Judicial Council *of* California

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 23-029
For business meeting on September 19, 2023

Title
Jury Instructions: Criminal Jury Instructions (2023 Supplement)

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

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

Agenda Item Type
Action Required

Effective Date
September 19, 2023

Date of Report
August 18, 2023

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Executive Summary

The Advisory Committee on Criminal Jury Instructions recommends approving for publication the revised criminal jury instructions prepared by the committee under rule 2.1050 of the California Rules of Court. These changes will keep the instructions current with statutory and case authority. Once approved, the revised instructions will be published in the 2023 supplement of *Judicial Council of California Criminal Jury Instructions (CALCRIM)*.

Recommendation

The Advisory Committee on Criminal Jury Instructions recommends that the Judicial Council, effective September 19, 2023, approve the following changes to the criminal jury instructions prepared by the committee:

1. Addition of CALCRIM Nos. 209 and 526; and
2. Revisions to CALCRIM Nos. 101, 318, 319, 334, 377, 401, 402, 403, 417, 521, 522, 540B, 540C, 563, 592, 600, 604, 703, 733, 763, 1801, and 1802.

Relevant Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted what is now rule 10.59 of the California Rules of Court, which established the Advisory Committee on Criminal Jury Instructions and its charge.[1] In August 2005, the council voted to approve the *CALCRIM* instructions under what is now rule 2.1050 of the California Rules of Court.

Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CALCRIM.* The council approved the last *CALCRIM* release at its March 2023 meeting.

Analysis/Rationale

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

Below is an overview of some of the proposed changes.

Proposed new CALCRIM No. 209, *Implicit or Unconscious Bias*

The California Judges' Association (CJA) submitted a proposed implicit bias jury instruction to both the Advisory Committee on Criminal Jury Instructions and the Advisory Committee on Civil Jury Instructions, which issues *Judicial Council of California Civil Jury Instructions* (*CACI*). The submission letter noted that CJA's Committee on the Elimination of Bias and Inequality in Our Courts spent more than a year researching and drafting the language. The letter urged both committees either to expand existing instructions to include language related to implicit bias, or to create a new standalone instruction to address the issues of implicit bias more substantively. Included in their submission was a packet of information containing sample implicit bias jury instructions from other jurisdictions.

The committee agreed that a new standalone instruction on implicit bias would be an important addition. A key consideration for the committee was to ensure that this new instruction would have the desired outcome of educating jurors about implicit bias and providing effective tools to help them avoid implicit bias impacting their deliberations. An overarching concern was that the instruction avoid any unintended backlash effect—by inadvertently causing jurors to feel defensive and resistant to the ideas and tools presented. The committee initially consulted with a behavioral scientist at Stanford SPARQ[2] who reviewed the instruction and offered edits designed to achieve these twin objectives. The draft then went through several iterations to fine-tune 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."

[2] The acronym SPARQ stands for Social Psychological Answers to Real-World Questions. According to the mission statement on its website, "Stanford SPARQ is a behavioral science 'do tank' at Stanford University" that "build[s] research-driven partnerships with industry leaders and changemakers to combat bias, reduce disparities, and drive culture change."

language. The committee shared its final version with the chair of the *CACI* committee for review and consideration by that committee. The committee also reviewed and considered suggested edits made by a *CACI* workgroup.[3]

In addition to the new proposed instruction, the committee incorporated two paragraphs from CALCRIM No. 209 into No. 101, *Cautionary Admonitions: Jury Conduct (Before, During, or After Jury Is Selected)*. In this way, jurors will be introduced to the concept of implicit bias during the pretrial phase, so that No. 209 (which could be given posttrial) would relate back to this introductory instruction.

Several commenters expressed enthusiastic support for the new instruction. One commenter, a judge from the Superior Court of Los Angeles County, requested that the committee modify the instructional duty section to clarify that the instruction could be given by the judge sua sponte, in the absence of a party's request. The committee agreed with this suggestion and changed the instructional duty to include this language. Another comment, from a judge of the Superior Court of San Francisco County, urged the *CACI* committee to recommend adoption of the identical instruction in the civil jury instructions.

CALCRIM No. 402, *Natural and Probable Consequences Doctrine (Target and Non-Target Offenses Charged)*; No. 403, *Natural and Probable Consequences Doctrine (Only Non-Target Offense Charged)*; No. 417, *Liability of Coconspirator's Acts*; and No. 600, *Attempted Murder*
Senate Bill 1437 (Stats. 2018, ch. 1015) amended Penal Code section 188 to prohibit the imputation of malice for murder liability,[4] amended Penal Code section 189 to limit felony murder liability, and added Penal Code section 1170.95 to authorize resentencing relief. After the enactment of SB 1437, the committee added a bench note to these four instructions that explained: "A verdict of murder may not be based on the natural and probable consequences doctrine." This note also raised the question whether the statutory amendment to Penal Code section 188 abolished the natural and probable consequences doctrine as to attempted murder.

A few years later, Senate Bill 775 (Stats. 2021, ch. 551) amended Penal Code section 1170.95 (now renumbered as Penal Code section 1172.6) to expressly provide resentencing relief for persons convicted of attempted murder and manslaughter under a theory of felony murder and the natural probable consequences doctrine. In *People v. Sanchez* (2022) 75 Cal.App.5th 191, 196 [290 Cal.Rptr.3d 390], the Fifth District Court of Appeal reviewed SB 1437 and SB 775 and concluded that "the natural and probable consequences doctrine cannot prove an accomplice committed attempted murder." In response, the committee updated the bench note about SB 1437 in these four instructions. The bench note now states: "A verdict of murder or attempted murder may not be based on the natural and probable consequences doctrine. (Pen. Code,

[3] This committee understands that the CACI committee is considering a similar civil jury instruction as part of its next set of proposed civil jury instructions.

[4] The legislation added subdivision (a)(3), which provides: "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime."

§ 188(a)(3); *People v. Gentile* (2020) 10 Cal.5th 830, 849 [272 Cal.Rptr.3d 814, 477 P.3d 539] [murder]; *People v. Sanchez* (2022) 75 Cal.App.5th 191, 196 [290 Cal.Rptr.3d 390] [attempted murder].)"

CALCRIM No. 521, *First Degree Murder*

In *People v. Brown* (2023) 14 Cal.5th 453, 455–456 [305 Cal.Rptr.3d 127, 524 P.3d 1088], the California Supreme Court addressed a first degree murder by poison case involving a newborn baby who died after nursing from a mother who had ingested heroin and methamphetamine. At the outset, the court recognized the need to define the required mental state and specifically to determine whether "it is enough for the prosecution to show the defendant's use of poison was a substantial factor in causing the victim's death, or whether instead the prosecution must show the defendant acted with a particular mental state when using the poison, separate from the showing of malice that would support a conviction of second degree murder." (*Id.* at p. 460.) After reviewing the language, context, and history of Penal Code section 189, the court held: "We now clarify that to prove a murder by poison is in the first degree, the prosecution must show that the defendant deliberately gave the victim poison with the intent to kill the victim or inflict injury likely to cause the victim's death." (*Id.* at p. 471.) The committee added these two elements to the murder-by-poison section of the instruction and cited *Brown* in the authority section. The committee also made technical word changes.

Proposed new CALCRIM No. 526, *Implied Malice Murder: Aiding and Abetting*

In *People v. Gentile* (2020) 10 Cal.5th 830, 839 [272 Cal.Rptr.3d 814, 477 P.3d 539], the California Supreme Court reviewed the changes to murder liability enacted by SB 1437 and held that the amendments to Penal Code section 188 prohibit a second degree murder conviction based on the natural and probable consequences theory. The court further explained that "notwithstanding Senate Bill 1437's elimination of natural and probable consequences liability for second degree murder, an aider and abettor who does not expressly intend to aid a killing can still be convicted of second degree murder if the person knows that his or her conduct endangers the life of another and acts with conscious disregard for life." (*Id.* at p. 850.) Following *Gentile*, several appellate cases upheld direct aiding and abetting liability for implied malice murder. (See, e.g., *People v. Vizcarra* (2022) 84 Cal.App.5th 377, 388–392 [300 Cal.Rptr.3d 371]; *People v. Schell* (2022) 84 Cal.App.5th 437, 442 [300 Cal.Rptr.3d 409]; *People v. Vargas* (2022) 84 Cal.App.5th 943, 953–955 [300 Cal.Rptr.3d 777]; *People v. Silva* (2023) 87 Cal.App.5th 632 [303 Cal.Rptr.3d 645].)

Meanwhile, in *People v. Powell* (2021) 63 Cal.App.5th 689, 710–714 [278 Cal.Rptr.3d 150], the Third District Court of Appeal examined the *CALCRIM* aiding and abetting instructions in the context of a second degree implied malice murder case and found—absent revisions to address aiding and abetting second degree implied malice murder—CALCRIM No. 401 lacked sufficient specificity. In particular, *Powell* noted that the instruction's use of the term "the crime" did not apply to aiding and abetting implied malice murder because "the aider and abettor of implied malice murder need not intend the commission of *the crime* of murder. Rather, relative to the aider and abettor's intent, he or she need only intend the commission of the perpetrator's *act*, the

natural and probable consequences of which are dangerous to human life, intentionally aid in the commission of that *act* and do so with conscious disregard for human life." (*Id.* at p. 714 [emphasis in original].) Likewise, in *People v. Langi* (2022) 73 Cal.App.5th 972, 982–983 [288 Cal.Rptr.3d 809], the First District Court of Appeal considered a *CalJIC*[5] aiding and abetting instruction, which was similar to CALCRIM No. 401, in an implied malice murder case. *Langi* concluded that the instruction "creates an ambiguity under which the jury may find the defendant guilty of aiding and abetting second degree murder without finding that he personally acted with malice." (*Id.* at p. 982.) In *People v. Maldonado* (2023) 87 Cal.App.5th 1257, 1266 [304 Cal.Rptr.3d 391], the First District Court of Appeal similarly concluded that CALCRIM No. 401 impermissibly permitted a conviction based on imputed malice in the context of a lying-in-wait murder.

Initially, the committee considered modifying No. 401 to address the concerns raised in *Powell*, *Langi*, and *Maldonado*. However, the committee was concerned that simply changing the existing instruction would not be sufficient and could be potentially confusing, given the complex legal concepts involved. As a result, the committee decided to draft a new instruction specifically for aiding and abetting implied malice murder. In addition to the instructional language suggested by *Powell*, the committee added a commentary that discusses aiding and abetting liability for implied malice murder, citing *Gentile* along with *Vizcarra*, *Schell*, *Vargas*, and *Silva*. For No. 401, the committee added a bench note to direct users to this new instruction.

During the comment period, the California Supreme Court issued a decision about aiding and abetting an implied malice murder in *People v. Reyes* (June 29, 2023, S270723). *Reyes* noted that since *Gentile*, "the Courts of Appeal have held a defendant may directly aid and abet an implied malice murder" and extensively quoted *Powell*'s explanation of the elements of this offense. Thus, *Reyes* confirmed the case law that the committee had already relied upon when drafting this new instruction. In response to this new case, the committee added *Reyes* to the bench notes and will update the citation as soon as it becomes available. The committee also removed the citations to *Powell*, *Langi*, and *Maldonado*, as well as *Vizcarra*, *Schell*, *Vargas*, and *Silva*, that had previously appeared in the bench notes of the draft, because a citation to *Reyes* is sufficient authority.

Based on *Reyes*, two commenters—the Orange County Public Defender's Office and the Office of the State Public Defender (OSPD)—requested that the committee further define terms. The committee agreed with some, but not all, of the proposed edits. The committee added "perpetrator's" to clarify "act[s]" in elements 4 and 5 and inserted "that (was/were) dangerous to human life" at the end of element 4. The committee also included the following definition: "An act is *dangerous to human life* if there is a high probability that the act will result in death" and provided a new entry in the authority section for this definition.

[5] *CALJIC* refers to *California Jury Instructions, Criminal*, a separate publication that was originally authored by the Committee on Standard Jury Instructions of the Superior Court of Los Angeles County.

CALCRIM No. 540B, *Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act*; No. 540C, *Felony Murder: First Degree—Other Acts Allegedly Caused Death*; No. 703, *Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder*

Recent case law has examined and further refined the standard for reckless indifference to human life. First, in *In re Scoggins* (2020) 9 Cal.5th 667, 677 [264 Cal.Rptr.3d 804, 467 P.3d 198], the California Supreme Court reviewed cases defining reckless indifference to human life and clarified that this concept has both "a subjective and an objective element." In response, the committee refined the instruction's definition of reckless indifference to better distinguish the subjective element from the objective element. The committee also added *Scoggins* to the authority section.

Second, several appellate cases have recently upheld youth as a relevant factor when determining whether a defendant acted with reckless indifference to human life. (See *People v. Keel* (2022) 84 Cal.App.5th 546, 558–559 [300 Cal.Rptr.3d 483]; *People v. Jones* (2022) 86 Cal.App.5th 1076 [302 Cal.Rptr.3d 847]; *In re Moore* (2021) 68 Cal.App.5th 434, 454 [283 Cal.Rptr.3d 584]; *People v. Ramirez* (2021) 71 Cal.App.5th 970, 987 [286 Cal.Rptr.3d 771].) Based on this developing case law, the committee added a new bullet point based on age ("How old was the defendant?") as an optional factor for the jury to consider when determining whether the defendant acted with reckless indifference to human life. The committee also added these cases to the authority section.

