Cal.App.2d 487, 493 [237 P.2d 64]; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22 [132 P.2d 51].
- Reasonable Belief. ▸ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1]; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].
- Must Act Under Influence of Fear Alone. ▸ Pen. Code, § 198.
- This Instruction Upheld. ▸ *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1306 [132 Cal.Rptr.3d 248]; *People v. Genovese* (2008) 168 Cal.App.4th 817, 832 [85 Cal.Rptr.3d 664].

## COMMENTARY

Penal Code section 197, subdivision 1 provides that self-defense may be used in response to threats of death or great bodily injury, or to resist the commission of a felony. (Pen. Code, § 197, subd. 1.) However, in *People v. Ceballos* (1974) 12 Cal.3d 470, 477–479 [116 Cal.Rptr. 233, 526 P.2d 241], the court held that

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although the latter part of section 197 appears to apply when a person resists the commission of any felony, it should be read in light of common law principles that require the felony to be "some atrocious crime attempted to be committed by force." (*Id.* at p. 478.) This instruction is therefore written to provide that self-defense may be used in response to threats of great bodily injury or death or to resist the commission of forcible and atrocious crimes.

## RELATED ISSUES

### *Imperfect 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. (*People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86 [31 Cal.Rptr.2d 475], overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675]; *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 defendant's version of the crime "could only lead to an acquittal based on justifiable homicide," and when the prosecutor's version could only lead to a conviction of first degree murder. (*People v. Rodriguez* (1992) 53 Cal.App.4th 1250, 1275 [62 Cal.Rptr.2d 345]; see also *People v. Williams* (1997) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961] [in rape prosecution, no mistake-of-fact instruction was required when two sides gave wholly divergent accounts with no middle ground to support a mistake-of-fact instruction].)

### *No Defense for Initial Aggressor*

An aggressor whose victim fights back in self-defense may not invoke the doctrine of self-defense against the victim's legally justified acts. (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1 [30 Cal.Rptr.2d 33, 872 P.2d 574].) If the aggressor attempts to break off the fight and communicates this to the victim, but the victim continues to attack, the aggressor may use self-defense against the victim to the same extent as if he or she had not been the initial aggressor. (Pen. Code, § 197, subd. 3; *People v. Trevino* (1988) 200 Cal.App.3d 874, 879 [246 Cal.Rptr. 357]; see CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.) In addition, if the victim responds with a sudden escalation of force, the aggressor may legally defend against the use of force. (*People v. Quach* (2004) 116 Cal.App.4th 294, 301–302 [10 Cal.Rptr.3d 196]; see CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.)

### *Transferred Intent Applies*

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"[T]he doctrine of self-defense is available to insulate one from criminal responsibility where his act, justifiably in self-defense, inadvertently results in the injury of an innocent bystander." (*People v. Mathews* (1979) 91 Cal.App.3d 1018, 1024 [154 Cal.Rptr. 628]; see also *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1357 [37 Cal.Rptr.2d 304].) There is no sua sponte duty to instruct on this principle, although such an instruction must be given on request when substantial evidence supports it. (*People v. Mathews, supra,* 91 Cal.App.3d at p. 1025; see also CALCRIM No. 562, *Transferred Intent*.)

***Definition of "Imminent"***

In *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167], overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [56 Cal.Rptr.2d 142, 921 P.2d 1], the jury requested clarification of the term "imminent." In response, the trial court instructed:

> "Imminent peril," as used in these instructions, means that the peril must have existed or appeared to the defendant to have existed at the very time the fatal shot was fired. In other words, the peril must appear to the defendant as immediate and present and not prospective or even in the near future. An imminent peril is one that, from appearances, must be instantly dealt with.

*(Ibid.)*

The Court of Appeal agreed with this definition of "imminent." (*Id.* at pp. 1187–1190 [citing *People* v. *Scoggins* (1869) 37 Cal. 676, 683–684].)

***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

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1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, §§ 67–85.

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

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

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

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## 510. Excusable Homicide: Accident

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

**1. By accident and misfortune;**

**OR**

**1. If ~~T~~the defendant was doing a lawful act in a lawful way;**

**AND**

**~~1.~~2. The defendant was acting with usual and ordinary caution;**

**AND**

**~~2.~~3. The defendant was acting without an~~y~~ unlawful intent to commit (murder/ [or] manslaughter).**

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

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

*New January 2006; Revised August 2012, March 2022*

## BENCH NOTES

***Instructional Duty***

The court has no **sua sponte** duty to instruct on accident. (*People v. Anderson* (2011) 51 Cal.4th 989, 997-998 [125 Cal.Rptr.3d 408, 252 P.3d 968].)
When this instruction is given, it should always be given in conjunction with CALCRIM No. 581, *Involuntary Manslaughter: Murder Not Charged* or CALCRIM No. 580, *Involuntary Manslaughter: Lesser Included Offense*, unless vehicular manslaughter with ordinary negligence is charged. (*People v. Velez* (1983) 144 Cal.App.3d 558, 566–568 [192 Cal.Rptr. 686].) A lawful act can be the basis of involuntary manslaughter, but only if that act is committed with *criminal*

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

***Related Instructions***
CALCRIM No. 3404, *Accident*.

## AUTHORITY

- Excusable Homicide ~~If Committed by Lawful Act~~. ▸ Pen. Code, § 195, subd. 1; *People v. Garnett* (1908) 9 Cal.App. 194, 203-204 [98 P. 247], disapproved on other grounds by *People v. Collup* (1946) 27 Cal.2d 829, 838–839 [167 P.2d 714] and *People v. Bouchard* (1957) 49 Cal.2d 438, 441–442 [317 P.2d 971].
- Burden of Proof. ▸ Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217].
- Instructing With Involuntary Manslaughter. ▸ *People v. Velez* (1983) 144 Cal.App.3d 558, 566–568 [192 Cal.Rptr. 686].
- ~~Misfortune as Accident.~~ ▸ ~~*People v. Gorgol* (1953) 122 Cal.App.2d 281, 308 [265 P.2d 69].~~

## RELATED ISSUES

***Traditional Self-Defense***
In *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1358–1359 [37 Cal.Rptr.2d 304], the court held that the claim that a killing was accidental bars the defendant from relying on traditional self-defense not only as a defense, but also to negate implied malice. However, in *People v. Elize* (1999) 71 Cal.App.4th 605, 610–616 [84 Cal.Rptr.2d 35], the court reached the opposite conclusion, holding that the trial court erred in refusing to give self-defense instructions where the defendant testified that the gun discharged accidentally. *Elize* relies on two Supreme Court opinions, *People v. Barton* (1995) 12 Cal.4th 186 [47 Cal.Rtpr.2d 569, 906 P.2d 531], and *People v. Breverman* (1998) 19 Cal.4th 142 [77 Cal.Rptr.2d 870, 960 P.2d 1094]. Because *Curtis* predates these opinions, *Elize* appears to be the more persuasive authority.

## SECONDARY SOURCES

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1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, § 274.

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

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

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

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## 511. Excusable Homicide: Accident in the Heat of Passion

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**The defendant is not guilty of (murder/ [or] manslaughter) if (he/she) killed someone by accident while acting in the heat of passion. Such a killing is excused, and therefore not unlawful, if, at the time of the killing:**

1. **The defendant acted in the heat of passion;**

2. **The defendant was (suddenly provoked by _____**<*insert name of decedent*>**/ [or] suddenly drawn into combat by _____**<*insert name of decedent*>**);**

3. **The defendant did not take undue advantage of _____**<*insert name of decedent*>**;**

4. **The defendant did not use a dangerous weapon;**

5. **The defendant did not kill _____**<*insert name of decedent*> **in a cruel or unusual way;**

6. **The defendant did not intend to kill _____**<*insert name of decedent*> **and did not act with conscious disregard of the danger to human life;**

**AND**

7. **The defendant did not act with criminal negligence.**

**A person acts *in the heat of passion* when he or she is provoked into doing a rash act under the influence of intense emotion that obscures his or her reasoning or judgment. The provocation must be sufficient to have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.**

**Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.**

**In order for the killing to be excused on this basis, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote**

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**provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.**

**It is not enough that the defendant simply was provoked. The defendant is not allowed to set up (his/her) own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than judgment.**

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

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

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

***Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with *criminal negligence* when:**

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

**AND**

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

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

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

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*New January 2006; Revised April 2011, September 2019, September 2020, March 2022*

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## BENCH NOTES

***Instructional Duty***

The trial court has a **sua sponte** duty to instruct on accident and heat of passion that excuses homicide when there is evidence supporting the defense. (*People v. Hampton* (1929) 96 Cal.App. 157, 159–160 [273 P. 854] [court erred in refusing defendant's requested instruction].)

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

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

***Related Instructions***

CALCRIM No. 510, *Excusable Homicide: Accident*.

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

CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion –Lesser Included Offense*.

## AUTHORITY

- Excusable Homicide if Committed in Heat of Passion. ▸ Pen. Code, § 195, subd. 2.
- Burden of Proof. ▸ Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217].
- Deadly Weapon Defined. ▸ See *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Inherently Deadly Defined ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].

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- Examples of Noninherently Deadly Weapon ▸ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

## RELATED ISSUES

***Distinguished From Voluntary Manslaughter***

Under Penal Code section 195, subd. 2, a homicide is "excusable," "in the heat of passion" if done "by accident," or on "sudden . . . provocation . . . or . . . combat." (Pen. Code, § 195, subd. 2.) Thus, unlike voluntary manslaughter, the killing must have been committed without criminal intent, that is, accidentally. (See *People v. Cooley* (1962) 211 Cal.App.2d 173, 204 [27 Cal.Rptr. 543], disapproved on other grounds in *People v. Lew* (1968) 68 Cal.2d 774, 778, fn. 1 [69 Cal.Rptr. 102, 441 P.2d 942]; Pen. Code, § 195, subd. 1 [act must be without criminal intent]; Pen. Code, § 26, subd. 5 [accident requires absence of "evil design [or] intent"].) The killing must also be on "sudden" provocation, eliminating the possibility of provocation over time, which may be considered in cases of voluntary manslaughter. (See Bench Notes to CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion–Lesser Included Offense*.)

***Distinguished From Involuntary Manslaughter***

Involuntary manslaughter requires a finding of gross or criminal negligence. (See Bench Notes to CALCRIM No. 581, *Involuntary Manslaughter: Murder Not Charged*; Pen. Code, § 26, subd. 5 [accident requires no "culpable negligence"].)

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, § 274.

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 230.

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

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

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

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## 523. First Degree Murder: Hate Crime (Pen. Code, § 190.03)

**If you find the defendant guilty of first degree murder [as charged in Count __], you must then decide whether the People have proved the additional allegation that the murder was a hate crime.**

**To prove this allegation the People must prove that the defendant committed the murder, in whole or in part, because of the deceased person's actual or perceived (disability[,]/[or] gender[,]/[or] nationality[,]/[or] race or ethnicity[,]/[or] religion[,]/[or] sexual orientation[,]/ [or] association with a person or group with (this/one or more of these) actual or perceived characteristic[s]).**

**The defendant acted, *in whole or in part, because of* the actual or perceived characteristic[s] of the deceased person if:**

1. **The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);**

**AND**

2. **The bias motivation caused the defendant to commit the alleged murder.**

**If you find that the defendant had more than one reason to commit the alleged murder, the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the conduct.**

**[The term *disability* is explained in Instruction 1353, to which you should refer.]**

**[*Gender*, as used here, means sex and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]**

**[*Nationality*, as used here, means ~~includes citizenship,~~ country of origin, immigration status, including citizenship, and national origin.]**

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**[*Race or ethnicity* includes ancestry, color, and ethnic background.]**

**[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]**

**[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]**

**[*Association with a person or group with (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ group[,]/ family[,]/ community center[,]/ educational facility[,]/ office[,]/ meeting hall[,]/ place of worship[,]/ private institution[,]/ public agency[,]/ library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]**

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

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*New January 2006; Revised March 2017, March 2022*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (See *People v. Marshall* (2000) 83 Cal.App.4th 186, 193–195 [99 Cal.Rptr.2d 441]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

This statute was substantially revised, effective January 1, 2005. Prior to that time, the statute was limited to murder committed because of the decedent's disability, gender, or sexual orientation.

**Do not** give CALCRIM No. 370, *Motive*, with this instruction because motive is an element of this enhancement. (See *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165 [197 Cal.Rptr.3d 317]; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1127 [38 Cal.Rptr.2d 335].)

Give all relevant bracketed definitions. If the term "disability" is used, give CALCRIM No. 1353, *Hate Crime: Disability Defined*.

## AUTHORITY

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- Murder That is a Hate Crime. ▸ Pen. Code, § 190.03(a).
- Hate Crime Defined. ▸ Pen. Code, § 422.55.
- "In Whole or in Part Because of" Defined. ▸ Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].
- Disability Defined. ▸ Pen. Code, § 422.56(b); Gov. Code, §12926(i)–(*l*).
- Gender Defined. ▸ Pen. Code, §§ 422.56(c) & 422.57.
- Nationality Defined. ▸ Pen. Code, § 422.56(e).
- Race or Ethnicity Defined. ▸ Pen. Code, § 422.56(f).
- Religion Defined. ▸ Pen. Code, § 422.56(g).
- Sexual Orientation Defined. ▸ Pen. Code, § 422.56(h).
- Association With Defined. ▸ Pen. Code, § 422.56(a).

## SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 542.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.44 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[4][a][ii] (Matthew Bender).

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## 524. Second Degree Murder: Peace Officer (Pen. Code, § 190(b), (c))

**If you find the defendant guilty of second degree murder [as charged in Count __], you must then decide whether the People have proved the additional allegation that (he/she) murdered a peace officer.**

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

1. _____ *<insert officer's name, excluding title>* **was a peace officer lawfully performing (his/her) duties as a peace officer;**

**[AND]**

2. **When the defendant killed** _____ *<insert officer's name, excluding title>***, the defendant knew, or reasonably should have known, that** _____ *<insert officer's name, excluding title>* **was a peace officer who was performing (his/her) duties(;/.)**

*<Give element 3 when defendant charged with Pen. Code, § 190(c)>*
**[AND**

3. **The defendant (intended to kill the peace officer/ [or] intended to inflict great bodily injury on the peace officer/ [or] personally used a (deadly or dangerous weapon/ [or] firearm) in the commission of the offense).]**

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

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

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

**[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.]**

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**[Someone *personally uses* a (deadly weapon/ [or] firearm) if he or she intentionally does any of the following:**

1. **Displays the weapon in a menacing manner;**

2. **Hits someone with the weapon;**

**OR**

3. **Fires the weapon.]**

**[The People allege that the defendant** _____ *<insert all of the factors from element 3 when multiple factors are alleged>***. You may not find the defendant guilty unless you all agree that the People have proved at least one of these alleged facts and you all agree on which fact or facts were proved. You do not need to specify the fact or facts in your verdict.]**

**[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>***.]**

*<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).]**

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*New January 2006; Revised August 2009, February 2013, September 2019, September 2020, March 2022*

## BENCH NOTES

***Instructional Duty***
The court has a **sua sponte** duty to give an instruction defining the elements of the sentencing enhancement. (See *People v. Marshall* (2000) 83 Cal.App.4th 186,

193–195 [99 Cal.Rptr.2d 441]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

If the defendant is charged under Penal Code section 190(b), give only elements 1 and 2. If the defendant is charged under Penal Code section 190(c), give all three elements, specifying the appropriate factors in element 3, and give the appropriate definitions, which follow in brackets. Give the bracketed unanimity instruction if the prosecution alleges more than one factor in element 3.

In order to be "engaged in the performance of his or her duties," a peace officer must be acting lawfully. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) "[D]isputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element." *(Ibid.)* If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

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."

"Peace officer," as used in this statute, means "as defined in subdivision (a) of Section 830.1, subdivision (a), (b), or (c) of Section 830.2, subdivision (a) of Section 830.33, or Section 830.5." (Pen. Code, § 190(b) & (c).)

The court may give the bracketed sentence that begins, "The duties of a _____ <*insert title . . . .*> include," on request. The court may insert a description of the officer's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr.

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729, 800 P.2d 1159].)

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

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

## AUTHORITY

- Second Degree Murder of a Peace Officer. ▸ Pen. Code, § 190(b) & (c).
- Personally Used Deadly or Dangerous Weapon. ▸ Pen. Code, § 12022.
- Personally Used Firearm. ▸ Pen. Code, § 12022.5.
- Personal Use. ▸ Pen. Code, § 1203.06(b)(2).
- Inherently Deadly Defined. ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Examples of Noninherently Deadly Weapon ▸ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 186.

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

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

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[4][c] (Matthew Bender).

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

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**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.**

**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*>
**[A danger is *imminent* if, when the fatal wound occurred, the danger actually existed or the defendant 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.]**

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**[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 minor or moderate harm.]**

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

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*New January 2006; Revised August 2012, February 2015, September 2020, March 2022*

## 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*.

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-

535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

***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* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531]; *In re Christian S.* (1994) 7 Cal.4th 768, 773 [30 Cal.Rptr.2d 33, 872 P.2d 574]; see *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197–198 [272 Cal.Rptr. 693] [insufficient evidence to support defense of another person].
- Imperfect Defense of Others. ▸ *People v. Randle* (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].
- Imperfect Self-Defense May be Available When Defendant Set in Motion Chain of Events Leading to Victim's Attack, but Not When Victim was Legally Justified in Resorting to Self-Defense. ▸ *People v. Enraca* (2012) 53 Cal.4th 735, 761 [137 Cal.Rptr.3d 117, 269 P.3d 543]; *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179–1180 [39 Cal.Rptr.3d 433].
- 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].
- This Instruction Upheld. ▸ *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1306 [132 Cal.Rptr.3d 248]; *People v. Genovese* (2008) 168 Cal.App.4th 817, 832 [85 Cal.Rptr.3d 664].

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- 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

***Battered Woman's Syndrome***

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

**Blakeley *Not Retroactive***

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

***Inapplicable to Felony Murder***

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

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

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

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

***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 (4th ed. 2012) Crimes Against the Person, §§ 242–244.

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).

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

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

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

1. **The defendant intentionally killed _____ <***insert name of victim***>;**

2. **At the time of the killing, the defendant was an active participant in a criminal street gang;**

3. **The defendant knew that members of the gang engage in or have engaged in a pattern of criminal gang activity;**

**AND**

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

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

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

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

**<***If criminal street gang has not already been defined in another instruction***>**
**[A *criminal street gang* is an~~y~~ ongoing organized~~ation,~~ association~~,~~ or group of three or more persons, whether formal or informal:**

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

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

**AND**

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

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

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

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

~~*<Give 1A if the crime or crimes are in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>*~~

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

~~**[OR]**~~

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

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

~~**AND**~~

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

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

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

~~**AND**~~

4. **The crimes were committed on separate occasions, or by two or more members~~persons;.]~~**

5. **The crimes commonly benefitted a criminal street gang;**

**AND**

6. **The common benefit from the crimes was more than reputational.**

**Examples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant.**
**~~[The crimes, if any, that establish a pattern of criminal gang activity, need not be gang-related.]~~**

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

**[You may not consider evidence of the charged offense[s] in deciding whether a pattern of criminal gang activity has been established.]**

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

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

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*New January 2006; Revised August 2006, June 2007, February 2014, February 2016, March 2022*

## BENCH NOTES

***Instructional Duty***

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

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

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

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

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

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

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Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758]; see also Related Issues section to CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.)

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

***Related Instructions***
CALCRIM No. 562, *Transferred Intent.*
CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.

## AUTHORITY

- Special Circumstance. ▸ Pen. Code, § 190.2(a)(22).
- Active Participation Defined. ▸ ~~Pen. Code, § 186.22(i);~~ *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined. ▸ Pen. Code, § 186.22(f)~~; see *People v. Duran, supra,* 97 Cal.App.4th at pp. 1464–1465~~.
- Transferred Intent Under Penal Code Section 190.2(a)(22). ▸ *People v. Shabazz* (2006) 38 Cal.4th 55 [40 Cal.Rptr.3d 750, 130 P.3d 519].
- Pattern of Criminal Gang Activity Defined. ▸ Pen. Code, § 186.22(e), (g~~j~~)~~;~~ ~~*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236]~~.
- Examples of Common Benefit ▸ Pen. Code, § 186.22(g).
- Felonious Criminal Conduct Defined. ▸ *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140] [abrogated on other grounds by *People v. Castenada* (2000) 23 Cal.4th 743, 747–748 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Separate Intent From Underlying Felony. ▸ *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].
- Crimes Committed After Charged Offense Not Predicates. ▸ *People v. Duran, supra,* 97 Cal.App.4th at p. 1458.
- Proof of Sufficient Connection Among Gang "Subsets" and Umbrella Gang Required. ▸ *People v. Prunty* (2015) 62 Cal.4th 59, 81-85 [192 Cal.Rptr.3d 309, 355 P.3d 480].

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## RELATED ISSUES

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

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

## SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 523.

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

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

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

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

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

*<Alternative 1A—force with weapon>*

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

**[OR]**

*<Alternative 1B—force without weapon>*

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

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

**2. The defendant did that act willfully;**

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

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

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

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**[AND]**

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

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

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

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

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

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

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

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

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

**[Voluntary intoxication is not a defense to assault.]**

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

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

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

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

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

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

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

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

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

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

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

**AND**

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

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

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

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

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

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

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*New January 2006; Revised April 2011, February 2012, February 2013, September 2019, April 2020, September 2020, March 2022*

## BENCH NOTES

***Instructional Duty***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

## AUTHORITY

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

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- Inherently Deadly Defined ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Examples of Noninherently Deadly Weapon ▸ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

## LESSER INCLUDED OFFENSES

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

## RELATED ISSUES

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

***Dual Convictions Prohibited***

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

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

## SECONDARY SOURCES

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

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

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## 862. Assault on Custodial Officer With Deadly Weapon or Force Likely to Produce Great Bodily Injury (Pen. Code, §§ 240, 245, 245.3)

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**The defendant is charged [in Count __] with assault with (force likely to produce great bodily injury/a deadly weapon) on a custodial officer [in violation of Penal Code section 245.3].**

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

*<Alternative 1A—force with weapon>*

**[1. The defendant willfully did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;]**

*<Alternative 1B—force without weapon>*

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

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

**2. The defendant did that act willfully;**

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

**4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;**

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

**[AND]**

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

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

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

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

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

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

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

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

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

**[Voluntary intoxication is not a defense to assault.]**

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

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

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

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

**[The term[s] (*great bodily injury/ [and] deadly weapon)* (is/are) defined in another instruction to which you should refer.]**

**A *custodial officer* is someone who works for a law enforcement agency of a city or county, is responsible for maintaining custody of prisoners, and helps operate a local detention facility. [A (county jail/city jail/_____ <*insert other detention facility*>) is a local detention facility.] [A custodial officer is not a peace officer.]**

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*New January 2006; Revised April 2011, February 2013, September 2019, September 2020, March 2022*

## BENCH NOTES

***Instructional Duty***

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

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

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) If lawful performance is an issue, give the appropriate portions of CALCRIM No. 2671, *Lawful Performance: Custodial Officer*.

Give element 1A if it is alleged the assault was committed with a deadly weapon. Give element 1B if it is alleged that the assault was committed with force likely to produce great bodily injury. (See Pen. Code, § 245.3.)

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

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

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

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

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

In the bracketed definition of "local detention facility," do not insert the name of a specific detention facility. Instead, insert a description of the type of detention facility at issue in the case. (See *People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869] [jury must determine if alleged victim is a peace officer]; see Penal Code section 6031.4 [defining local detention facility].)

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

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

## AUTHORITY

- Elements ▸ Pen. Code, §§ 240, 245, 245.3.
- Custodial Officer Defined ▸ Pen. Code, § 831.
- Local Detention Facility Defined ▸ Pen. Code, § 6031.4.

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- Willful Defined ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▸ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault ▸ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Inherently Deadly Defined ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Examples of Noninherently Deadly Weapon ▸ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 72-74.

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

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## 863. Assault on Transportation Personnel or Passenger With Deadly Weapon or Force Likely to Produce Great Bodily Injury (Pen. Code, §§ 240, 245, 245.2)

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**The defendant is charged [in Count __] with assault with (force likely to produce great bodily injury/a deadly weapon) on (a/an) (operator/driver/station agent/ticket agent/passenger) of (a/an) _____** *<insert name of vehicle or transportation entity specified in Pen. Code, § 245.2>* **[in violation of Penal Code section 245.2].**

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

*<Alternative 1A—force with weapon>*

**[1. The defendant willfully did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;]**

*<Alternative 1B—force without weapon>*

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

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

**2. The defendant did that act willfully;**

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

**4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;**

*<Alternative 5A—transportation personnel>*

**[5. When the defendant acted, the person assaulted was performing (his/her) duties as (a/an) (operator/driver/station agent/ticket agent) of (a/an) _____** *<insert name of vehicle or transportation entity specified in Pen. Code, § 245.2>***;]**

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*<Alternative 5B—passenger>*

**[5. The person assaulted was a passenger of (a/an) _____** *<insert name of vehicle or transportation entity specified in Pen. Code, § 245.2>***;]**

**[AND]**

**6. When the defendant acted, (he/she) knew, or reasonably should have known, [both] that the person assaulted was (a/an) (operator/driver/station agent/ticket agent/passenger) of (a/an) _____** *<insert name of vehicle or transportation entity specified in Pen. Code, § 245.2>* **[and that (he/she) was performing (his/her) duties](;/.)**

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

**[AND**

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

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

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

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

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

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

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

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**[Voluntary intoxication is not a defense to assault.]**

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

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

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

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

**[The term[s] (*great bodily injury*/ [and] *deadly weapon*) (is/are) defined in another instruction to which you should refer.]**

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*New January 2006; Revised February 2013, September 2019, September 2020, March 2022*

## BENCH NOTES

***Instructional Duty***

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

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

Give element 1A if it is alleged the assault was committed with a deadly weapon. Give element 1B if it is alleged that the assault was committed with force likely to produce great bodily injury. (See Pen. Code, § 245.2.)

If the victim was an operator, driver, station agent, or ticket agent of an identified vehicle or transportation entity, give element 5A and the bracketed language in element 6. If the victim was a passenger, give element 5B and omit the bracketed language in element 6.

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

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

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

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

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

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

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

## AUTHORITY

- Elements ▸ Pen. Code, §§ 240, 245, 245.2.
- Willful Defined ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▸ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault ▸ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].

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- Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Inherently Deadly Defined ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Examples of Noninherently Deadly Weapon ▸ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

## LESSER INCLUDED OFFENSES

- Assault ▸ Pen. Code, § 240.

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 79.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11[3]; Ch. 144, *Crimes Against Order*, § 144.01[1][j] (Matthew Bender).

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## 875. Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury (Pen. Code, §§ 240, 245(a)(1)–(4), (b))

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

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

*<Alternative 1A—force with weapon>*

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

*<Alternative 1B—force without weapon>*

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

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

**2. The defendant did that act willfully;**

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

**[AND]**

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

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

**[AND**

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**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.**

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

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

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

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

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

**[Voluntary intoxication is not a defense to assault.]**

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

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

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

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

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

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

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

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

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

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

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

   **AND**

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

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

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*New January 2006; Revised June 2007, August 2009, October 2010, February 2012, February 2013, August 2013, September 2019, September 2020, March 2022*

## BENCH NOTES

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

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

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

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

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

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

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

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

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

If the charging document names more than one victim, modification of this instruction may be necessary to clarify that each victim must have been subject to the application of force. (*People v. Velasquez* (2012) 211 Cal.App.4th 1170, 1176–1177 [150 Cal.Rptr.3d 612].)The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily

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injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

## AUTHORITY

- Elements ▸ Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- To Have Present Ability to Inflict Injury, Gun Must Be Loaded Unless Used as Club or Bludgeon ▸ *People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3 [82 Cal.Rptr.2d 413, 971 P.2d 618].
- This Instruction Affirmed ▸ *People v. Golde* (2008) 163 Cal.App.4th 101, 122-123 [77 Cal.Rptr.3d 120].
- Assault Weapon Defined ▸ Pen. Code, §§ 30510, 30515.
- Semiautomatic Pistol Defined ▸ Pen. Code, § 17140.
- Firearm Defined ▸ Pen. Code, § 16520.
- Machine Gun Defined ▸ Pen. Code, § 16880.
- .50 BMG Rifle Defined ▸ Pen. Code, § 30530.
- Willful Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▸ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault ▸ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Inherently Deadly Defined ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Examples of Noninherently Deadly Weapon ▸ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez*

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(2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

## LESSER INCLUDED OFFENSES

- Assault ▸ Pen. Code, § 240.

Assault with a firearm is a lesser included offense of assault with a semiautomatic firearm. (*People v. Martinez* (2012) 208 Cal.App.4th 197, 199 [145 Cal.Rptr.3d 141].)