Separate from the reckless indifference standard, in *People v. Sifuentes* (2022) 83 Cal.App.5th 217, 229 [299 Cal.Rptr.3d 320], the First District Court of Appeal addressed the peace officer exception in Penal Code section 189(f).[6] The court held that the legal standard "knew or reasonably should have known" here "implicates an objective criminal negligence standard." (*Id.* at p. 230.) The committee added this case to the authority sections of Nos. 540B and 540C.

Two commenters—Appellate Defenders Inc. and OSPD—agreed with these proposed changes but requested additional language. Appellate Defenders Inc. proposed amending the age factor to state instead: "Did the defendant's youth and maturity level contribute to the commission of the offense?" The committee declined to make this change, noting that the questions in this section of the instruction are intentionally open-ended and neutral. Further, the authority section informs the parties about the significance of the defendant's age, which the parties can choose to argue at trial. Separately, OSPD proposed that these instructions include additional language to explain further the concept of reckless indifference to human life. The committee declined to add OSPD's proposed language, observing that the instruction already accurately reflects case law.

[6] Penal Code section 189(f) states: "Subdivision (e) does not apply to a defendant when the victim is a peace officer who was killed while in the course of the peace officer's duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of the peace officer's duties."

CALCRIM No. 563, *Conspiracy to Commit Murder*

People v. Ware (2022) 14 Cal.5th 151 [301 Cal.Rptr.3d 511, 520 P.3d 601] involved an evidentiary challenge to a murder conspiracy conviction in the context of a long-standing gang rivalry. In this case, the California Supreme Court initially reviewed the requirements for a murder conspiracy conviction and noted that "[t]he type and volume of evidence necessary to establish the existence of a broad, nonspecific gang-related conspiracy of the sort alleged here poses challenges to a fact finder attempting to distinguish the guilt of one defendant from that of another." (*Id.* at p. 165.) Ultimately, the court found insufficient evidence of the defendant's intent to participate in a conspiracy to kill rival gang members. (*Id.* at p. 174.) In reaching this conclusion, the court warned:

> The risk of jury confusion makes it all the more vital for courts to carefully distinguish between evidence of mere membership in a gang embroiled in a violent rivalry, on the one hand, and evidence sufficient to support a conviction for conspiracy to commit murder, on the other.

(*Id.* at p. 175.)

CALCRIM No. 563 already contains optional language that explains: "[Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the crime is not a member of the conspiracy]." The related bench note currently directs the trial court simply to give this bracketed language "upon request." In response to the concerns articulated in *Ware*, the committee added a use note stating "*<Give when evidence of group membership is used to prove the conspiracy>*" before the bracketed language. The committee also inserted a bench note that recommends "adding an admonition to distinguish evidence of gang rivalry violent conduct from evidence to support a conviction for conspiracy to commit murder" and provided suggested language. Finally, the committee added *Ware* to the authority section.

CALCRIM No. 592, *Gross Vehicular Manslaughter*

Senate Bill 1472 (Stats. 2022, ch. 626) amended Penal Code section 192 to clarify the definition of gross negligence as an element of vehicular manslaughter. Specifically, this legislation added the following types of conduct that could, based on the totality of the circumstances, constitute gross negligence: participating in a sideshow, an exhibition of speed, and speeding over 100 miles per hour. (Pen. Code, § 192(e).) The committee added these three types of conduct to the instruction, included relevant statutory definitions, and added references to the authority section.

CALCRIM No. 604, *Attempted Voluntary Manslaughter*

A trial judge pointed out that CALCRIM No. 571, *Voluntary Manslaughter*, includes the following bracketed sentence: "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." The judge noted that CALCRIM No. 604 does not contain this language and suggested that the same language would also be appropriate for this instruction on an attempt of that offense. The committee agreed with this suggestion and added the bracketed language to the instruction, along with the relevant authority section from No. 571.

CALCRIM No. 733, *Special Circumstances: Murder With Torture*

In *People v. Superior Court (Fernandez)* (2023) 88 Cal.App.5th 26, 32–39 [304 Cal.Rptr.3d 488], the Fourth District Court of Appeal discussed the torture-murder special circumstance in Penal Code section 190.2(a)(18) and specifically case law that explains the relationship between the acts of torture and the intent to kill. The court explained: "[I]f a person tortures another with the intent that the torture will eventually kill them, they do not escape the special circumstance if the victim dies during the abuse at an unexpected moment or in an unanticipated way—or if, as here, there is no evidence specifically showing intent at the precise moment of the death blow." (*Id.* at p. 38.)

In a footnote, the court made the following suggestion to the committee:

> We note that CALCRIM No. 733, the jury instruction applicable to the torture-murder special circumstance, includes the element that the defendant intended to kill, and the Bench Notes explain that causation is not required. We think this case suggests that it would be helpful for the commentary to the instruction to also refer to the authority discussed above establishing that the accused's intent to kill must be "when he tortured" the victim, and not necessarily at the moment of a particular fatal blow. (*Jennings, supra,* 50 Cal.4th at p. 647.)

(*Id.* at p. 39, fn.7.)

Pursuant to this suggestion, the committee expanded the discussion under "Causation Not Required for Special Circumstance" to include *Fernandez* as well as the cases discussed in the *Fernandez* opinion.

CALCRIM No. 1802, *Theft: As Part of Overall Plan*

Assembly Bill 2356 (Stats. 2022, ch. 22) added subdivision (e) to Penal Code section 487. This new subsection states: "If the value of the money, labor, real property, or personal property taken exceeds nine hundred fifty dollars ($950) over the course of distinct but related acts, the value of the money, labor, real property, or personal property taken may properly be aggregated to charge a count of grand theft, if the acts are motivated by one intention, one general impulse, and one plan." The legislation notes that the amendment "is declaratory of existing law in *People v. Bailey* (1961) 55 Cal.2d 514." (Assem. Bill 2356; Stats. 2022, ch. 22, § 2.)

CALCRIM No. 1802 was modeled on the *Bailey* doctrine, which allowed aggregating multiple thefts when committed as part of an overall plan. In response to the legislation, the committee modified the instruction to track the new statutory language. The committee made additional changes to account for cases in which some, but not all, charged thefts are part of an overall plan. In the Related Issues section, the committee updated the "Combining Grand Thefts" paragraph to include a discussion of *People v. Whitmer* (2014) 59 Cal.4th 733 [174 Cal.Rptr.3d 594, 329 P.3d 154] and added this case to the authority section. The committee also removed the "Multiple Victims" discussion because the legislative counsel's digest in the introduction of AB 2356 specified that the aggregation would apply "whether committed against one or more victims." Finally, the committee removed the "Theft Enhancement" discussion because Penal Code section

12022.6 has previously sunsetted. For CALCRIM No. 1801, *Grand and Petty Theft*, the committee added a reference to CALCRIM No. 1802 as well as made conforming technical changes to the instructional text.

Policy implications

Rule 2.1050 of the California Rules of Court requires the Advisory Committee on Criminal Jury Instructions to regularly update, amend, and add topics to *CALCRIM* and to submit its recommendations to the council for approval. This proposal fulfills that requirement.

Comments

The proposed additions, revisions, and revocation to *CALCRIM* circulated for public comment from May 24 through June 30, 2023. The committee received responses from 10 commenters: 4 judicial officers, 1 superior court committee, 1 bar association, 1 public defender's office, 1 district attorney's office, and 2 appellate defender offices.

Six commenters expressed support for proposed new CALCRIM No. 209 as well as the added implicit bias language in CALCRIM No. 101. One commenter requested additional language from *People v. Thomas* added to the instructional duty section of No. 522. Two commenters agreed with the proposed changes to CALCRIM Nos. 540B, 540C, and 703, but requested additional modifications with which the committee did not agree, as discussed above. Two commenters submitted suggested changes for new CALCRIM No. 526, based on the California Supreme Court's recent opinion in *People v. Reyes*, as discussed above. Finally, one commenter agreed with a majority of the proposals and pointed out pincite corrections for *People v. Thomas*. This commenter disagreed with only two instructions: No. 526 (cautioning that it be deferred until *People v. Reyes* is decided) and No. 733 (on the grounds that the case arose out of a denial of a Penal Code section 995 motion and that a dissenting opinion disagreed with the majority's legal analysis).

The text of all comments received and the committee's responses are included in a chart of comments attached at pages 10–24.

Alternatives considered

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

Fiscal and Operational Impacts

No implementation costs are associated with this proposal.

Attachments and Links

1. Chart of comments, at pages 10–24
2. Full text of revised *CALCRIM* instructions, including table of contents, at pages 25–135

Instruction No.	Commenter	Position	Comment	Committee Response
101, 209, 377, 401, 402, 403, 417, 521, 540B, 540C, 563, 592, 600, 604, 703, 1801, 1802	Orange County Bar Association, by Michael A. Gregg, President.	A	The Orange County Bar Association agrees with the following proposals.	No response necessary.
101 and New 209	Judge Khymberli Apaloo, Superior Court of San Bernardino County	AM	I am writing to comment specifically on Proposed modification to Instruction 101 and the proposed addition of Instruction 209. These proposals are fantastic, and it is great to see such a robust instruction on the issue of bias making its way to the criminal jury instructions, which were previously lacking. The only suggestion for changes I would make is to include language in the Bench Notes, Instructional Duty that makes it clear the Court could give the instruction sua sponte. It could read "This instruction may be given on request, or by the Court, sua sponte."	The committee agrees with this suggestion and has changed the instructional duty section to read: "This instruction may be given on request or sua sponte."
101 and New 209	Judge Rebecca S. Riley, Ret., Temporary Assigned Judges Program	A	The new wording of 101 addressing bias and the new instruction, 209, are long needed instructions. As our brains are hard-wired to categorize, we really can't help it, it is extremely important to address this with potential jurors. I particularly like "2." in 209 as it actually sets out a way to approach addressing a person's implicit bias. When people understand that everyone has biases, that it isn't shameful but something to be aware of in assessing evidence.	No response necessary.
101 and New 209	Access and Fairness Committee, Superior Court of Los Angeles County, by Bryan Borys, Director of Research & Data Management	A	The Access and Fairness Committee of the Los Angeles County Superior Court supports the proposed changes to jury instructions on implicit bias. The proposed instructions provide substantial guidance for jurors to reflect on their own biases and to thoroughly examine their decision-making process to ensure the conclusions they draw are a fair reflection of the law and evidence. As the United States Supreme Court noted in	No response necessary.

Instruction No.	Commenter	Position	Comment	Committee Response
			Pena-Rodriguez v. Colorado, 580 U.S. 206, 224 (2017), racial bias is, "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice. . . An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy." The proposed modification of CALCRIM 101 and the addition of 209 brings us closer to that promise.	
New 209	Judge Curtis Karnow, Superior Court of San Francisco County	A	I support this instruction, and suggest it be part of CACI as well. Indeed, to the extent practicable, all preliminary and general instructions equally applicable to civil and criminal cases should be the same in CalCrim and CACI.	No response necessary.
New 209	Judge Gary L. Paden, Ret., California Judges Association, executive board member	A	I see no problem with the instruction.	No response necessary.
318 and 319	Orange County Bar Association, by Michael A. Gregg, President.	AM	Appropriately adds *People v. Thomas* (2023) 14 Cal.5th 327, 369 under Authority section. Designated page 369 citation from *Thomas* is incorrect. Page cite should be changed to page 394.	The committee agrees and has corrected the pincite.
334	Orange County Bar Association, by Michael A. Gregg, President.	AM	Appropriately adds *People v. Thomas* (2023) 14 Cal.5th 327, 367-368 under Authority section. Designated pages 367-368 citation from Thomas is incorrect. Page cite should be changed to page 391-392.	The committee agrees and has corrected the pincite.
520	Office of the State Public Defenders, by Mary McComb, State Public Defender and Samuel Weiscovitz, Senior Deputy State Public Defender		*As set forth [below], the Supreme Court's opinion in *Reyes, supra,* 2023 Cal. LEXIS 3568, clarified (1) the meaning of "dangerous to human life" and (2) when an act does not proximately cause death. These statements apply equally to aiding and abetting implied malice murder and to directly committing implied malice murder. OSPD thus suggests that the Committee make two changes to CALCRIM No. 520 (First or Second Degree Murder With Malice Aforethought).	These comments raise issues about an instruction that are outside the scope of the current invitation to comment. The committee will consider them at its next meeting.

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

Instruction No.	Commenter	Position	Comment	Committee Response
			First, the second element of implied malice should read as follows: The natural and probable consequences of the (act/[or] failure to act) were dangerous to human life <u>in that they involved a high degree of probability that they would result in death</u>. (Proposed modification underlined.) Second, the bracketed language on proximate causation should read as follows: (An act/[or] (A/a) failure to act) causes death if the death is the direct, natural, and probable consequence of the (act/[or] failure to act) and the death would not have happened without the (act/[or] failure to act). A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. <u>An act that merely creates a dangerous situation in which death is possible depending on how circumstances unfold does not, without more, cause death.</u> (Proposed modification underlined.)	
522	Orange County Bar Association, by Michael A. Gregg, President.	AM	Bench Notes, Instructional Duty section for authority that this CALCRIM is a pinpoint instruction to be given upon request. Designated page 362 citation from *Thomas* is incorrect. Page cite should be changed to page 384.	The committee agrees and has corrected the pincite.
522	San Diego County District Attorney's Office by Shawn Tafreshi, Assistant Chief.	AM	Please accept the following comment from the San Diego County District Attorney's Office on proposed California Criminal Jury Instruction Number 522. Specifically, our office has discovered an incomplete point of law in the Bench Notes accompanying the latest proposed California Criminal Jury Instructions (CALCRIM 2023-01). In CALCRIM 522, as currently proposed, the first paragraph of the Bench Notes attempts to give guidance on whether this pinpoint instruction	The committee agrees with this suggestion and has added the phrase "where evidence supports the theory" at the end of the pinpoint instruction sentence.

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

Instruction No.	Commenter	Position	Comment	Committee Response
			regarding provocation should be given sua sponte or upon request of any party. The relevant portion of the Bench Notes is located at the end of the first paragraph, and states: There is, however, no sua sponte duty to instruct the jury on this issue. (*People v. Rogers* (2006) 39 Cal.4th 826, 877-880 [48 Cal.Rptr.3d 1, 141 P.3d 135].) This is a pinpoint instruction, to be given on request. (*People v. Thomas* (2023) 14 Cal.5th 327, 362 [304 Cal.Rptr.3d 1, 523 P.3d 323].) The Bench Notes now cite to the California Supreme Court decision of *People v. Thomas* to support the statement that a pinpoint instruction is to be given on request. However, page 362 of the *Thomas* case does not support the narrow legal view that: "[t]his is a pinpoint instruction, to be given on request." Instead, *Thomas* provides much more guidance that should be included in the Bench Notes for a more full and accurate explanation of the law. On page 384, the *Thomas* decision completes the rule of law on this point, stating: "An instruction that provocation may be sufficient to raise reasonable doubt about premeditation or deliberation, such as ... CALCRIM No. 522, is a pinpoint instruction to which a defendant is entitled only upon request where evidence supports the theory. (*People v. Thomas* (2023) 14 Cal.5th 327, 384 (citing *People v. Rivera* (2019) 7 Cal.5th 306,328 (*Rivera*) [247 Cal.Rptr.3d 363]).)" This direct quote from *Thomas* and *Rivera* reminds courts in murder trials that instructions such as CALCRIM 522 must only be given where trial evidence supports the theory described in the pinpoint instruction. We respectfully recommend the inclusion of the above-quoted paragraph within the CALCRIM 522 Bench Notes to accurately assist courts	

Instruction No.	Commenter	Position	Comment	Committee Response
			tasked with the important duty of accurately instructing juries in important murder trials. Thank you so much for your tireless efforts in ensuring that juries are correctly apprised of the law. Your efforts are greatly appreciated by us in San Diego!	
New 526	Orange County Public Defender, by Adam Vining, Assistant Public Defender	AM	S.B. 1437 eliminated imputed malice for murder. The California Supreme Court in *People v. Gentile* (2020) 10 Cal.5th 830 stated: "Senate Bill 1437 as a whole and in the context of the Penal Code, bars a conviction for first or second degree murder under a natural and probable consequences theory." On June 29, 2023 the California Supreme Court published its opinion in ***People v. Reyes*** (S270723). This opinion must be incorporated. Also, terms should be further defined:	The committee agrees with adding *People v. Reyes* to the authority section.
			Element 4: Before or during the commission of the act[s] causing death, the defendant intended to aid and abet the perpetrator in committing the act[s] that [was/were] dangerous to human life. (*Reyes*)	The committee agrees to clarify element 4. Instead of adding the words "causing death," the committee inserted the word "perpetrator's" in front of "act[s]" in elements 4 and 5. The committee also added the phrase "that (was/were) dangerous to human life" at the end of element 4.
			Element 6: By words or conduct, the defendant did in fact aid and abet the perpetrator's commission of the act[s] that caused death. (*Reyes*)	Element 2 already states that "the perpetrator's acts caused the death."
			Add Element 7: The defendant's act was a substantial factor contributing to the death. (*Reyes*)	Neither *Reyes* nor any other published opinion that the committee is aware of provides authority for this proposed element.

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

Instruction No.	Commenter	Position	Comment	Committee Response
			Dangerous to human life: An act is dangerous to human life if it carries a high probability that it will result in death. Acts that merely create a dangerous situation in which death is possible, alone, do not suffice. (*Reyes*).	The committee added the following definition to the instruction: "An act is *dangerous to human life* if there is a high degree of probability that the act will result in death."
			The following language should be added: "An aider and abettor's mental state must be at least that required of the direct perpetrator. An aider and abettor must know and share the murderous intent of the actual perpetrator." (*People v. Gentile* (2020) 10 Cal.5th 830, 845, 850.)	The elements in the instruction already convey this legal concept.
			Conscious disregard for human life is an extreme indifference to human life. (*People v. Summers* (1983) 147 Cal.App.3d 180, 184.)	The instruction does not need further amplification of this legal concept.
			Conscious disregard of the risk of serious bodily injury is insufficient to show conscious disregard for human life. (*People v. Knoller* (2007) 41 Cal.4th 139, 156.)	The instruction does not need further amplification of this legal concept.
New 526	Office of the State Public Defenders, by Mary McComb, State Public Defender, and Samuel Weiscovitz, Senior Deputy State Public Defender		The Office of the State Public Defender ("OSPD") is a statewide office with the mission of representing indigent persons in their appeals from criminal convictions in both capital and non-capital cases. The Legislature has instructed OSPD to "engage in related efforts for the purpose of improving the quality of indigent defense." (Govt. Code § 15420, subd. (b).) The jury instructions addressed in our comments are implicated repeatedly in our day-to-day practice. We hope that our experience with the application of these instructions and the problems they have sometimes engendered can provide a useful perspective to the Council as it attempts to ensure that jurors receive the most accurate information possible when undergoing the difficult task of applying the law to the facts	

Instruction No.	Commenter	Position	Comment	Committee Response
			before them. We appreciate the opportunity to participate in this process. Thank you for considering the following comments.	
			Last week, the Supreme Court issued its first opinion directly addressing the subject matter of proposed new instruction CALCRIM No. 526 – aiding and abetting implied malice murder. (*People v. Reyes* (June 29, 2023) _Cal.5th ___ [2023 Cal. LEXIS 3568] (*Reyes*).) As *Reyes* illustrates, the language of the current proposed instruction – while not itself inaccurate – is susceptible to interpretations that lead to the imposition of liability inconsistent with governing legal principles. The Court set forth in *Reyes* more precise definitions of the required elements of this theory of liability. The Office of the State Public Defender (OSPD) offers this comment to urge the Committee to incorporate the Supreme Court's very recent clarifications into the language of the proposed new instruction. (For the convenience of the Committee, a copy of the proposed instruction with OSPD's suggested additions is appended to this comment.)	
			First, *Reyes* makes clear that, absent further definition, the phrase "dangerous to human life" is susceptible to misunderstanding and misapplication. To the trial court in that case, for the 15-year-old defendant to join other gang members (one of whom was armed) riding bicycles into a rival gang's territory was, in the words adopted in the proposed instruction, "an act dangerous to human life." As that finding illustrates, after a murder has taken place virtually any unwise or unlawful act that led up to the killing can be viewed in hindsight as in some sense "dangerous to human life." The Supreme Court responded firmly: "we . . . take issue with the trial court's conclusion." (*Ibid.*) The Court explained that "[t]o suffice for implied malice murder, the defendant's act must not merely be	The committee agrees, in light of *Reyes*, that the definition of an act that is dangerous to human life should be further defined. However, instead of modifying the first element, the committee added the following definition after the elements: "An act is *dangerous to human life* if there is a high degree of probability that the act will result in death."

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

Instruction No.	Commenter	Position	Comment	Committee Response
			dangerous to life in some vague or speculative sense; it must ' "involve[] *a high degree of probability that it will result in death*." ' " (*Ibid.*, italics added, quoting *People v. Knoller* (2007) 41 Cal.4th 139, 152, alteration added by *Reyes*.) Accordingly, the Committee should modify the initial element in the proposed instruction to precisely state what is required in regard to the perpetrator's actus reus. If the trial court in *Reyes* misunderstood the danger required by the relevant act(s), then a jury interpreting the same phrase is likely to do the same. The committee can and should provide juries the same guidance the Supreme Court deemed necessary. The first element in the instruction should read: The perpetrator committed [an] act[s] that (was/were) dangerous to human life <u>in that (it/they) involved a high degree of probability that (it/they) would result in death</u>. (Proposed modification underlined.) And bracketed language should likewise read as follows: <u>[For an act to be dangerous to human life, the act must not merely be dangerous to life in some vague or speculative sense; it must involve a high degree of probability that it will result in death.]</u> (Proposed modification underlined.)	
			Second, the Court repeatedly emphasized that "to be liable for an implied malice murder, the direct aider and abettor must, by words or conduct, aid the commission of the life endangering act, not the result of that act." (*Reyes*, supra, 2023 Cal. LEXIS 3568 at *16, italics in original, quoting *People v. Powell* (2021) 63 Cal.App.5th 689, 713; see also *Reyes* at *18 ["implied malice murder requires attention to the aider and abettor's	The committee agrees with the suggestion to clarify element 4. Instead of "life-endangering**,**" the committee inserted the word "perpetrator's" in front of "act[s]" in elements 4 and 5. The committee also added "that

Instruction No.	Commenter	Position	Comment	Committee Response
			mental state concerning the life endangering act committed by the direct perpetrator, such as shooting at the victim"].) The Committee should ensure that all mens rea elements reflect this focus. Elements 3 through 5 of the proposed instruction pertain to the defendant's knowledge and intent. While elements 3 and 5 include the phase "dangerous to human life," element 4 includes no such qualifier. So, the fourth element in the instruction should read: Before or during the commission of the <u>life-endangering</u> act[s], the defendant intended to aid and abet the perpetrator in committing the act[s]. (Proposed modification underlined.)	(was/were) dangerous to human life" at the end of element 4.
			The Supreme Court's laser focus on this point similarly requires clarification that it is the life-endangering act which the defendant must aid. Element 6 of the proposed instruction currently states that "By words or conduct, the defendant did in fact aid and abet the perpetrator's commission of the act[s]." The instruction should properly reflect the nature of the act aided by stating the following: By words or conduct, the defendant did in fact aid and abet the perpetrator's commission of the <u>life-endangering</u> act[s]. (Proposed modification underlined.)	The suggested addition of "life-endangering" to element 6 is not necessary because elements 1, 3, and (now) 4 specify that the act[s] "(was/were) dangerous to human life."
			Finally, the instruction should incorporate *Reyes*'s critical clarification of proximate causation. The proposed instruction includes bracketed language on that subject which mirrors CALCRIM No. 240 (Causation). But in *Reyes*, after reviewing its prior holdings, the Supreme Court explained what does not qualify for proximate causation in a murder case: "acts that merely create a dangerous situation in which death is possible	The committee disagrees with adding this language. The instruction, as currently drafted, adequately states that the consequence of the act must be probable and not merely possible.

Instruction No.	Commenter	Position	Comment	Committee Response
			depending on how circumstances unfold do not, without more, satisfy [the proximate] causation requirement." (*Reyes, supra,* 2023 Cal. LEXIS 3568 at *12.) New bracketed language should guide jurors in the same way the Court did, with the instruction reading as follows: An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. <u>An act that merely creates a dangerous situation in which death is possible depending on how circumstances unfold does not, without more, cause death</u>. (Proposed modification underlined.)	
New 526	Orange County Bar Association, by Michael A. Gregg, President.	D	S.B. 1437 eliminated imputed malice for murder. The issue of implied malice murder: aiding and abetting, is currently before the California Supreme Court in People v. Reyes (S270723). The case has been argued and submitted and an opinion is impending. Publication of any instruction on this issue should be delayed until the case is decided.	The California Supreme Court issued its decision in *People v. Reyes* on June 29, 2023. This opinion confirmed the caselaw that the committee relied upon in proposing the instruction.
540B, 540C, 703	Appellate Defenders Inc., by Cindi Mishkin, Assistant Director.	AM	The appellate project associated with the Fourth District Court of Appeal appreciates the opportunity to review and comment on the proposed modifications to the Judicial Council of California, Criminal Jury Instructions (CALCRIM). After reviewing the proposals, our staff respectfully submits the following comments which apply to the proposed (identical) additions to CALCRIM Nos. 540B, 540C, and 703.	No response necessary.

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

Instruction No.	Commenter	Position	Comment	Committee Response
			For each of these instructions, we do agree with the addition of the last bullet under Authority, namely, "Defendant's Youth Can Be Relevant Factor When Determining Reckless Indifference," and the attendant case law. The key word in the foregoing is "youth," as each of the cases does address.	
			ADI notes, however, that in the instruction itself, the wording, which presumably is intended to reflect this case law, is, "How old was the defendant?" ADI finds the wording uncertain in two respects. First, all of the other factors (but one), are worded in terms such as, "Did the defendant know . . . ?" or "Was the defendant [near/aware] . . . ?" That is, a juror is asked to make a "yes" or "no" determination. In contrast, the proposed factor, "How old was the defendant?" does not suggest how the jurors are to apply this factor. Amending the language to read, "Did the defendant's youth and maturity level contribute to the commission of the offense?" uses language from *People v. Jones* (2022) 86 Cal.App.5th 1076, cited in the proposed CALCRIM's new authority, to explain how the jurors are to consider this factor. Thank you for your consideration.	The committee declines to make this change. The questions in this section are intentionally open-ended and neutral. The authority section informs the parties about the significance of the defendant's age.
540B, 540C, and 703	Office of the State Public Defenders, by Mary McComb, State Public Defender, and AJ Kutchins, Supervising Deputy State Public Defender	AM	The Office of the State Public Defender ("OSPD") is a statewide office with the mission of representing indigent persons in their appeals from criminal convictions in both capital and non-capital cases. The Legislature has instructed OSPD to "engage in related efforts for the purpose of improving the quality of indigent defense." (Govt. Code § 15420, subd. (b).)	No response necessary.