A misdemeanor brandishing of a weapon or firearm under Penal Code section 417 is not a lesser and necessarily included offense of assault with a deadly weapon. (*People v. Escarcega* (1974) 43 Cal.App.3d 391, 398 [117 Cal.Rptr. 595]; *People v. Steele* (2000) 83 Cal.App.4th 212, 218, 221 [99 Cal.Rptr.2d 458].)

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 41.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11[3] (Matthew Bender).

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## 890. Assault With Intent to Commit Specified Crimes [While Committing First Degree Burglary] (Pen. Code, § 220(a), (b))

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**The defendant is charged [in Count __] with assault with intent to commit _____** *<insert crime specified in Penal Code section 220(a)>* **[while committing first degree burglary] [in violation of Penal Code section 220((a)/ [and] (b))].**

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

1. **The defendant did an act that by its nature would directly and probably result in the application of force to a person;**

2. **The defendant did that act willfully;**

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

4. **When the defendant acted, (he/she) had the present ability to apply force to a person;**

**[AND]**

5. **When the defendant acted, (he/she) intended to commit _____***<insert crime specified in Pen. Code, ' 220(a)>***;**

**[AND**

**6. When the defendant acted, (he/she) was committing a first degree burglary.]**

*<If the court concludes that the first degree burglary requirement in Pen. Code, § 220(b) is a penalty allegation and not an element of the offense, give the bracketed language below in place of element 6.>*

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**[If you find the defendant guilty of the charged crime, you must then decide whether the People have proved the additional allegation that the crime was committed in the commission of a first degree burglary.]**

**[First degree burglary is defined in another instruction to which you should refer.]**

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

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

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

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

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

**To decide whether the defendant intended to commit _____** *<insert crime specified in Pen. Code, § 220(a)>* **please refer to Instruction[s] _____which define[s] (that/those) crime[s].**

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*New January 2006; Revised April 2010, October 2010, August 2012, March 2022*

## BENCH NOTES

***Instructional Duty***

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

The court has a **sua sponte** duty to give a *Mayberry* consent instruction if the defense is supported by substantial evidence and is consistent with the defense

raised at trial. (*People v. May* (1989) 213 Cal.App.3d 118, 124–125 [261 Cal.Rptr. 502]; see *People v. Mayberry* (1975) 15 Cal.3d 143 [125 Cal.Rptr. 745, 542 P.2d 1337]; see also CALCRIM No. 1000, *Rape ~~or Spousal Rape~~ by Force, Fear, or Threats* [alternative paragraph on reasonable and actual belief in consent].)

The court has a **sua sponte** duty to instruct on the sex offense or offense alleged. (*People v. May* (1989) 213 Cal.App.3d 118, 129 [261 Cal.Rptr. 502].) In the blanks, specify the sex offense or offenses that the defendant is charged with intending to commit. Included sex offenses are: rape (Pen. Code, § 261); oral copulation (Pen. Code, § 287 [including in-concert offense]); sodomy (Pen. Code, § 286 [including in-concert offense]); sexual penetration (Pen. Code, § 289); rape~~, spousal rape,~~ or sexual penetration in concert (Pen. Code, § 264.1); and lewd or lascivious acts (Pen. Code, § 288). (See Pen. Code, § 220.) Give the appropriate instructions on the offense or offenses alleged.

The court should also give CALCRIM Nos. 1700 and 1701 on burglary, if defendant is charged with committing the offense during a first degree burglary, as well as the appropriate CALCRIM instruction on the target crime charged pursuant to Penal Code section 220.

If the specified crime is mayhem, give CALCRIM No. 891, *Assault With Intent to Commit Mayhem*.

Element 6 is in brackets because there is no guidance from courts of review regarding whether the first degree burglary requirement in Penal Code section 220(b) is an element or an enhancement.

***Related Instructions***
CALCRIM No. 915, *Simple Assault*.

## AUTHORITY

- Elements ▸ Pen. Code, § 220.
- Elements for Assault ▸ Pen. Code, § 240; *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Court Must Instruct on Elements of Intended Crime ▸ *People v. May* (1989) 213 Cal.App.3d 118, 129 [261 Cal.Rptr. 502] [in context of assault to commit rape].

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## LESSER INCLUDED OFFENSES

- Simple Assault ▸ Pen. Code, § 240; see *People v. Greene* (1973) 34 Cal.App.3d 622, 653 [110 Cal.Rptr. 160] [in context of charged assault with intent to commit rape].

Both assault with intent to commit rape and first degree burglary are lesser included offenses of assault with intent to commit rape during first degree burglary (Pen. Code, § 220(b); (*People v. Dyser* (2012) 202 Cal.App.4th 1015, 1021 [135 Cal.Rptr.3d 891].)

There is no crime of attempted assault to commit an offense. (See *People v. Duens* (1976) 64 Cal.App.3d 310, 314 [134 Cal.Rptr. 341] [in context of assault to commit rape].)

## RELATED ISSUES

***Abandonment***

An assault with intent to commit another crime is complete at any point during the incident when the defendant entertains the intent to commit the crime. "It makes no difference whatsoever that he later abandons that intent." (See *People v. Trotter* (1984) 160 Cal.App.3d 1217, 1223 [207 Cal.Rptr. 165]; *People v. Meichtry* (1951) 37 Cal.2d 385, 388–389 [231 P.2d 847] [both in context of assault to commit rape].)

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 28–34.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.60 (Matthew Bender).

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

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## 982. Brandishing Firearm or Deadly Weapon to Resist Arrest (Pen. Code, § 417.8)

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**The defendant is charged [in Count __] with brandishing a (firearm/deadly weapon) to resist arrest or detention [in violation of Penal Code section 417.8].**

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

1. **The defendant drew or exhibited a (firearm/deadly weapon);**

   **AND**

2. **When the defendant drew or exhibited the (firearm/deadly weapon), (he/she) intended to resist arrest or to prevent a peace officer from arresting or detaining (him/her/someone else).**

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

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

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

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

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

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

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

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**[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">***.]**

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*New January 2006; Revised February 2012, February 2013, September 2019, September 2020, March 2022*

## BENCH NOTES

***Instructional Duty***

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

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

Give the bracketed paragraph about the lack of any requirement that the firearm be loaded on request.

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

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

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

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

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The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

***Related Instructions***
CALCRIM No. 983, *Brandishing Firearm or Deadly Weapon: Misdemeanor*.
CALCRIM No. 981, *Brandishing Firearm in Presence of Peace Officer*.
CALCRIM No. 2653, *Taking Firearm or Weapon While Resisting Peace Officer or Public Officer*.

## AUTHORITY

- Elements ▸ Pen. Code, § 417.8.
- Firearm Defined ▸ Pen. Code, § 16520; see *In re Jose A.* (1992) 5 Cal.App.4th 697, 702 [7 Cal.Rptr.2d 44] [pellet gun not a "firearm" within meaning of Pen. Code, § 417(a)].
- Peace Officer Defined ▸ Pen. Code, § 830 et seq.
- Deadly Weapon Defined ▸ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204] [hands and feet not deadly weapons]; see, e.g., *People v. Simons* (1996) 42 Cal.App.4th 1100, 1107 [50 Cal.Rptr.2d 351] [screwdriver was capable of being used as a deadly weapon and defendant intended to use it as one if need be]; *People v. Henderson* (1999) 76 Cal.App.4th 453, 469–470 [90 Cal.Rptr.2d 450] [pit bulls were deadly weapons under the circumstances].
- Lawful Performance of Duties Not an Element ▸ *People v. Simons* (1996) 42 Cal.App.4th 1100, 1109–1110 [50 Cal.Rptr.2d 351].
- Inherently Deadly Defined ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Examples of Noninherently Deadly Weapon ▸ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

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## LESSER INCLUDED OFFENSES

Resisting arrest by a peace officer engaged in the performance of his or her duties in violation of Penal Code section 148(a) is not a lesser included offense of Penal Code section 417.8. (*People v. Simons* (1996) 42 Cal.App.4th 1100, 1108–1110 [50 Cal.Rptr.2d 351].) Brandishing a deadly weapon in a rude, angry, or threatening manner in violation of Penal Code section 417(a)(1) is also not a lesser included offense of section 417.8. (*People v. Pruett* (1997) 57 Cal.App.4th 77, 88 [66 Cal.Rptr.2d 750].)

## RELATED ISSUES

See the Related Issues section to CALCRIM No. 981, *Brandishing Firearm in Presence of Peace Officer*.

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 8-10.

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

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## 983. Brandishing Firearm or Deadly Weapon: Misdemeanor (Pen. Code, § 417(a)(1) & (2))

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**The defendant is charged [in Count __] with brandishing a (firearm/deadly weapon) [in violation of Penal Code section 417(a)].**

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

1. **The defendant drew or exhibited a (firearm/deadly weapon) in the presence of someone else;**

**[AND]**

*<Alternative 2A—displayed in rude, angry, or threatening manner>*
**[2. The defendant did so in a rude, angry, or threatening manner(;/.)]**

*<Alternative 2B—used in fight>*
**[2. The defendant [unlawfully] used the (firearm/deadly weapon) in a fight or quarrel(;/.)]**

*<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).]**

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

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

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

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

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

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

**[It is not required that the firearm be loaded.]**

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*New January 2006; Revised October 2010, February 2012, February 2013, September 2019, September 2020, March 2022*

## BENCH NOTES

***Instructional Duty***

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

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

If the prosecution alleges that the defendant displayed the weapon in a rude, angry, or threatening manner, give alternative 2A. If the prosecution alleges that the defendant used the weapon in a fight, give alternative 2B.

If the defendant is charged under Penal Code section 417(a)(2)(A), the court **must** also give CALCRIM No. 984, *Brandishing Firearm: Misdemeanor—Public Place*.

Give the bracketed definition of "firearm" or "deadly weapon" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

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

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

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If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.
On request, give the bracketed sentence stating that the firearm need not be loaded.

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

## AUTHORITY

- Elements ▸ Pen. Code, § 417(a)(1) & (2).
- Firearm Defined ▸ Pen. Code, § 16520.
- Deadly Weapon Defined ▸ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Victim's Awareness of Firearm Not a Required Element ▸ *People v. McKinzie* (1986) 179 Cal.App.3d 789, 794 [224 Cal.Rptr. 891].
- Weapon Need Not Be Pointed Directly at Victim ▸ *People v. Sanders* (1995) 11 Cal.4th 475, 542 [46 Cal.Rptr.2d 751, 905 P.2d 420].
- Inherently Deadly Defined ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Examples of Noninherently Deadly Weapon ▸ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 4-7.

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

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

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

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

**1. The defendant had sexual intercourse with a woman;**

~~**2. He and the woman were (not married/married) to each other at the time of the intercourse;**~~

**2~~3~~. The woman did not consent to the intercourse;**

**AND**

**3~~4~~. The defendant accomplished the intercourse by**

*<Alternative 4A—force or fear>*
**[force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the woman or to someone else.]**

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

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

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

**[To *consent,* a woman must act freely and voluntarily and know the nature of the act.]**

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

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

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

**AND**

3. **The defendant forcibly continued the act of intercourse despite her objection.]**

**[It is not required that she physically resist or fight back in order to communicate her lack of consent.]**

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

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

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

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

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

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

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

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**[A woman must be alive at the time of the sexual intercourse for the crime of rape to occur.]**

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

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

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give an instruction defining the elements of rape ~~or spousal rape. If spousal rape is charged, the court must include the appropriate bracketed language throughout the instruction to indicate that the parties were married~~.

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

The court should select the appropriate alternative in element 4 describing how the sexual intercourse was allegedly accomplished.

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

The defendant must continue to actually and reasonably believe in the victim's consent throughout the act. If the act of intercourse begins consensually and the victim then changes her mind, the victim must clearly and unequivocally communicate to the defendant her withdrawal of consent to the act. If, however, the defendant initiates the use of nonconsensual duress, menace, or force during the act, the victim's subsequent withdrawal of consent to the act may be inferred

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from the circumstances and need not be expressed. (*People v. Ireland* (2010) 188 Cal.App.4th 328, 338 [114 Cal.Rptr.3d 915]). If there is an issue regarding the defendant's continued belief in the victim's consent, give the second optional first sentence in the definition of "*Defense: Reasonable Belief in Consent*."

***Defenses—Instructional Duty***

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

***Related Instructions***

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

## AUTHORITY

***~~Rape:~~***

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

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

~~***Spousal Rape:***~~

- ~~Elements ▸ Pen. Code, § 262(a)(1), (4) & (5).~~
- ~~Duress Defined ▸ Pen. Code, § 262(b).~~
- ~~Menace Defined ▸ Pen. Code, § 262(c).~~
- ~~Mistake of Fact Regarding Consent ▸ *People v. Burnham* (1986) 176 Cal.App.3d 1134, 1148–1149 [222 Cal.Rptr. 630, 542 P.2d 1337]; see *People* v. *Mayberry, supra,* 15 Cal.3d at pp. 153–158; *People* v. *May* (1989) 213 Cal.App.3d 118, 124 [261 Cal.Rptr. 502].~~

## COMMENTARY

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

~~Penal Code section 262 requires that the intercourse be "against the person's [or victim's] will." (Pen. Code, § 262(a)(1), (4) & (5).) "Against the will" has been defined as without consent. (*People v. Key* (1984) 153 Cal.App.3d 888, 895 [203 Cal.Rptr. 144]; see also *People v. Young* (1987) 190 Cal.App.3d 248, 257 [235 Cal.Rptr. 361].)~~

"[T]he offense of forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection. . . . '[I]t is immaterial at what point the victim withdraws her consent, so long as that withdrawal is communicated to the male and he thereafter ignores it.' " (*In re John Z., supra,* 29 Cal.4th at p. 760.)

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

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

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

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

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

## LESSER INCLUDED OFFENSES

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

## RELATED ISSUES

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***Consent Obtained by Fraudulent Representation***

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

***Minor Victim and Unanimity***

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

When there is no reasonable likelihood the jury will disagree on particular acts of molestation, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim. (*People v. Matute, supra,* 103 Cal.App.4th at p. 1448; *People v. Jones, supra,* 51 Cal.3d at pp. 321–322; see CALCRIM No. 3501, *Unanimity: When Generic Testimony of Offense Presented*.)

***Mistake-of-Fact Defense and Developmental Disability***

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

***Multiple Rapes***

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

***Resistance Is Not Required***

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

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 1–15, 20, 178.

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

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:18~~6~~, 12:19~~7~~ (The Rutter Group).

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## 1001. Rape ~~or Spousal Rape~~ in Concert (Pen. Code, § 264.1)

**The defendant[s] [_____ <*insert name[s] if not all defendants in trial charged with this count*>] (is/are) charged [in Count __] with committing rape by acting in concert [with _____ <*insert name[s] or description[s] of uncharged participant[s]*>] [in violation of Penal Code section 264.1].**

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

<*Alternative A—defendant committed rape*>
**[1.] [The defendant personally committed forcible rape and voluntarily acted with someone else who aided and abetted its commission(;/.)]**

**[OR]**

<*Alternative B—defendant aided and abetted*>
**[(1/2).] [The defendant voluntarily aided and abetted someone else who personally committed forcible rape.]**

**To decide whether the defendant[s] [or _____ <*insert name[s] or description[s] of uncharged participant[s]*>] committed rape, please refer to the separate instructions that I (will give/have given) you on that crime. To decide whether the defendant[s] [or _____ <*insert name[s] or description[s] of uncharged participant[s]*>] aided and abetted rape, please refer to the separate instructions that I (will give/have given) you on aiding and abetting. You must apply those instructions when you decide whether the People have proved rape in concert.**
<*Make certain that all appropriate instructions on rape and aiding and abetting are given.*>

**[To prove the crime of rape in concert, the People do not have to prove a prearranged plan or scheme to commit rape.]**

*New January 2006; Revised October 2021, March 2022*

## BENCH NOTES

***Instructional Duty***
The court has a **sua sponte** duty to give an instruction defining the elements of the crime. (See Pen. Code, § 264.1; *People v. Ramirez* (1987) 189 Cal.App.3d 603,

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621 [236 Cal.Rptr. 404] [rape in concert is a separate crime, not an enhancement].) The court also has a **sua sponte** duty to instruct on rape. Give one or more of the following instructions defining rape: CALCRIM No. 1000, or CALCRIM Nos. 1005–1114.

Select alternative A or B, or both, depending on whether the defendant personally committed the crime or aided and abetted someone else.

Depending on the evidence, give the final bracketed paragraph on request regarding the lack of a prearranged plan. (See *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658].)

***Related Instructions***
See generally CALCRIM No. 400, *Aiding and Abetting: General Principles* and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

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

## AUTHORITY

- Elements. ▸ Pen. Code, § 264.1; see *People v. Mom* (2000) 80 Cal.App.4th 1217, 1224 [96 Cal.Rptr.2d 172] [requires no greater force than that necessary for forcible rape], disapproved on other grounds in *People v. Griffin* (2004) 33 Cal.4th 1015, 1028 [16 Cal.Rptr.3d 891, 94 P.3d 1089].
- Forcible Rape Defined. ▸ Pen. Code, § 261(a)(2).
- ~~Spousal Rape Defined. ▸ Pen. Code, § 262(a)(1).~~
- Aiding and Abetting. ▸ *People v. Adams* (1993) 19 Cal.App.4th 412, 445–446 [23 Cal.Rptr.2d 512]; see *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].

## COMMENTARY

There is conflicting authority whether all types of forcible rape may be the basis for charging a rape in concert. (Compare *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [rape by duress, menace, and fear unavailable under Pen. Code, § 264.1] and *People v. Mom* (2000) 80 Cal.App.4th 1217, 1222–1223 [96 Cal.Rptr.2d 172] [§ 264.1 only includes rape involving "force" and "violence"], disapproved on other grounds in *People v. Griffin* (2004) 33 Cal.4th 1015, 1028 [16 Cal.Rptr.3d 891, 94 P.3d 1089], with *People v. Wheeler* (1977) 71 Cal.App.3d 902, 907 [139 Cal.Rptr. 737] [§ 264.1 includes any unlawful use of

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force, including threat of harm].) The instruction addresses rape accomplished by force or violence. (See Pen. Code, §§ 261(a)(2), 264.1.) If another basis for charging rape in concert is argued, for example, rape by duress, menace, fear, or threats (see Pen. Code, § 261(a)(2), (6), & (7)), see CALCRIM No. 1000, *Rape ~~or Spousal Rape~~ by Force, Fear, or Threats* for appropriate language that may be included on request.

Penal Code section 264.1 deals with a crime of substance, and is not an enhancement statute, as discussed in *People v. Best* (1983) 143 Cal.App.3d 232, 237 [191 Cal.Rptr. 614].

## LESSER INCLUDED OFFENSES

- Assault. ▸ Pen. Code, § 240.
- Assault With Intent to Commit Rape. ▸ Pen. Code, § 220; *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible rape is charged].
- Attempted Rape. ▸ Pen. Code, §§ 664, 261.
- Battery. ▸ Pen. Code, § 242.
- Rape. ▸ Pen. Code, §~~§~~ 261~~, 262~~.

## RELATED ISSUES

***Need Not Personally Participate***

A defendant may be convicted of rape in concert if he or she was at the general scene of the rape and aided and abetted another person in accomplishing the act, even if the defendant did not personally participate in the act or was not personally present at the exact scene of the act. (See *People v. Lopez* (1981) 116 Cal.App.3d 882, 887–888 [172 Cal.Rptr. 374]; *People v. Barnett* (1976) 54 Cal.App.3d 1046, 1049 [127 Cal.Rptr. 88] [oral copulation in concert although not in room when act took place]; *People v. Champion* (1995) 9 Cal.4th 879, 933 [39 Cal.Rptr.2d 547] [rape in concert by holding victim's family at gun point in another room].) However, the Supreme Court has not resolved whether a person acts in concert when his accomplice assists in the commission of the crime, but is not present at the general scene (for example, when the accomplice provides the rapist with information about the victim, or pays the rapist to commit the act). (*People v. Champion* (1995) 9 Cal.4th 879, 933, fn. 22 [891 P.2d 93].)

## SECONDARY SOURCES

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2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 21.

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

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:18~~6~~, 12:19~~7~~ (The Rutter Group).

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## 1002. Rape of Intoxicated Woman ~~or Spouse~~ (Pen. Code, §~~§~~ 261(a)(3), ~~262(a)(2)~~)

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**The defendant is charged [in Count __] with raping ~~(~~a woman~~/his wife)~~ while she was intoxicated [in violation of _____** *<insert appropriate code section[s]>*].

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

1. **The defendant had sexual intercourse with a woman;**

~~2. He and the woman were (not married/married) to each other at the time of the intercourse;~~

~~3.~~2. **The effect of (a/an) (intoxicating/anesthetic/controlled) substance prevented the woman from resisting;**

**AND**

~~4.~~3. **The defendant knew or reasonably should have known that the effect of (a/an) (intoxicating/anesthetic/controlled) substance prevented the woman from resisting.**

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

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

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

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

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*New January 2006; Revised August 2012, March 2018, March 2022*

## BENCH NOTES

***Instructional Duty***

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

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

A space is provided to identify controlled substances, if the parties agree.

***Defenses—Instructional Duty***

There is no sua sponte duty to instruct on the defense of reasonable belief that the person was capable of consent. (*People v. Lujano* (2017) 15 Cal.App.5th 187 [223 Cal.Rptr.3d 105].)

***Related Instructions***

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

## AUTHORITY

- Elements. ▸ Pen. Code, §~~§~~ 261(a)(3)~~, 262(a)(2)~~.
- Consent Defined. ▸ Pen. Code, § 261.6.
- Controlled Substances. ▸ Health & Safety Code, §§ 11054–11058; see *People v. Avila* (2000) 80 Cal.App.4th 791, 798, fn. 7 [95 Cal.Rptr.2d 651].
- Penetration Defined. ▸ Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].
- Anesthetic Effect. ▸ See *People v. Avila* (2000) 80 Cal.App.4th 791, 798–799 [95 Cal.Rptr.2d 651] [in context of sodomy].
- General Intent and Knowledge Requirements. ▸ *People v. Linwood* (2003) 105 Cal.App.4th 59, 67–72 [129 Cal.Rptr.2d 73] [statute is not impermissibly vague and uses appropriate criminal negligence standard].

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- "Prevented From Resisting" Defined. *People v. Lujano* (2017) 15 Cal.App.5th 187, 192-193 [223 Cal.Rptr.3d 105] [CALCRIM 1032 has correct definition]; *People v. Giardino* (2000) 82 Cal.App.4th 454, 465–466 [98 Cal.Rptr.2d 315].
- Reasonable Belief in Capacity to Consent. *People v. Lujano* (2017) 15 Cal.App.5th 187, 191-192 [223 Cal.Rptr.3d 105]; *People v. Giardino* (2000) 82 Cal.App.4th 454, 471-472 [98 Cal.Rptr.2d 315].
- This Instruction Upheld. *People v. Smith* (2010) 191 Cal.App.4th 199, 204–205 [120 Cal.Rptr.3d 52].

## COMMENTARY

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

## LESSER INCLUDED OFFENSES

- Attempted Rape. Pen. Code, §§ 663, 261(a)(3).
- ~~Attempted Rape of Intoxicated Spouse. Pen. Code, §§ 663, 262(a)(2).~~
- Assault. Pen. Code, § 240.
- Battery. Pen. Code, § 242; *People v. Guiterrez* (1991) 232 Cal.App.3d 1624, 1636 [284 Cal.Rptr. 230], disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 [103 Cal.Rptr.2d 23, 15 P.3d 243]; but see *People v. Marshall* (1997) 15 Cal.4th 1, 38-39 [61 Cal.Rptr.2d 84, 931 P.2d 262] [battery not a lesser included offense of attempted rape].

## RELATED ISSUES

***Administering Drugs to Assist Commission of Felony***

A person who administers to someone else any chloroform, ether, laudanum, or any controlled substance, anesthetic, or intoxicating agent, with the intent to enable or assist himself or herself or any other person to commit a felony is guilty of a felony. (Pen. Code, § 222.)

See the Related Issues section to CALCRIM No. 1000, *Rape ~~or Spousal Rape~~ by Force, Fear, or Threats.*

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## SECONDARY SOURCES

6 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 1–8, 18, 20, 178.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.20[1][a], [5], 142.23[1][e] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:18~~6~~, 12:19~~7~~ (The Rutter Group).

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## 1003. Rape of Unconscious Woman ~~or Spouse~~ (Pen. Code, §§ 261(a)(4)~~, 262(a)(3)~~)

**The defendant is charged [in Count __] with raping ~~(~~a woman~~/his wife)~~ who was unconscious of the nature of the act [in violation of_____** *<insert appropriate code section[s]>*].

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

1. **The defendant had sexual intercourse with a woman;**

~~2. He and the woman were (not married/married) to each other at the time of the intercourse;~~

~~3.~~2. **The woman was unable to resist because she was unconscious of the nature of the act;**

**AND**

~~4.~~3. **The defendant knew that the woman was unable to resist because she was unconscious of the nature of the act.**

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

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

*New January 2006; Revised August 2012, August 2013, March 2022*

### BENCH NOTES

***Instructional Duty***

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

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~~If spousal rape is charged, include the appropriate language throughout the instruction to indicate that the parties were married.~~

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

Select the appropriate language defining "unconscious of the nature of the act" based on the facts of the case.

***Related Instructions***
CALCRIM No. 1001, *Rape ~~or Spousal Rape~~ in Concert*, may be given in conjunction with this instruction, if appropriate.

## AUTHORITY

- Elements. ▸ Pen. Code, §~~§~~ 261(a)(4)~~, 262(a)(3)~~.
- Penetration Defined. ▸ Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].
- Unconscious of Nature of Act. ▸ *People v. Howard* (1981) 117 Cal.App.3d 53, 55 [172 Cal.Rptr. 539] [total unconsciousness is not required]; see *Boro v. Superior Court* (1985) 163 Cal.App.3d 1224, 1229–1231 [210 Cal.Rptr. 122] [rape victim not unconscious of nature of act; fraud in the inducement].
- Assault. ▸ Pen. Code, § 240.
- Battery. ▸ Pen. Code, § 242; *People v. Guiterrez* (1991) 232 Cal.App.3d 1624, 1636 [284 Cal.Rptr. 230], disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 [103 Cal.Rptr.2d 23, 15 P.3d 243]; but see *People v. Marshall* (1997) 15 Cal.4th 1, 38-39 [61 Cal.Rptr.2d 84, 931 P.2d 262] [battery not a lesser included offense of attempted rape].
- ~~Perpetrator Must Impersonate Spouse of Married Woman Under Current Statute. ▸ *People v. Morales* (2013) 212 Cal.App.4th 583, 594-595 [150 Cal.Rptr.3d 920].~~

## COMMENTARY

The statutory language describing unconsciousness includes "was not aware, knowing, perceiving, or cognizant that the act occurred." (See Pen. Code, §~~§~~

261(a)(4)(B)–(D)~~, 262(a)(3)(B), (C)~~.) The committee did not discern any difference among the statutory terms and therefore used "aware" in the instruction. If there is an issue over a particular term, that term should be inserted in the instruction.

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

## LESSER INCLUDED OFFENSES

- Attempted Rape of Unconscious Woman. ▸ Pen. Code, §§ 663, 261(a)(4).
- ~~Attempted Rape of Unconscious Spouse. ▸ Pen. Code, §§ 663, 262(a)(3).~~

## RELATED ISSUES

***Advance Consent***

Neither a woman's actual "advance consent" nor a man's belief in "advance consent" eliminates the wrongfulness of a man's conduct in knowingly depriving an unconscious woman of her freedom of choice both at the initiation of and during sexual intercourse. A person who commits the prohibited act necessarily acts with a wrongful intent. (*People v. Dancy* (2002) 102 Cal.App.4th 21, 37 [124 Cal.Rptr.2d 898].)

See the Related Issues section in CALCRIM No. 1000, *Rape~~ or Spousal Rape~~ by Force, Fear, or Threats*.

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 1–8, 178.

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

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:18~~6~~, 12:19~~7~~ (The Rutter Group).