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

Instruction No.	Commenter	Position	Comment	Committee Response
			The jury instructions addressed in our comments are implicated repeatedly in our day-to-day practice. We hope that our experience with the application of these instructions and the problems they have sometimes engendered can provide a useful perspective to the Council as it attempts to ensure that jurors receive the most accurate information possible when undergoing the difficult task of applying the law to the facts before them. We appreciate the opportunity to participate in this process. Thank you for considering the following comments.	
			Clarification of the Reckless Indifference Standard The Office of the State Public Defender (OSPD) offers this comment out of concern that CALCRIM Nos. 540B, 540C and 703 – both as they have existed and under the proposed revisions – fail to provide jurors with the basic guidance necessary to determine if a defendant has acted with "reckless indifference to human life" as that standard has been defined, repeatedly, by the Supreme Court. The proposed revisions to these instructions address the potential felony-murder liability of defendants who aided and abetted the underlying felony but did so without intending the resulting murder. As the instructions accurately state, such defendants can be found liable for felony murder only if, as "major participant[s]" in the underlying felony they acted "with reckless indifference to human life." (Pen. Code, §§ 189, subd. (e)(3), 190.2, subd. (d).) That standard has been an expression of California law since 1990, when it was adopted as a limitation on aider-and-abettor liability for the felony-murder special circumstance set out in Penal Code section 190.2. More recently, the Legislature	The committee declines to make this change. Based on *Scoggins*, the instruction as drafted incorporates the definition of the objective and subjective elements of reckless indifference to human life and the questions jurors may use to reach their conclusion. (*In re Scoggins* (2020) 9 Cal.5th 667, 676–677.)

Instruction No.	Commenter	Position	Comment	Committee Response
			incorporated it into the statute governing liability for felony murder itself. (Senate Bill No. 1437 (2017-2018 Reg. Sess.).) Throughout that time, the only explanation of the mental component of that standard has been the one set forth in the current instructions: "A person acts with reckless indifference to human life when he or she knowingly engages in criminal activity that he or she knows involves a grave risk of death." However, as the Supreme Court has recognized in a series of decisions in the interim, that definition, without more, has frequently permitted juries and courts alike to find defendants liable for felony murder even when the evidence did not justify such verdicts. (See *People v. Strong* (2022) 13 Cal.5th 698 (Strong); *In re Scoggins* (2020) 9 Cal.5th 667 (*Scoggins*); *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*); *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*).) Most recently, the Court referred to such instructions as expressing "outdated legal standards." (*Strong*, at p. 720 & fn. 4 [discussing CALCRIM No. 703].) As those cases make plain, the core of the problem lies with the phrase "grave risk"; unless further illumination is provided, any armed robbery or similar crime in which weapons are used could be seen as "involv[ing] a grave risk of death." But the law will not tolerate holding everyone who participates in such crimes culpable for felony murder every time an accomplice commits an unintended and unexpected killing in the course of the underlying felony. (See *Banks, supra,* 61 Cal.4th at p. 808.) Thus the Supreme Court has emphasized – in terms that speak directly to the proposed instructions – that "participation in an armed robbery, without more, does not involve 'engaging in criminal activities known to carry a grave risk of death.'"	

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

Instruction No.	Commenter	Position	Comment	Committee Response
			(*Banks, supra,* 61 Cal.4th at p. 805, italics added and citation omitted.) Rather, as the Court explained in *Banks*, to suffer liability, "[t]he defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed, demonstrating reckless indifference to the significant risk of death his or her actions create." (*Id.* at p. 801.) *Clark* agreed, and refined the point further, explaining that reckless indifference "encompasses a willingness to kill (or to assist another in killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his actions." (*Clark*, supra, 63 Cal.4th at p. 617.) The Supreme Court has repeatedly reiterated that exact language in subsequent cases describing the "reckless indifference" standard. (See *Strong, supra,* 13 Cal.5th at p. 706; *Scoggins, supra,* 9 Cal.5th at pp. 676-677.) In that series of opinions, each reversing a judgment, the Supreme Court made clear to the lower courts that the old understanding of the standard is no longer adequate or tolerable. But no one is telling jurors that. The Committee is now proposing to modify the instructions to reflect – in accordance with *Clark* – that "reckless indifference" entails both a subjective and an objective component. (See *Clark, supra,* 61 Cal.4th at p. 622.) OSPD supports that effort – but it does not begin to fill the fatal gap in the existing instructions.	

Instruction No.	Commenter	Position	Comment	Committee Response
			OSPD suggests that, to avoid the confusion and improper, unjust results that have repeatedly arisen, the instructions incorporate the clarifying language found in the Supreme Court's opinions. Thus OSPD proposes that the portions of CALCRIM Nos. 540B, 540C and 703 discussing "reckless indifference to human life" be modified to read substantially as follows: A person acts with reckless indifference to human life when he or she engages in criminal activity that a reasonable person would know involves a grave risk of death and he or she knows that the activity involves a grave risk of death. However, the defendant's participation in [insert underlying felony] does not, in itself, constitute engaging in a criminal activity known to carry a grave risk of death. Rather, to find that the defendant acted with reckless disregard of human life you must determine that his or her conduct demonstrated a willingness to kill (or to assist another in killing) to achieve a distinct aim, even if the defendant did not specifically desire that death as the outcome of his or her actions.	
733	Orange County Bar Association, by Michael A. Gregg, President.	D	Although, in a footnote, the Court of Appeal asks for this language to be added to the CALCRIM, it is important to note that, not only was this case arising in the context of a PC 995 motion with a reduced burden of proof, but also, there was a dissent that disagreed with the other 2 justices in their opinion of when the intent to kill must be manifested by the defendant. It is entirely possible that the result of this case would be different if it was a BRD standard.	The articulation of the law about torture and intent to kill for the special circumstance is not dependent on the standard of proof, nor does a dissenting opinion affect whether a case is authority.
763	Orange County Bar Association, by Michael A. Gregg, President.	AM	Appropriately adds *People v. Thomas* (2023) 14 Cal.5th 327, 378 to Authority section for proposition that "Mercy Equivalent to Sympathy or Compassion." However, citation to page 378 is incorrect. The citation should be changed to page 407.	The committee agrees and has corrected the pincite.

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

CALCRIM Proposed Changes: Table of Contents

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604	Attempted Voluntary Manslaughter
703	Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder
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1801	Grand and Petty Theft
1802	Theft: As Part of Overall Plan

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

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

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

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

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

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

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

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

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

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

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

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

You must not be biased in favor of or against any party, witness, attorney, defendant[s], or alleged victim because of his or her disability, gender, nationality, national origin, race or ethnicity, religion, gender identity, sexual

orientation, [or] age (,/,) [or socioeconomic status] (,/,) [or _____<*insert any other impermissible form of bias*>.]

You must reach your verdict without any consideration of punishment.

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

AUTHORITY

- Statutory Admonitions. Pen. Code, § 1122.
- Avoid Discussing the Case. *People v. Pierce* (1979) 24 Cal.3d 199 [155 Cal.Rptr. 657, 595 P.2d 91]; *In re Hitchings* (1993) 6 Cal.4th 97 [24

Cal.Rptr.2d 74, 860 P.2d 466]; *In re Carpenter* (1995) 9 Cal.4th 634, 646–658 [38 Cal.Rptr.2d 665, 889 P.2d 985].

- Avoid News Reports. *People v. Holloway* (1990) 50 Cal.3d 1098, 1108–1111 [269 Cal.Rptr. 530, 790 P.2d 1327], disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830 [38 Cal.Rptr.2d. 394, 889 P.2d 588].
- Judge's Conduct as Indication of Verdict. *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].
- No Bias, Sympathy, or Prejudice. *People v. Hawthorne* (1992) 4 Cal.4th 43, 73 [14 Cal.Rptr.2d 133, 841 P.2d 118].
- No Independent Research. *People v. Karis* (1988) 46 Cal.3d 612, 642 [250 Cal.Rptr. 659, 758 P.2d 1189]; *People v. Castro* (1986) 184 Cal.App.3d 849, 853 [229 Cal.Rptr. 280]; *People v. Sutter* (1982) 134 Cal.App.3d 806, 820 [184 Cal.Rptr. 829].
- Prior Version of This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1182–1183 [67 Cal.Rptr.3d 871].
- Court's Contempt Power for Violations of Admonitions. Pen. Code, § 1122(a)(1); Code Civ. Proc., § 1209(a)(6) (effective January 1, 2012~~1/1/12~~).

RELATED ISSUES

Admonition Not to Discuss Case With Anyone

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

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

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

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

Jury Misconduct

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

SECONDARY SOURCES

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

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

209. Implicit or Unconscious Bias

In your role as a juror, you must not let bias influence your assessment of the evidence or your decisions.

I will now provide some information about how bias might affect decisionmaking. Our brains help us navigate and respond quickly to events by grouping and categorizing people, places, and things. We all do this. These mental shortcuts are helpful in some situations, but in the courtroom they may lead to biased decisionmaking.

Bias can affect what we notice and pay attention to, what we see and hear, what we remember, how we perceive people, and how we make decisions. We may favor or be more likely to believe people whom we see as similar to us or with whom we identify. Conversely, we may disfavor or be less likely to believe people whom we see as different.

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

To ensure that bias does not affect your decisions in this case, consider the following steps:

1. **Reflect carefully and thoughtfully about the evidence. Think about why you are making each decision and examine it for bias. Resist the urge to jump to conclusions or to make judgments based on personal likes or dislikes, generalizations, prejudices, stereotypes, or biases.**

2. **Consider your initial impressions of the people and the evidence in this case. Would your impressions be different if any of the people were, for example, of a different age, gender, race, religion, sexual orientation, ethnicity, or national origin? Was your opinion affected because a person has a disability or speaks in a language other than English or with an accent? Think about the people involved in this case as individuals. Focusing on individuals can help reduce the effect of stereotypes on decisionmaking.**

3. **Listen to the other jurors. Their backgrounds, experiences, and insights may be different from yours. Hearing and sharing different perspectives may help identify and eliminate biased conclusions.**

The law demands that jurors make unbiased decisions, and these strategies can help you fulfill this important responsibility. You must base your decisions solely on the evidence presented, your evaluation of that evidence, your common sense and experience, and these instructions.

New September 2023

BENCH NOTES

Instructional Duty

This instruction may be given on request or sua sponte.

AUTHORITY

- Right to Unbiased Jurors. Pen. Code, § 745(a).
- Conduct Exhibiting Bias Prohibited. Pen. Code, § 1127h; Standard 10.20(b) of the California Standards of Judicial Administration.
- Implicit Bias in Decisionmaking. *People v. McWilliams* (2023) 14 Cal.5th 429, 451 [304 Cal.Rptr.3d 779, 796, 524 P.3d 768, 782] (conc. opn. of Liu, J.) [discussing empirical studies]; *United States v. Ray* (6th Cir. 2015) 803 F.3d 244, 259–260 & fn. 8 [defining the concept of implicit bias and recognizing its impact].

318. Prior Statements as Evidence

You have heard evidence of [a] statement[s] that a witness made before the trial. If you decide that the witness made (that/those) statement[s], you may use (that/those) statement[s] in two ways:

1. **To evaluate whether the witness's testimony in court is believable;**

AND

2. **As evidence that the information in (that/those) earlier statement[s] is true.**

New January 2006; Revised August 2012, September 2023

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give this instruction. (*People v. Griffin* (1988) 46 Cal.3d 1011, 1026 [251 Cal.Rptr. 643, 761 P.2d 103].) Use this instruction when a testifying witness has been confronted with a prior inconsistent statement.

If prior testimony of an unavailable witness was impeached with a prior inconsistent statement, use CALCRIM No. 319, *Prior Statements of Unavailable Witness*. (*People v. Williams* (1976) 16 Cal.3d 663, 668–669 [128 Cal.Rptr. 888, 547 P.2d 1000].) If the prior statements were obtained by a peace officer in violation of *Miranda*, give CALCRIM No. 356, Miranda-*Defective Statements*.

AUTHORITY

- Instructional Requirements. *California v. Green* (1970) 399 U.S. 149, 158 [90 S.Ct. 1930, 26 L.Ed.2d 489]; *People v. Cannady* (1972) 8 Cal.3d 379, 385–386 [105 Cal.Rptr. 129, 503 P.2d 585]; see Evid. Code, §§ 770, 791, 1235, 1236.
- This Instruction Upheld. *People v. Thomas* (2023) 14 Cal.5th 327, 394 [304 Cal.Rptr.3d 1, 523 P.3d 323]; *People v. Tuggles* (2009) 179 Cal.App.4th 339, 363-367 [100 Cal.Rptr.3d 820]; *People v. Golde* (2008) 163 Cal.App.4th 101, 120 [77 Cal.Rptr.3d 120].

SECONDARY SOURCES

1 Witkin, California Evidence (5th ed. 2012) Hearsay, § 158.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.22[3][b], Ch. 83, *Evidence*, § 83.13[3][e], [f], Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][b] (Matthew Bender).