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## 1004. Rape of a Disabled Woman (Pen. Code, § 261(a)(1))

**The defendant is charged [in Count __] with raping a mentally or physically disabled woman [in violation of Penal Code section 261(a)(1)].**

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

1. **The defendant had sexual intercourse with a woman;**

2. **He and the woman were not married to each other at the time of the intercourse;**

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

**AND**

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

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

**A woman is *prevented from legally consenting* if she is unable to understand the act, its nature, and possible consequences.**

*New January 2006; Revised August 2012, March 2022*

## BENCH NOTES

***Instructional Duty***

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

***Related Instructions***

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

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## AUTHORITY

- Elements. ▸ Pen. Code, § 261(a)(1).
- Consent Defined. ▸ Pen. Code, § 261.6; *People v. Boggs* (1930) 107 Cal.App. 492, 495–496 [290 P. 618].
- Penetration Defined. ▸ Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].
- Assault. ▸ Pen. Code, § 240.
- Battery. ▸ Pen. Code, § 242; *People v. Guiterrez* (1991) 232 Cal.App.3d 1624, 1636 [284 Cal.Rptr. 230], disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 [103 Cal.Rptr.2d 23, 15 P.3d 243]; but see *People v. Marshall* (1997) 15 Cal.4th 1, 38-39 [61 Cal.Rptr.2d 84, 931 P.2d 262] [battery not a lesser included offense of attempted rape].
- This Instruction Completely Explains Inability to Give Legal Consent. ▸ *People v. Miranda* (2011) 199 Cal.App.4th 1403, 1419, fn. 13 [132 Cal.Rptr.3d 315] [in dicta].

## COMMENTARY

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

## LESSER INCLUDED OFFENSES

- Attempted Rape. ▸ Pen. Code, §§ 663, 261.

## RELATED ISSUES

***No Duty to Define "Developmental Disability"***

There is no sua sponte duty to define "developmental disability" under Welfare and Institutions Code section 4512(a) or Penal Code section 1370.1(a)(1). The Legislature did not intend to limit this phrase to such technical medical or legal definitions, although a pinpoint instruction may be requested if it helps the jury in

any particular case. (*People v. Mobley* (1999) 72 Cal.App.4th 761, 781–783 [85 Cal.Rptr.2d 474] [in context of oral copulation].)

See the Related Issues section under CALCRIM No. 1000, *Rape ~~or Spousal Rape~~ by Force, Fear, or Threats*.

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 1–8, 19, 178.

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

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:18~~6~~, 12:19~~7~~ (The Rutter Group).

## 1005. Rape by Fraud (Pen. Code, § 261(a)(5))

**The defendant is charged [in Count __] with rape by fraud [in violation of Penal Code section 261(a)(5)].**

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

1. **The defendant had sexual intercourse with a woman;**

~~2. The defendant and the woman were not married to each other at the time of the intercourse;~~

~~3.~~2. **The woman submitted to the intercourse because she believed the defendant was someone she knew, other than the defendant;**

**AND**

~~4.~~3. **The defendant tricked her, lied to her, [used an artifice or pretense,] or concealed information from her, intending to make her believe he was someone she knew, while intending to hide his own identity.**

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

*New January 2006*; *Revised February 2015*, *March 2022*

## BENCH NOTES

***Instructional Duty***

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

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

~~Penal Code section 261(a)(5) was amended effective September 9, 2013, in response to *People v. Morales* (2013) 212 Cal.App.4th 583 [150 Cal.Rptr.3d 920].~~

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## AUTHORITY

- Elements. ▸ Pen. Code, § 261(a)(5).
- Penetration Defined. ▸ Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].

## COMMENTARY

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

## LESSER INCLUDED OFFENSES

- Attempted Rape. ▸ Pen. Code, §§ 663, 261.

## RELATED ISSUES

See the Related Issues section to CALCRIM No. 1000, *Rape ~~or Spousal Rape~~ by Force, Fear, or Threats*.

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 16–17.

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

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:18~~6~~, 12:19~~7~~ (The Rutter Group).

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

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

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

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

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

**AND**

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

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

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

*<Alternative 3C—threat of official action>*
**[threatening to use the authority of a public office to incarcerate, arrest, or deport someone. A *public official* is a person employed by a government agency who has the authority to incarcerate, arrest, or deport. The other person must have reasonably believed that the defendant was a public official even if (he/she) was not.]**

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

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

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

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

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

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

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

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

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

**[The defendant is not guilty of forcible oral copulation if he or she actually and reasonably believed that the other person consented to the act. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the person consented. If the People have not met this burden, you must find the defendant not guilty.]**

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*New January 2006; Revised August 2006, October 2021, March 2022*

## BENCH NOTES

***Instructional Duty***

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

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

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

## AUTHORITY

- Elements. ▸ Pen. Code, § 287(c)(2) & (3), (k).
- Consent Defined. ▸ Pen. Code, §§ 261.6, 261.7.
- Duress Defined. ▸ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221].
- Menace Defined. ▸ Pen. Code, § 261(c) [in context of rape].
- Oral Copulation Defined. ▸ Pen. Code, § 287(a); *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].
- Threatening to Retaliate Defined. ▸ Pen. Code, § 287(l).
- Fear Defined. ▸ *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. ▸ *People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089]; *People v. Guido* (2005) 125 Cal.App.4th 566, 574–576 [22 Cal.Rptr.3d 826].
- Threatening to Retaliate. ▸ *People v. White* (2005) 133 Cal.App.4th 473, 484–485 [34 Cal.Rptr.3d 848]; *People v. Ward* (1986) 188 Cal.App.3d 459, 468 [233 Cal.Rptr. 477].

## COMMENTARY

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

The instruction includes a definition of the sufficiency of "fear" because that term has meaning in the context of forcible oral copulation that is technical and may not

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

The court is not required to instruct sua sponte on the definition of "duress" or "menace" and Penal Code section 287~~8a~~ does not define either term. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress].)~~.~~ Optional definitions are provided for the court to use at its discretion. The definition of "duress" is based on *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071], and *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]. The definition of "menace" is based on the statutory definition~~s~~ contained in Penal Code section~~s~~ 261 ~~and 262~~ [rape]. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416] [using rape definition in case involving forcible lewd acts].) In *People v. Leal, supra,* 33 Cal.4th at pp. 1004–1010, the court held that the statutory definition of "duress" contained in Penal Code sections 261 and former 262 does not apply to the use of that term in any other statute. The court did not discuss the statutory definition of "menace." The court should consider the *Leal* opinion before giving the definition of "menace."

The term "force" as used in the forcible sex offense statutes does not have a specialized meaning and court is not required to define the term sua sponte. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024; *People v. Guido* (2005) 125 Cal.App.4th 566, 574–576 [22 Cal.Rptr.3d 826]). In *People v. Griffin, supra,* the Supreme Court further stated,

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

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

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

## LESSER INCLUDED OFFENSES

- Assault. ▸ Pen. Code, § 240.
- Assault With Intent to Commit Oral Copulation. ▸ Pen. Code, § 220; see *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible crime is charged].
- Attempted Oral Copulation. ▸ Pen. Code, §§ 663, 287.
- Battery. ▸ Pen. Code, § 242.

## RELATED ISSUES

***Consent Obtained by Fraudulent Representation***

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

***Consent Withdrawn***

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

***Multiple Acts of Oral Copulation***

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

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

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 35–38, 178.

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

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:1~~8~~86, 12:1~~9~~97 (The Rutter Group).

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## 1016. Oral Copulation in Concert (Pen. Code, § 287(d))

**The defendant[s] [_____ <*insert name[s] if not all defendants in trial charged with this count*>] (is/are) charged [in Count __] with committing oral copulation by acting in concert [with _____ <*insert name[s] or description[s] of uncharged participant[s]*>] [in violation of Penal Code section 287(d)].**

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

<*Alternative A—defendant committed oral copulation*>
**[1.] [The defendant personally committed oral copulation and voluntarily acted with someone else who aided and abetted its commission(;/.)]**

**[OR]**

<*Alternative B—defendant aided and abetted*>
**[(1/2).] [The defendant voluntarily aided and abetted someone else who personally committed oral copulation.]**

**To decide whether the defendant[s] [or _____ <*insert name[s] or description[s] of uncharged participant[s]*>] committed oral copulation, please refer to the separate instructions that I (will give/have given) you on that crime. To decide whether the defendant[s] [or _____ <*insert name[s] or description[s] of uncharged participant[s]*>] aided and abetted oral copulation, please refer to the separate instructions that I (will give/have given) you on aiding and abetting. You must apply those instructions when you decide whether the People have proved oral copulation in concert.**
<*MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ORAL COPULATION AND AIDING AND ABETTING ARE GIVEN.*>

**[To prove the crime of oral copulation in concert, the People do not have to prove a prearranged plan or scheme to commit oral copulation.]**

*New January 2006; Revised October 2021, March 2022*

## BENCH NOTES

***Instructional Duty***

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The court has a **sua sponte** duty to give an instruction defining the elements of the crime. (See Pen. Code, § 287(d).) The court also has a **sua sponte** duty to instruct on oral copulation. Give one or more of the following instructions defining oral copulation: CALCRIM No. 1015 or CALCRIM Nos. 1017–1022.

Select alternative A or B, or both, depending on whether the defendant personally committed the crime or aided and abetted someone else.

Depending on the evidence, give the final bracketed paragraph on request regarding the lack of a prearranged plan. (See *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658].)

***Related Instructions***
See generally CALCRIM No. 400, *Aiding and Abetting: General Principles*, and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

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

## AUTHORITY

- Elements. ▸ Pen. Code, § 287(d).
- Aiding and Abetting. ▸ *People v. Adams* (1993) 19 Cal.App.4th 412, 429, 444–446 [23 Cal.Rptr.2d 512]; *People v. Caldwell* (1984) 153 Cal.App.3d 947, 951–952 [200 Cal.Rptr. 508]; *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658] [in context of sodomy in concert].
- Consent Defined. ▸ *People v. Boggs* (1930) 107 Cal.App. 492, 495–496 [290 P. 618].

## LESSER INCLUDED OFFENSES

- Assault. ▸ Pen. Code, § 240.
- Assault With Intent to Commit Oral Copulation. ▸ Pen. Code, § 220; see *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [when forcible crime is charged].
- Attempted Oral Copulation. ▸ Pen. Code, §§ 664, 287.
- Attempted Oral Copulation in Concert. ▸ Pen. Code, §§ 663, 287(d).
- Battery. ▸ Pen. Code, § 242.

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- Oral Copulation. ▸ Pen. Code, § 287.

## RELATED ISSUES

See the Related Issues sections under CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*, and CALCRIM No. 1001, *Rape ~~or Spousal Rape~~ in Concert*.

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 35, 40, 178.

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

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:18~~6~~, 12:19~~7~~ (The Rutter Group).

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

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

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

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

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

**AND**

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

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

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

*<Alternative 3C—threat of official action>*
**[by threatening to use the authority of a public office to incarcerate, arrest, or deport someone. A *public official* is a person employed by a government agency who has authority to incarcerate, arrest, or deport. The other person must have reasonably believed that the defendant was a public official even if (he/she) was not.]**

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

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

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

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

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

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

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

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

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

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

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

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*New January 2006; Revised August 2006, February 2012, October 2021, March 2022*

## BENCH NOTES

***Instructional Duty***
The court has a **sua sponte** duty to give an instruction defining the elements of sodomy. (Pen. Code, § 286(c)(2), (3), (k); *People v. Martinez* (1986) 188

Cal.App.3d 19, 24–26 [232 Cal.Rptr. 736]; *People v. Moore* (1989) 211 Cal.App.3d 1400, 1407 [260 Cal.Rptr. 134].)

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

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

***Defenses—Instructional Duty***

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

***Related Instructions***

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

## AUTHORITY

- Elements. ▸ Pen. Code, § 286(c)(2), (3), (k).
- Consent Defined. ▸ Pen. Code, §§ 261.6, 261.7.
- Duress Defined. ▸ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221].
- Menace Defined. ▸ Pen. Code, § 261(c) [in context of rape].
- Sodomy Defined. ▸ Pen. Code, § 286(a); see *People v. Singh* (1923) 62 Cal.App. 450, 452 [217 P. 121] [ejaculation is not required].
- Threatening to Retaliate Defined. ▸ Pen. Code, § 286(*l*).
- Fear Defined. ▸ *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. ▸ *People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089]; see also *People v. Guido* (2005) 125 Cal.App.4th 566, 574 [22 Cal.Rptr.3d 826].

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## COMMENTARY

Penal Code section 286 requires that the sodomy be "against the will" of the other person. (Pen. Code, § 286(c)(2), (3), (k).) "Against the will" has been defined as "without consent." (*People v. Key* (1984) 153 Cal.App.3d 888, 895 [203 Cal.Rptr. 144] [in context of rape]; see also *People v. Young* (1987) 190 Cal.App.3d 248, 257 [235 Cal.Rptr. 361].)

The instruction includes a definition of the sufficiency of "fear" because that term has meaning in the context of forcible sodomy that is technical and may not be readily apparent to jurors. (See *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651] [fear]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].)

The court is not required to instruct sua sponte on the definition of "duress" or "menace" and Penal Code section 286 does not define either term. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress].). Optional definitions are provided for the court to use at its discretion. The definition of "duress" is based on *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071], and *People v. Pitmon*, *supra*, 170 Cal.App.3d at 50. The definition of "menace" is based on the statutory definitions contained in Penal Code sections 261 and 262 [rape]. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416] [using rape definition in case involving forcible lewd acts].) In *People v. Leal, supra,* 33 Cal.4th at pp. 1004–1010, the court held that the statutory definition of "duress" contained in Penal Code sections 261 and former 262 does not apply to the use of that term in any other statute. The court did not discuss the statutory definition of "menace." The court should consider the *Leal* opinion before giving the definition of "menace."

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

> Nor is there anything in the common usage definitions of the term "force," or in the express statutory language of section 261 itself, that suggests force in a forcible rape prosecution actually means force "*substantially* different from or *substantially* greater than" the physical force normally inherent in an act of consensual sexual intercourse. (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582].) To the contrary, it has long been recognized that "in order to establish force within the meaning of section 261, [former]

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> subdivision (2), the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim]." (*People v. Young* (1987) 190 Cal.App.3d 248, 257–258 [235 Cal.Rptr. 361].)

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

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

## LESSER INCLUDED OFFENSES

- Assault. ▸ Pen. Code, § 240.
- Assault With Intent to Commit Sodomy. ▸ Pen. Code, § 220; see *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible crime is charged].
- Attempted Forcible Sodomy. ▸ Pen. Code, §§ 664, 286.
- Battery. ▸ Pen. Code, § 242; *People v. Hughes* (2002) 27 Cal.4th 287, 366 [116 Cal.Rptr.2d 401, 39 P.3d 432].

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

## RELATED ISSUES

***Consent Obtained by Fraudulent Representation***

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

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***Consent Withdrawn***

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

***Victim Must Be Alive***

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

***Penetration May Be Through Victim's Clothing***

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

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 27, 28, 30, 178.

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

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:18~~6~~, 12:19~~7~~ (The Rutter Group).

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## 1031. Sodomy in Concert (Pen. Code, § 286(d))

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**The defendant[s] [_____** *<insert name[s] if not all defendants in trial charged with this count>***] (is/are) charged [in Count __] with committing sodomy by acting in concert [with _____** *<insert name[s] or description[s] of uncharged participant[s]>*] **[in violation of Penal Code section 286(d)].**

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

*<Alternative A—defendant committed sodomy >*
**[1.] [The defendant personally committed sodomy and voluntarily acted with someone else who aided and abetted its commission(;/.)]**

**[OR]**

*<Alternative B—defendant aided and abetted>*
**[(1/2).] [The defendant voluntarily aided and abetted someone else who personally committed sodomy.]**

**To decide whether the defendant[s] [or _____** *<insert name[s] or description[s] of uncharged participant[s]>***] committed sodomy, please refer to the separate instructions that I (will give/have given) you on that crime. To decide whether the defendant[s] [or _____** *<insert name[s] or description[s] of uncharged participant[s]>***] aided and abetted sodomy, please refer to the separate instructions that I (will give/have given) you on aiding and abetting. You must apply those instructions when you decide whether the People have proved sodomy in concert.**
*<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON SODOMY AND AIDING AND ABETTING ARE GIVEN.>*

**[To prove the crime of sodomy in concert, the People do not have to prove a prearranged plan or scheme to commit sodomy.]**

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*New January 2006; Revised October 2021, March 2022*

## BENCH NOTES

***Instructional Duty***
The court has a **sua sponte** duty to give an instruction defining the elements of the crime. (*People v. Ramirez* (1987) 189 Cal.App.3d 603, 621 [236 Cal.Rptr. 404]

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[rape in concert is a separate crime, not an enhancement].) The court also has a **sua sponte** duty to instruct on sodomy. Give one or more of the following instructions defining sodomy: CALCRIM No. 1030 or CALCRIM Nos. 1032–1037.

Select alternative A or B, or both, depending on whether the defendant personally committed the crime or aided and abetted someone else.

Depending on the evidence, give the final bracketed paragraph on request regarding the lack of a prearranged plan. (See *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658].)

***Related Instructions***
See CALCRIM No. 400, *Aiding and Abetting: General Principles*, and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

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

## AUTHORITY

- Elements. ▸ Pen. Code, § 286(d).
- Aiding and Abetting. ▸ *People v. Adams* (1993) 19 Cal.App.4th 412, 429, 444–446 [23 Cal.Rptr.2d 512]; *People v. Caldwell* (1984) 153 Cal.App.3d 947, 951–952 [200 Cal.Rptr. 508]; *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658].

## LESSER INCLUDED OFFENSES

- Assault. ▸ Pen. Code, § 240.
- Assault With Intent to Commit Sodomy. ▸ Pen. Code, § 220; see *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible crime is charged].
- Attempted Sodomy. ▸ Pen. Code, §§ 664, 286.
- Attempted Sodomy in Concert. ▸ Pen. Code, §§ 663, 286(d).
- Battery. ▸ Pen. Code, § 242.

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- Sodomy. ▸ Pen. Code, §§ 663, 286.

## RELATED ISSUES

See the Related Issues section under CALCRIM No. 1030, *Sodomy by Force, Fear, or Threats*, and CALCRIM No. 1001, *Rape ~~or Spousal Rape~~ in Concert*.

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 34.

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

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:18~~6~~, 12:19~~7~~ (The Rutter Group).

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

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

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

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

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

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

**AND**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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*New January 2006; Revised August 2016, April 2020, October 2021, March 2022*

## BENCH NOTES

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

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

***Defenses—Instructional Duty***
The court has a **sua sponte** duty to instruct on the defense of reasonable belief in consent if there is "substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not." (See *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337].) The statutory presumption that a minor over 14 is incapable of legal consent does not apply to a violation of Penal Code section 289(a)(1)(C). (*People v. Duarte-Lara* (2020) 49 Cal.App.5th 332, 339 [262 Cal.Rptr.3d 774].)

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

## AUTHORITY

- Elements. ▸ Pen. Code, § 289(a)(1), (2), (g).
- Specific Intent Crime. ▸ *People v. McCoy* (2013) 215 Cal.App.4th 1510, 1538 [156 Cal.Rptr.3d 382].
- Consent Defined. ▸ Pen. Code, §§ 261.6, 261.7.

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- Duress Defined. ‣ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221].
- Foreign Object, Substance, Instrument, or Device Defined. ‣ Pen. Code, § 289(k)(2); *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rtpr. 170] [a finger is a "foreign object"].
- Menace Defined. ‣ Pen. Code, § 261(c) [in context of rape].
- Sexual Penetration Defined. ‣ Pen. Code, § 289(k); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].
- Threatening to Retaliate Defined. ‣ Pen. Code, § 289(*l*).
- Unknown Object Defined. ‣ Pen. Code, § 289(k)(3).
- Fear Defined. ‣ *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. ‣ *People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089].
- Intent. ‣ *People v. Senior* (1992) 3 Cal.App.4th 765, 776 [5 Cal.Rptr.2d 14] [specific intent is "purpose of sexual arousal, gratification, or abuse"].
- Mistake of Fact Regarding Consent. ‣ See *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337] [in context of kidnapping and rape]; *People v. Duarte-Lara* (2020) 49 Cal.App.5th 332, 339 [262 Cal.Rptr.3d 774] [noting minor over 14].
- Sexual Abuse Defined. ‣ *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].

## COMMENTARY

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

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

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

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

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

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

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

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

## LESSER INCLUDED OFFENSES

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

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

## RELATED ISSUES

***Consent Obtained by Fraudulent Representation***

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

***Consent Withdrawn***

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

***Minor Victim***

When sexual penetration is committed against the will of a person who is incapable of consent, such as a baby, and is accomplished by physical force that results in physical

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injury to the victim, the statutory requirements "against the will" and "use of force" are fully satisfied. (*People v. White* (1986) 179 Cal.App.3d 193, 202 [224 Cal.Rptr. 467].)

***Multiple Penetrations***

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

## SECONDARY SOURCES

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

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

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

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:18~~6~~, 12:19~~7~~ (The Rutter Group).

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## 1046. Sexual Penetration in Concert (Pen. Code, §§ 264.1, 289(a)(1))

**The defendant[s] [_____ *<insert name[s] if not all defendants in trial charged with this count>*] (is/are) charged [in Count __] with committing sexual penetration by acting in concert [with _____ *<insert name[s] or description[s] of uncharged participant[s]>*] [in violation of Penal Code sections 264.1 and 289(a)(1)].**

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

*<Alternative A—defendant committed sexual penetration>*

**[1.] [The defendant personally committed sexual penetration and voluntarily acted with someone else who aided and abetted its commission(;/.)]**

**[OR]**

*<Alternative B—defendant aided and abetted>*

**[(1/2).] [The defendant voluntarily aided and abetted someone else who personally committed sexual penetration.]**

**To decide whether the defendant[s] [or _____ *<insert name[s] or description[s] of uncharged participant[s]>*] committed sexual penetration, please refer to the separate instructions that I (will give/have given) you on that crime. To decide whether the defendant[s] [or _____ *<insert name[s] or description[s] of uncharged participant[s]>*] aided and abetted sexual penetration, please refer to the separate instructions that I (will give/have given) you on aiding and abetting. You must apply those instructions when you decide whether the People have proved sexual penetration in concert.**
*<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON SEXUAL PENETRATION AND AIDING AND ABETTING ARE GIVEN.>*

**[To prove the crime of sexual penetration in concert, the People do not have to prove a prearranged plan or scheme to commit sexual penetration.]**

*New January 2006; Revised October 2021, March 2022*

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## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. (*People v. Ramirez* (1987) 189 Cal.App.3d 603, 621 [236 Cal.Rptr. 404] [rape in concert is a separate crime, not an enhancement].) The court also has a **sua sponte** duty to instruct on sexual penetration. Give one or more of the following instructions defining sexual penetration: CALCRIM Nos. 1045 or 1047–1051.

Select alternative A or B, or both, depending on whether the defendant personally committed the crime or aided and abetted someone else.

Depending on the evidence, give the final bracketed paragraph on request regarding the lack of a prearranged plan. (See *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rtpr. 658].)

***Related Instructions***

See generally CALCRIM No. 400, *Aiding and Abetting*: *General Principles*, and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

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

## AUTHORITY

- Elements. ▸ Pen. Code, §§ 264.1, 289(a)(1); see *People v. Mom* (2000) 80 Cal.App.4th 1217, 1224 [96 Cal.Rptr.2d 172] [rape in concert requires no greater force than that necessary for forcible rape], disapproved on other grounds in *People v. Griffin* (2004) 33 Cal.4th 1015, 1028 [16 Cal.Rptr.3d 891, 94 P.3d 1089].
- Aiding and Abetting. ▸ *People v. Adams* (1993) 19 Cal.App.4th 412, 445–446 [23 Cal.Rptr.2d 512]; see *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].

## LESSER INCLUDED OFFENSES

- Assault. ▸ Pen. Code, § 240.
- Attempted Sexual Penetration. ▸ Pen. Code, §§ 664, 289(a)(1).
- Attempted Sexual Penetration in Concert. ▸ Pen. Code, §§ 663, 264.1, 289(a)(1).

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- Battery. ▸ Pen. Code, § 242.
- Sexual Penetration. ▸ Pen. Code, § 289(a)(1).

## RELATED ISSUES

See the Related Issues section under CALCRIM No. 1045, *Sexual Penetration by Force, Fear, or Threats*, and CALCRIM No. 1001, *Rape ~~or Spousal Rape~~ in Concert*.

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 21.

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

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:18~~6~~, 12:19~~7~~ (The Rutter Group).

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## 1060. Lewd or Lascivious Act: Dependent Person (Pen. Code, § 288(b)(2) & (c)(2))

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**The defendant is charged [in Count __] with a lewd or lascivious act on a dependent person [by force or fear] [in violation of Penal Code section 288].**

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

1. **The defendant was a caretaker of a dependent person;**

2. **The defendant, while serving as a caretaker, willfully (committed/conspired to commit/aided and abetted/facilitated) a lewd or lascivious act on that person;**

**[AND]**

3. **The defendant (committed/conspired to commit/aided and abetted/facilitated) the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of (himself/herself) or the dependent person(;/.)**

*<Give element 4 when instructing on force or violence>*
**[AND**

4. **In (committing/conspiring to commit/aiding and abetting/facilitating) the act, the defendant used force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the dependent person or someone else.]**

**A *lewd or lascivious act* is any touching of a person with the intent to sexually arouse the perpetrator or the other person. A *lewd or lascivious act* includes touching any part of the person's body, either on the bare skin or through the clothes the person is wearing. [A *lewd or lascivious act* includes causing someone to touch his or her own body or someone else's body at the instigation of the perpetrator who has the required intent.]**

**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.**

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**A *caretaker* is an owner, operator, administrator, employee, independent contractor, agent, or volunteer of a public or private facility, including (a/an) _____ <*insert specific facility from Pen. Code, § 288(f)(1)*>, that provides care for dependent persons or for those aged 65 or older.**

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

**[Actually arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or dependent person is not required.]**

**[The *force* used must be substantially different from or substantially greater than the force needed to accomplish the lewd and lascivious act itself.]**

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

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

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

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*New January 2006; Revised February 2013, September 2017, March 2022*

## BENCH NOTES

***Instructional Duty***

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

If the defendant is charged in a single count with multiple alleged acts, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322 [270 Cal.Rptr. 611, 792 P.2d 643].) The court must determine whether it is appropriate to give the standard unanimity instruction, CALCRIM

No. 3500, *Unanimity*, or the modified unanimity instruction, CALCRIM No. 3501, *Unanimity: When Generic Testimony of Offense Presented*. Review the discussion in the bench notes to these two instructions and *People v. Jones, supra,* 51 Cal.3d at pp. 321–322.

If the defendant is charged with using force or fear in committing the lewd act on a dependent person, give bracketed element 4 and the bracketed sentence that begins with "The force must be substantially different." (See *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [court has **sua sponte** duty to define "force" as used in Pen. Code, § 288(b)(1)]; *People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891, 94 P.3d 1089].) On request, give any of the relevant bracketed definitions of duress, menace, or fear.

In the paragraph defining "caretaker," insert applicable caretaker facilities listed in Penal Code section 288(f)(1), such as a 24-hour health facility, a home health agency, or a community care or respite care facility, depending on the facts of the case.

Penal Code section 288(b)(2) or (c)(2) does not apply to a caretaker who is a spouse of, or who is in an equivalent domestic relationship with, the dependent person. (Pen. Code, § 288(h).)

Give the bracketed sentence that begins, "Actually arousing, appealing to," on request. (*People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].)

***Defenses—Instructional Duty***

In the context of lewd acts accomplished by force on a minor, there is disagreement as to whether knowing consent by the minor is an affirmative defense. (See *People v. Cicero* (1984) 157 Cal.App.3d 465, 484–485 [204 Cal.Rptr. 582] [when no physical harm, knowing consent of minor is an affirmative defense]; *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1158 [249 Cal.Rptr. 435] [lewd act need not be against will of victim, following dissent in *Cicero, supra,* 157 Cal.App.3d at pp. 487–488, dis. opn. of Regan, Acting P.J.]; *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [26 Cal.Rptr.2d 567] [dicta].) If the court concludes that consent is a defense and there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. (See consent defense instructions in CALCRIM No. 1000, *Rape ~~or Spousal Rape~~ by Force, Fear, or Threats*.)

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## AUTHORITY

- Elements. ▸ Pen. Code, § 288(b)(2) & (c)(2).
- Caretaker Defined. ▸ Pen. Code, § 288(f)(1) & (g).
- Dependent Person Defined. ▸ Pen. Code, § 288(f)(3).
- Duress Defined. ▸ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]; *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416].
- Elder Defined. ▸ See Pen. Code, § 368(g).
- Menace Defined. ▸ See Pen. Code, § 261(c) [in context of rape].
- Actual Arousal Not Required. ▸ See *People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].
- Any Touching With Intent to Arouse. ▸ See *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [45 Cal.Rptr.2d 905, 903 P.2d 1037] [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 [14 Cal.Rptr.2d 67] and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [49 Cal.Rptr.2d 252] [list of examples].
- Dependent Person Touching Own Body Parts at Defendant's Instigation. ▸ See *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 [199 Cal.Rptr. 586] ["constructive" touching; approving *Austin* instruction]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115 [168 Cal.Rptr. 401].
- Fear Defined. ▸ See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [26 Cal.Rptr.2d 567]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. ▸ *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221]; see also *People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891, 94 P.3d 1089] [discussing *Cicero* and *Pitmon*].
- Lewd Defined. ▸ See *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].

## COMMENTARY

The instruction includes definitions of "force" and "fear" because those terms have meanings in the context of the crime of lewd acts by force that are technical

and may not be readily apparent to jurors. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [force]; see *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [26 Cal.Rptr.2d 567] [fear]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].) The Court of Appeal has held that the definition of "force" as used in Penal Code section 288(b), subsection (1) (lewd acts by force with a minor) is different from the meaning of "force" as used in other sex offense statutes. (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582].) In other sex offense statutes, such as Penal Code section 261 defining rape, "force" does not have a technical meaning and there is no requirement to define the term. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891, 94 P.3d 1089].) In Penal Code section 288(b)(1), on the other hand, "force" means force "*substantially* different from or *substantially* greater than" the physical force normally inherent in the sexual act. (*Id.* at p. 1018 [quoting *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582] [emphasis in *Griffin*].) The court is required to instruct **sua sponte** in this special definition of "force." (*People v. Pitmon, supra,* 170 Cal.App.3d at p. 52; see also *People v. Griffin, supra,* 33 Cal.4th at pp. 1026–1028.) It would seem that this definition of "force" would also apply to the crime of lewd acts with a dependant person, under Penal Code section 288(b) subsection (2).

The court is not required to instruct sua sponte on the definition of "duress" or "menace" and Penal Code section 288 does not define either term. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress].)~~.~~ Optional definitions are provided for the court to use at its discretion. The definition of "duress" is based on *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071], and *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]. The definition of "menace" is based on the statutory definition~~s~~ contained in Penal Code section~~s~~ 261 ~~and 262~~ [rape]. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416] [using rape definition in case involving forcible lewd acts].) In *People v. Leal, supra,* 33 Cal.4th at p. 1007, the court held that the statutory definition of "duress" contained in Penal Code sections 261 and former 262 does not apply to the use of that term in any other statute. The court did not discuss the statutory definition of "menace." The court should consider the *Leal* opinion before giving the definition of "menace."

## LESSER INCLUDED OFFENSES

- Attempted Lewd Act With Dependent Person. ▸ Pen. Code, §§ 664, 288(c)(2).
- Attempted Lewd Act by Force With Dependent Person. ▸ Pen. Code, §§ 664, 288(b)(2).
- Simple Battery Not Lesser Included Offense of Lewd Act on Dependent Person Under the Statutory Elements Test. ▸ *People v. Chenelle* (2016) 4 Cal.App.5th 1255, 1263-1264 [209 Cal.Rptr.3d 371].

## RELATED ISSUES

***Developmental Disability***

If the dependent person has a developmental disability, arguably there is no sua sponte duty to define "developmental disability" under Welfare and Institutions Code section 4512(a) or Penal Code section 1370.1(a)(1). The Legislature did not intend to limit this phrase in other code sections to such technical medical or legal definitions, although a pinpoint instruction may be requested if it helps the jury in any particular case. (See *People v. Mobley* (1999) 72 Cal.App.4th 761, 781–783 [85 Cal.Rptr.2d 474] [in context of oral copulation of disabled person].)

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 41, 47–55, 178.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21[1][a][iv], [v], [b]–[d] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:18~~6~~, 12:19~~7~~ (The Rutter Group).

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## 1123. Aggravated Sexual Assault of Child Under 14 Years (Pen. Code, § 269(a))

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**The defendant is charged [in Count __] with aggravated sexual assault of a child who was under the age of 14 years and at least seven years younger than the defendant [in violation of Penal Code section 269(a)].**

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

1. **The defendant committed** _____ *<insert sex offense specified in Pen. Code, § 269(a)(1)–(5)>* **on another person;**

**AND**

2. **When the defendant acted, the other person was under the age of 14 years and was at least seven years younger than the defendant.**

**To decide whether the defendant committed** _____ *<insert sex offense specified in Pen. Code, § 269(a)(1)–(5)>***, please refer to the separate instructions that I (will give/have given) you on that crime.**

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

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*New January 2006; Revised June 2007, March 2022*

## BENCH NOTES

***Instructional Duty***

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

In element 1 and in the sentence following element 2, insert the sex offense specified in Penal Code section 269(a)(1)–(5) that is charged. The sex offenses specified in section 269(a)(1)–(5) and their applicable instructions are:

1. Rape (Pen. Code, § 261(a)(2); see CALCRIM No. 1000, *Rape ~~or Spousal Rape~~ by Force, Fear, or Threats*).

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2. Rape or sexual penetration in concert (Pen. Code, § 264.1; see CALCRIM No. 1001, *Rape ~~or Spousal Rape~~ in Concert*, and CALCRIM No.1046, *Sexual Penetration in Concert*).

3. Sodomy (Pen. Code, § 286(c)(2); see CALCRIM No. 1030, *Sodomy by Force, Fear, or Threats*).

4. Oral copulation (Pen. Code, § 287~~8a~~(c)(2); see CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*).

5. Sexual penetration (Pen. Code, § 289(a); see CALCRIM No. 1045, *Sexual Penetration by Force, Fear, or Threats*).

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

## AUTHORITY

- Elements. ▸ Pen. Code, § 269(a).

## LESSER INCLUDED OFFENSES

- Simple Assault. ▸ Pen. Code, § 240.
- Underlying Sex Offense. ▸ Pen. Code, §§ 261(a)(2) [rape], 264.1 [rape or sexual penetration in concert], 286(c)(2) [sodomy], 287(c)(2) [oral copulation], 289(a) [sexual penetration].

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 65, 178.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[2][a], [c], [7][c] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:18~~6~~, 12:19~~7~~ (The Rutter Group).

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

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

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

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

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

**AND**

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

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

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

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

*New January 2006; Revised February 2012, February 2013, August 2013, April 2020, March 2022*

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## BENCH NOTES

***Instructional Duty***

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

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

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

***Related Instructions***

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

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

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

## AUTHORITY

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

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

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

## LESSER INCLUDED OFFENSES

- Kidnapping. ‣ Pen. Code, § 207.

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

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

## SECONDARY SOURCES

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

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

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

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

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

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

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

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

**[AND]**

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

**[AND]**

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

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

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

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

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

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

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*New January 2006; Revised April 2008, April 2020, September 2020, October 2021, March 2022*

## BENCH NOTES

***Instructional Duty***

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

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

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

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

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

There is no sua sponte duty to define "illegal intent" or "illegal purpose." (*People v. Singh* (2019) 42 Cal.App.5th 175, 181-183 [254 Cal.Rptr.3d 871].)

***Related Instructions***

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

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

## AUTHORITY

- Elements. ▸ Pen. Code, § 207(a), (e).
- Punishment If Victim Under 14 Years of Age. ▸ Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206] [ignorance of victim's age not defense].
- Asportation Requirement. ▸ See *People v. Martinez* (1999) 20 Cal.4th 225, 235–237 [83 Cal.Rptr.2d 533, 973 P.2d 512] [adopting modified two-pronged asportation test from *People v. Rayford* (1994) 9 Cal.4th 1, 12–14 [36 Cal.Rptr.2d 317, 884 P.2d 1369] and *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225]].
- Force Required to Kidnap Unresisting Infant or Child. ▸ *In re Michele D.* (2002) 29 Cal.4th 600, 610 [128 Cal.Rptr.2d 92, 59 P.3d 164]; Pen. Code, § 207(e).
- Force Required to Kidnap Unconscious and Intoxicated Adult. ▸ *People v. Daniels* (2009) 176 Cal.App.4th 304, 333 [97 Cal.Rptr.3d 659].
- Movement Must Be for Illegal Purpose or Intent if Victim Incapable of Consent. ▸ *In re Michele D.* (2002) 29 Cal.4th 600, 610–611 [128 Cal.Rptr.2d 92, 59 P.3d 164]; *People v. Oliver* (1961) 55 Cal.2d 761, 768 [12 Cal.Rptr. 865, 361 P.2d 593]; but see *People v. Hartland* (2020) 54 Cal.App.5th 71, 80 [268 Cal.Rptr.3d 1] [an illegal purpose or intent is not required for an intoxicated and resisting adult victim].

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- Substantial Distance Requirement. ▸ *People v. Daniels* (1993) 18 Cal.App.4th 1046, 1053 [22 Cal.Rptr.2d 877]; *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058] [since movement must be more than slight or trivial, it must be substantial in character].
- Deceit Alone Does Not ~~May~~ Substitute for Force. ▸ *People v. Nieto* (2021) 62 Cal.App.5th 188, 195 [276 Cal.Rptr.3d 379] ~~*People v. Dalerio* (2006) 144 Cal.App.4th 775, 783 [50 Cal.Rptr.3d 724] [taking requirement satisfied when defendant relies on deception to obtain child's consent and through verbal directions and his constant physical presence takes the child substantial distance].~~
- ~~This Instruction Upheld. ▸ *People v. Singh* (2019) 42 Cal.App.5th 175, 181-183 [254 Cal.Rptr.3d 871] [no sua sponte duty to define "illegal intent" or "illegal purpose"].~~

## COMMENTARY

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

## LESSER INCLUDED OFFENSES

Attempted kidnapping is not a lesser included offense of simple kidnapping under subdivision (a) of section 207, but the jury may be instructed on attempted kidnapping if supported by the evidence. (*People v. Fontenot* (2019) 8 Cal.5th 57, 65-71 [251 Cal.Rptr.3d 341, 447 P.3d 252] [discussing Pen. Code, § 1159].)

## RELATED ISSUES

***Victim Must Be Alive***

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

## SECONDARY SOURCES

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

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

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

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

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

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

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

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

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

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

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

**[AND]**

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

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

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

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

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

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

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

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

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

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

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*New January 2006; Revised June 2007, April 2008, February 2013, August 2013, April 2020, March 2022*

## BENCH NOTES

***Instructional Duty***

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

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

Give the bracketed definition of "consent" on request.

***Defenses—Instructional Duty***

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

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

***Timing of Necessary Intent***

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

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

## AUTHORITY

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

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

## LESSER INCLUDED OFFENSES

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

Attempted kidnapping is not a lesser included offense of simple kidnapping under subdivision (a) of section 207, but the jury may be instructed on attempted kidnapping if supported by the evidence. (*People v. Fontenot* (2019) 8 Cal.5th 57, 65-71 [251 Cal.Rptr.3d 341, 447 P.3d 252] [discussing Pen. Code, § 1159].)

## RELATED ISSUES

***Psychological Harm***

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

## SECONDARY SOURCES

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

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

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

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## 1215. Kidnapping (Pen. Code, § 207(a))

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

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

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

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

**[AND]**

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

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

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

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

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

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

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**reasonably and actually believe that the other person consented to the movement. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

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

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

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*New January 2006; Revised October 2010, April 2020, October 2021, March 2022*

## BENCH NOTES

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

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

The court must give the bracketed language on movement incidental to an associated crime when it is supported by the evidence. (*People v. Martinez, supra,* 20 Cal.4th at p. 237; *People v. Bell* (2009) 179 Cal.App.4th 428, 439 [102 Cal.Rptr.3d 300].)

Give the bracketed definition of "consent" on request.

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***Defenses—Instructional Duty***

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

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

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

***Related Instructions***

If the victim is incapable of consent because of immaturity or mental condition, see CALCRIM No. 1201, *Kidnapping: Child or Person Incapable of Consent*. An illegal purpose or intent is not required for an intoxicated and resisting adult victim. (*People v. Hartland* (2020) 54 Cal.App.5th 71, 80 [268 Cal.Rptr.3d 1].)

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

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

## AUTHORITY

- Elements. ▸ Pen. Code, § 207(a).

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

## COMMENTARY

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

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## LESSER INCLUDED OFFENSES

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

Attempted kidnapping is not a lesser included offense of simple kidnapping under subdivision (a) of section 207, but the jury may be instructed on attempted kidnapping if supported by the evidence. (*People v. Fontenot* (2019) 8 Cal.5th 57, 65-71 [251 Cal.Rptr.3d 341, 447 P.3d 252] [discussing Pen. Code, § 1159].)

## RELATED ISSUES

***Victim Must Be Alive***

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

***Threat of Arrest***

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

## SECONDARY SOURCES

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

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

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

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## 1350. Hate Crime: Misdemeanor Interference With Civil Rights by Force (Pen. Code, § 422.6(a))

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**The defendant is charged [in Count __] with interfering with another person's civil rights by the use of force [in violation of Penal Code section 422.6(a)].**

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

1. **The defendant used force to willfully interfere with[, or injure, intimidate, or oppress,] another person's free exercise or enjoyment of the right [or privilege] to _____** *<describe the right allegedly infringed, e.g., "be free from violence or bodily harm">*, **established by the law or Constitution of California or the United States;**

2. **The defendant did so in whole or in part because of the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);**

**AND**

3. **The defendant intended to interfere with the other person's legally protected right [or privilege].**

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

**The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the other person if:**

1. **The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);**

**AND**

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2. **The bias motivation caused the defendant to commit the alleged acts.**

**If you find that the defendant had more than one reason to commit the alleged acts, the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the conduct.**

**[The term *disability* is explained in Instruction 1353, to which you should refer.]**

**[*Gender*, as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]**

**[*Nationality*, as used here, means ~~includes citizenship,~~ country of origin, immigration status, including citizenship, and national origin.]**

**[*Race or ethnicity* includes ancestry, color, and ethnic background.]**

**[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]**

**[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]**

**[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ [or] identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ [or] group[,]/ [or] family[,]/ [or] community center[,]/ [or] educational facility[,]/ [or] office[,]/ [or] meeting hall[,]/ [or] place of worship[,]/ [or] private institution[,]/ [or] public agency[,]/ [or] library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]**

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*New January 2006; Revised March 2017, March 2022*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. ~~This statute was substantially revised, effective January 1, 2005.~~

If the prosecution is based on the defendant's speech alone, do not give this instruction. (Pen. Code, § 422.6(c); *In re M.S.* (1995) 10 Cal.4th 698, 711–716 [42 Cal.Rptr.2d 355, 896 P.2d 1365].) Give CALCRIM No. 1351, *Hate Crime: Misdemeanor Interference With Civil Rights by Threat*.

In element 1, insert a description of the specific right or rights allegedly infringed, for example, the right to be free from violence or the threat of violence or the right to be protected from bodily harm. (See Civil Code, §§ 43, 51.7; *People v. Lashley* (1991) 1 Cal.App.4th 938, 950–951 [2 Cal.Rptr.2d 629]; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].)

Give all relevant bracketed definitions. If the term "disability" is used, give CALCRIM No. 1353, *Hate Crime: Disability Defined*.

**Do not** give CALCRIM No. 370, *Motive*, with this instruction because motive is an element of this crime. (See *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165 [197 Cal.Rptr.3d 317]; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1127 [38 Cal.Rptr.2d 335].)

## AUTHORITY

- Elements ▸ Pen. Code, § 422.6(a).
- Willfully Defined ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Hate Crime Defined ▸ Pen. Code, § 422.55.
- "In Whole or in Part Because of" Defined ▸ Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].
- Disability Defined ▸ Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(*l*).
- Gender Defined ▸ Pen. Code, §§ 422.56(c), 422.57.
- Nationality Defined ▸ Pen. Code, § 422.56(e).
- Race or Ethnicity Defined ▸ Pen. Code, § 422.56(f).
- Religion Defined ▸ Pen. Code, § 422.56(g).
- Sexual Orientation Defined ▸ Pen. Code, § 422.56(h).
- Association With Defined ▸ Pen. Code, § 422.56(a).

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- Specific Intent to Deprive Individual of Protected Right Required ▸ *In re M.S.* (1995) 10 Cal.4th 698, 713 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Lashley* (1991) 1 Cal.App.4th 938, 947–949 [2 Cal.Rptr.2d 629].
- Not Limited to "Significant Constitutional Rights." ▸ *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].
- Statute Constitutional ▸ *In re M.S.* (1995) 10 Cal.4th 698, 715–717, 724 [42 Cal.Rptr.2d 355, 896 P.2d 1365].

## RELATED ISSUES

***Defendant Need Not Know He or She Is Violating the Law***

" '[S]pecific intent' under the statute does not require an actual awareness on the part of the defendant that he is violating another's constitutional rights. It is enough that he engages in activity that interferes with rights clearly and specifically protected by the laws of the United States." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 948 [2 Cal.Rptr.2d 629].) "It is sufficient if the right is clearly defined and that the defendant intended to invade interests protected by constitutional or statutory authority." (*Id.* at p. 949.)

***Penal Code Section 654***

In *In re M.S.* (1995) 10 Cal.4th 698, 727 [42 Cal.Rptr.2d 355, 896 P.2d 1365], the court rejected the argument that Penal Code section 654 does not apply to convictions under Penal Code section 422.6. In 2004, the Legislature amended the statute to add subdivision (d), which specifically states that Penal Code section 654 applies to convictions under Penal Code section 422.6.

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 505, 506.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.44 (Matthew Bender).

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## 1351. Hate Crime: Misdemeanor Interference With Civil Rights by Threat (Pen. Code, § 422.6(a) & (c))

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**The defendant is charged [in Count __] with interfering with another person's civil rights by threatening violence [in violation of Penal Code section 422.6].**

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

1. **The defendant threatened physical violence against a specific person [or a specific group of people];**

2. **The threat would have caused a reasonable person to be afraid because the defendant appeared able to carry out the threat;**

3. **The defendant used the threat to willfully interfere with[, or injure, intimidate, or oppress,] another person's free exercise or enjoyment of the right [or privilege] to _____** *<describe the right allegedly infringed, e.g., "be free from violence or bodily harm">*, **established by the law or Constitution of California or the United States;**

4. **The defendant did so in whole or in part because of the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);**

**AND**

5. **The defendant intended to interfere with the other person's legally protected right [or privilege].**

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

**The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the other person if:**

1. **The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or]**


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**nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);**

**AND**

**2. The bias motivation caused the defendant to commit the alleged acts.**

**If you find that the defendant had more than one reason to commit the alleged acts, the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the conduct.**

**[The term *disability* is explained in Instruction 1353, to which you should refer.]**

**[*Gender*, as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]**

**[*Nationality*, as used here, means ~~includes citizenship,~~ country of origin, immigration status, including citizenship, and national origin.]**

**[*Race or ethnicity* includes ancestry, color, and ethnic background.]**

**[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]**

**[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]**

**[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ [or] identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ [or] group[,]/ [or] family[,]/ [or] community center[,]/ [or] educational facility[,]/ [or] office[,]/ [or] meeting hall[,]/ [or] place of worship[,]/ [or] private institution[,]/ [or] public agency[,]/ [or] library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]**

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## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. ~~This statute was substantially revised, effective January 1, 2005.~~

Give this instruction if the prosecution is based on the defendant's speech alone. (Pen. Code, § 422.6(c); *In re M.S.* (1995) 10 Cal.4th 698, 711–716 [42 Cal.Rptr.2d 355, 896 P.2d 1365].)

In element 3, insert a description of the specific right or rights allegedly infringed, for example, the right to be free from violence or the threat of violence or the right to be protected from bodily harm. (See Civil Code, §§ 43, 51.7; *People v. Lashley* (1991) 1 Cal.App.4th 938, 950–951 [2 Cal.Rptr.2d 629]; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].)

Give all relevant bracketed definitions. If the term "disability" is used, give CALCRIM No. 1353, *Hate Crime: Disability Defined*.

**Do not** give CALCRIM No. 370, *Motive*, with this instruction because motive is an element of this crime. (See *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165 [197 Cal.Rptr.3d 317]; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1127 [38 Cal.Rptr.2d 335].)

## AUTHORITY

- Elements ▸ Pen. Code, § 422.6(a) & (c).
- Willfully Defined ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Hate Crime Defined ▸ Pen. Code, § 422.55.
- "In Whole or in Part Because of" Defined ▸ Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].
- Disability Defined ▸ Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(*l*).
- Gender Defined ▸ Pen. Code, §§ 422.56(c), 422.57.
- Nationality Defined ▸ Pen. Code, § 422.56(e).
- Race or Ethnicity Defined ▸ Pen. Code, § 422.56(f).
- Religion Defined ▸ Pen. Code, § 422.56(g).


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- Sexual Orientation Defined ▸ Pen. Code, § 422.56(h).
- Association With Defined ▸ Pen. Code, § 422.56(a).
- Specific Intent to Deprive Individual of Protected Right Required ▸ *In re M.S.* (1995) 10 Cal.4th 698, 713 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Lashley* (1991) 1 Cal.App.4th 938, 947–949 [2 Cal.Rptr.2d 629].
- Requirements for Threat of Violence ▸ Pen. Code, § 422.6(c); *In re M.S.* (1995) 10 Cal.4th 698, 711–716 [42 Cal.Rptr.2d 355, 896 P.2d 1365].
- Not Limited to "Significant Constitutional Rights." ▸ *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].
- Statute Constitutional ▸ *In re M.S.* (1995) 10 Cal.4th 698, 715–717, 724 [42 Cal.Rptr.2d 355, 896 P.2d 1365].

## RELATED ISSUES

See the Related Issues section of CALCRIM No. 1350, *Hate Crime: Misdemeanor Interference With Civil Rights by Force*.

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 505, 506.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.44 (Matthew Bender).


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## 1352. Hate Crime: Misdemeanor Interference With Civil Rights by Damaging Property (Pen. Code, § 422.6(b))

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**The defendant is charged [in Count __] with interfering with another person's civil rights by damaging property [in violation of Penal Code section 422.6(b)].**

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

1. **The defendant (defaced[,]/ [or] damaged[,]/ [or] destroyed) (real/ [or] personal) property (owned[,]/ [or] used[,]/ [or] possessed[,]/ [or] occupied) by another person;**

2. **The defendant knew that (he/she) was (defacing[,]/ [or] damaging[,]/ [or] destroying) property that was (owned[,]/ [or] used[,]/ [or] possessed[,]/ [or] occupied) by that person;**

3. **The defendant did so for the purpose of interfering with [or intimidating] that person's free exercise or enjoyment of the right [or privilege] to _____** *<describe the right allegedly infringed, e.g., "be free from violence or bodily harm">*, **established by the law or Constitution of California or the United States;**

4. **The defendant did so in whole or in part because of the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);**

**AND**

5. **The defendant intended to interfere with the other person's legally protected right [or privilege].**

**The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the other person if:**

1. **The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual**

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**orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);**

**AND**

**2. The bias motivation caused the defendant to commit the alleged acts.**

**If you find that the defendant had more than one reason to commit the alleged acts, the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the conduct.**

**[The term *disability* is explained in Instruction 1353, to which you should refer.]**

**[*Gender,* as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]**

**[*Nationality*, as used here, means ~~includes citizenship,~~ country of origin, immigration status, including citizenship, and national origin.]**

**[*Race or ethnicity* includes ancestry, color, and ethnic background.]**

**[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]**

**[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]**

**[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ [or] identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ [or] group[,]/ [or] family[,]/ [or] community center[,]/ [or] educational facility[,]/ [or] office[,]/ [or] meeting hall[,]/ [or] place of worship[,]/ [or] private institution[,]/ [or] public agency[,]/ [or] library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]**

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## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. ~~This statute was substantially revised, effective January 1, 2005.~~

In element 3, insert a description of the specific right or rights allegedly infringed, for example, the right to be free from violence or the threat of violence or the right to be protected from bodily harm. (See Civil Code, §§ 43, 51.7; *People v. Lashley* (1991) 1 Cal.App.4th 938, 950–951 [2 Cal.Rptr.2d 629]; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].)

Give all relevant bracketed definitions. If the term "disability" is used, give CALCRIM No. 1353, *Hate Crime: Disability Defined*.

**Do not** give CALCRIM No. 370, *Motive*, with this instruction because motive is an element of this crime. (See *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165 [197 Cal.Rptr.3d 317]; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1127 [38 Cal.Rptr.2d 335].)

## AUTHORITY

- Elements ▸ Pen. Code, § 422.6(b).
- Hate Crime Defined ▸ Pen. Code, § 422.55.
- "In Whole or in Part Because of" Defined ▸ Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].
- Disability Defined ▸ Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(*l*).
- Gender Defined ▸ Pen. Code, §§ 422.56(c), 422.57.
- Nationality Defined ▸ Pen. Code, § 422.56(e).
- Race or Ethnicity Defined ▸ Pen. Code, § 422.56(f).
- Religion Defined ▸ Pen. Code, § 422.56(g).
- Sexual Orientation Defined ▸ Pen. Code, § 422.56(h).
- Association With Defined ▸ Pen. Code, § 422.56(a).
- Specific Intent to Deprive Individual of Protected Right Required ▸ *In re M.S.* (1995) 10 Cal.4th 698, 713 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Lashley* (1991) 1 Cal.App.4th 938, 947–949 [2 Cal.Rptr.2d 629].

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- Not Limited to "Significant Constitutional Rights" ▸ *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].
- Statute Constitutional ▸ *In re M.S.* (1995) 10 Cal.4th 698, 715–717, 724 [42 Cal.Rptr.2d 355, 896 P.2d 1365].
- Victim Need Not Own Property ▸ *In re Michael M.* (2001) 86 Cal.App.4th 718, 724–726 [104 Cal.Rptr.2d 10].

## RELATED ISSUES

***Target of Intimidation Need Not Own Property***

"[T]he phrase 'property of any other person' in section 422.6, subdivision (b) does not require that the victim own the property. As long as the property is regularly and openly used, possessed, or occupied by the victim so that it is readily identifiable with him or her, it falls within the statutory scope." (*In re Michael M.* (2001) 86 Cal.App.4th 718, 724–726 [104 Cal.Rptr.2d 10] [classroom was the "property of" the students whose class met there].)

See the Related Issues section of CALCRIM No. 1350, *Hate Crime: Misdemeanor Interference With Civil Rights by Force*.

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 505, 506.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.44 (Matthew Bender).

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## 1354. Hate Crime Allegation: Felony (Pen. Code, § 422.75(a)–(c))

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**If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [ or the lesser 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 crime[s] committed by the defendant (was a/were) hate crime[s]. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

**To prove this allegation [for each crime] the People must prove that the defendant committed that crime in whole or in part because of the alleged victim's actual or perceived (disability[,]/ gender[,]/ nationality[,]/ race or ethnicity[,]/ religion[,]/ sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]).**

**As used here, *victim* includes, but is not limited to, a (person[,]/ [or] individual[,]/ [or] family[,]/ [or] group[,]/ [or] community center[,]/ [or] educational facility[,]/ [or] entity[,]/ [or] office[,]/ [or] meeting hall[,]/ [or] place of worship[,]/ [or] private institution[,]/ [or] public agency[,]/ [or] library[,]/ [or] other victim or intended victim of the crime).**

**The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the victim if:**

1. **The defendant was biased against the victim based on the victim's actual or perceived (disability[,]/ gender[,]/ nationality[,]/ race or ethnicity[,]/ religion[,]/ sexual orientation[,]/ [or] association with a person or group with (this/one or more of these) actual or perceived characteristic[s]);**

**AND**

2. **The bias motivation caused the defendant to commit the alleged acts.**

**If you find that the defendant had more than one reason to commit the alleged acts, the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the conduct.**

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**[The term *disability* is explained in Instruction 1353, to which you should refer.]**

**[*Gender*, as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]**

**[*Nationality*, as used here, means ~~includes citizenship,~~ country of origin, immigration status, including citizenship, and national origin.]**

**[*Race or ethnicity* includes ancestry, color, and ethnic background.]**

**[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]**

**[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]**

**[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ group[,]/ family[,]/ community center[,]/ educational facility[,]/ office[,]/ meeting hall[,]/ place of worship[,]/ private institution[,]/ public agency[,]/ library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]**

**[If you conclude that the People have proved that the crime[s] committed by the defendant (was a/were) hate crime[s], you must also decide whether the defendant voluntarily acted together with another person by either personally committing the crime or by aiding and abetting another person in committing the crime.]**

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

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*New January 2006; Revised March 2017, March 2022*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490

[120 S.Ct. 2348, 147 L.Ed.2d 435].) ~~This statute was substantially revised, effective January 1, 2005.~~

Give all relevant bracketed definitions. If the term "disability" is used, give CALCRIM No. 1353, *Hate Crimes: Disability Defined*.

If the prosecution alleges that the defendant acted in concert with another, pursuant to Penal Code section 422.75(b), give the bracketed sentence that begins with "If you conclude that the People have proved." Give all relevant instructions on aiding and abetting. The jury must be provided with a verdict form on which it may indicate whether this factor has also been proved.

If the prosecution alleges that the defendant has a qualifying prior conviction under Penal Code section 422.75(d), then, in addition to this instruction, also give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant has stipulated to the truth of the prior conviction.

**Do not** give CALCRIM No. 370, *Motive*, with this instruction because motive is an element of this crime. (See *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165 [197 Cal.Rptr.3d 317]; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1127 [38 Cal.Rptr.2d 335].)