319. Prior Statements of Unavailable Witness

_____ <~~I~~*insert name of unavailable witness*> did not testify in this trial, but (his/her) testimony, taken at another time, was (read/played) for you. In addition to this testimony, you have heard evidence that _____ <*insert name of unavailable witness*> made (another/other) statement[s]. [I am referring to the statement[s] about which _____ <*insert name[s]*> testified.]

If you conclude that _____ <*insert name of unavailable witness*> made (that/those) other statement[s], you may only consider (it/them) in a limited way. You may only use (it/them) in deciding whether to believe the testimony of _____ <*insert name of unavailable witness*> that was (read/played) here at trial. You may not use (that/those) other statement[s] as proof that the information contained in (it/them) is true, nor may you use (it/them) for any other reason.

New January 2006; Revised September 2023

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give this instruction. (*People v. Griffin* (1988) 46 Cal.3d 1011, 1026 [251 Cal.Rptr. 643, 761 P.2d 103].)

Give this instruction when prior inconsistent statements of an unavailable witness were admitted for impeachment purposes. (*People v. Williams* (1976) 16 Cal.3d 663, 668–669 [128 Cal.Rptr. 888, 547 P.2d 1000].) If a testifying witness was confronted with prior inconsistent statements, give CALCRIM No. 318, *Prior Statements as Evidence*. If the prior statements were obtained by a peace officer in violation of *Miranda*, give CALCRIM No. 356, Miranda~~*Miranda*~~*-Defective Statements*.

Evidence Code section 1294 creates an exception to the impeachment-only rule in *Williams* for the use of prior inconsistent statements given as testimony in a preliminary hearing or prior proceeding in the same criminal matter.

AUTHORITY

- Instructional Requirements. *People v. Williams* (1976) 16 Cal.3d 663, 668–669 [128 Cal.Rptr. 888, 547 P.2d 1000]; see Evid. Code, §§ 145, 240, 770, 791, 1235, 1236, 1291.
- This Instruction Upheld. *People v. Thomas* (2023) 14 Cal.5th 327, 394 [304 Cal.Rptr.3d 1, 523 P.3d 323].

SECONDARY SOURCES

1 Witkin, California Evidence (5th ed. 2012) Hearsay, § 158.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.13[3][e] (Matthew Bender).

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

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

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

OR

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

AND

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

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

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

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

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

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

1. **The nature and effect of the criminal conduct;**

2. **That the conduct was wrongful and forbidden;**

AND

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

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

If you decide that a (declarant/ [or] witness) was an accomplice, then you may not convict the defendant of _____ *<insert charged crime[s]>* **based on his or her (statement/ [or] testimony) alone. You may use (a statement/ [or] testimony) of an accomplice that tends to incriminate the defendant to convict the defendant only if:**

1. **The accomplice's (statement/ [or] testimony) is supported by other evidence that you believe;**

2. **That supporting evidence is independent of the accomplice's (statement/ [or] testimony);**

AND

3. **That supporting evidence tends to connect the defendant to the commission of the crime[s].**

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime[s], and it does not need to support every fact (mentioned by the accomplice in the statement/ [or] about which the accomplice testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

[The evidence needed to support the (statement/ [or] testimony) of one accomplice cannot be provided by the (statement/ [or] testimony) of another accomplice.]

Any (statement/ [or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statement/ [or] testimony) the weight you think it deserves after examining it with care and caution and in the light of all the other evidence.

New January 2006; Revised June 2007, April 2010, April 2011, February 2016, March 2019, April 2020, September 2023

BENCH NOTES

Instructional Duty

There is a **sua sponte** duty to instruct on the principles governing the law of accomplices, including the need for corroboration, if the evidence at trial suggests that a witness could be an accomplice. (*People v. Tobias* (2001) 25 Cal.4th 327, 331 [106 Cal.Rptr.2d 80, 21 P.3d 758]; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].)

"Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed." (*People v. Coffman and Marlow* (2004) 34 Cal.4th~~th~~ 1, 104 [17 Cal.Rptr.3d 710, 96 P.3d 30].) When the court concludes that the witness is an accomplice as a matter of law or the parties agree about the witness's status as an accomplice, do not give this instruction. Give CALCRIM No. 335, *Accomplice Testimony: No Dispute Whether Witness Is Accomplice*.

If a codefendant's testimony tends to incriminate another defendant, the court **must give** an appropriate instruction on accomplice testimony. (*People v. Avila* (2006) 38 Cal.4th 491, 562 [43 Cal.Rptr.3d 1, 133 P.3d 1076]; *citing People v. Box* (2000) 23 Cal.4th 1153, 1209 [99 Cal.Rptr.2d 69, 5 P.3d 130]; *People v. Alvarez* (1996) 14 Cal.4th 155, 218 [58 Cal.Rptr.2d 385, 926 P.2d 365].) The court **must** also instruct on accomplice testimony when two codefendants testify against each other and blame each other for the crime. (*Id.* at 218–219).

When the witness is a codefendant whose testimony includes incriminating statements, the court **should not** instruct that the witness is an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555 [58 Cal.Rptr. 340, 426 P.2d 908].) Instead, the court should give this instruction, informing the jury that it must decide whether the testifying codefendant is an accomplice. In addition, the court should instruct that when the jury considers this testimony as it relates to the testifying codefendant's defense, the jury should evaluate the testimony using the general rules of credibility, but if the jury considers testimony as incriminating evidence against the non-testifying codefendant, the testimony must be corroborated and should be viewed with caution. (See *People v. Coffman and Marlow, supra,* ~~(2004)~~ 34 Cal.4th at p.~~1,~~ 105~~ [17 Cal.Rptr.3d 710, 96 P.3d 30]~~.)

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

If the court concludes that the corroboration requirement applies to an out-of-court statement, use the word "statement" throughout the instruction. (See discussion in Related Issues section below.)

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

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

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

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

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

AUTHORITY

- Instructional Requirements. Pen. Code, § 1111; *People v. Guiuan, supra,* ~~(1998)~~ 18 Cal.4th at p.~~558,~~ 569 ~~[76 Cal.Rptr.2d 239, 957 P.2d 928]~~.
- Accomplice May Not Provide Sole Basis for Admission of Other Evidence. *People v. Bowley* (1963) 59 Cal.2d 855, 863 [31 Cal.Rptr. 471, 382 P.2d 591].
- Consideration of Incriminating Testimony. *People v. Guiuan, supra,* ~~(1998)~~ 18 Cal.4th at p.~~558,~~ 569 ~~[76 Cal.Rptr.2d 239, 957 P.2d 928]~~.
- Defendant's Burden of Proof. *People v. Belton* (1979) 23 Cal.3d 516, 523 [153 Cal.Rptr. 195, 591 P.2d 485].
- Defense Admissions May Provide Necessary Corroboration. *People v. Williams* (1997) 16 Cal.4th 635, 680 [66 Cal.Rptr.2d 573, 941 P.2d 752].

- Accomplice Includes Co-perpetrator. *People v. Felton* (2004) 122 Cal.App.4th 260, 268 [18 Cal.Rptr.3d 626].
- Definition of Accomplice as Aider and Abettor. *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- Extent of Corroboration Required. *People v. Szeto* (1981) 29 Cal.3d 20, 27 [171 Cal.Rptr. 652, 623 P.2d 213].
- One Accomplice May Not Corroborate Another. *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15 [117 P.2d 437], disapproved on other grounds in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301, fn. 11 [124 Cal.Rptr. 204, 540 P.2d 44] and *People v. Dillon* (1983) 34 Cal.3d 441, 454, fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697].
- Presence or Knowledge Insufficient. *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].
- Testimony of Feigned Accomplice Need Not Be Corroborated. *People v. Salazar* (1962) 201 Cal.App.2d 284, 287 [20 Cal.Rptr. 25]; but see *People v. Brocklehurst* (1971) 14 Cal.App.3d 473, 476 [92 Cal.Rptr. 340]; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193 [120 Cal.Rptr. 136].
- Uncorroborated Accomplice Testimony May Establish Corpus Delicti. *People v. Williams* (1988) 45 Cal.3d 1268, 1317 [248 Cal.Rtpr. 834, 756 P.2d 221].
- Witness an Accomplice as a Matter of Law. *People v. Williams, supra,* ~~(1997)~~ 16 Cal.4th at p.~~635,~~ 679 ~~[66 Cal.Rptr.2d 573, 941 P.2d 752]~~.
- In-Custody Informant Testimony and Accomplice Testimony May Corroborate Each Other. *People v. Huggins* (2015) 235 Cal.App.4th 715, 719-720 [185 Cal.Rptr.3d 672].
- No Corroboration Requirement for Exculpatory Accomplice Testimony. *People v. Smith, supra,* ~~(2017)~~ 12 Cal.App.5th at pp.~~766,~~ 778–~~–~~780 ~~[218 Cal.Rptr.3d 892]~~.
- This Instruction Upheld. *People v. Thomas* (2023) 14 Cal.5th 327, 391–392 [304 Cal.Rptr.3d 1, 523 P.3d 323].

RELATED ISSUES

Out-of-Court Statements

The out-of-~~-~~court statement of a witness *may* constitute "testimony" within the meaning of Penal Code section 1111, and may require corroboration. (*People v. Williams, supra,* ~~(1997)~~ 16 Cal.4th at p.~~153,~~ 245 ~~[66 Cal.Rptr.2d 123, 940 P.2d 710]~~; *People v. Belton, supra,* ~~(1979)~~ 23 Cal.3d at p.~~516,~~ 526 ~~[153 Cal.Rptr. 195, 591 P.2d 485]~~.) The Supreme

Court has quoted with approval the following summary of the corroboration requirement for out-of-court statements:

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

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

Incest With a Minor

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

Liable to Prosecution When Crime Committed

The test for determining if a witness is an accomplice is not whether that person is subject to trial when he or she testifies, but whether he or she was liable to prosecution for the same offense at the time the acts were committed. (*People v. Gordon* (1973) 10 Cal.3d 460, 469 [110 Cal.Rptr. 906, 516 P.2d 298].) However, the fact that a witness was charged for the same crime and then granted immunity does not necessarily establish that he or she is an accomplice. (*People v. Stankewitz*, *supra,* ~~(1990)~~ 51 Cal.3d at p.~~72,~~ 90 ~~[270 Cal.Rptr. 817, 793 P.2d 23]~~.)

Threats and Fear of Bodily Harm

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

Defense Witness

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

SECONDARY SOURCES

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

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.03, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][b], 85.03[2][b], [d], Ch. 87, *Death Penalty*, § 87.23[4][b] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.02[5][b] (Matthew Bender).

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

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

New March 2018; Revised April 2020, September 2023

BENCH NOTES

Instructional Duty

The court must give this instruction for support dog, dog handler, or both, on request. The court may give this instruction for support person on request. If instructing on support persons, this instruction ~~only~~ applies only to prosecution witnesses.

AUTHORITY

- Elements. Pen. Code, §§ 868.4, 868.5.
- This Instruction Upheld. *People v. Picazo* (2022) 84 Cal.App.5th 778, 803–805 [300 Cal.Rptr.3d 649].

401. Aiding and Abetting: Intended Crimes

To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that:

1. **The perpetrator committed the crime;**

2. **The defendant knew that the perpetrator intended to commit the crime;**

3. **Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime;**

AND

4. **The defendant's words or conduct did in fact aid and abet the perpetrator's 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.]

New January 2006; Revised August 2012, September 2023

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecution relies on it as a theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-561 [199 Cal.Rptr. 60, 674 P.2d 1318].)

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 evidence that the defendant withdrew from participation in the crime, the court has a **sua sponte** duty to give the bracketed portion regarding withdrawal. (*People v. Norton* (1958) 161 Cal.App.2d 399, 403 [327 P.2d 87]; *People v. Ross* (1979) 92 Cal.App.3d 391, 404–405 [154 Cal.Rptr. 783].)

Do not give this instruction when instructing on aiding and abetting implied malice murder. Instead, give CALCRIM No. 526, *Implied Malice Murder: Aiding and Abetting.*

Related Instructions

Give CALCRIM No. 400, *Aiding and Abetting: General Principles*, before this instruction. Note that Penal Code section 30 uses "principal" but that CALCRIM Nos. 400 and 401 substitute "perpetrator" for clarity.

If the prosecution charges non-target crimes under the Natural and Probable Consequences Doctrine, give CALCRIM No. 402, *Natural and Probable Consequences Doctrine (Target and Non-Target Offenses Charged)*, if both non-target and target crimes have been charged. Give CALCRIM No. 403, *Natural and Probable Consequences (Only Non-Target Offense Charged)*, if only the non-target crimes have been charged.

If the defendant is charged with aiding and abetting robbery and there is an issue as to when intent to aid and abet was formed, give CALCRIM No. 1603, *Robbery: Intent of Aider and Abettor*.

If the defendant is charged with aiding and abetting burglary and there is an issue as to when intent to aid and abet was formed, give CALCRIM No. 1702, *Burglary: Intent of Aider and Abettor*.