***Related Instructions***

CALCRIM No. 1350, *Hate Crime: Misdemeanor Interference With Civil Rights by Force*.

CALCRIM No. 1351, *Hate Crime: Misdemeanor Interference With Civil Rights by Threat*.

CALCRIM No. 1352, *Hate Crime: Misdemeanor Interference With Civil Rights by Damage to Property*.

CALCRIM No. 1355, *Hate Crime Allegation: Misdemeanor*.

## AUTHORITY

- Enhancement ▸ Pen. Code, § 422.75(a)–(c).
- Hate Crime Defined ▸ Pen. Code, § 422.55.
- "In Whole or in Part Because of" Defined ▸ Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].

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- Victim Defined ▸ Pen. Code, § 422.56(i).
- Disability Defined ▸ Pen. Code, § 422.56(b); Gov. Code, §12926(i)–(*l*).
- Gender Defined ▸ Pen. Code, §§ 422.56(c) & 422.57.
- Nationality Defined ▸ Pen. Code, § 422.56(e).
- Race or Ethnicity Defined ▸ Pen. Code, § 422.56(f).
- Religion Defined ▸ Pen. Code, § 422.56(g).
- Sexual Orientation Defined ▸ Pen. Code, § 422.56(h).
- Association With Defined ▸ Pen. Code, § 422.56(a).
- Enhancement, Not Substantive Offense ▸ See *People v. Wallace* (2003) 109 Cal.App.4th 1699, 1702 [1 Cal.Rptr.3d 324].
- Aiding and Abetting ▸ *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].
- Acting in Concert ▸ See *People v. Calimee* (1975) 49 Cal.App.3d 337, 341 [122 Cal.Rptr. 658] [construing sodomy-in-concert statute]; *People v. Lopez* (1981) 116 Cal.App.3d 882, 886 [172 Cal.Rptr. 374] [construing rape-in-concert statute].
- No Specific Intent Required ▸ *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 740–741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].

## SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 373.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.44 (Matthew Bender).

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## 1355. Hate Crime Allegation: Misdemeanor (Pen. Code, § 422.7)

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**If you find the defendant guilty of _____ <*insert offense[s]*> [as charged in Count[s] __], you must then decide whether the People have proved the additional allegation that the crime[s] committed by the defendant (was a/were) hate crime[s]. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

**To prove this allegation [for each crime], the People must prove that:**

1. **When committing that crime, the defendant intended to interfere with [or intimidate] another person's free exercise or enjoyment of the right [or privilege] to _____** <*describe the right raised by the evidence*>**, established by the law or Constitution of California or the United States;**

**[AND]**

2. **The defendant acted in whole or in part because of the other person's actual or perceived (disability[,]/ gender[,]/ nationality[,]/ race or ethnicity[,]/ religion[,]/ sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s])(;/.)**

**[AND**

<*Alternative 3A—caused physical injury*>

**[3. When committing that crime, the defendant caused an actual physical injury or had the ability at that time to cause a violent injury.]**

<*Alternative 3B—caused property damage*>

**[3. The defendant caused property damage in excess of $950.]]**

**The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the other person if:**

1. **The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);**

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**AND**

2. **The bias motivation caused the defendant to commit the alleged acts.**

**If you find that the defendant had more than one reason to commit the alleged acts, the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the conduct.**

**[The term *disability* is explained in Instruction 1353, to which you should refer.]**

**[*Gender*, as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]**

**[*Nationality*, as used here, means ~~includes citizenship,~~ country of origin, immigration status, including citizenship, and national origin.]**

**[*Race or ethnicity* includes ancestry, color, and ethnic background.]**

**[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]**

**[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]**

**[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ group[,]/ family[,]/ community center[,]/ educational facility[,]/ office[,]/ meeting hall[,]/ place of worship[,]/ private institution[,]/ public agency[,]/ library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]**

**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 this allegation has not been proved.**

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*New January 2006; Revised February 2012, March 2017, March 2022*

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## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give an instruction defining the elements of the enhancement. (*People v. Wallace* (2003) 109 Cal.App.4th 1699, 1702 [1 Cal.Rptr.3d 324] [statute defines enhancement, not separate offense].) This enhancement makes a crime "committed against the person or property of another" that would otherwise be a misdemeanor into a misdemeanor-felony "wobbler." (Pen. Code, § 422.7.) ~~This statute was substantially revised, effective January 1, 2005.~~

In element 1, insert a description of the specific right or rights allegedly infringed, for example, the right to be free from violence or the threat of violence or the right to be protected from bodily harm. (See Civil Code, §§ 43 & 51.7; *People v. Lashley* (1991) 1 Cal.App.4th 938, 950–951 [2 Cal.Rptr.2d 629]; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].)

Give element 3A if the prosecution alleges that the crime was committed "against a person" and caused injury or included "the present ability to commit a violent injury." (Pen. Code, § 422.7(a)). Give element 3B if the prosecution alleges property damage exceeding $950. (Pen. Code, § 422.7(b).) If the prosecution alleges that the defendant has a qualifying prior conviction under Penal Code section 422.7(c), then, in addition to this instruction, also give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant has stipulated to the truth of the prior conviction.

Give all relevant bracketed definitions. If the term "disability" is used, give CALCRIM No. 1353, *Hate Crimes: Disability Defined*.

**Do not** give CALCRIM No. 370, *Motive*, with this instruction because motive is an element of this crime. (See *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165 [197 Cal.Rptr.3d 317]; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1127 [38 Cal.Rptr.2d 335].)

***Related Instructions***

CALCRIM No. 1350, *Hate Crime: Misdemeanor Interference With Civil Rights by Force*.

CALCRIM No. 1351, *Hate Crime: Misdemeanor Interference With Civil Rights by Threat*.

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CALCRIM No. 1352, *Hate Crime: Misdemeanor Interference With Civil Rights by Damaging Property*.

CALCRIM No. 1354, *Hate Crime Allegation: Felony*.

## AUTHORITY

- Enhancement ▸ Pen. Code, § 422.7.
- Hate Crime Defined ▸ Pen. Code, § 422.55.
- "In Whole or in Part Because of" Defined ▸ Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [896 P.2d 1387].
- Disability Defined ▸ Pen. Code, § 422.56(b); Gov. Code, §12926(i)–(*l*).
- Gender Defined ▸ Pen. Code, §§ 422.56(c) & 422.57.
- Nationality Defined ▸ Pen. Code, § 422.56(e).
- Race or Ethnicity Defined ▸ Pen. Code, § 422.56(f).
- Religion Defined ▸ Pen. Code, § 422.56(g).
- Sexual Orientation Defined ▸ Pen. Code, § 422.56(h).
- Association With Defined ▸ Pen. Code, § 422.56(a).
- Enhancement, Not Substantive Offense ▸ *People v. Wallace* (2003) 109 Cal.App.4th 1699, 1702 [1 Cal.Rptr.3d 324].
- Intent to Deprive Individual of Protected Rights ▸ *In re M.S.* (1995) 10 Cal.4th 698, 713 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Lashley* (1991) 1 Cal.App.4th 938, 947–949 [2 Cal.Rptr.2d 629]; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1268 [40 Cal.Rptr.2d 793]; *In re Joshua H.* (1993) 13 Cal.App.4th 1734, 1742 [17 Cal.Rptr.2d 291].

## LESSER INCLUDED OFFENSES

The underlying misdemeanor, and the attempt of the underlying misdemeanor (see Pen. Code, § 664), are lesser included offenses of a violation of Penal Code section 422.7.

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 505, 506.

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5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.44 (Matthew Bender).

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

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

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

1. **The defendant actively participated in a criminal street gang;**

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

**AND**

3. **The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by:**

    a. **directly and actively committing a felony offense;**

**OR**

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

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

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

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

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

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

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

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

**AND**

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

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

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

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

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

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

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

~~**[OR]**~~

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

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

~~**AND**~~

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

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

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

~~**AND**~~

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

5. **The crimes commonly benefitted a criminal street gang;**

**AND**

6. **The common benefit from the crimes was more than reputational.**

**Examples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant.**

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

**[To decide whether a member of the gang [or the defendant] committed** _____ *<insert felony or felonies from Pen. Code, § 186.22(e)(1)~~–(33)~~>*

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**please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

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

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

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

**[You may not consider evidence of the charged offense[s] in deciding whether a pattern of criminal gang activity has been established.]**

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

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

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

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

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

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

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

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

**AND**

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

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

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

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

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

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

**AND**

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

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

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*New January 2006; Revised August 2006, June 2007, December 2008, August 2012, February 2013, August 2013, February 2014, August 2014, February 2016, March 2022*

## BENCH NOTES

***Instructional Duty***

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

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

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

In the definition of "felonious criminal conduct," insert the felony or felonies the defendant allegedly aided and abetted. (See *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140] [abrogated on other grounds by *People v. Castenada* (2000) 23 Cal.4th 743, 747–748 [97 Cal.Rptr.2d 906, 3 P.3d 278].) Note that a defendant's misdemeanor conduct in the charged case, which is elevated to a felony by operation of Penal Code section 186.22(a), is not sufficient to satisfy the felonious criminal conduct requirement of an active gang participation offense charged under subdivision (a) of section 186.22 or of active gang participation charged as an element of felony firearm charges under section

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12025(b)(3) or 12031(a)(2)(C). *People v. Lamas* (2007) 42 Cal.4th 516, 524 [67 Cal.Rptr.3d 179, 169 P.3d 102].

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

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

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

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

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

If the defendant is charged with other counts that do not require gang evidence as an element, the court must try the Penal Code section 186.22(a) count separately. (Pen. Code, § 1109(b).)

***Defenses—Instructional Duty***

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

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

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***Related Instructions***

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

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

## AUTHORITY

- Elements. ▸ Pen. Code, § 186.22(a)~~; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1468 [83 Cal.Rptr.2d 307]~~.
- Active Participation Defined. ▸ ~~Pen. Code, § 186.22(i); *People v. Castenada*~~ (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined. ▸ Pen. Code, § 186.22(f)~~; see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272]~~.
- Pattern of Criminal Gang Activity Defined. ▸ Pen. Code, § 186.22(e), (g~~j~~); ~~*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236]~~.
- Examples of Common Benefit. ▸ Pen. Code, § 186.22(g).
- Willful Defined. ▸ Pen. Code, § 7(1).
- Applies to Both Perpetrator and Aider and Abettor. ▸ *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436 [105 Cal.Rptr.2d 837]; *People v. Castenada* (2000) 23 Cal.4th 743, 749–750 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Felonious Criminal Conduct Defined. ▸ *People v. Albillar* (2010) 51 Cal.4th 47, 54-59 [119 Cal.Rptr.3d 415, 244 P.3d 1062]; *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140] [abrogated on other grounds by *People v. Castenada* (2000) 23 Cal.4th 743, 747–748 [97 Cal.Rptr.2d 906, 3 P.3d 278]].
- ~~Separate Intent From Underlying Felony. ▸ *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].~~
- Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct. ▸ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132-1138 [150 Cal.Rptr.3d 533,

290 P.3d 1143]; *People v. Salcido* (2007) 149 Cal.App.4th 356 [56 Cal.Rptr.3d 912].

- Temporal Connection Between Active Participation and Felonious Criminal Conduct. *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509 [64 Cal.Rptr.3d 104].
- Crimes Committed After Charged Offense Not Predicates. *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464-1465 [119 Cal.Rptr.2d 272].
- Conspiracy to Commit This Crime. *People v. Johnson* (2013) 57 Cal.4th 250, 255, 266-267 [159 Cal.Rptr.3d 70, 303 P.3d 379].
- Proof of Sufficient Connection Among Gang "Subsets" and Umbrella Gang Required *People v. Prunty* (2015) 62 Cal.4th 59, 81-85 [192 Cal.Rptr.3d 309, 355 P.3d 480].

## COMMENTARY

The jury may not consider past offenses as well as the circumstances of the charged crime to establish a pattern of criminal activity. (Pen. Code, § 186.22(e)(2).) (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739], disapproving *In re Elodio O.* (1997) 56 Cal.App.4th 1175, 1181 [66 Cal.Rptr.2d 95], to the extent it only allowed evidence of past offenses.) A "pattern of criminal gang activity" requires two or more "predicate offenses" during a statutory time period. The charged crime may serve as a predicate offense (*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]), as can aAnother offense committed on the same occasion by a fellow gang member may serve as a predicate offense. (*People v. Loeun* (1997) 17 Cal.4th 1, 9–10 [69 Cal.Rptr.2d 776, 947 P.2d 1313]; see also *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two incidents each with single perpetrator, or single incident with multiple participants committing one or more specified offenses, are sufficient]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484 [67 Cal.Rptr.2d 126].) However, convictions of a perpetrator and an aider and abettor for a single crime establish only one predicate offense (*People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196]), and "[c]rimes occurring *after* the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity." (*People v. Duran,* (2002)*supra,* 97 Cal.App.4th 1448, at p. 1458 [119 Cal.Rptr.2d 272] [original italics].) The "felonious criminal conduct" need not be gang-related. (*People v. Albillar* (2010) 51 Cal.4th 47, 54-59 [119 Cal.Rptr.3d 415, 244 P.3d 1062].)

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## LESSER INCLUDED OFFENSES

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

## RELATED ISSUES

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

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

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

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

## SECONDARY SOURCES

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

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

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

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

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

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

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

   **AND**

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

**To benefit, promote, further, or assist means to provide a common benefit to members of a gang where the common benefit is more than reputational. Examples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant.**

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

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

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

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

**AND**

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

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

<*Give this paragraph only when the conduct that establishes the pattern of criminal gang activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition.*>
**[To decide whether the organized~~ation,~~ association~~,~~ or group has, as one of its primary activities, the commission of** _____<*insert felony or felonies from Pen. Code, § 186.22(e)(1)~~ (25), (31) (33)~~*>**> please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

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

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

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

   **~~[OR]~~**

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

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

~~**AND**~~

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

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

~~**3.**~~ **The most recent crime occurred within three years of one of the earlier crimes and within three years of the date of the charged offense;**

~~**AND**~~

**3. The crimes were committed on separate occasions or were personally committed by two or more memberspersons;.]**

**4. The crimes commonly benefitted a criminal street gang;**

**AND**

**5. The common benefit from the crimes was more than reputational.**

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

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

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

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

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

**[You may not consider evidence of the charged offense[s] in deciding whether a pattern of criminal gang activity has been established.]**

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

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

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*New January 2006; Revised August 2006, June 2007, April 2008, December 2008, August 2012, February 2013, August 2013, February 2014, February 2016, March 2022*

## BENCH NOTES

***Instructional Duty***

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

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

~~In element 1A of the paragraph defining a "pattern of criminal gang activity," insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient]) if the alleged crime or crimes are listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). Give on request the bracketed phrase "any combination of" if two or more different crimes are inserted in the blank. If~~

~~one or more of the alleged crimes are listed in Penal Code section 186.22(e)(26)–(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). (See Pen. Code, § 186.22(j) ["A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone."].)~~

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

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

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

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

The court must~~may~~ bifurcate the trial on the gang enhancement~~,~~ upon request of the defense. ~~at its discretion~~. (Pen. Code, § 1109(a)~~*People v. Hernandez, supra,* 33 Cal.4th at p. 1048~~.) If the trial is bifurcated, give CALCRIM No. 221 (*Reasonable Doubt: Bifurcated Trial*).

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

## AUTHORITY

- Enhancement ▸ Pen. Code, § 186.22(b)(1).
- ~~"For the Benefit of, at the Direction of, or in Association With Any Criminal Street Gang" Defined.~~ ▸ ~~*People v. Albillar* (2010) 51 Cal.4th 47, 59–64 [119 Cal.Rptr.3d 415, 244 P.3d 1062].~~

- Specific Intent Defined.- ▸ *People v. Albillar* (2010) 51 Cal.4th 47, 64–68 [119 Cal.Rptr.3d 415, 244 P.3d 1062].
- Criminal Street Gang Defined ▸ Pen. Code, § 186.22(f)~~; see *People v. Duran, supra,* 97 Cal.App.4th at pp. 1464–1465~~.
- Pattern of Criminal Gang Activity Defined ▸ Pen. Code, § 186.22(e), (g~~f~~); ~~*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236];~~ see *People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196] [conviction of perpetrator and aider and abettor for single crime establishes only single predicate offense].
- "To Benefit, Promote, Further, or Assist" Defined ▸ Pen. Code, § 186.22(g).
- Active or Current Participation in Gang Not Required ▸ *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207 [66 Cal.Rptr.2d 816].
- Primary Activities Defined ▸ *People v. Sengpadychith, supra,* 26 Cal.4th at pp. 323–324.
- Defendant Need Not Act With Another Gang Member ▸ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1138-1139 [150 Cal.Rptr.3d 533].
- Crimes Committed After Charged Offense Not Predicates ▸ *People v. Duran, supra,* 97 Cal.App.4th at p. 1458.
- Proof of Sufficient Connection Among Gang "Subsets" and Umbrella Gang Required ▸ -*People v. Prunty* (2015) 62 Cal.4th 59, 81-85 [192 Cal.Rptr.3d 309, 355 P.3d 480].

## RELATED ISSUES

***Commission On or Near School Grounds***

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

***Enhancements for Multiple Gang Crimes***

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

***Wobblers***

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

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

The enhancements provided by Penal Code section 186.22(b)(1) do not apply to crimes "punishable by imprisonment in the state prison for life . . . " (Pen. Code, § 186.22(b)(5); *People v. Lopez* (2005) 34 Cal.4th 1002, 1004 [22 Cal.Rptr.3d 869, 103 P.3d 270].) Thus, the 10-year enhancement provided by Penal Code section 186.22(b)(1)(C) for a violent felony committed for the benefit of the street gang may not apply in some sentencing situations involving the crime of murder.

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

## SECONDARY SOURCES

2 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 40.

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

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

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## 1600. Robbery (Pen. Code, § 211)

**The defendant is charged [in Count _____] with robbery [in violation of Penal Code section 211].**

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

1. **The defendant took property that was not (his/her) own;**

2. **The property was in the possession of another person;**

3. **The property was taken from the other person or (his/her) immediate presence;**

4. **The property was taken against that person's will;**

5. **The defendant used force or fear to take the property or to prevent the person from resisting;**

**AND**

6. **When the defendant used force or fear, (he/she) intended (to deprive the owner of the property permanently/ [or] to remove the property from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property).**

**The defendant's intent to take the property must have been formed before or during the time (he/she) used force or fear. If the defendant did not form this required intent until after using the force or fear, then (he/she) did not commit robbery.**

<*Give the following bracketed paragraph if the second degree is the only possible degree of the charged crime for which the jury may return a verdict.*>

**[If you find the defendant guilty of robbery, it is robbery of the second degree.]**

**[A person *takes* something when he or she gains possession of it and moves it some distance. The distance moved may be short.]**

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**[The property taken can be of any value, however slight.] [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.]**

**[A (store/ [or] business) (employee/ _____ <*insert description*>) who is on duty has possession of the (store/ [or] business) owner's property.]**

**[*Fear*, as used here, means fear of (injury to the person himself or herself[,]/ [or] injury to the person's family or property[,]/ [or] immediate injury to someone else present during the incident or to that person's property).]**

**An act is accomplished by *fear* if the other person is actually afraid. The other person's actual fear may be inferred from the circumstances.**

**[Property is within a person's *immediate presence* if it is sufficiently within his or her physical control that he or she could keep possession of it if not prevented by force or fear.]**

**[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.]**

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*New January 2006; Revised August 2009, October 2010, April 2011, August 2013, August 2014, March 2017, September 2018, March 2022*

## BENCH NOTES

***Instructional Duty***

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

To have the requisite intent for theft, the defendant must either intend to deprive the owner permanently or to deprive the owner of a major portion of the property's value or enjoyment. (See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1].) Select the appropriate language in element 5.

There is no sua sponte duty to define the terms "possession," "fear," and "immediate presence." (*People v. Anderson* (1966) 64 Cal.2d 633, 639 [51 Cal.Rptr. 238, 414 P.2d 366] [fear]; *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708 [286 Cal.Rptr. 394] [fear].) These definitions are discussed in the Commentary below.

If second degree robbery is the only possible degree of robbery that the jury may return as their verdict, do not give CALCRIM No. 1602, *Robbery: Degrees*.

Give the bracketed definition of "against a person's will" on request.

If there is an issue as to whether the defendant used force or fear during the commission of the robbery, the court may need to instruct on this point. (See *People v. Estes* (1983) 147 Cal.App.3d 23, 28 [194 Cal.Rptr. 909].) See CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule*.

## AUTHORITY

- Elements. ▸ Pen. Code, § 211.
- Fear Defined. ▸ Pen. Code, § 212; see *People v. Collins* (2021) 65 Cal.App.5th 333, 340–341 [279 Cal.Rptr.3d 407]; *People v. Cuevas* (2001) 89 Cal.App.4th 689, 698 [107 Cal.Rptr.2d 529] [victim must actually be afraid].
- Immediate Presence Defined. ▸ *People v. Hayes* (1990) 52 Cal.3d 577, 626–627 [276 Cal.Rptr. 874, 802 P.2d 376].
- Intent. ▸ *People v. Green* (1980) 27 Cal.3d 1, 52–53 [164 Cal.Rptr. 1, 609 P.2d 468], overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99]; see *Rodriguez v. Superior Court* (1984) 159 Cal.App.3d 821, 826 [205 Cal.Rptr. 750] [same intent as theft].
- Intent to Deprive Owner of Main Value. ▸ See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1] [in context of theft]; *People v. Zangari* (2001) 89 Cal.App.4th 1436, 1447 [108 Cal.Rptr.2d 250] [same].
- Possession Defined. ▸ *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618].
- Constructive Possession by Employee. ▸ *People v. Scott* (2009) 45 Cal.4th 743, 751 [89 Cal.Rptr.3d 213, 200 P.3d 837].
- Constructive Possession by Subcontractor/Janitor. ▸ *People v. Gilbeaux*

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(2003) 111 Cal.App.4th 515, 523 [3 Cal.Rptr.3d 835].

- Constructive Possession by Person With Special Relationship. *People v. Weddles* (2010) 184 Cal.App.4th 1365, 1369-1370 [109 Cal.Rptr.3d 479].
- Felonious Taking Not Satisfied by Theft by False Pretense. *People v. Williams* (2013) 57 Cal.4th 776, 784-789 [161 Cal.Rptr.3d 81, 305 P.3d 1241].
- Constructive Possession and Immediate Presence of Funds in Account of Robbery Victims Using ATM. *People v. Mullins* (2018) 19 Cal.App.5th 594, 603 [228 Cal.Rptr.3d 198].

## COMMENTARY

The instruction includes definitions of "possession," "fear," and "immediate presence" because those terms have meanings in the context of robbery that are technical and may not be readily apparent to jurors. (See *People v. McElheny* (1982) 137 Cal.App.3d 396, 403 [187 Cal.Rptr. 39]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221].)

Possession was defined in the instruction because either actual or constructive possession of property will satisfy this element, and this definition may not be readily apparent to jurors. (*People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797] [defining possession], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618]; see also *People v. Nguyen* (2000) 24 Cal.4th 756, 761, 763 [102 Cal.Rptr.2d 548, 14 P.3d 221] [robbery victim must have actual or constructive possession of property taken; disapproving *People v. Mai* (1994) 22 Cal.App.4th 117, 129 [27 Cal.Rptr.2d 141]].)

Fear was defined in the instruction because the statutory definition includes fear of injury to third parties, and this concept is not encompassed within the common understanding of fear. Force was not defined because its definition in the context of robbery is commonly understood. (See *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1709 [286 Cal.Rptr. 394] ["force is a factual question to be determined by the jury using its own common sense"].)

Immediate presence was defined in the instruction because its definition is related to the use of force and fear and to the victim's ability to control the property. This definition may not be readily apparent to jurors.

## LESSER INCLUDED OFFENSES

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- Attempted Robbery. ▸ Pen. Code, §§ 664, 211; *People v. Webster* (1991) 54 Cal.3d 411, 443 [285 Cal.Rptr. 31, 814 P.2d 1273].
- Grand Theft. ▸ Pen. Code, §§ 484, 487g; *People v. Webster, supra*, at p. 443; *People v. Ortega* (1998) 19 Cal.4th 686, 694, 699 [80 Cal.Rptr.2d 489, 968 P.2d 48]; see *People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1411–1413 [116 Cal.Rptr.2d 1] [insufficient evidence to require instruction].
- Grand Theft Automobile. ▸ Pen. Code, § 487(d); *People v. Gamble* (1994) 22 Cal.App.4th 446, 450 [27 Cal.Rptr.2d 451] [construing former Pen. Code, § 487h]; *People v. Escobar* (1996) 45 Cal.App.4th 477, 482 [53 Cal.Rptr.2d 9] [same].
- Petty Theft. ▸ Pen. Code, §§ 484, 488; *People v. Covington* (1934) 1 Cal.2d 316, 320 [34 P.2d 1019].
- Petty Theft With Prior. ▸ Pen. Code, § 666; *People v. Villa* (2007) 157 Cal.App.4th 1429, 1433–1434 [69 Cal.Rptr.3d 282].

When there is evidence that the defendant formed the intent to steal after the application of force or fear, the court has a **sua sponte** duty to instruct on any relevant lesser included offenses. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055–1057 [60 Cal.Rptr.2d 225, 929 P.2d 544] [error not to instruct on lesser included offense of theft]); *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 350–352 [216 Cal.Rptr. 455, 702 P.2d 613] [same].)

On occasion, robbery and false imprisonment may share some elements (e.g., the use of force or fear of harm to commit the offense). Nevertheless, false imprisonment is not a lesser included offense, and thus the same conduct can result in convictions for both offenses. (*People v. Reed* (2000) 78 Cal.App.4th 274, 281–282 [92 Cal.Rptr.2d 781].)

## RELATED ISSUES

### *Asportation—Felonious Taking*

To constitute a taking, the property need only be moved a small distance. It does not have to be under the robber's actual physical control. If a person acting under the robber's direction, including the victim, moves the property, the element of taking is satisfied. (*People v. Martinez* (1969) 274 Cal.App.2d 170, 174 [79 Cal.Rptr. 18]; *People v. Price* (1972) 25 Cal.App.3d 576, 578 [102 Cal.Rptr. 71].)

### *Claim of Right*

If a person honestly believes that he or she has a right to the property even if that belief is mistaken or unreasonable, such belief is a defense to robbery. (*People v. Butler* (1967) 65 Cal.2d 569, 573 [55 Cal.Rptr. 511, 421 P.2d 703]; *People v.*

*Romo* (1990) 220 Cal.App.3d 514, 518 [269 Cal.Rptr. 440] [discussing defense in context of theft]; see CALCRIM No. 1863, *Defense to Theft or Robbery: Claim of Right*.) This defense is only available for robberies when a specific piece of property is reclaimed; it is not a defense to robberies perpetrated to settle a debt, liquidated or unliquidated. (*People v. Tufunga* (1999) 21 Cal.4th 935, 945–950 [90 Cal.Rptr.2d 143, 987 P.2d 168].)

***Fear***

A victim's fear may be shown by circumstantial evidence. (*People v. Davison* (1995) 32 Cal.App.4th 206, 212 [38 Cal.Rptr.2d 438].) Even when the victim testifies that he or she is not afraid, circumstantial evidence may satisfy the element of fear. (*People v. Renteria* (1964) 61 Cal.2d 497, 498–499 [39 Cal.Rptr. 213, 393 P.2d 413]; *People v. Collins* (2021) 65 Cal.App.5th 333, 341 [279 Cal.Rptr.3d 407].)

***Force—Amount***

The force required for robbery must be more than the incidental touching necessary to take the property. (*People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246 [53 Cal.Rptr.2d 256] [noting that force employed by pickpocket would be insufficient], disapproved on other grounds in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fns. 2, 3 [15 Cal.Rptr.3d 262, 92 P.3d 841].) Administering an intoxicating substance or poison to the victim in order to take property constitutes force. (*People v. Dreas* (1984) 153 Cal.App.3d 623, 628–629 [200 Cal.Rptr. 586]; see also *People v. Wright* (1996) 52 Cal.App.4th 203, 209–210 [59 Cal.Rptr.2d 316] [explaining force for purposes of robbery and contrasting it with force required for assault].)

***Force—When Applied***

The application of force or fear may be used when taking the property or when carrying it away. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8 [282 Cal.Rptr. 450, 811 P.2d 742]; *People v. Pham* (1993) 15 Cal.App.4th 61, 65–67 [18 Cal.Rptr.2d 636]; *People v. Estes* (1983) 147 Cal.App.3d 23, 27–28 [194 Cal.Rptr. 909].)