AUTHORITY

- Definition of Principals. Pen. Code, § 31.
- Parties to Crime. Pen. Code, § 30.
- Presence or Knowledge Insufficient. *People v. Boyd*, *supra,* ~~(1990)~~ 222 Cal.App.3d at p. ~~541,~~ 557 fn.14 ~~[271 Cal.Rptr. 738]~~; *In re Michael T.*, *supra,* ~~(1978)~~ 84 Cal.App.3d at p. ~~907,~~ 911 ~~[149 Cal.Rptr. 87]~~.
- Requirements for Aiding and Abetting. *People v. Beeman*, *supra,* ~~(1984)~~ 35 Cal.3d at pp. ~~547,~~ 560–561 ~~[199 Cal.Rptr. 60, 674 P.2d 1318]~~.
- Withdrawal. *People v. Norton*, *supra,* ~~(1958)~~ 161 Cal.App.2d ~~399,~~ at p. 403 ~~[327 P.2d 87]~~; *People v. Ross*, *supra,* ~~(1979)~~ 92 Cal.App.3d ~~391,~~at pp. 404–405 ~~[154 Cal.Rptr. 783]~~.
- This Instruction Correct re Withdrawal Defense. *People v. Battle* (2011) 198 Cal.App.4th 50, 67 [129 Cal.Rptr.3d 828].

RELATED ISSUES

Perpetrator versus Aider and Abettor

For purposes of culpability, the law does not distinguish between perpetrators and aiders and abettors; however, the required mental states that must be proved for each are different. One who engages in conduct that is an element of the charged crime is a perpetrator, not an aider and abettor of the crime. (*People v. Cook* (1998) 61 Cal.App.4th 1364, 1371 [72 Cal.Rptr.2d 183].)

Accessory After the Fact

The prosecution must show that an aider and abettor intended to facilitate or encourage the target offense before or during its commission. If the defendant formed an intent to aid after the crime was completed, then he or she may be liable as an accessory after the fact. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1160–1161 [282 Cal.Rptr. 450, 811 P.2d 742] [get-away driver, whose intent to aid was formed after asportation of property, was an accessory after the fact, not an aider and abettor]; *People v. Rutkowsky* (1975) 53 Cal.App.3d 1069, 1072–1073 [126 Cal.Rptr. 104]; *People v. Rodriguez* (1986) 42 Cal.3d 730, 760–761 [230 Cal.Rptr. 667, 726 P.2d 113].)

Factors Relevant to Aiding and Abetting

Factors relevant to determining whether a person is an aider and abettor include: presence at the scene of the crime, companionship, and conduct before or after the offense. (*People v. Singleton* (1987) 196 Cal.App.3d 488, 492 [241 Cal.Rptr. 842] [citing *People v. Chagolla* (1983) 144 Cal.App.3d 422, 429 [193 Cal.Rptr. 711]]; *People v. Campbell* (1994) 25 Cal.App.4th 402, 409 [30 Cal.Rptr.2d 525].)

Presence Not Required

A person may aid and abet a crime without being physically present. (*People v. Bohmer* (1975) 46 Cal.App.3d 185, 199 [120 Cal.Rptr. 136]; see also *People v. Sarkis* (1990) 222 Cal.App.3d 23, 27 [272 Cal.Rptr. 34].) Nor does a person have to physically assist in the commission of the crime; a person may be guilty of aiding and abetting if he or she intends the crime to be committed and instigates or encourages the perpetrator to commit it. (*People v. Booth* (1996) 48 Cal.App.4th 1247, 1256 [56 Cal.Rptr.2d 202].)

Principal Acquitted or Convicted of Lesser Offense

Although the jury must find that the principal committed the crime aided and abetted, the fact that a principal has been acquitted of a crime or convicted of a lesser offense in a separate proceeding does not bar conviction of an aider and abettor. (*People v. Wilkins* (1994) 26 Cal.App.4th 1089, 1092–1094 [31 Cal.Rptr.2d 764]; *People v. Summersville* (1995) 34 Cal.App.4th 1062, 1066–1069 [40 Cal.Rptr.2d 683]; *People v. Rose* (1997) 56 Cal.App.4th 990 [65 Cal.Rptr.2d 887].) A single Supreme Court case has created an exception to this principle and held that non-mutual collateral estoppel bars conviction of an aider and abettor when the principal was acquitted in a separate proceeding. (*People v. Taylor* (1974) 12 Cal.3d 686, 696–698 [117 Cal.Rptr.70, 527 P.2d 622].) In *Taylor*, the defendant was the "get-away driver" in a liquor store robbery in which one of the perpetrators inadvertently killed another during a gun battle inside the store. In a separate trial, the gunman was acquitted of the murder of his co-perpetrator because the jury did not find malice. The court held that collateral estoppel barred conviction of the aiding and abetting driver, reasoning that the policy considerations favoring application of collateral estoppel were served in the case. The court specifically limited its holding to the facts, emphasizing the clear identity of issues involved and the need to prevent inconsistent verdicts. (See also *People v. Howard* (1988) 44 Cal.3d 375, 411–414 [243 Cal.Rptr. 842, 749 P.2d 279] [court rejected collateral estoppel argument and reiterated the limited nature of its holding in *Taylor*].)

Specific Intent Crimes

If a specific intent crime is aided and abetted, the aider and abettor must share the requisite specific intent with the perpetrator. "[A]n aider and abettor will 'share' the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*People v. Beeman*, *supra*, ~~(1984)~~ 35 Cal.3d ~~547,~~at p. 560 ~~[199 Cal.Rptr. 60, 674 P.2d 1318]~~ [citations omitted].) The perpetrator must have the requisite specific intent and the jury must be so instructed. (*People v. Patterson*

(1989) 209 Cal.App.3d 610 [257 Cal.Rptr. 407] [trial court erred in failing to instruct jury that perpetrator must have specific intent to kill]; *People v. Torres* (1990) 224 Cal.App.3d 763, 768–769 [274 Cal.Rptr. 117].) And the jury must find that the aider and abettor shared the perpetrator's specific intent. (*People v. Acero* (1984) 161 Cal.App.3d 217, 224 [208 Cal.Rptr. 565] [to convict defendant of aiding and abetting and attempted murder, jury must find that he shared perpetrator's specific intent to kill].)

Greater Guilt Than Actual Killer

An aider and abettor may be guilty of greater homicide-related crimes than the actual killer. When a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilt is determined by the combined acts of all the participants as well as that person's own mens rea. If that person's mens rea is more culpable than another's, that person's guilt may be greater even if the other is deemed the actual killer. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1121 [108 Cal.Rptr.2d 188, 24 P.3d 1210].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Introduction to Crimes, §§ 94-97.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.10[3] (Matthew Bender).

402. Natural and Probable Consequences Doctrine (Target and Non-tTarget Offenses Charged)

The defendant is charged in Count[s] __ with _____ *<insert target offense>* **and in Counts[s] ___ with _____** *<insert non-target offense>***.**

You must first decide whether the defendant is guilty of _____ <*insert target offense***>. If you find the defendant is guilty of this crime, you must then decide whether (he/she) is guilty of _____ <***insert non-target offense***>.**

Under certain circumstances, a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time.

To prove that the defendant is guilty of _____ *<insert non-target offense>***, the People must prove that:**

1. **The defendant is guilty of _____ <***insert target offense***>;**

2. **During the commission of _____** *<insert target offense>* **a coparticipant in that _____** *<insert target offense>* **committed the crime of _____ <***insert non-target offense***>;**

   AND

3. **Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of _____** *<insert non-target offense>* **was a natural and probable consequence of the commission of the _____** *<insert target offense>***.**

A *coparticipant* in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.

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

[Do not consider evidence of defendant's intoxication in deciding whether _____ *<insert non-target offense>* **was a natural and probable consequence of _____** *<insert target offense>***.]**

To decide whether the crime of _____ *<insert non-target offense>* **was committed,**

please refer to the separate instructions that I (will give/have given) you on that crime.

[The People allege that the defendant originally intended to aid and abet the commission of either _____ *<insert target offense>* **or _____** *<insert other target offense>*. **The defendant is guilty of _____** *<insert non-target offense>* **if the People have proved that the defendant aided and abetted either _____** *<insert target offense>* **or _____** *<insert other target offense>* **and that _____** *<insert non-target offense>* **was the natural and probable consequence of either _____** *<insert target offense>* **or _____** *<insert other target offense>*. **However, you do not need to agree on which of these two crimes the defendant aided and abetted.]**

New January 2006; Revised June 2007, April 2010, February 2013, August 2014, February 2015, September 2019, September 2023

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecution relies on that theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560–561[199 Cal.Rptr. 60, 674 P.2d 1318].)

The court has a **sua sponte** duty to identify and instruct on any target offense relied on by the prosecution as a predicate offense when substantial evidence supports the theory. Give all relevant instructions on the alleged target offense or offenses. The court, however, does not have to instruct on all potential target offenses supported by the evidence if the prosecution does not rely on those offenses. (*People v. Prettyman* (1996) 14 Cal.4th 248, 267–268 [58 Cal.Rptr.2d 827, 926 P.2d 1013]; see *People v. Huynh* (2002) 99 Cal.App.4th 662, 677–678 [121 Cal.Rptr.2d 340] [no sua sponte duty to instruct on simple assault when prosecutor never asked court to consider it as target offense].)

The target offense is the crime that the accused parties intended to commit. The non-target is an additional unintended crime that occurs during the commission of the target.

Give the bracketed paragraph beginning, "Do not consider evidence of defendant's intoxication" when instructing on aiding and abetting liability for a non-target offense. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1134 [77 Cal.Rptr.2d 428, 959 P.2d 735].)

Related Instructions

Give CALCRIM No. 400, *Aiding and Abetting: General Principles*, and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*, before this instruction.

This instruction should be used when the prosecution relies on the natural and probable

consequences doctrine and charges both target and non-target crimes. If only non-target crimes are charged, give CALCRIM No. 403, *Natural and Probable Consequences Doctrine (Only Non-tTarget Offense Charged)*.

AUTHORITY

- Aiding and Abetting Defined. *People v. Beeman, supra,* (1984) 35 Cal.3d 547, at pp. 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].
- Natural and Probable Consequences, Reasonable Person Standard. *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [26 Cal.Rptr.2d 323].
- Reasonably Foreseeable Crime Need Not Be Committed for Reason Within Common Plan. *People v. Smith* (2014) 60 Cal.4th 603, 616–617 [180 Cal.Rptr.3d 100, 337 P.3d 1159].

COMMENTARY

In *People v. Prettyman, supra,* (1996) 14 Cal.4th at p.248, 268 [58 Cal.Rptr.2d 827, 926 P.2d 1013], the court concluded that the trial court must sua sponte identify and describe for the jury any target offenses allegedly aided and abetted by the defendant.

Although no published case to date gives a clear definition of the terms "natural" and "probable," nor holds that there is a sua sponte duty to define them, we have included a suggested definition. (See *People v. Prettyman, supra,* 14 Cal.4th at p. 291 (conc. & dis. opn. of Brown, J.); see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107–109 [17 Cal.Rptr.3d 710, 96 P.3d 30] [court did not err in failing to define "natural and probable"].)

RELATED ISSUES

Murder and Attempted Murder

A verdict of murder or attempted murder may not be based on the natural and probable consequences doctrine. (Pen. Code, § 188(a)(3); *People v. Gentile* (2020) 10 Cal.5th 830, 849 [272 Cal.Rptr.3d 814, 477 P.3d 539] [murder]; *People v. Sanchez* (2022) 75 Cal.App.5th 191, 196 [290 Cal.Rptr.3d 390] [attempted murder].) Penal Code section 188, as amended by Statutes 2018, ch. 1015 (S.B. 1437), became effective January 1, 2019. The amendment added "malice shall not be imputed to a person based solely on his or her participation in a crime." The question whether this amendment abolished the natural and probable consequences doctrine as to attempted murder is unresolved.

Lesser Included Offenses

The court has a duty to instruct on lesser included offenses that could be the natural and probable consequence of the intended offense when the evidence raises a question

whether the greater offense is a natural and probable consequence of the original, intended criminal act. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1586–1588 [11 Cal.Rptr.2d 231] [aider and abettor may be found guilty of second degree murder under doctrine of natural and probable consequences although the principal was convicted of first degree murder].)

Specific Intent—Non-tTarget Crimes

Before an aider and abettor may be found guilty of a specific intent crime under the natural and probable consequences doctrine, the jury must first find that the perpetrator possessed the required specific intent. (*People v. Patterson* (1989) 209 Cal.App.3d 610, 614 [257 Cal.Rptr. 407] [trial court erroneously failed to instruct the jury that they must find that the perpetrator had the specific intent to kill necessary for attempted murder before they could find the defendant guilty as an aider and abettor under the "natural and probable" consequences doctrine], disagreeing with *People v. Hammond* (1986) 181 Cal.App.3d 463 [226 Cal.Rptr. 475] to the extent it held otherwise.) However, it is not necessary that the jury find that the aider and abettor had the specific intent; the jury must only determine that the specific intent crime was a natural and probable consequence of the original crime aided and abetted. (*People v. Woods, supra,* (1992) 8 Cal.App.4th 1570,at pp. 1586–1587 [11 Cal.Rptr. 2d 231].)

Target and Non-tTarget Offense May Consist of Same Act

Although generally, non-target offenses charged under the natural and probable consequences doctrine will be different and typically more serious criminal acts than the target offense alleged, they may consist of the same act with differing mental states. (*People v. Laster* (1997) 52 Cal.App.4th 1450, 1463–1466 [61 Cal.Rptr.2d 680] [defendants were properly convicted of attempted murder as natural and probable consequence of aiding and abetting discharge of firearm from vehicle. Although both crimes consist of same act, attempted murder requires more culpable mental state].)

Target Offense Not Committed

The Supreme Court has left open the question whether a person may be liable under the natural and probable consequences doctrine for a non-target offense, if the target offense was not committed. (*People v. Prettyman, supra,* (1996) 14 Cal.4th at p.248, 262, fn. 4 [58 Cal.Rptr.2d 827, 926 P.2d 1013], but see *People v. Ayala* (2010) 181 Cal.App.4th 1440, 1452 [105 Cal.Rptr.3d 575]; *People v. Laster, supra,* (1997) 52 Cal.App.4th at pp.1450, 1464–1465 [61 Cal.Rptr.2d 680].)