***Immediate Presence***

Property that is 80 feet away or around the corner of the same block from a forcibly held victim is not too far away, as a matter of law, to be outside the victim's immediate presence. (*People v. Harris* (1994) 9 Cal.4th 407, 415–419 [37 Cal.Rptr.2d 200, 886 P.2d 1193]; see also *People v. Prieto* (1993) 15 Cal.App.4th 210, 214 [18 Cal.Rptr.2d 761] [reviewing cases where victim is distance away from property taken].) Property has been found to be within a person's immediate presence when the victim is lured away from his or her property and force is subsequently used to accomplish the theft or escape (*People v. Webster* (1991) 54

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Cal.3d 411, 440–442 [285 Cal.Rptr. 31, 814 P.2d 1273]) or when the victim abandons the property out of fear (*People v. Dominguez* (1992) 11 Cal.App.4th 1342, 1348–1349 [15 Cal.Rptr.2d 46].)

***Multiple Victims***

Multiple counts of robbery are permissible when there are multiple victims even if only one taking occurred. (*People v. Ramos* (1982) 30 Cal.3d 553, 589 [180 Cal.Rptr. 266, 639 P.2d 908], reversed on other grounds *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446, 77 L.Ed.2d 1171]; *People v. Miles* (1996) 43 Cal.App.4th 364, 369, fn. 5 [51 Cal.Rptr.2d 87] [multiple punishment permitted].) Conversely, a defendant commits only one robbery, no matter how many items are taken from a single victim pursuant to a single plan. (*People v. Brito* (1991) 232 Cal.App.3d 316, 325–326, fn. 8 [283 Cal.Rptr. 441].)

***Value***

The property taken can be of small or minimal value. (*People v. Simmons* (1946) 28 Cal.2d 699, 705 [172 P.2d 18]; *People v. Thomas* (1941) 45 Cal.App.2d 128, 134–135 [113 P.2d 706].) The property does not have to be taken for material gain. All that is necessary is that the defendant intended to permanently deprive the person of the property. (*People v. Green* (1980) 27 Cal.3d 1, 57 [164 Cal.Rptr. 1, 609 P.2d 468], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99].)

## SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, § 85.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.10 (Matthew Bender).

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## 1830. Extortion by Threat or Force (Pen. Code, §§ 518, 519)

**The defendant is charged [in Count __] with extortion by (threat/ [or] force) [in violation of Penal Code section 518].**

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

*<Alternative 1A—threatened to injure or used force>*

**[1. The defendant (threatened to unlawfully injure/ [or] used force against) (another person or a third person/ [or] the property of another person or a third person);]**

*<Alternative 1B—threatened to accuse of crime>*

**[1. The defendant threatened to accuse another person[, or that person's relative or family member,] of a crime;]**

*<Alternative 1C—threatened to expose secret>*

**[1. The defendant threatened to expose a secret about another person[, or that person's relative or family member,] [or to expose or connect (him/her/any of them) with a (disgrace[,]/ [or] crime[,]/ [or] deformity)];]**

**2. When (making the threat/ [or] using force), the defendant intended to use that (fear/ [or] force) to obtain the other person's consent (to give the defendant money [or property]/ [or] to give the defendant anything of value [that involves (sexual conduct /[or] an image of an intimate body part)]/ [or] to do an official act);**

**3. As a result of the (threat/ [or] use of force), the other person consented (to give the defendant money [or property]/ [or] to give the defendant anything of value [that involves (sexual conduct /[or] an image of an intimate body part)]/ [or] to do an official act);**

**AND**

**4. As a result of the (threat/ [or] use of force), the other person then (gave the defendant money [or property]/ [or] gave the defendant anything of value [that involves (sexual conduct [or]/ an image of an intimate body part)]/ [or] did an official act).**

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**The term *consent* has a special meaning here. Consent for extortion can be coerced or unwilling, as long as it is given as a result of the wrongful use of force or fear.**

**The (threat/use of force) must be the controlling reason that the other person consented. If the person consented because of some other controlling reason, the defendant is not guilty of extortion.**

**[Threatening to do something that a person has a legal right to do is not a threat to commit an unlawful injury.]**

**[The threat may involve harm to be inflicted by the defendant or by someone else.]**

**[An *official act* is an act that a person does in his or her official capacity, using the authority of his or her public office.]**

**[A *secret* is a fact that:**

1. **Is unknown to the general public or to someone who might be interested in knowing the fact;**

   **AND**

2. **Harms the threatened person's reputation or other interest so greatly that he or she would be likely to (give the defendant money [or property]/ [or] give the defendant anything of value [that involves (sexual conduct /[or] an image of an intimate body part)]/ [or] do an official act) to prevent the fact from being revealed.]**

**[*Sexual conduct* means any of the following:**

- **[Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals(;/.)]**
- **[Penetration of the vagina or rectum by any object(;/.)]**
- **[Masturbation for the purpose of sexual stimulation of the viewer(;/.)]**
- **[Sadomasochistic abuse for the purpose of sexual stimulation of the viewer(;/.)]**

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**[• Exhibition of the genitals or the pubic or rectal area of any person for the purpose of sexual stimulation of the viewer(;/.)]**

**[• Defecation or urination for the purpose of sexual stimulation of the viewer(;/.)]]**

**[An *intimate body part* means any portion of the genitals, the anus and, in the case of a female, also includes any portion of the breasts below the top of the areola, that is either uncovered or clearly visible through clothing.]**

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*New January 2006; Revised March 2022*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. (See *People v. Hesslink* (1985) 167 Cal.App.3d 781, 788–790 [213 Cal.Rptr. 465].)

Depending on the evidence, in element 1, give the appropriate alternative A–C describing the threat. (Pen. Code, § 519.)

***Related Instructions***

For an instruction on the crime of kidnapping for ransom, reward, or extortion, see CALCRIM No. 1202, *Kidnapping: For Ransom, Reward, or Extortion*.

## AUTHORITY

- Elements ▸ Pen. Code, §§ 518, 519; *People v. Hesslink* (1985) 167 Cal.App.3d 781, 789 [213 Cal.Rptr. 465].
- Specific Intent Required ▸ *People v. Hesslink* (1985) 167 Cal.App.3d 781, 789–790 [213 Cal.Rptr. 465].
- Felony Punishment ▸ Pen. Code, § 520.
- Property Defined ▸ Pen. Code, § 7(10) and (12); see *People v. Baker* (1978) 88 Cal.App.3d 115, 119 [151 Cal.Rptr. 362] [includes right to file administrative protest]; *People v. Cadman* (1881) 57 Cal. 562, 564 [includes right to prosecute appeal]; *People v. Kozlowski* (2002) 96 Cal.App.4th 853, 869 [117 Cal.Rptr.2d 504] [includes PIN code].
- Coerced Consent ▸ *People v. Goodman* (1958) 159 Cal.App.2d 54, 61 [323 P.2d 536]; *People v. Peck* (1919) 43 Cal.App. 638, 645 [185 P. 881].

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- Force or Fear Must Be Controlling Cause ▸ *People v. Goodman* (1958) 159 Cal.App.2d 54, 61 [323 P.2d 536].
- Official Act Defined ▸ See *People v. Mayfield* (1997) 14 Cal.4th 668, 769–773 [60 Cal.Rptr.2d 1, 928 P.2d 485] [kidnapping for extortion]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [219 Cal.Rptr. 7, 706 P.2d 1141] [same].
- Secret Defined ▸ *People v. Lavine* (1931) 115 Cal.App. 289, 295 [1 P.2d 496].
- Threat of Harm by Third Person ▸ *People v. Hopkins* (1951) 105 Cal.App.2d 708, 709–710 [233 P.2d 948].
- Unlawful Injury Defined ▸ *People v. Schmitz* (1908) 7 Cal.App. 330, 369–370 [94 P. 407].
- Wrongful Defined ▸ *People v. Beggs* (1918) 178 Cal. 79, 83–84 [172 P. 152].
- Sexual Conduct Defined ▸ Pen. Code, § 311.3(b).
- Intimate Body Part Defined ▸ Pen. Code, § 647(j)(4)(C).

## LESSER INCLUDED OFFENSES

- Attempted Extortion ▸ Pen. Code, § 524; see *People v. Sales* (2004) 116 Cal.App.4th 741, 748–749 [10 Cal.Rptr.3d 527]; *People v. Franquelin* (1952) 109 Cal.App.2d 777, 783–784 [241 P.2d 651]; *Isaac v. Superior Court* (1978) 79 Cal.App.3d 260, 263 [146 Cal.Rptr. 396]; *People v. Lavine* (1931) 115 Cal.App. 289, 297 [1 P.2d 496].

## RELATED ISSUES

***No Defense of Good Faith***

A good faith belief in the right to property does not negate the specific intent required for extortion. A debt cannot be collected by extortion. (*People v. Beggs* (1918) 178 Cal. 79, 84 [172 P. 152]; see *People v. Serrano* (1992) 11 Cal.App.4th 1672, 1677–1678 [15 Cal.Rptr.2d 305] [kidnapping for ransom].)

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 119–124.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.02 (Matthew Bender).

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## 2220. Driving With Suspended or Revoked Driving Privilege (Veh. Code, §§ 13106, 14601, 14601.1, 14601.2, 14601.5)

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**The defendant is charged [in Count __] with driving while (his/her) driving privilege was (suspended/ [or] revoked) [in violation of _____** <*insert appropriate code section[s]*>**].**

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

1. **The defendant drove a motor vehicle while (his/her) driving privilege was (suspended/ [or] revoked) [for _____** <*insert basis for suspension or revocation*>**];**

**AND**

2. **When the defendant drove, (he/she) knew that (his/her) driving privilege was (suspended/ [or] revoked).**

**[If the People prove that:**

1. **The California Department of Motor Vehicles mailed a notice to the defendant telling (him/her) that (his/her) driving privilege had been (suspended/ [or] revoked);**

2. **The notice was sent to the most recent address reported to the department [or any more recent address reported by the person, a court, or a law enforcement agency];**

**AND**

3. **The notice was not returned to the department as undeliverable or unclaimed;**

**then you may, but are not required to, conclude that the defendant knew that (his/her) driving privilege was (suspended/ [or] revoked).]**

**[If the People prove beyond a reasonable doubt that a court informed the defendant that (his/her) driving privilege had been (suspended/ [or] revoked), you may but are not required to conclude that the defendant knew that (his/her) driving privilege was (suspended/ [or] revoked).]**

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**[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*>).]**

**[The term *motor vehicle* is defined in another instruction to which you should refer.]**

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*New January 2006; Revised April 2008, March 2022*

## BENCH NOTES

***Instructional Duty***

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

In element 1, the court may insert the reason for the suspension or revocation unless the court has accepted a stipulation regarding this issue.

The two bracketed paragraphs that begin with "If the People prove" each explain rebuttable presumptions created by statute. (See Veh. Code, §§ 14601(a), 14601.1(a), 14602(c), 14601.5(c); 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 [658 P.2d 1302].) In accordance with *Roder,* the bracketed paragraphs have been written as permissive inferences.

The court **must not** give the bracketed paragraph that begins with "If the People prove that the California Department of Motor Vehicles mailed a notice" if there is evidence that the defendant did not receive the notice or for other reasons did not know that his or her driving privilege was revoked or suspended.

Similarly, the court **must not** give the bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that a court informed the defendant" if there is evidence that the defendant did not receive the notice or for other reasons did not know that his or her driving privilege was revoked or suspended. In addition, this provision regarding notice by the court only applies if the defendant is charged with a violation of Vehicle Code section 14601.2. (See Veh. Code, § 14601.2(c).) Do not give this paragraph if the defendant is charged under any other Vehicle Code section.

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Give the bracketed definition of motor vehicle unless the court has already given the definition in another instruction. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Give CALCRIM No. 2241, *Driver and Driving Defined*, on request.

If the defendant is charged with one or more prior convictions, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the defendant has stipulated to the conviction. If the court has granted a bifurcated trial on the prior conviction, use CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

## AUTHORITY

- Elements. ▸ Veh. Code, §§ 13106, 14601, 14601.1, 14601.2, 14601.5.
- Motor Vehicle Defined. ▸ Veh. Code, § 415.
- Actual Knowledge of Suspension or Revocation Required. ▸ *In re Murdock* (1968) 68 Cal.2d 313, 315–316 [66 Cal.Rptr. 380, 437 P.2d 764].
- Mandatory Presumption Unconstitutional Unless Instructed as Permissive Inference. ▸ *People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].

## RELATED ISSUES

***Suspension or Revocation Continues Until License Restored***
In *People v. Gutierrez* (1998) 65 Cal.App.4th Supp. 1 [76 Cal.Rptr.2d 166], the defendant's license had been suspended for a period of one year for driving under the influence. The defendant was arrested for driving after that one-year period had expired. The court held that the defendant's license remained suspended even though the stated time period had passed because the defendant had not taken the steps necessary to restore his driving privilege. (*Id.* at pp. 8–9.)

***Privilege to Drive May Be Suspended or Revoked Even If No License Issued***
A person's privilege to drive may be suspended or revoked even though that person has never been issued a valid driver's license. (*People v. Matas* (1988) 200 Cal.App.3d Supp. 7, 9 [246 Cal.Rptr. 627].)

~~***May Be Punished for This Offense and Driving Under the Influence***~~
~~In *In re Hayes* (1969) 70 Cal.2d 604, 611 [75 Cal.Rptr. 790, 451 P.2d 430], the court held that Penal Code section 654 did not preclude punishing the defendant for both driving under the influence and driving with a suspended license.~~

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 306.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction*, § 93.08[6] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1][c] (Matthew Bender).

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## 2306. Possession of Controlled Substance with Intent to Commit Sexual Assault (Health & Saf. Code, §§ 11350.5, 11377.5)

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**The defendant is charged [in Count ___] with possession of _____** *<insert type of controlled substance from sections 11056(c)(11), (g), 11054(e)(3); or 11057(d)(13) of the Health and Safety Code>***, a controlled substance, with intent to commit _____** *<insert description of alleged target crime or crimes from sections 243.4, 261, ~~262,~~ 286, 287, or 289 of the Penal Code>***, [in violation of Health and Safety Code section[s] (11350.5[,]/ [and/or] 11377.5)].**

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

1. **The defendant possessed a controlled substance;**

2. **The defendant knew of its presence;**

3. **The defendant knew of the substance's nature or character as a controlled substance;**

4. **When the defendant possessed the controlled substance, (he/she) intended to use it to commit _____** *<insert description of alleged target crime or crimes from sections 243.4, 261, ~~262,~~ 286, 287, or 289 of the Penal Code>***;**

5. **The controlled substance was _____ <***insert type of controlled substance***>;**

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

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

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

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

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**[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.]**

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*New September 2017; Revised March 2022*

## BENCH NOTES

***Instructional Duty***

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

The court must also give the appropriate instructions on the target sexual offense or offenses in element 4.

## AUTHORITY

- Elements ▸ Health & Saf. Code, §§ 11350.5, 11377.5.
- Prohibited Controlled Substances ▸ Health & Saf. Code, §§ 11054(e)(3), 11056(c)(11) or (g); 11057(d)(13).
- Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge ▸ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Usable Amount ▸ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 105, 106.

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 1-69.

## 2307–2314. Reserved for Future Use

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## 2503. Possession of Deadly Weapon With Intent to Assault (Pen. Code, § 17500)

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**The defendant is charged [in Count __] with possessing a deadly weapon with intent to assault [in violation of Penal Code section 17500].**

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

1. **The defendant possessed a deadly weapon on (his/her) person;**

2. **The defendant knew that (he/she) possessed the weapon;**

**AND**

3. **At the time the defendant possessed the weapon, (he/she) intended to assault someone.**

**A person intends to assault someone else if he or she intends to do an act that by its nature would directly and probably result in the application of force to a person.**

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

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

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

**[The term *deadly weapon* is defined in another instruction to which you should refer.]**

**[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed[,] [and] [where the person who possessed the object was going][,] [and] [whether the object was changed from its standard form] and any other evidence that indicates that the object would be used for a dangerous, rather than a harmless, purpose.]**

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

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

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

**[The People allege that the defendant possessed the following weapons: _____ <*insert description of each weapon when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant possessed at least one of these weapons and you all agree on which weapon (he/she) possessed.]**

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*New January 2006; Revised February 2012, February 2013, September 2019, September 2020, March 2022*

## BENCH NOTES

***Instructional Duty***

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

If the prosecution alleges under a single count that the defendant possessed multiple 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 that begins with "The People allege that the defendant possessed the following weapons," inserting the items alleged.

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

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

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

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.***Defenses—Instructional Duty***
Evidence of voluntary intoxication or mental impairment may be admitted to show that the defendant did not form the required mental state. (See *People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364].) The court has no sua sponte duty to instruct on these defenses; however, the trial court must give these instructions on request if supported by the evidence. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588] [on duty to instruct generally]; *People v. Stevenson* (1978) 79 Cal.App.3d 976, 988 [145 Cal.Rptr. 301] [instructions applicable to possession of weapon with intent to assault].) See Defenses and Insanity, CALCRIM No. 3400 et seq.

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

## AUTHORITY

- Elements ▸ Pen. Code, § 17500.
- Deadly Weapon Defined ▸ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Objects With Innocent Uses ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].
- Knowledge Required ▸ See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885].
- Assault ▸ Pen. Code, § 240; see also *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].

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- Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Inherently Deadly Defined ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Examples of Noninherently Deadly Weapon ▸ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 189.

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[1] (Matthew Bender).

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## 2514. Possession of Firearm by Person Prohibited by Statute: Self–Defense

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**The defendant is not guilty of unlawful possession of a firearm[, as charged in Count __,] if (he/she) temporarily possessed the firearm in (self-defense/ [or] defense of another). The defendant possessed the firearm in lawful (self-defense/ [or] defense of another) if:**

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

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

3. **A firearm became available to the defendant without planning or preparation on (his/her) part;**

4. **The defendant possessed the firearm temporarily, that is, for a period no longer than was necessary [or reasonably appeared to have been necessary] for self-defense;**

5. **No other means of avoiding the danger of injury was available;**

**AND**

6. **The defendant's use of the firearm was reasonable under the circumstances.**

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

**When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar**

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**knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.**

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

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

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

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

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

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

**The People have the burden of proving beyond a reasonable doubt that the defendant did not temporarily possess the firearm in (self-defense/ [or] defense of another). If the People have not met this burden, you must find the defendant not guilty of this crime.**

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*New January 2006; Revised December 2008, February 2012, September 2020, March 2022*

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## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to instruct on self-defense when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (See *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [249 Cal.Rptr. 897] [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses]; *People v. King* (1978) 22 Cal.3d 12, 24 [148 Cal.Rptr. 409, 582 P.2d 1000] [self-defense applies to charge under now repealed Pen. Code, § 12021].)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of "antecedent threats or assaults against the defendant on the reasonableness of defendant's conduct." (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488 [1 Cal.Rptr.3d 774].) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475 [198 Cal.Rptr. 819]; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068 [56 Cal.Rptr.2d 133, 920 P.2d 1337]; see also CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.) If these instructions have already been given in CALCRIM No. 3470 or CALCRIM No. 505, the court may delete them here.

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

***Related Instructions***

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

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## AUTHORITY

- Temporary Possession of Firearm by Felon in Self-Defense ▸ *People v. King* (1978) 22 Cal.3d 12, 24 [148 Cal.Rptr. 409, 582 P.2d 1000].
- Duty to Retreat Limited to Felon in Possession Cases ▸ *People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1343–1346 [29 Cal.Rptr.3d 226].
- Possession Must Be Brief and Not Planned ▸ *People v. McClindon* (1980) 114 Cal.App.3d 336, 340 [170 Cal.Rptr. 492].
- Instructional Requirements ▸ *People v. Moody* (1943) 62 Cal.App.2d 18 [143 P.2d 978]; *People v. Myers* (1998) 61 Cal.App.4th 328, 335, 336 [71 Cal.Rptr.2d 518].
- Lawful Resistance ▸ Pen. Code, §§ 692, 693, 694; Civ. Code, § 50.
- Burden of Proof ▸ Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements ▸ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Imminence ▸ *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167], disapproved on other grounds by *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088–1089 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Reasonable Belief ▸ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1]; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].

## RELATED ISSUES

***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

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[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 (4th ed. 2012) Defenses, §§ 86, 87, 68, 71, 72, 73.

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 233-237.

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

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction,* § 93.06 (Matthew Bender).

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

## 2515–2519. Reserved for Future Use

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

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

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

1. **When the defendant (carried the firearm/ [or] caused the firearm to be carried concealed in a vehicle), the defendant was an active participant in a criminal street gang;**

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

**AND**

3. **The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by:**

   a. **Directly and actively committing a felony offense;**

   **OR**

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

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

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

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

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**A *criminal street gang* is an~~y~~ ongoing organized~~ation,~~ association~~,~~ or group of three or more persons, whether formal or informal:**

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

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

**AND**

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

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

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

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

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

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

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

   ~~**[OR]**~~

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

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

~~**AND**~~

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

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

**3. The most recent crime occurred within three years of one of the earlier crimes and within three years of the date of the currently charged offense;**

~~**AND**~~

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

**5. The crimes commonly benefitted a criminal street gang;**

**AND**

**6. The common benefit from the crimes was more than reputational.**

**Examples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant.**

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

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

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

**[You may not consider evidence of the charged offense[s] in deciding whether a pattern of criminal gang activity has been established.]**

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

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

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

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

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

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

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

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

**AND**

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

**Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid,**

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**facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.**

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

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

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

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

**AND**

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

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

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

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*New January 2006; Revised August 2006, June 2007, December 2008, February 2012, August 2013, February 2014, February 2016, March 2022*

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## BENCH NOTES

***Instructional Duty***

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

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

If the defendant does stipulate that he or she is an active gang participant, this instruction should not be given and that information should not be disclosed to the jury. (See *People v. Hall, supra,* 67 Cal.App.4th at p. 135.)~~In element 2 of the paragraph defining a "criminal street gang," insert one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33) that are alleged to be the primary activities of the gang. (See *People v. Sengpadychith, supra,* 26 Cal.4th at pp. 316, 323–324.)~~

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

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~~the felony or felonies the defendant allegedly aided and abetted. (See *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].)~~

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

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

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

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

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

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

***Defenses—Instructional Duty***

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

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

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***Related Instructions***
CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.
CALCRIM No. 1401, *Felony or Misdemeanor Committed for Benefit of Criminal Street Gang (Pen. Code, § 186.22(b)(1) (Felony) and § 186.22(d) (Felony or Misdemeanor))*.

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

## AUTHORITY

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

## RELATED ISSUES

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***Gang Expert Cannot Testify to Defendant's Knowledge or Intent***
In *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658 [126 Cal.Rptr.2d 876], the court held it was error to permit a gang expert to testify that the defendant knew there was a loaded firearm in the vehicle:

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

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

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

## SECONDARY SOURCES

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

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

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## 2670. Lawful Performance: Peace Officer

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**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.**

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**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**

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**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.]**

**[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.]**

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**[*Deadly force* is force that creates a substantial risk of causing death or serious bodily injury. It includes, but is not limited to, the discharge of a firearm. It does not require that the encounter result in the death of the person against whom the force was used.]**

**[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.**

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

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

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

*<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**

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**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.]**

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*New January 2006; Revised August 2016, March 2022*

## 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.

If this instruction is only relevant to a charge of violating Penal Code section 148, the court **must not give** the bracketed sentence in section C 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

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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* (1993) 14 Cal.App.4th 761, 777 [17 Cal.Rptr.2d 743].) 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* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159]; *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].
- Lawful Detention ▸ *People v. Celis* (2004) 33 Cal.4th 667, 674-675 [16 Cal.Rptr.3d 85, 93 P.3d 1027].

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- Lawful Arrest ▸ Pen. Code, §§ 834–836, 841.
- Probable Cause Defined ▸ *People v. Celis* (2004) 33 Cal.4th 667, 673 [16 Cal.Rptr.3d 85, 93 P.3d 1027]; *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* (1993) 14 Cal.App.4th 761, 777 [17 Cal.Rptr.2d 743]; *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.
- Excessive Use of Deadly Force ▸ Pen. Code, § 835a.
- Excessive Force Makes Arrest Unlawful ▸ *People v. White* (1980) 101 Cal.App.3d 161, 166–168 [161 Cal.Rptr. 541].
- Excessive Force Triggers Right to Self-Defense With Reasonable Force ▸ *People v. Curtis* (1969) 70 Cal.2d 347, 356 [74 Cal.Rptr. 713, 450 P.2d 33].
- Merely Photographing or Recording Officers Not a Crime ▸ Pen. Code, § 148(g).

## 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* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].) 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).

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## 2672. Lawful Performance: Resisting Unlawful Arrest With Force

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**The defendant is not guilty of the crime of (battery against a peace officer[,]/ [or] assault against a peace officer[,]/ [or] assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon) against a peace officer[,]/ [or] _____ <*insert other crime charged, e.g., resisting arrest*>) if the officer was not lawfully performing (his/her) duties because (he/she) was unlawfully arresting someone.**

**However, even if the arrest was unlawful, as long as the officer used only reasonable force to accomplish the arrest, the defendant may be guilty of the lesser crime of (battery[,]/ [or] assault[,]/ [or] assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon)).**

**On the other hand, if the officer used unreasonable or excessive force, and the defendant used only reasonable force in (self-defense/ [or] defense of another), then the defendant is not guilty of the lesser crime[s] of (battery[,]/ [or] assault[,]/ [or] assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon)).**

**[A peace officer may use reasonable non-deadly force to arrest or detain someone, to prevent escape, to overcome resistance, or in self-defense.]**

**[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* >;**

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**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* is force that creates a substantial risk of causing death or serious bodily injury. It includes, but is not limited to, the discharge of a firearm. It does not require that the encounter result in the death of the person against whom the force was used.]**

**[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.**

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

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

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**[● The officer was able, under the circumstances, [[to [identify] [or] [attempt to identify]] him or herself as a peace officer] [and] [to [warn] [or] [attempt to warn] that deadly force may be used].]**

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

**The People have the burden of proving beyond a reasonable doubt that the officer was lawfully performing (his/her) duties. If the People have not met this burden, you must find the defendant not guilty [of** _____ *<insert crimes>***].**

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*New January 2006; Revised March 2022*

## BENCH NOTES

***Instructional Duty***

The court may give this instruction on request.

## AUTHORITY

- No Right to Forcibly Resist Arrest ▸ Pen. Code, § 834a.
- Applies to Arrest, Not Detention ▸ *People v. Coffey* (1967) 67 Cal.2d 204, 221 [60 Cal.Rptr. 457, 430 P.2d 15]; *People v. Jones* (1970) 8 Cal.App.3d 710, 717 [87 Cal.Rptr. 625].
- Forcible Resistance to Unlawful Arrest Is Battery or Assault on Nonofficer ▸ *People v. Curtis* (1969) 70 Cal.2d 347, 355–356 [74 Cal.Rptr. 713, 450 P.2d 33]; *People v. White* (1980) 101 Cal.App.3d 161, 166 [161 Cal.Rptr. 541].
- Use of Reasonable Force in Response to Excessive Force Is Complete Defense ▸ *People v. White* (1980) 101 Cal.App.3d 161, 168 [161 Cal.Rptr. 541].
- May Not Be Convicted of Resisting Unlawful Arrest ▸ *People v. White* (1980) 101 Cal.App.3d 161, 166 [161 Cal.Rptr. 541]; *People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 10 [108 Cal.Rptr. 338].

## SECONDARY SOURCES

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3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.11[2][b], 73.15[2] (Matthew Bender).

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## 2720. Assault by Prisoner Serving Life Sentence (Pen. Code, § 4500)

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**The defendant is charged [in Count __] with assault with (force likely to produce great bodily injury/a deadly weapon) with malice aforethought, while serving a life sentence [in violation of Penal Code section 4500].**

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

*<Alternative 1A—force with weapon>*

**[1. The defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;]**

*<Alternative 1B—force without weapon>*

**[1. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and the force used was likely to produce great bodily injury;]**

**2. The defendant did that act willfully;**

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

**4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;**

**5. The defendant acted with malice aforethought;**

**[AND]**

*<Alternative 6A—defendant sentenced to life term>*

**[6. When (he/she) acted, the defendant had been sentenced to a maximum term of life in state prison [in California](;/.)]**

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*<Alternative 6B—defendant sentenced to life and to determinate term>*

**[6. When (he/she) acted, the defendant had been sentenced to both a specific term of years and a maximum term of life in state prison [in California](;/.)]**

*<Give element 7 when self-defense or defense of another is an issue raised by the evidence.>*

**[AND**

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

**Someone commits an act *willfully* when he or she does it willingly or on purpose.**

**[The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]**

**[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]**

**[The People are not required to prove that the defendant actually touched someone.]**

**No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].**

**[A *deadly weapon* is any object, instrument, or weapon [that is inherently deadly or dangerous or one] that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]**

**[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]**

**[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances.]**

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**[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]**

**[The term (*great bodily injury/deadly weapon*) is defined in another instruction.]**

**There are two kinds of *malice aforethought*, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for this crime.**

**The defendant acted with *express malice* if (he/she) unlawfully intended to kill the person assaulted.**

**The defendant acted with *implied malice* if:**

1. **(He/She) intentionally committed an act.**

2. **The natural and probable consequences of the act were dangerous to human life.**

3. **At the time (he/she) acted, (he/she) knew (his/her) act was dangerous to human life.**

**AND**

4. **(He/She) deliberately acted with conscious disregard for human life.**

**Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act is committed. It does not require deliberation or the passage of any particular period of time.**

**[A person is *sentenced to a term in a state prison* if he or she is (sentenced to confinement in _____ <*insert name of institution from Pen. Code, § 5003*>/committed to the Department of Corrections and Rehabilitation[, Division of Juvenile Justice,]) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *sentenced to a term in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is *not sentenced to a term in a state prison*.]]**

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*New January 2006; Revised February 2013, August 2016, September 2019, September 2020, March 2022*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In element 1, give alternative 1A if it is alleged the assault was committed with a deadly weapon. Give alternative 1B if it is alleged that the assault was committed with force likely to produce great bodily injury.