See generally, the related issues under CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Introduction to Crimes, §§ 102, 104-106, 110.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[1A][a], 85.03[2][d] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.10[3] (Matthew Bender).

403. Natural and Probable Consequences (Only Non-tTarget Offense Charged)

[Before you may decide whether the defendant is guilty of _____ *<insert non-target offense>*, **you must decide whether (he/she) is guilty of _____** *<insert target offense>*.**]**

To prove that the defendant is guilty of _____ *<insert non-target offense>*, **the People must prove that:**

1. **The defendant is guilty of _____** *<insert target offense>*;

2. **During the commission of _____** *<insert target offense>* **a coparticipant in that _____** *<insert target offense>* **committed the crime of _____** *<insert non-target offense>*;

AND

3. **Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the _____** *<insert non-target offense>* **was a natural and probable consequence of the commission of the _____** *<insert target offense>*.

A *coparticipant* in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.

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

[Do not consider evidence of defendant's intoxication in deciding whether _____ *<insert non-target offense>* **was a natural and probable consequence of _____** *<insert target offense>*.**]**

To decide whether crime of _____ *<insert non-target offense>* **was committed, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].**

[The People are alleging that the defendant originally intended to aid and abet _____ <*insert target offenses*>.

If you decide that the defendant aided and abetted one of these crimes and that _____ <*insert non-target offense*> was a natural and probable consequence of that crime, the defendant is guilty of _____ <*insert non-target offense*>. You do not need to agree about which of these crimes the defendant aided and abetted.]

New January 2006; Revised June 2007, April 2010, February 2015, September 2019, September 2023

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecution relies on it as a theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-561 [199 Cal.Rptr. 60, 674 P.2d 1318].)

The court has a **sua sponte** duty to identify and instruct on any target offense relied on by the prosecution as a predicate offense when substantial evidence supports the theory. Give all relevant instructions on the alleged target offense or offenses. The court, however, does not have to instruct on all potential target offenses supported by the evidence if the prosecution does not rely on those offenses. (*People v. Prettyman* (1996) 14 Cal.4th 248, 267–268 [58 Cal.Rptr.2d 827, 926 P.2d 1013]; see *People v. Huynh* (2002) 99 Cal.App.4th 662, 677–678 [121 Cal.Rptr.2d 340] [no sua sponte duty to instruct on simple assault when prosecutor never asked court to consider it as target offense].)

The target offense is the crime that the accused parties intended to commit. The non-target is an additional unintended crime that occurs during the commission of the target.

Do not give the first bracketed paragraph in cases in which the prosecution is also pursuing a conspiracy theory.

Give the bracketed paragraph beginning, "Do not consider evidence of defendant's intoxication" when instructing on aiding and abetting liability for a non-target offense. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1134 [77 Cal.Rptr.2d 428, 959 P.2d 735].)

Related Instructions

Give CALCRIM No. 400, *Aiding and Abetting: General Principles*, and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*, before this instruction.

This instruction should be used when the prosecution relies on the natural and probable consequences doctrine and charges only non-target crimes. If both target and non-target crimes are charged, give CALCRIM No. 402, *Natural and Probable Consequences Doctrine (Target and Non-tTarget Offenses Charged).*

AUTHORITY

- Aiding and Abetting Defined. *People v. Beeman, supra,* (1984) 35 Cal.3d at pp.547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].
- Natural and Probable Consequences, Reasonable Person Standard. *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [26 Cal.Rptr.2d 323].
- No Unanimity Required. *People v. Prettyman, supra,* (1996) 14 Cal.4th at pp.248, 267–268 [58 Cal.Rptr.2d 827, 926 P.2d 1013].
- Presence or Knowledge Insufficient. *People v. Boyd* (1990) 222 Cal.App.3d 541, 557 fn.14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87, 926 P.2d 1013].
- Withdrawal. *People v. Norton* (1958) 161 Cal.App.2d 399, 403 [327 P.2d 87]; *People v. Ross* (1979) 92 Cal.App.3d 391, 404–405 [154 Cal.Rptr. 783].
- Reasonably Foreseeable Crime Need Not Be Committed for Reason Within Common Plan. *People v. Smith* (2014) 60 Cal.4th 603, 616–617 [180 Cal.Rptr.3d 100, 337 P.3d 1159].

COMMENTARY

In *People v. Prettyman, supra,* (1996) 14 Cal.4th at p. 248, 268 [58 Cal.Rptr.2d 827, 926 P.2d 1013], the court concluded that the trial court must sua sponte identify and describe for the jury any target offenses allegedly aided and abetted by the defendant.

Although no published case to date gives a clear definition of the terms "natural" and "probable," nor holds that there is a sua sponte duty to define them, we have included a suggested definition. (See *People v. Prettyman, supra,* 14 Cal.4th at p. 291 (conc. & dis. opn. of Brown, J.); see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107–109 [17 Cal.Rptr.3d 710, 96 P.3d 30] [court did not err in failing to define "natural and probable."])

RELATED ISSUES

Murder and Attempted Murder

A verdict of murder or attempted murder may not be based on the natural and probable consequences doctrine. (Pen. Code, § 188(a)(3); *People v. Gentile* (2020) 10 Cal.5th 830, 849 [272 Cal.Rptr.3d 814, 477 P.3d 539] [murder]; *People v. Sanchez* (2022) 75 Cal.App.5th 191, 196 [290 Cal.Rptr.3d 390] [attempted murder].) ~~Penal Code section 188, as amended by Statutes 2018, ch. 1015 (S.B. 1437), became effective January 1, 2019.) This amendment added "malice shall not be imputed to a person based solely on his or her participation in a crime." The question whether this legislation abolished the natural and probable consequences doctrine as to attempted murder is unresolved.~~

See the Related Issues section under CALCRIM No. 401, *Aiding and Abetting*, and CALCRIM No. 402, *Natural and Probable Consequences Doctrine (Target and Non-t~~T~~arget Offenses Charged)*.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Introduction to Crimes, §§ 102, 104-106, 110.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, Challenges to Crimes, § 140.10[3] (Matthew Bender).

417. Liability for Coconspirators' Acts

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

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

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

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

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

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

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

AND

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

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

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

New January 2006; Revised October 2021, September 2023

BENCH NOTES

Instructional Duty

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

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

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

Although no published case to date gives a clear definition of the terms "natural" and "probable," nor holds that there is a sua sponte duty to define them, a suggested definition is included. (See *People v. Prettyman, supra,* ~~(1996)~~ 14 Cal.4th at p.~~248,~~ 291 ~~[58 Cal.Rptr.2d 827, 926 P.2d 1013]~~ (conc. & dis. opn. of Brown, J.).)

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

Related Instructions

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

AUTHORITY

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

- Must Identify and Describe Target Offense. *People v. Prettyman*, *supra,* ~~(1996)~~ 14 Cal.4th at p.~~248,~~ 254 ~~[58 Cal.Rptr.2d 827, 926 P.2d 1013]~~.

RELATED ISSUES

Murder and Attempted Murder

A verdict of murder or attempted murder may not be based on the natural and probable consequences doctrine. (Pen. Code, § 188(a)(3); *People v. Gentile* (2020) 10 Cal.5th 830, 849 [272 Cal.Rptr.3d 814, 477 P.3d 539] [murder]; *People v. Sanchez* (2022) 75 Cal.App.5th 191, 196 [290 Cal.Rptr.3d 390] [attempted murder].) ~~(Penal Code section 188, as amended by Statutes 2018, ch. 1015 (S.B. 1437), became effective January 1, 2019.) The amendment added "malice shall not be imputed to a person based solely on his or her participation in a crime." The question of whether this amendment abolished the natural and probable consequences doctrine as to attempted murder is unresolved.~~

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Elements, §§ 98-99.

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

521. First Degree Murder (Pen. Code, § 189)

<Select the appropriate section[s]. Give the final paragraph in every case.>

<Give if multiple theories alleged.>
[The defendant has been prosecuted for first degree murder under (two/__ <*insert number*>) theories: (1) _____ *<insert first theory, e.g., "the murder was willful, deliberate, and premeditated">* **[and] (2) _____** *<insert second theory, e.g., "the murder was committed by lying in wait">* **[and] [_____** *<insert additional theories>***].**

[Each theory of first degree murder has different requirements, and I will instruct you on (both/all __ <*insert number*>).

You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory.]

<A. Deliberation and Premeditation>
[The defendant is guilty of first degree murder if the People have proved that (he/she) acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if (he/she) intended to kill. The defendant acted *deliberately* if (he/she) carefully weighed the considerations for and against (his/her) choice and, knowing the consequences, decided to kill. The defendant *acted with premeditation* if (he/she) decided to kill before completing the act[s] that caused death.

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

<B. Torture>
[The defendant is guilty of first degree murder if the People have proved that the defendant committed murder~~ed~~ by torture. The defendant committed murder~~ed~~ by torture if:

1. **(He/She) willfully, deliberately, and with premeditation intended to inflict extreme and prolonged pain on the person killed while that person was still alive;**

2. **(He/She) intended to inflict such pain on the person killed for the calculated purpose of revenge, extortion, persuasion, or any other sadistic reason;**

3. **The acts causing death involved a high degree of probability of death;**

AND

4. **The torture was a cause of death.]**

[A person commits an act *willfully* when he or she does it willingly or on purpose. A person commits an act *deliberately* if he or she carefully weighs the considerations for and against his or her choice and, knowing the consequences, decides to act. A person commits an act with *premeditation* if (he/she) decided to inflict extreme and prolonged pain on a person before completing the act[s] that caused death.]

[There is no requirement that the person killed be aware of the pain.]

[A finding of torture does not require that the defendant intended to kill.]

<C. Lying in Wait>

[The defendant is guilty of first degree murder if the People have proved that the defendant committed murder~~ed~~ while lying in wait or immediately thereafter. The defendant committed murder~~ed~~ by lying in wait if:

1. **(He/She) concealed (his/her) purpose from the person killed;**

2. **(He/She) waited and watched for an opportunity to act;**

AND

3. **Then, from a position of advantage, (he/she) intended to and did make a surprise attack on the person killed.**

The lying in wait does not need to continue for any particular period of time, but its duration must be substantial enough to show a state of mind

equivalent to deliberation or premeditation. [*Deliberation* means carefully weighing the considerations for and against a choice and, knowing the consequences, deciding to act. An act is done with *premeditation* if the decision to commit the act is made before the act is done.]

[A person can conceal his or her purpose even if the person killed is aware of the person's physical presence.]

[The concealment can be accomplished by ambush or some other secret plan.]]

<D. Destructive Device or Explosive>
[The defendant is guilty of first degree murder if the People have proved that the defendant committed murder~~ed~~ by using a destructive device or explosive.]

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

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

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

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

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

<E. Weapon of Mass Destruction>
[The defendant is guilty of first degree murder if the People have proved that the defendant committed murder~~ed~~ by using a weapon of mass destruction.

[_____ *<insert type of weapon from Pen. Code, § 11417(a)(1)>* **is a *weapon of mass destruction*.]**

[_____ *<insert type of agent from Pen. Code, § 11417(a)(2)>* **is a *chemical warfare agent*.]]**

<F. Penetrating Ammunition>

[The defendant is guilty of first degree murder if the People have proved that when the defendant committed murder~~ed~~, (he/she) used ammunition designed primarily to penetrate metal or armor to commit the murder and (he/she) knew that the ammunition was designed primarily to penetrate metal or armor.]

<G. Discharge From Vehicle>

[The defendant is guilty of first degree murder if the People have proved that the defendant committed murder~~ed~~ by shooting a firearm from a motor vehicle. The defendant committed this kind of murder if:

1. **(He/She) shot a firearm from a motor vehicle;**

2. **(He/She) intentionally shot at a person who was outside the vehicle;**

AND

3. **(He/She) intended to kill that person.**

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

<H. Poison>

[The defendant is guilty of first degree murder if the People have proved that the defendant committed murder~~ed~~ by using poison. The defendant committed murder by poison if:

1. **(He/She) deliberately gave _____ *<insert name of victim>* poison;**

AND

2. **When giving the poison, the defendant intended to kill _____ *<insert name of victim>* or to inflict injury likely to cause _____ *<insert name of victim>*'s death.**

[*Poison* is a substance, applied externally to the body or introduced into the body, that can kill by its own inherent qualities.]]

[_____ <*insert name of substance*> is a *poison*.]

[The requirements for second degree murder based on express or implied malice are explained in CALCRIM No. 520, *First or Second Degree Murder With Malice Aforethought*.]

The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder.

New January 2006; Revised August 2006, June 2007, April 2010, October 2010, February 2012, February 2013, February 2015, August 2015, September 2017, September 2022, September 2023

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Before giving this instruction, the court must give CALCRIM No. 520, *Murder With Malice Aforethought*. Depending on the theory of first degree murder relied on by the prosecution, give the appropriate alternatives A through H.

The court **must give** the final paragraph in every case.

If the prosecution alleges two or more theories for first degree murder, give the bracketed section that begins with "The defendant has been prosecuted for first degree murder under." If the prosecution alleges felony murder in addition to one of the theories of first degree murder in this instruction, give CALCRIM No. 548, *Murder: Alternative Theories*, instead of the bracketed paragraph contained in this instruction.