In element 6, give alternative 6A if the defendant was sentenced to only a life term. Give element 6B if the defendant was sentenced to both a life term and a determinate term. (*People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836].)

Give the bracketed definition of "application of force and apply force" on request.

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Give the bracketed phrase "that is inherently deadly or one" and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with "In deciding whether" if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

On request, give the bracketed definition of "sentenced to a term in state prison." Within that definition, give the bracketed portion that begins with "regardless of

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the purpose," or the bracketed second or third sentence, if requested and relevant based on the evidence.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

Penal Code section 4500 provides that the punishment for this offense is death or life in prison without parole, unless "the person subjected to such assault does not die within a year and a day after" the assault. If this is an issue in the case, the court should consider whether the time of death should be submitted to the jury for a specific factual determination pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

***Defense—Instructional Duty***

As with murder, the malice required for this crime may be negated by evidence of heat of passion or imperfect self-defense. (*People v. St. Martin* (1970) 1 Cal.3d 524, 530–531 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781 [73 Cal.Rptr. 10, 447, P.2d 106].) If the evidences raises an issue about one or both of these potential defenses, the court has a **sua sponte** duty to give the appropriate instructions, CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion–Lesser Included Offense*, or CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense–Lesser Included Offense*. The court must modify these instructions for the charge of assault by a life prisoner.

***Related Instructions***

CALCRIM No. 875, *Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury*.

CALCRIM No. 520, *Murder With Malice Aforethought*.

## AUTHORITY

- Elements of Assault by Life Prisoner ▸ Pen. Code, § 4500.

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- Elements of Assault With Deadly Weapon or Force Likely ▸ Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- Willful Defined ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Malice Equivalent to Malice in Murder ▸ *People v. St. Martin* (1970) 1 Cal.3d 524, 536–537 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781 [73 Cal.Rptr. 10, 447 P.2d 106].
- Malice Defined ▸ Pen. Code, § 188; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1217–1222 [264 Cal.Rptr. 841, 783 P.2d 200]; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103–105 [13 Cal.Rptr.2d 864, 840 P.2d 969].
- Ill Will Not Required for Malice ▸ *People v. Sedeno* (1974) 10 Cal.3d 703, 722 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1].
- Undergoing Sentence of Life ▸ *People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836].
- Inherently Deadly Defined ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Examples of Noninherently Deadly Weapon ▸ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

## LESSER INCLUDED OFFENSES

- Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury—Not a Prisoner ▸ Pen. Code, § 245; see *People v. St. Martin* (1970) 1 Cal.3d 524, 536 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].
- Assault ▸ Pen. Code, § 240; *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].

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Note: In *People v. Noah* (1971) 5 Cal.3d 469, 476–477 [96 Cal.Rptr. 441, 487 P.2d 1009], the court held that assault by a prisoner not serving a life sentence, Penal Code section 4501, is not a lesser included offense of assault by a prisoner serving a life sentence, Penal Code section 4500. The court based its on conclusion on the fact that Penal Code section 4501 includes as an element of the offense that the prisoner was not serving a life sentence. However, Penal Code section 4501 was amended, effective January 1, 2005, to remove this element. The trial court should, therefore, consider whether Penal Code section 4501 is now a lesser included offense to Penal Code section 4500.

## RELATED ISSUES

***Status as Life Prisoner Determined on Day of Alleged Assault***

Whether the defendant is sentenced to a life term is determined by his or her status on the day of the assault. (*People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836]; *Graham v. Superior Court* (1979) 98 Cal.App.3d 880, 890 [160 Cal.Rptr. 10].) It does not matter if the conviction is later overturned or the sentence is later reduced to something less than life. (*People v. Superior Court of Monterey (Bell), supra,* 99 Cal.App.4th at p. 1341; *Graham v. Superior Court, supra,* 98 Cal.App.3d at p. 890.)

***Undergoing Sentence of Life***

This statute applies to "[e]very person undergoing a life sentence . . . ." (Pen. Code, § 4500.) In *People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836], the defendant had been sentenced both to life in prison and to a determinate term and, at the time of the assault, was still technically serving the determinate term. The court held that he was still subject to prosecution under this statute, stating "a prisoner who commits an assault is subject to prosecution under section 4500 for the crime of assault by a life prisoner if, on the day of the assault, the prisoner was serving a sentence which potentially subjected him to actual life imprisonment, and therefore the prisoner might believe he had 'nothing left to lose' by committing the assault." *(Ibid.)*

***Error to Instruct on General Definition of Malice and General Intent***

"Malice," as used in Penal Code section 4500, has the same meaning as in the context of murder. (*People v. St. Martin* (1970) 1 Cal.3d 524, 536–537 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781 [73 Cal.Rptr. 10, 447 P.2d 106].) Thus, it is error to give the general definition of malice found in Penal Code section 7, subdivision 4. (*People v. Jeter* (2005) 125 Cal.App.4th 1212, 1217 [23 Cal.Rptr.3d 402].) It is also error to instruct that Penal Code section 4500 is a general intent crime. *(Ibid.)*

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## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 58–60.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.11[3] (Matthew Bender).

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## 2721. Assault by Prisoner (Pen. Code, § 4501)

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**The defendant is charged [in Count __] with assault with (force likely to produce great bodily injury/a deadly weapon) while serving a state prison sentence [in violation of Penal Code section 4501].**

**To prove that the defendant is guilty of this crime, the People must prove that:**

*<Alternative 1A—force with weapon>*

**[1. The defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;]**

*<Alternative 1B—force without weapon>*

**[1. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and the force used was likely to produce great bodily injury;]**

**2. The defendant did that act willfully;**

**3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;**

**4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;**

**[AND]**

**5. When (he/she) acted, the defendant was confined in a [California] state prison(;/.)**

*<Give element 6 when self-defense or defense of another is an issue raised by the evidence.>*

**[AND**

**6. The defendant did not act (in self-defense/ [or] in defense of someone else).]**

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**Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.**

**[The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]**

**[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]**

**[The People are not required to prove that the defendant actually touched someone.]**

**No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].**

**[A *deadly weapon* is any object, instrument, or weapon [that is inherently deadly or dangerous or one] that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]**

**[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]**

**[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances.]**

**[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]**

**[The term (*great bodily injury/deadly weapon*) is defined in another instruction.]**

**A person is *confined in a state prison* if he or she is (confined in _____** *<insert name of institution from Pen. Code, § 5003>*/**committed to the Department of Corrections and Rehabilitation[, Division of Juvenile Justice,]) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the**

**(confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *confined in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is not *confined in a state prison*.]**

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*New January 2006; Revised August 2016, September 2019, September 2020, March 2022*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 6 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In element 1, give alternative 1A if it is alleged the assault was committed with a deadly weapon. Give alternative 1B if it is alleged that the assault was committed with force likely to produce great bodily injury.

Give the bracketed definition of "application of force and apply force" on request.

Give the bracketed phrase "that is inherently deadly or one" and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with "In deciding whether" if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

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.

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In the definition of "serving a sentence in a state prison," give the bracketed portion that begins with "regardless of the purpose," or the bracketed second or third sentence, if requested and relevant based on the evidence.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

***Related Instructions***
CALCRIM No. 875, *Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury*.

## AUTHORITY

- Elements of Assault by Prisoner ▸ Pen. Code, § 4501.
- Elements of Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury ▸ Pen. Code, §§ 240, 245(a)(1)–(3) & (b).

- Willful Defined ▸ Pen. Code, § 7 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Confined in State Prison Defined ▸ Pen. Code, § 4504.
- Underlying Conviction Need Not Be Valid ▸ *Wells v. California* (9th Cir. 1965) 352 F.2d 439, 442.
- Inherently Deadly Defined ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].

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- Examples of Noninherently Deadly Weapon ▸ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

## LESSER INCLUDED OFFENSES

- Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury—Not a Prisoner ▸ Pen. Code, § 245; see *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].
- Assault ▸ Pen. Code, § 240; *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].

## RELATED ISSUES

***Not Serving a Life Sentence***

Previously, this statute did not apply to an inmate "undergoing a life sentence." (See *People v. Noah* (1971) 5 Cal.3d 469, 477 [96 Cal.Rptr. 441, 487 P.2d 1009].) The statute has been amended to remove this restriction, effective January 1, 2005. If the case predates this amendment, the court must add to the end of element 5, "for a term other than life."

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 61, 63.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.11[3] (Matthew Bender).

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## 2749. Bringing or Sending Controlled Substance or Paraphernalia Into Penal Institution (Pen. Code, § 4573(a))

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**The defendant is charged [in Count __] with (bringing/sending/ [or] assisting in (bringing/sending)) (_____ <*insert type of controlled substance*>, a controlled substance/an object intended for use to inject or consume controlled substances), into a penal institution [in violation of Penal Code section 4573].**

**To prove that the defendant is guilty of this crime, the People must prove that:**

1. **The defendant [unlawfully] (brought/sent/ [or] assisted in (bringing/sending)) (a controlled substance[,]/ [or] an object intended for use to inject or consume controlled substances) into a penal institution [or onto the grounds of a penal institution];**

2. **The defendant knew that (he/she) was (bringing/sending/ [or] assisting in (bringing/sending)) (a controlled substance/an object intended for use to inject or consume a controlled substance) into a penal institution [or onto the grounds of a penal institution];**

**[AND]**

3. **The defendant knew (of the substance's nature or character as a controlled substance/that the object was intended to be used for injecting or consuming a controlled substance)(;/.)**

*<Give elements 4 and 5 if defendant is charged with possession of a controlled substance, not possession of paraphernalia.>*

**[4. The controlled substance was [an analog of] _____** *<insert type of controlled substance>***;**

**AND**

5. **The controlled substance was a usable amount.]**

**[In order to prove that the defendant is guilty of this crime, the People must prove that _____***<insert name of analog drug>* **is an analog of**

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_____<*insert type of controlled substance*>. **An analog of a controlled substance:**

**[1. Has a chemical structure substantially similar to the structure of a controlled substance(./;)]**

**[OR]**

**[(2/1). Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]]**

**A *penal institution* is a (state prison[,]/ [or] prison camp or farm[,]/ [or] jail[,]/ [or] county road camp[,]/ [or] place where prisoners of the state prison are located under the custody of prison officials, officers, or employees).**

**[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]**

**[An object is *intended to be used* for injecting or consuming a controlled substance if the defendant (1) actually intended it to be so used, or (2) should have known, based on the item's objective features, that it was intended for such use.]**

**[The People allege that the defendant (brought/sent/ [or] assisted in (bringing/sending)) the following items:** _____ <*insert description of each controlled substance or all paraphernalia 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/sent/ [or] assisted in (bringing/sending)) at least one of these items and you all agree on which item (he/she) (brought/sent/ [or] assisted in (bringing/sending)).]**

<*Defense: Conduct Authorized*>
**[The defendant is not guilty of this offense if (he/she) was authorized to (bring/send) the (substance/item) into the penal institution by (law[,]/ [or] a person in charge of the penal institution[,]/ [or] an officer of the penal institution empowered by the person in charge of the institution to give such authorization). The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to (bring/send) the**

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**(substance/item) into the institution. If the People have not met this burden, you must find the defendant not guilty of this offense.]**

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*New March 2022*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with bringing or sending a controlled substance, give elements 1 through 5. If the defendant is charged with bringing or sending paraphernalia, give elements 1 through 3 only.

If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give the bracketed phrase "an analog of" in element 4.

If the prosecution alleges under a single count that the defendant brought or sent multiple items into the institution, 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/sent/ [or] assisted in (bringing/sending)),"
inserting the items alleged.

If there is sufficient evidence that the defendant was authorized to bring or send the controlled substance or item, give the bracketed word "unlawfully" in element 1. Give also the bracketed paragraph headed "Defense: Conduct Authorized."

## AUTHORITY

- Elements ▸ Pen. Code, § 4573; *People v. Low* (2010) 49 Cal.4th 372, 381–387 [110 Cal.Rptr.3d 640, 232 P.3d 635].
- Knowingly Brings or Sends ▸ *People v. Low* (2010) 49 Cal.4th 372, 386 [110 Cal.Rptr.3d 640, 232 P.3d 635]; *People v. Gastello* (2010) 49 Cal.4th 395, 402–403 [110 Cal.Rptr.3d 658, 232 P.3d 650].
- Usable Amount ▸ *People v. Blanco* (2021) 61 Cal.App.5th 278, 286 [275 Cal.Rptr.3d 558].

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- Jail Defined ‣ *People v. Carter* (1981) 117 Cal.App.3d 546, 550 [172 Cal.Rptr. 838].
- Knowledge of Location as Penal Institution ‣ *People v. Seale* (1969) 274 Cal.App.2d 107, 111 [78 Cal.Rptr. 811].
- Unanimity ‣ *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].
- Definition of Analog Controlled Substance ‣ Health & Saf. Code, § 11401; *People v. Davis* (2013) 57 Cal.4th 353, 357, fn. 2 [159 Cal.Rptr.3d 405, 303 P.3d 1179].
- No Finding Necessary for "Expressly Listed" Controlled Substance ‣ *People v. Davis, supra,* 57 Cal.4th at p. 362, fn. 5.

## RELATED ISSUES

***Inmate Transferred to Mental Hospital***

A prison inmate transferred to a mental hospital for treatment pursuant to Penal Code section 2684 is not "under the custody of prison officials." (*People v. Superior Court (Ortiz)* (2004) 115 Cal.App.4th 995, 1002 [9 Cal.Rptr.3d 745].)

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, § 105.

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).

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## 3010. Eavesdropping or Recording Confidential Communication (Pen. Code, § 632(a))

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**The defendant is charged [in Count __] with using an electronic device to eavesdrop on or to record a confidential communication [in violation of Penal Code section 632(a)].**

**To prove that the defendant is guilty of this crime, the People must prove that:**

1. **The defendant willfully listened to or recorded a (conversation/communication);**

2. **When the defendant listened to or recorded the (conversation/communication), (he/she) used (an/a) (electronic amplifying/recording) device;**

3. **When the defendant listened to or recorded the (conversation/communication), (he/she) did not have the consent of all the individuals who were party to the (conversation/communication);**

4. **At least one of the [other] individuals who were party to the (conversation/communication) intended that the (conversation/communication) be confidential(;/.)**

**[AND]**

5. **The individual[s] who intended that the (conversation/communication) be confidential had objectively reasonable grounds to believe that the (conversation/communication) would be confidential(;/.)**

**[AND]**

*<Give element 6 if evidence shows defendant may have been an officer, agent, or employee of a public communications utility.>*
**[6. The defendant was not an officer, agent, or employee of a public communications utility company acting in the lawful performance of (his/her) duties.]**

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**Someone commits an act *willfully* when he or she does it willingly or on purpose.**

**[A *confidential communication* does not include a communication made in a public gathering or in any legislative, judicial, executive, or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.]**

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*New March 2022*

## BENCH NOTES

***Instructional Duty***
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

## AUTHORITY

- Elements ▸ Pen. Code, § 632(a).
- Willfully Defined ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Confidential Communication ▸ Pen. Code, § 632(c); *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 774–776 [117 Cal.Rptr.2d 574, 41 P.3d 575].
- Exceptions ▸ Pen. Code, § 632(e) & (f).

## RELATED ISSUES

***Prostitution and Reasonable Expectation of Privacy***
"A person's participation in sexual activities at a private residence in exchange for money, without more, does not necessarily cause them to expect that their words and actions will be recorded without their consent." (*People v. Lyon* (2021) 61 Cal.App.5th 237, 247 [275 Cal.Rptr.3d 581].)

***Wiretapping***
Wiretapping is the interception of communications by an unauthorized connection to the transmission line. (See Pen. Code, § 631). Penal Code section 632 does not prohibit wiretapping but instead prohibits the interception of communications with equipment that is not connected to a transmission line. (See *People v. Ratekin* (1989) 212 Cal.App.3d 1165, 1168 [26 Cal.Rptr. 143].)

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## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 71.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.20 (Matthew Bender).

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## 3100. Prior Conviction: Nonbifurcated Trial (Pen. Code, §§ 1025, 1158)

**If you find the defendant guilty of a crime, you must also decide whether the People have proved the additional allegation that the defendant was previously convicted of (another/other) crime[s]. It has already been determined that the defendant is the person named in exhibit[s]** _____ *<insert number[s] or description[s] of exhibit[s]>***. You must decide whether the evidence proves that the defendant was convicted of the alleged crime[s].**

**The People allege that the defendant has been convicted of:**

**[1.] A violation of** _____ *<insert code section alleged>***,[ for which judgment was entered] on** _____ *<insert date of conviction/judgment>***, in the** _____ *<insert name of court>***, in Case Number** _____ *<insert docket or case number>***(;/.)**

**[AND** *<Repeat for each prior conviction alleged>***.]**

**[Consider the evidence presented on this allegation only when deciding whether the defendant was previously convicted of the crime[s] alleged [or for the limited purpose of** _____ *<insert other permitted purpose, e.g., assessing credibility of the defendant>***]. Do not consider this evidence as proof that the defendant committed any of the crimes with which he is currently charged or for any other purpose.]**

**[You must consider each alleged conviction separately.] The People have the burden of proving (the/each) alleged conviction beyond a reasonable doubt. If the People have not met this burden [for any alleged conviction], you must find that the alleged conviction has not been proved.**

*New January 2006; Revised March 2018, September 2020, March 2022*

### BENCH NOTES

***Instructional Duty***

If the defendant is charged with a prior conviction, the court has a **sua sponte** duty to instruct on the allegation.

If identity is an issue, the court must make the factual determination that the defendant is the person who has suffered the convictions in question before giving this instruction.

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Do **not** give this instruction if the court has bifurcated the trial. Instead, give CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

If the defendant is charged with a prison prior, the court must determine whether the jury should decide if the defendant served a separate prison term for the conviction and whether the defendant remained free of prison custody for the "washout" period. (Pen. Code, § 667.5(a) & (b).) The Commentary below discusses these issues further. If the court chooses to submit these issues to the jury, give CALCRIM No. 3102, *Prior Conviction: Prison Prior*, with this instruction.

If the court determines that there is a factual issue regarding the prior conviction that must be submitted to the jury, give CALCRIM No. 3103, *Prior Conviction: Factual Issue for Jury*, with this instruction. The Commentary below discusses this issue further.

Give the bracketed phrase "for which judgment was entered" if there is more than one prior conviction charged.

On request, the court should give the limiting instruction that begins with "Consider the evidence presented on this allegation only when deciding. . . ." (See *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913].) There is no sua sponte duty to give the limiting instruction, and the defense may request that no limiting instruction be given. (See *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].)

The court must provide the jury with a verdict form on which the jury will indicate whether the prior conviction has been proved. (Pen. Code, § 1158.)

## AUTHORITY

- Statutory Authority ▸ Pen. Code, §§ 1025, 1158.
- Bifurcation ▸ *People v. Calderon* (1994) 9 Cal.4th 69, 77–79 [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].
- Judge Determines Whether Defendant Is Person Named in Documents ▸ Pen. Code, § 1025(c); *People v. Epps* (2001) 25 Cal.4th 19, 25 [104 Cal.Rptr.2d 572, 18 P.3d 2]; *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165 [132 Cal.Rptr.2d 694].

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- Limiting Instruction on Prior Conviction ▸ See *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].
- Disputed Factual Issues ▸ See *People v. Gallardo* (2017) 4 Cal.5th 120, 136 [226 Cal.Rptr.3d 379, 407 P.3d 55]; *Descamps v. United States* (2013) 570 U.S. 254, 268–70 [133 S.Ct. 2276, 186 L.Ed.2d 438]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].
- Three-Strikes Statutes ▸ Pen. Code, §§ 667(e), 1170.12.
- Five-Year Enhancement for Serious Felony ▸ Pen. Code, § 667(a)(1).
- Three-Year Enhancement for Prison Prior If Violent Felony ▸ Pen. Code, § 667.5(a).
- One-Year Enhancement for Prison Prior ▸ Pen. Code, § 667.5(b).
- Serious Felony Defined ▸ Pen. Code, § 1192(c).
- Violent Felony Defined ▸ Pen. Code, § 667.5(c).

## COMMENTARY

***Factual Issues—Decided by Jury or Court?***

Penal Code sections 1025 and 1158 state that when an accusation charges a defendant with having suffered a prior conviction, the jury must decide whether the defendant "suffered the prior conviction" (unless the right to a jury trial is waived). Under Penal Code section 1025, the court, not the jury, must determine whether the defendant is the person named in the documents submitted to prove the prior conviction. (Pen. Code, § 1025(c); see also *People v. Epps* (2001) 25 Cal.4th 19, 24-25 [104 Cal.Rptr.2d 572, 18 P.3d 2].)

In some cases, however, a prior conviction may present an ancillary factual issue that must be decided before the conviction may be used under a particular enhancement or sentencing statute. For example, if the prosecution seeks sentencing under the "three strikes" law and alleges that the defendant was previously convicted of two burglaries, these prior convictions would qualify as "strikes" only if the burglaries were residential. (See *People v. Kelii* (1999) 21 Cal.4th 452, 455 [87 Cal.Rptr.2d 674, 981 P.2d 518].) If the defendant had been specifically convicted of first degree burglary of an inhabited dwelling, then there would be no issue over whether the prior convictions qualified. If, on the other hand, the defendant had been convicted simply of "burglary," then whether the offenses were residential would be a factual issue. *(Ibid.)*

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The court's role is "limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea." (See *People v. Gallardo* (2017) 4 Cal.5th 120, 136-137 [226 Cal.Rptr.3d 379, 407 P.3d 55].) A court considering whether to impose an increased sentence based on a prior conviction may not make its own findings about what facts or conduct "realistically" supported the conviction. (*Ibid.*) To allow otherwise would constitute impermissible judicial factfinding violative of the Sixth Amendment right to a jury trial. (*Ibid.*; see also *Descamps v. United States* (2013) 570 U.S. 254, 268-70 [133 S.Ct. 2276, 186 L.Ed.2d 438] [under federal Constitution's Sixth Amendment right to jury trial, the only facts related to a prior conviction that a sentencing court can rely on in imposing recidivist punishment are the facts necessarily implied by the elements of the relevant prior offense].)

***Prior Prison Term and "Washout" Period***

A similar issue arises over whether the jury or the court must decide if the defendant served a prison term as a result of a particular conviction and if the defendant has been free of custody for sufficient time to satisfy the "washout" period. (See Pen. Code, § 667.5(a) & (b).) In *People v. Winslow* (1995) 40 Cal.App.4th 680, 687 [46 Cal.Rptr.2d 901], the Court of Appeal held that the jury must determine whether the defendant served a prior prison term for a felony conviction. The other holdings in *Winslow* were rejected by the California Supreme Court. (*People v. Kelii, supra,* 21 Cal.4th at pp. 458–459; *People v. Wiley* (1995) 9 Cal.4th 580, 592 [38 Cal.Rptr.2d 347, 889 P.2d 541].) However, the *Winslow* holding that the jury must determine if the defendant served a prison term for a felony conviction remains controlling authority.

But, in *People v. Epps, supra,* 25 Cal.4th at pp. 25–26, the Court expressed doubt, in dicta, about whether the fact of having served a prison term is properly submitted to the jury. Discussing the 1997 amendment to Penal Code section 1025, the Court noted that

> [t]he analysis lists the following questions that the jury would still decide if Senate Bill 1146 became law: . . . 'Was the defendant sentenced to prison based on that conviction? How long has the defendant been out of custody since he or she suffered the prior conviction?' . . .
>
> [T]hough we do not have a case before us raising the issue, it appears that many of the listed questions are the sort of legal

> questions that are for the court under [*Wiley*]. For example, determining . . . whether the defendant was sentenced to prison is "largely legal" (*Kelii*, *supra*, 21 Cal. 4th at p. 455, quoting *Wiley*, *supra*, 9 Cal. 4th at p. 590), and though these questions require resolution of some facts, "a factual inquiry, limited to examining court documents, is . . . 'the type of inquiry traditionally performed by judges as part of the sentencing function.'" (*Kelii*, at p. 457, quoting *Wiley*, at p. 590.) . . . Therefore, the list of questions in the committee analysis should not be read as creating new jury trial rights that did not exist under *Wiley*.

*(Ibid.)*

On the other hand, *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] could be interpreted as requiring the jury to make these factual findings. (But see *People v. Thomas* (2001) 91 Cal.App.4th 212, 223 [110 Cal.Rptr.2d 571] [even under *Apprendi*, no federal due process right to have jury determine whether defendant served a prior prison term].)

Until the California Supreme Court resolves this question, the court should consider submitting to the jury the issues of whether the defendant served a prison term and whether the defendant has remained free of custody for sufficient time to satisfy the "washout" period. The court may use CALCRIM No. 3102, *Prior Conviction: Prison Prior*.

## RELATED ISSUES

### *Constitutionality of Prior*

The prosecution is not required to prove the constitutional validity of a prior conviction as an "element" of the enhancement. (*People v. Walker* (2001) 89 Cal.App.4th 380, 386 [107 Cal.Rptr.2d 264].) Rather, following the procedures established in *People v. Sumstine* (1984) 36 Cal.3d 909, 922–924 [206 Cal.Rptr. 707, 687 P.2d 904], and *People v. Allen* (1999) 21 Cal.4th 424, 435–436 [87 Cal.Rptr.2d 682, 981 P.2d 525], the defense may bring a motion challenging the constitutional validity of the prior. These questions are matters of law to be determined by the trial court.

### *Defense Stipulation to Prior Convictions*

The defendant may stipulate to the truth of the prior convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) If the defendant stipulates, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].)

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***Motion for Bifurcated Trial***
Either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra,* 231 Cal.App.3d at p. 90.)

## SECONDARY SOURCES

4 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 618.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 42, *Arraignment, Pleas, and Plea Bargaining,* § 42.21[6][a] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.21[2], 91.60, 91.80 (Matthew Bender).

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## 3101. Prior Conviction: Bifurcated Trial (Pen. Code, §§ 1025, 1158)

**The People have alleged that the defendant was previously convicted of (another/other) crime[s]. It has already been determined that the defendant is the person named in exhibit[s]** _____ *<insert number[s] or description[s] of exhibit[s]>***. You must decide whether the evidence proves that the defendant was convicted of the alleged crime[s].**

**The People allege that the defendant has been convicted of:**

**[1.] A violation of** _____ *<insert code section[s] alleged>***,[ for which judgment was entered] on** _____ *<insert date of conviction/judgment>***, in the** _____ *<insert name of court>***, Case Number** _____ *<insert docket or case number>***(;/.)**

**[AND** *<Repeat for each prior conviction alleged.>***]**

**[In deciding whether the People have proved the allegation[s], consider only the evidence presented in this proceeding. Do not consider your verdict or any evidence from the earlier part of the trial.]**

**You may not return a finding that (the/any) alleged conviction has or has not been proved unless all 12 of you agree on that finding.**

*New January 2006; Revised September 2020, March 2022*

### BENCH NOTES

***Instructional Duty***

If the defendant is charged with a prior conviction, the court has a **sua sponte** duty to instruct on the allegation. Give this instruction if the court has granted a bifurcated trial. The court **must also give** CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

If the defendant is charged with a prison prior, the court must determine whether the jury should decide if the defendant served a separate prison term for the conviction and whether the defendant remained free of prison custody for the "washout" period. (Pen. Code, § 667.5(a) & (b).) The Commentary to CALCRIM No. 3100 discusses this issue. If the court chooses to submit these issues to the

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jury, give CALCRIM No. 3102, *Prior Conviction: Prison Prior*, with this instruction.

If the court determines that there is a factual issue regarding the prior conviction that must be submitted to the jury, give CALCRIM No. 3103: *Prior Conviction: Factual Issue for Jury*, with this instruction. The Commentary to CALCRIM No. 3100 discusses this issue.

Give the bracketed phrase "for which judgment was entered" if there is more than one prior conviction alleged.

Give the bracketed paragraph that begins with "In deciding whether the People have proved" on request.

The court must provide the jury with a verdict form on which the jury will indicate whether each prior conviction has been proved. (Pen. Code, § 1158.)

## AUTHORITY

- Statutory Authority ▸ Pen. Code, §§ 1025, 1158.
- Bifurcation ▸ *People v. Calderon* (1994) 9 Cal.4th 69, 77–79 [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].
- Judge Determines Whether Defendant Is Person Named in Documents ▸ Pen. Code, § 1025(b); *People v. Epps* (2001) 25 Cal.4th 19, 25 [104 Cal.Rptr.2d 572, 18 P.3d 2]; People *v. Garcia* (2003) 107 Cal.App.4th 1159, 1165 [132 Cal.Rptr.2d 694].
- Disputed Factual Issues ▸ See *People v. Gallardo* (2017) 4 Cal.5th 120, 136 [226 Cal.Rptr.3d 379, 407 P.3d 55]; *Descamps v. United States* (2013) 570 U.S. 254, 268–70 [133 S.Ct. 2276, 186 L.Ed.2d 438]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].
- Three-Strikes Statutes ▸ Pen. Code, §§ 667(e), 1170.12.
- Five-Year Enhancement for Serious Felony ▸ Pen. Code, § 667(a)(1).
- Three-Year Enhancement for Prison Prior If Violent Felony ▸ Pen. Code, § 667.5(a).
- One-Year Enhancement for Prison Prior ▸ Pen. Code, § 667.5(b).
- Serious Felony Defined ▸ Pen. Code, § 1192(c).
- Violent Felony Defined ▸ Pen. Code, § 667.5(c).

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## RELATED ISSUES

See *Motion for Bifurcated Trial* in the Related Issues section of CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*.

## SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 618.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 42, *Arraignment, Pleas, and Plea Bargaining,* § 42.21[6][a] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.21[2], 91.60, 91.80 (Matthew Bender).

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## 3130. Personally Armed With Deadly Weapon (Pen. Code, § 12022.3)

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**If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]][ or the lesser 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 deadly weapon 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 *deadly weapon* is any object, instrument, or weapon [that is inherently deadly or one] that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.**

**[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]**

**[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed[,] [and] [where the person who possessed the object 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.]]**

***Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

**A person is *armed* with a deadly weapon when that person:**

1. **Carries a deadly weapon [or has a deadly weapon 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 deadly weapon [or has it available].**

*<If there is an issue in the case over whether the defendant was armed with the weapon "in the commission of" the offense, see Bench Notes.>*

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**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.**

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*New January 2006; Revised December 2008, February 2013, September 2019, September 2020, March 2022*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give an 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].)

Give the bracketed phrase "that is inherently deadly or one" and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with "In deciding whether" if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

In the definition of "armed," the court may give the bracketed phrase "or has a deadly weapon available" on request if the evidence shows that the weapon 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, *While Committing a Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996)

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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].)

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

## AUTHORITY

- Enhancement ▸ Pen. Code, § 12022.3.
- Deadly Weapon Defined ▸ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086–1087 [130 Cal.Rptr.2d 717].
- Objects With Innocent Uses ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].
- Armed ▸ *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].
- Must Be Personally Armed ▸ *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].
- "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].
- Inherently Deadly Defined ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].\
- Examples of Noninherently Deadly Weapon ▸ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

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## RELATED ISSUES

***Penal Code Section 220***

A defendant convicted of violating Penal Code section 220 may receive an enhancement under Penal Code section 12022.3 even though the latter statute does not specifically list section 220 as a qualifying offense. (*People v. Rich* (2003) 109 Cal.App.4th 255, 261 [134 Cal.Rptr.2d 553].) Section 12022.3 does apply to attempts to commit one of the enumerated offenses, and a conviction for violating section 220, assault with intent to commit a sexual offense, "translates into an attempt to commit" a sexual offense. (*People v. Rich, supra,* 109 Cal.App.4th at p. 261.)

***Multiple Weapons***

There is a split in the Court of Appeal over whether a defendant may receive multiple enhancements under Penal Code section 12022.3 if the defendant has multiple weapons in his or her possession during the offense. (*People v. Maciel* (1985) 169 Cal.App.3d 273, 279 [215 Cal.Rptr. 124] [defendant may only receive one enhancement for each sexual offense, either for being armed with a rifle or for using a knife, but not both]; *People v. Stiltner* (1982) 132 Cal.App.3d 216, 232 [182 Cal.Rptr. 790] [defendant may receive both enhancement for being armed with a knife and enhancement for using a pistol for each sexual offense].) The court should review the current state of the law before sentencing a defendant to multiple weapons enhancements under Penal Code section 12022.3.

***Pepper Spray***

In *People v. Blake* (2004) 117 Cal.App.4th 543, 559 [11 Cal.Rptr.3d 678], the court upheld the jury's determination that pepper spray was a deadly weapon.

## SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 349, 364, 388.

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 727.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.31 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.20[7][c], 142.21[1][d][iii] (Matthew Bender).

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## 3145. Personally Used Deadly Weapon (Pen. Code, §§ 667.61(e)(3), 1192.7(c)(23), 12022(b)(1) & (2), 12022.3)

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**If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]][ or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally used a deadly [or dangerous] weapon during the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

**A *deadly* [*or dangerous*] *weapon* is any object, instrument, or weapon that is [inherently deadly] [or] [dangerous] [or] [one that is] used in such a way that it is capable of causing and likely to cause death or great bodily injury.**

**[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]**

**[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed[,] [and] [where the person who possessed the object 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.]]**

***Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

**Someone *personally uses* a deadly [or dangerous] weapon if he or she intentionally [does any of the following]:**

**[1. Displays the weapon in a menacing manner(./;)]**

**[OR]**

**[(2/1). Hits someone with the weapon(./;)]**

**[OR]**

**[(3/2). Fires the weapon(./;)]**

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**[OR**

**(4/3). _____** *<insert description of use>*. **]**

*<If there is an issue in the case over whether the defendant used the weapon "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.**

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*New January 2006; Revised June 2007, February 2013, September 2017, September 2019, September 2020, March 2022*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give an instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give all of the bracketed "or dangerous" phrases if the enhancement charged uses both the words "deadly" and "dangerous" to describe the weapon. (Pen. Code, §§ 667.61, 1192.7(c)(23), 12022(b).) Do not give these bracketed phrases if the enhancement uses only the word "deadly." (Pen. Code, § 12022.3.)

Give the bracketed phrase "inherently deadly" and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with "In deciding whether" if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.
In the definition of "personally uses," the court may give the bracketed item 3 if the case involves an object that may be "fired."

If the case involves an issue of whether the defendant used the weapon "in the commission of" the offense, the court may give CALCRIM No. 3261, *While*

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*Committing a Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

## AUTHORITY

- Enhancements ▸ Pen. Code, §§ 667.61(e)(3), 1192.7(c)(23), 12022(b)(1) & (2), 12022.3.
- Deadly Weapon Defined ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086–1087 [130 Cal.Rptr.2d 717].
- Objects With Innocent Uses ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].
- Personally Uses ▸ *People v. Bland* (1995) 10 Cal.4th 991, 997 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320 [45 Cal.Rptr.2d 602]; see also Pen. Code, § 1203.06(b)(2).
- "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].
- May Not Receive Enhancement for Both Using and Being Armed With One Weapon ▸ *People v. Wischemann* (1979) 94 Cal.App.3d 162, 175–176 [156 Cal.Rptr. 386].
- Inherently Deadly Defined ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Examples of Noninherently Deadly Weapon ▸ *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez*

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(2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

## RELATED ISSUES

***No Duty to Instruct on "Lesser Included Enhancements"***
"[A] trial court's sua sponte obligation to instruct on lesser included offenses does not encompass an obligation to instruct on 'lesser included enhancements.' " (*People v. Majors* (1998) 18 Cal.4th 385, 411 [75 Cal.Rptr.2d 684, 956 P.2d 1137].) Thus, if the defendant is charged with an enhancement for use of a weapon, the court does not need to instruct on an enhancement for being armed.

***Weapon Displayed Before Felony Committed***
Where a weapon is displayed initially and the underlying crime is committed some time after the initial display, the jury may conclude that the defendant used the weapon in the commission of the offense if the display of the weapon was "at least … an aid in completing an essential element of the subsequent crimes. . . ." (*People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705].)

***Weapon Used Did Not Cause Death***
In *People v. Lerma* (1996) 42 Cal.App.4th 1221, 1224 [50 Cal.Rptr.2d 580], the defendant stabbed the victim and then kicked him. The coroner testified that the victim died as a result of blunt trauma to the head and that the knife wounds were not life threatening. *(Ibid.)* The court upheld the finding that the defendant had used a knife during the murder even though the weapon was not the cause of death. (*Id.* at p. 1226.) The court held that in order for a weapon to be used in the commission of the crime, there must be "a nexus between the offense and the item at issue, [such] that the item was an instrumentality of the crime." *(Ibid.)* [ellipsis and brackets omitted] Here, the court found that "[t]he knife was instrumental to the consummation of the murder and was used to advantage." *(Ibid.)*

***"One Strike" Law and Use Enhancement***
Where the defendant's use of a weapon has been used as a basis for applying the "one strike" law for sex offenses, the defendant may not also receive a separate enhancement for use of a weapon in commission of the same offense. (*People v. Mancebo* (2002) 27 Cal.4th 735, 754 [117 Cal.Rptr.2d 550, 41 P.3d 556].)

***Assault and Use of Deadly Weapon Enhancement***
"A conviction [for assault with a deadly weapon or by means of force likely to cause great bodily injury] under [Penal Code] section 245, subdivision (a)(1)

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cannot be enhanced pursuant to section 12022, subdivision (b)." (*People v. Summersville* (1995) 34 Cal.App.4th 1062, 1070 [40 Cal.Rptr.2d 683].)

***Robbery and Use of Deadly Weapon Enhancement***
A defendant may be convicted and sentenced for both robbery and an enhancement for use of a deadly weapon during the robbery. (*In re Michael L.* (1985) 39 Cal.3d 81, 88 [216 Cal.Rptr. 140, 702 P.2d 222].)

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 40.

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 356-357, 361–369.

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 727.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.30, 91.81[1][d] (Matthew Bender).

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## 3160. Great Bodily Injury (Pen. Code, §§ 667.5(c)(8), 667.61(d)(6), 1192.7(c)(8), 12022.7, 12022.8)

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**If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]][ or the lesser crime[s] of _____** *<insert name[s] of alleged lesser offense[s]>***], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally inflicted great bodily injury on _____** *<insert name of injured person>* **during the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

**[The People must also prove that _____** *<insert name of injured person>* **was not an accomplice to the crime.]**

***Great bodily injury*** **means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

**[Committing the crime of _____** *<insert sexual offense charged>* **is not by itself the infliction of great bodily injury.]**

*<Group Assault>*
**[If you conclude that more than one person assaulted _____** *<insert name of injured person>* **and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily injury on _____** *<insert name of injured person>* **if the People have proved that:**

1. **Two or more people, acting at the same time, assaulted _____** *<insert name of injured person>* **and inflicted great bodily injury on (him/her);**

2. **The defendant personally used physical force on _____** *<insert name of injured person>* **during the group assault;**

**AND**

**[3A. The amount or type of physical force the defendant used on _____** *<insert name of injured person>* **was enough that it alone**

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**could have caused _____** *<insert name of injured person>* **to suffer great bodily injury(;/.)]**

**[OR]**

**[3B. The physical force that the defendant used on _____** *<insert name of injured person>* **was sufficient in combination with the force used by the others to cause _____** *<insert name of injured person>* **to suffer great bodily injury.]**

**The defendant must have applied substantial force to _____** *<insert name of injured person>***. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]**

**[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:**

1. **He or she knew of the criminal purpose of the person who committed the crime;**

**AND**

2. **He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]**

*<If there is an issue in the case over whether the defendant inflicted the injury "during the commission of" the offense, see Bench Notes.>*

**The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.**

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*New January 2006; Revised June 2007, February 2015, September 2020, March 2022*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

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Give the bracketed sentence that begins with "Committing the crime of" if the defendant is charged with a sexual offense. (*People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100] [injury must be more than that which is present in every offense of rape].)

The bracketed section beneath the heading "Group Assault" is designed to be used in cases where the evidence shows a group assault.

If the court gives the bracketed sentence instructing that the People must prove that the person assaulted "was not an accomplice to the crime," the court should also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

The jury must determine whether an injury constitutes "great bodily injury." (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If there is an issue in the case over whether the defendant inflicted the injury "during the commission of" the offense, the court may give CALCRIM No. 3261, *While Committing a Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

## AUTHORITY

- Enhancements ▸ Pen. Code, §§ 667.5(c)(8), 667.61(d)(6), 12022.7, 12022.8.

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- Great Bodily Injury Enhancements Do Not Apply to Conviction for Murder or Manslaughter. ▸ *People v. Cook* (2015) 60 Cal.4th 922, 924 [183 Cal.Rptr.3d 502].
- Great Bodily Injury Defined ▸ Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Great Bodily Injury May Be Established by Pregnancy or Abortion ▸ *People v. Cross* (2008) 45 Cal.4th 58, 68 [82 Cal.Rptr.3d 373, 190 P.3d 706].
- Must Personally Inflict Injury ▸ *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Sex Offenses—Injury Must Be More Than Incidental to Offense ▸ *People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Group Beating Instruction ▸ *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762, 139 P.3d 136].
- This Instruction Is Correct In Defining Group Beating ▸ *People v. Dunkerson* (2007) 155 Cal.App.4th 1413, 1418 [66 Cal.Rptr.3d 795].
- Accomplice Defined ▸ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- "During 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].
- This Instruction Correctly Omits Requirement Of Intent to Inflict GBI ▸ *People v. Poroj* (2010) 190 Cal.App.4th 165, 176 [117 Cal.Rptr.3d 884].

## RELATED ISSUES

### *Specific Intent Not Required*

Penal Code section 12022.7 was amended in 1995, deleting the requirement that the defendant act with "the intent to inflict such injury." (Stats. 1995, ch. 341, § 1; see also *People v. Carter* (1998) 60 Cal.App.4th 752, 756 [70 Cal.Rptr.2d 569] [noting amendment].)

### *Instructions on Aiding and Abetting*

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In *People v. Magana* (1993) 17 Cal.App.4th 1371, 1378–1379 [22 Cal.Rptr.2d 59], the evidence indicated that the defendant and another person both shot at the victims. The jury asked for clarification of whether the evidence must establish that the bullet from the defendant's gun struck the victim in order to find the enhancement for personally inflicting great bodily injury true. (*Id.* at p. 1379.) The trial court responded by giving the instructions on aiding and abetting. *(Ibid.)* The Court of Appeal reversed, finding the instructions erroneous in light of the requirement that the defendant must personally inflict the injury for the enhancement to be found true. (*Id.* at p. 1381.)

***Sex Offenses—Examples of Great Bodily Injury***

The following have been held to be sufficient to support a finding of great bodily injury: transmission of a venereal disease (*People v. Johnson* (1986) 181 Cal.App.3d 1137, 1140 [225 Cal.Rptr. 251]); pregnancy (*People v. Sargent* (1978) 86 Cal.App.3d 148, 151 [150 Cal.Rptr. 113]); and a torn hymen (*People v. Williams* (1981) 115 Cal.App.3d 446, 454 [171 Cal.Rptr. 401]).

***Enhancement May be Applied Once Per Victim***

The court may impose one enhancement under Penal Code section 12022.7 for each injured victim. (Pen. Code, § 12022.7(h); *People v. Ausbie* (2004) 123 Cal.App.4th 855, 864 [20 Cal.Rptr.3d 371].)

***Furnishing Drugs***

In *People v. Ollo* (2021) 11 Cal.5th 682 [279 Cal.Rptr.3d 668, 487 P.3d 981], the defendant was charged with personally inflicting great bodily injury on a victim who had voluntarily ingested the drugs furnished by the defendant. The court held: "the act of furnishing is not by itself sufficient to establish personal infliction. Whether a defendant who furnishes drugs personally inflicts such injury depends on the facts of the particular case. To determine whether a defendant personally inflicts an injury, factfinders and courts must examine the circumstances of the underlying offense and the defendant's role in causing the injury that followed." (*Id.* at p. 685.)

## SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 350-351.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.35 (Matthew Bender).

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## 3404. Accident (Pen. Code, § 195)

*<Give this paragraph when instructing on general or specific intent crimes>*
**[The defendant is not guilty of _____** *<insert crime[s]>* **if (he/she) acted [or failed to act] without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of _____** *<insert crime[s]>* **unless you are convinced beyond a reasonable doubt that (he/she) acted with the required intent.]**

*<Give this paragraph when instructing on criminal or ordinary negligence crimes>*
**[The defendant is not guilty of _____** *<insert crime[s]>* **if (he/she) acted [or failed to act] accidentally without (criminal/ordinary) negligence. You may not find the defendant guilty of _____** *<insert crime[s]>* **unless you are convinced beyond a reasonable doubt that (he/she) acted with (criminal/ordinary) negligence.]**

**[(*Criminal/Ordinary*) *negligence* is defined in another instruction.]**

**[*Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when:**

**1. He or she acts in a reckless way that creates a high risk of death or great bodily injury;**

**AND**

**2. A reasonable person would have known that acting in that way would create such a risk.**

**In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.]**

**[*Ordinary negligence* is the failure to use reasonable care to prevent reasonably foreseeable harm to oneself or someone else. A person is negligent if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]**

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*New January 2006; Revised April 2008, August 2012, September 2017, March 2022*

## BENCH NOTES

***Instructional Duty***

The court has no **sua sponte** duty to instruct on accident. (*People v. Anderson* (2011) 51 Cal.4th 989, 997-998 [125 Cal.Rptr.3d 408].)

The court should select either "criminal" or "ordinary" based on the words used in the instruction on the elements of the underlying offense. (See *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1175–1176 [214 Cal.Rptr.3d 467].)

Give the bracketed definition of criminal or ordinary negligence unless the court has already given the definition in another instruction. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

***Related Instructions***

If murder is charged, see CALCRIM No. 510, *Excusable Homicide: Accidental*.

## AUTHORITY

- Instructional Requirements ▸ Pen. Code, §§ 26(5), 195.
- Burden of Proof ▸ *People v. Black* (1951) 103 Cal.App.2d 69, 79 [229 P.2d 61]; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217].
- Misfortune as Accident ▸ *People v. Gorgol* (1953) 122 Cal.App.2d 281, 308 [265 P.2d 69].
- Criminal or Gross Negligence Defined. ▸ *People v. Penny* (1955) 44 Cal.2d 861, 879 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Ordinary Negligence Defined. ▸ Pen. Code, § 7, subd. 2; *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1174–1175 [214 Cal.Rptr.3d 467].

## ~~RELATED ISSUES~~

~~***Misfortune Defined***~~

~~"'Misfortune' when applied to a criminal act is analogous [to] the word 'misadventure' and bears the connotation of accident while doing a lawful act." (*People v. Gorgol* (1953) 122 Cal.App.2d 281, 308 [265 P.2d 69].)~~

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## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, § 273.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.01[5] (Matthew Bender).

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## 3414. Coercion (Pen. Code, §§ 236.23 & 236.24)

**The defendant is not guilty of _____ <*insert crime[s]*> if (he/she) acted because of coercion.**

**In order to establish this defense, the defendant must prove that:**

1. **(He/She) acted because of coercion;**

2. **The coercion was a direct result of being a victim of (human trafficking/intimate partner violence/sexual violence) at the time the defendant acted;**

**AND**

3. **When the defendant acted, (he/she) had a reasonable fear of harm.**

*<Give for defense under Pen. Code, §236.23>*
**[To prove that the defendant was the victim of human trafficking, the defendant must prove that:**

1. **Another person either deprived the defendant of personal liberty or violated the defendant's personal liberty;**

**[AND]**

*<Give Alternative 2A if the defendant claims he or she was the victim of human trafficking under Pen. Code, § 236.1~~subsection~~ (a).>*

**[2A. When the other person acted, (he/she) intended to obtain forced labor or services(./;)]**

**[OR]**

*<Give Alternative 2B if the defendant claims~~alleges~~ he or she was the victim of human trafficking under Pen. Code, § 236.1~~subsection~~ (b).>*

**[2B. When the other person acted, (he/she) intended to (commit/ [or] maintain) a [felony] violation of _____ <***insert appropriate code section[s]***>).]]**

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**[*Depriving or violating a person's personal liberty*, as used here, includes substantial and sustained restriction of a person's liberty accomplished through _____<*insert terms that apply from statutory definition, i.e.: force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury*> to the person under circumstances in which the person receiving or perceiving the threat reasonably believes that it is likely that the person making the threat would carry it out.]**

**[*Forced labor or services,* as used here, means labor or services that are performed or provided by a person and are obtained or maintained through force, fraud, duress, or coercion, or equivalent conduct that would reasonably overbear the will of the person.]**

**[*Duress* means a direct or implied threat of force, violence, danger, hardship, or retribution that is enough to cause a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to].]**

**[*Duress* includes (a direct or implied threat to destroy, conceal, remove, confiscate, or possess any actual or purported passport or immigration document of the other person/ [or] knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or immigration document of the other person).]**

**[*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.]**

**[*Coercion* includes any scheme, plan, or pattern intended to cause a person to believe that failing to perform an act would result in (serious harm to or physical restraint against someone else/ [or] the abuse or threatened abuse of the legal process/ [or] debt bondage/ [or] providing or facilitating the possession of any controlled substance to impair the other person's judgment).]**

**[When you decide whether the other person (used *duress*/ [or] used *coercion*/ [or] *deprived the defendant of personal liberty or violated the defendant's personal liberty*), consider all of the circumstances, including the age of the**

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**defendant, (his/her) relationship to the other person [or the other person's agent[s]], and the defendant's handicap or disability, if any.]**

**The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.**

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*New September 2017; Revised March 2022*

## BENCH NOTES

***Instructional Duty***

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case.

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389–390 [88 Cal.Rptr.2d 111]; *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Substantial evidence means evidence, which, if believed, would be sufficient for a reasonable jury to find that the defendant has shown the defense to be more likely than not true.

This defense does not apply to ~~a serious felony, as defined in subdivision (c) of Penal Code section 1192.7, or~~ a violent felony, as defined in subdivision (c) of Penal Code section 667.5~~, or a violation of Penal Code section 236.1~~.

## AUTHORITY

- Instructional Requirements ▸ Pen. Code, § 236.23; Pen. Code, § 236.24.
- Definition of Coercion ▸ Pen. Code, § 236.1(h)(1); *In re D.C.* (2021) 60 Cal.App.5th 915, 920 [275 Cal.Rptr.3d 191] [in context of human trafficking].

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- Burden of Proof ‣ *People v. Waters* (1985) 163 Cal.App.3d 935, 938 [209 Cal.Rptr. 661]; *People v. Condley* (1977) 69 Cal.App.3d 999, 1008 [138 Cal.Rptr. 515].
- Human Trafficking Elements and Definitions ‣ Pen. Code, § 236.1.
- Menace Defined [in context of false imprisonment] ‣ *People v. Matian* (1995) 35 Cal.App.4th 480, 484–486 [41 Cal.Rptr.2d 459].
- Violence Defined [in context of false imprisonment] ‣ *People v. Babich* (1993) 14 Cal.App.4th 801, 806 [18 Cal.Rptr.2d 60].

***Related Instruction***
See CALCRIM No. 1243, *Human Trafficking*.

## SECONDARY SOURCES

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Human Trafficking,* § 142.14A (Matthew Bender).

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## 3470. Right to Self-Defense or Defense of Another (Non-Homicide)

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**Self-defense is a defense to _____**<*insert list of pertinent crimes charged*>. **The defendant is not guilty of (that/those crime[s]) if (he/she) used force against the other person in lawful (self-defense/ [or] defense of another). The defendant acted in lawful (self-defense/ [or] defense of another) if:**

1. **The defendant reasonably believed that (he/she/ [or] someone else/ [or] _____** <*insert name of third party*>**) was in imminent danger of suffering bodily injury [or was in imminent danger of being touched unlawfully];**

2. **The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;**

**AND**

3. **The defendant used no more force than was reasonably necessary to defend against that danger.**

**Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was (imminent danger of bodily injury to (himself/herself/ [or] someone else)/[or] an imminent danger that (he/she/[or] someone else) would be touched unlawfully). Defendant's belief must have been reasonable and (he/she) must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful (self-defense/ [or] defense of another).**

**When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.**

**[The slightest touching can be unlawful if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]**

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**[The defendant's belief that (he/she/ [or] someone else) was threatened may be reasonable even if (he/she) relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.]**

**[If you find that _____ <*insert name of victim*> threatened or harmed the defendant [or others] in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]**

**[If you find that the defendant knew that _____ <*insert name of victim*> had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]**

**[Someone who has been threatened or harmed by a person in the past is justified in acting more quickly or taking greater self-defense measures against that person.]**

**[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with _____<*insert name of victim*>, you may consider that threat in deciding whether the defendant was justified in acting in (self-defense/ [or] defense of another).]**

**[A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of (death/bodily injury/_____ <*insert crime*>) has passed. This is so even if safety could have been achieved by retreating.]**

**The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful (self-defense/ [or] defense of another). If the People have not met this burden, you must find the defendant not guilty of _____ <*insert crime(s) charged*>.**

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*New January 2006; Revised June 2007, April 2008, August 2009, February 2012, August 2012, March 2022*

## BENCH NOTES

### *Instructional Duty*

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the

defendant is relying on it or it is not inconsistent with the defendant's theory of the case. When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389–390 [88 Cal.Rptr.2d 111]; *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982–983 [38 Cal.Rptr.3d 624, 127 P.3d 40].)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of "antecedent threats and assaults against the defendant on the reasonableness of defendant's conduct." (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488 [1 Cal.Rptr.3d 774].) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475 [198 Cal.Rptr. 819]; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068 [56 Cal.Rptr.2d 133, 920 P.2d 1337]; see also CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.)

***Related Instructions***
CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.
CALCRIM Nos. 3471–3477, Defense Instructions: Defense of Self, Another, Property.
CALCRIM No. 851, *Testimony on Intimate Partner Battering and Its Effects: Offered by the Defense*.
CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute: Self–Defense*.

## AUTHORITY

- Instructional Requirements ▸ *People v. Moody* (1943) 62 Cal.App.2d 18 [143 P.2d 978]; *People v. Myers* (1998) 61 Cal.App.4th 328, 335, 336 [71 Cal.Rptr.2d 518].
- Lawful Resistance ▸ Pen. Code, §§ 692, 693, 694; Civ. Code, § 50; see also *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518].
- Burden of Proof ▸ Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].

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- Elements ▸ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Imminence ▸ *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167] (overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [56 Cal.Rptr.2d 142, 921 P.2d 1]).
- No Duty to Retreat ▸ *People v. Hughes* (1951) 107 Cal.App.2d 487, 494 [237 P.2d 64]; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22 [132 P.2d 51].
- Temporary Possession of Firearm by Felon in Self-Defense ▸ *People v. King* (1978) 22 Cal.3d 12, 24 [148 Cal.Rptr. 409, 582 P.2d 1000].
- Duty to Retreat Limited to Felon in Possession Cases ▸ *People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1343–1346 [29 Cal.Rptr.3d 226].
- Inmate Self-Defense ▸ *People v. Saavedra* (2007) 156 Cal.App.4th 561 [67 Cal.Rptr.3d 403].
- Reasonable Belief ▸ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1]; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].

## RELATED ISSUES

***Brandishing Weapon in Defense of Another***

The defense of others is a defense to a charge of brandishing a weapon under Penal Code section 417(a)(2). (*People v. Kirk* (1986) 192 Cal.App.3d Supp. 15, 19 [238 Cal.Rptr. 42].)

***Reasonable Person Standard Not Modified by Evidence of Mental Impairment***

In *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519 [14 Cal.Rptr.3d 473], the court rejected the argument that the reasonable person standard for self-defense should be the standard of a mentally ill person like the defendant. "The common law does not take account of a person's mental capacity when determining whether he has acted as the reasonable person would have acted. The law holds 'the mentally deranged or insane defendant accountable for his negligence as if the person were a normal, prudent person.' (Prosser & Keeton, Torts (5th ed. 1984) § 32, p. 177.)" (*Ibid.*; see also Rest.2d Torts, § 283B.)

***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*).

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See also the Related Issues section of CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, §§ 68, 71-73, 86-87.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.11, 73.12 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 124, *Jurisdiction and Disposition Hearings,* § 124.04 (Matthew Bender).

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