When instructing on murder by weapon of mass destruction, explosive, or destructive device, the court may use the bracketed sentence stating, "_____ is a weapon of mass destruction" or "is a chemical warfare agent," only if the device used is listed in the code section noted in the instruction. For example, "Sarin is a chemical warfare agent." However, the court may not instruct the jury that the defendant used the prohibited weapon. For example, the court may not state, "the defendant used a chemical warfare agent, sarin," or "the material used by the defendant, sarin, was a chemical warfare agent." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

Do **not** modify this instruction to include the factors set forth in *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [73 Cal.Rptr. 550, 447 P.2d 942].

Although those factors may assist in appellate review of the sufficiency of the evidence to support findings of premeditation and deliberation, they neither define the elements of first degree murder nor guide a jury's determination of the degree of the offense. (*People v. Moon* (2005) 37 Cal.4th 1, 31 [32 Cal.Rptr.3d 894, 117 P.3d 591]; *People v. Steele* (2002) 27 Cal.4th 1230, 1254 [120 Cal.Rptr.2d 432, 47 P.3d 225]; *People v. Lucero* (1988) 44 Cal.3d 1006, 1020 [245 Cal.Rptr. 185, 750 P.2d 1342].)

AUTHORITY

- Types of Statutory First Degree Murder. Pen. Code, § 189.
- Armor Piercing Ammunition Defined. Pen. Code, § 16660.
- Destructive Device Defined. Pen. Code, § 16460.
- For Torture, Act Causing Death Must Involve a High Degree of Probability of Death. *People v. Cook* (2006) 39 Cal.4th 566, 602 [47 Cal.Rptr.3d 22, 139 P.3d 492].
- Mental State Required for Implied Malice. *People v. Knoller* (2007) 41 Cal.4th 139, 143 [59 Cal.Rptr.3d 157, 158 P.3d 731].
- Explosive Defined. Health & Saf. Code, § 12000; *People v. Clark* (1990) 50 Cal.3d 583, 604 [268 Cal.Rptr. 399, 789 P.2d 127].
- Weapon of Mass Destruction Defined. Pen. Code, § 11417.
- Discharge From Vehicle. *People v. Chavez* (2004) 118 Cal.App.4th 379, 386–387 [12 Cal.Rptr.3d 837] [drive-by shooting clause is not an enumerated felony for purposes of the felony murder rule].
- Lying in Wait Requirements. *People v. Stanley* (1995) 10 Cal.4th 764, 794 [42 Cal.Rptr.2d 543, 897 P.2d 481]; *People v. Ceja* (1993) 4 Cal.4th 1134, 1139 [17 Cal.Rptr.2d 375, 847 P.2d 55]; *People v. Webster* (1991) 54 Cal.3d 411, 448 [285 Cal.Rptr. 31, 814 P.2d 1273]*; People v. Poindexter* (2006) 144 Cal.App.4th 572, 582–585 [50 Cal.Rptr.3d 489]; *People v. Laws* (1993) 12 Cal.App.4th 786, 794–795 [15 Cal.Rptr.2d 668].
- Poison Defined. *People v. Van Deleer* (1878) 53 Cal. 147, 149.
- Premeditation and Deliberation Defined. *People v. Pearson* (2013) 56 Cal.4th 393, 443–444 [154 Cal.Rptr.3d 541, 297 P.3d 793]; *People v. Anderson, supra,* 70 Cal.2d at pp. 26–27; *People v. Bender* (1945) 27 Cal.2d 164, 183–184 [163 P.2d 8]; *People v. Daugherty* (1953) 40 Cal.2d 876, 901–902 [256 P.2d 911].
- Torture Requirements. *People v. Pensinger* (1991) 52 Cal.3d 1210, 1239 [278 Cal.Rptr. 640, 805 P.2d 899]; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1101

[259 Cal.Rptr. 630, 774 P.2d 659], habeas corpus granted in part on other grounds in *In re Bittaker* (1997) 55 Cal.App.4th 1004 [64 Cal.Rptr.2d 679]; *People v. Wiley* (1976) 18 Cal.3d 162, 168–172 [133 Cal.Rptr. 135, 554 P.2d 881]; see also *People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739] [comparing torture murder with torture].

- Murder by Poison Requirements. *People v. Brown* (2023) 14 Cal.5th 453, 471 [305 Cal.Rptr.3d 127, 524 P.3d 1088].

LESSER INCLUDED OFFENSES

- Murder. Pen. Code, § 187.
- Voluntary Manslaughter. Pen. Code, § 192(a).
- Involuntary Manslaughter. Pen. Code, § 192(b).
- Attempted First Degree Murder. Pen. Code, §§ 663, 189.
- Attempted Murder. Pen. Code, §§ 663, 187.
- Elements of Special Circumstances Not Considered in Lesser Included Offense Analysis. *People v. Boswell* (2016) 4 Cal.App.5th 55, 59–60 [208 Cal.Rptr.3d 244].

RELATED ISSUES

Premeditation and Deliberation—Heat of Passion Provocation

Provocation may reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [156 P.2d 7] [provocation raised reasonable doubt about premeditation or deliberation, "leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation"]; see *People v. Padilla* (2002) 103 Cal.App.4th 675, 679 [126 Cal.Rptr.2d 889] [evidence of hallucination is admissible at guilt phase to negate deliberation and premeditation and to reduce first degree murder to second degree murder].) There is, however, no sua sponte duty to instruct the jury on this issue. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 31–33 [60 Cal.Rptr.2d 366], disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752 [3 Cal.Rptr.3d 676, 74 P.3d 771].) On request, give CALCRIM No. 522, *Provocation: Effect on Degree of Murder*.

Torture—Causation

The finding of murder by torture encompasses the totality of the brutal acts and circumstances that led to a victim's death. "The acts of torture may not be segregated into their constituent elements in order to determine whether any single

act by itself caused the death; rather, it is the continuum of sadistic violence that constitutes the torture [citation]." (*People v. Proctor* (1992) 4 Cal.4th 499, 530–531 [15 Cal.Rptr.2d 340, 842 P.2d 1100].)

Torture—Instruction on Voluntary Intoxication

"[A] court should instruct a jury in a torture-murder case, when evidence of intoxication warrants it, that intoxication is relevant to the specific intent to inflict cruel suffering." (*People v. Pensinger, supra,* 52 Cal.3d at p. 1242; see CALCRIM No. 625, *Voluntary Intoxication: Effects on Homicide Crimes*.)

Torture—Pain Not an Element

All that is required for first degree murder by torture is the calculated *intent to cause pain* for the purpose of revenge, extortion, persuasion, or any other sadistic purpose. There is no requirement that the victim actually suffer pain. (*People v. Pensinger*, *supra,* ~~(1991)~~ 52 Cal.3d ~~1210,~~at p. 1239 ~~[278 Cal.Rptr. 640, 805 P.2d 899]~~.)

Torture—Premeditated Intent to Inflict Pain

Torture-murder, unlike the substantive crime of torture, requires that the defendant acted with deliberation and premeditation when inflicting the pain. (*People v. Pre, supra,* 117 Cal.App.4th at pp. 419–420; *People v. Mincey* (1992) 2 Cal.4th 408, 434–436 [6 Cal.Rptr.2d 822, 827 P.2d 388].)

Lying in Wait—Length of Time Equivalent to Premeditation and Deliberation

In *People v. Stanley, supra,* 10 Cal.4th at p. 794, the court approved this instruction regarding the length of time a person lies in wait: "[T]he lying in wait need not continue for any particular time, provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation."

Discharge From a Vehicle—Vehicle Does Not Have to Be Moving

Penal Code section 189 does not require the vehicle to be moving when the shots are fired. (Pen. Code, § 189; see also *People v. Bostick* (1996) 46 Cal.App.4th 287, 291 [53 Cal.Rptr.2d 760] [finding vehicle movement is not required in context of enhancement for discharging firearm from motor vehicle under Pen. Code, § 12022.55].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 117.

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

522. Provocation: Effect on Degree of Murder

Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide.

If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.]

[Provocation does not apply to a prosecution under a theory of felony murder.]

New January 2006; Revised April 2011, March 2017, September 2023

BENCH NOTES

Instructional Duty

Provocation may reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [156 P.2d 7] [provocation raised reasonable doubt about premeditation or deliberation, "leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation"]; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1211–1212 [17 Cal.Rptr.3d 532, 95 P.3d 811] [court adequately instructed on relevance of provocation to whether defendant acted with intent to torture for torture murder].) There is, however, no sua sponte duty to instruct the jury on this issue. (*People v. Rogers* (2006) 39 Cal.4th 826, 877-880 [48 Cal.Rptr.3d 1, 141 P.3d 135].) This is a pinpoint instruction, to be given on request where evidence supports the theory. (*People v. Thomas* (2023) 14 Cal.5th 327, 384 [304 Cal.Rptr.3d 1, 523 P.3d 323].)

This instruction may be given after CALCRIM No. 521, *First Degree Murder*.

If the court will be instructing on voluntary manslaughter, give both bracketed portions on manslaughter.

If the court will be instructing on felony murder, give the bracketed sentence stating that provocation does not apply to felony murder.

AUTHORITY

- Provocation Reduces From First to Second Degree. *People v. Thomas*, *supra,* ~~(1945)~~ 25 Cal.2d at p.~~880,~~ 903 ~~[156 P.2d 7]~~; see also *People v. Cole*, *supra,* ~~(2004)~~ 33 Cal.4th ~~1158,~~ at pp. 1211–1212 ~~[17 Cal.Rptr.3d 532, 95 P.3d 811]~~.
- Pinpoint Instruction. *People v. Rogers*, *supra,* ~~(2006)~~ 39 Cal.4th at pp. ~~826,~~ 877–878~~]~~.
- This Instruction Upheld. *People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1333-1335 [107 Cal.Rptr.3d 915].

SECONDARY SOURCES

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, 142.02 (Matthew Bender).

526. Implied Malice Murder: Aiding and Abetting

To prove that the defendant is guilty of aiding and abetting murder by acting with implied malice, the People must prove that:

1. **The perpetrator committed [an] act[s] that (was/were) dangerous to human life;**

2. **The perpetrator's act[s] caused the death of (another person/ [or] a fetus);**

3. **The defendant knew that the perpetrator intended to commit the act[s] that (was/were) dangerous to human life;**

4. **Before or during the commission of the perpetrator's act[s], the defendant intended to aid and abet the perpetrator in committing the act[s] that (was/were) dangerous to human life;**

5. **Before or during the commission of the perpetrator's act[s], the defendant knew the perpetrator's act[s] (was/were) dangerous to human life, and the defendant deliberately acted with conscious disregard for human life;**

AND

6. **By words or conduct, the defendant did in fact aid and abet the perpetrator's commission of the act[s].**

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.

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.

An act is *dangerous to human life* if there is a high degree of probability that the act will result in death.

[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.]

[It is not necessary that the perpetrator or the defendant be aware of the existence of a fetus to be guilty of murdering that fetus.]

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

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

[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.]

New September 2023

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecution relies on it as a theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].)

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 evidence that the defendant withdrew from participation in the crime, the court has a **sua sponte** duty to give the bracketed portion regarding withdrawal. (*People v. Norton* (1958) 161 Cal.App.2d 399, 403 [327 P.2d 87]; *People v. Ross* (1979) 92 Cal.App.3d 391, 404–405 [154 Cal.Rptr. 783].)

If the prosecution's theory of the case is that the defendant committed murder based on his or her failure to perform a legal duty, the court may modify this instruction, consistent with the language in CALCRIM No. 520, *First or Second Degree Murder With Malice Aforethought*.

Related Instructions

Give CALCRIM No. 520, *Murder: First or Second Degree Murder With Malice Aforethought* and CALCRIM No. 400, *Aiding and Abetting: General Principles*, before this instruction. Note that Penal Code section 30 uses "principal" but that CALCRIM Nos. 400 and 526 substitute "perpetrator" for clarity.

AUTHORITY

- Instructional Requirements. *People v. Reyes* (2023) 14 Cal.5th 981, 992 [309 Cal.Rptr.3d 832, 531 P.3d 357].
- Aiding and Abetting Liability for Implied Malice Murder. *People v. Reyes, supra,* 14 Cal.5th at pp. 990–991; *People v. Gentile* (2020) 10 Cal.5th 830, 850–851 [272 Cal.Rptr.3d 814, 477 P.3d 539].
- Presence or Knowledge Insufficient. *People v. Boyd* (1990) 222 Cal.App.3d 541, 557 fn.14 [271 Cal.Rptr. 738]; *In re Michael T., supra,* 84 Cal.App.3d at p. 911.
- "Dangerous to Human Life" Defined. *People v. Reyes, supra*, 14 Cal.5th at p. 989.
- Fetus Defined. *People v. Davis* (1994) 7 Cal.4th 797, 814–815 [30 Cal.Rptr.2d 50, 872 P.2d 591]; *People v. Taylor* (2004) 32 Cal.4th 863, 867 [11 Cal.Rptr.3d 510, 86 P.3d 881].
- Withdrawal. *People v. Norton, supra,* 161 Cal.App.2d at p. 403; *People v. Ross* (1979) 92 Cal.App.3d 391, 404–405 [154 Cal.Rptr. 783].

COMMENTARY

In recognizing that Penal Code section 188(a)(3) bars imputed malice, and therefore bars conviction of second degree murder under a natural and probable consequences theory, the California Supreme Court further held that: "an aider and abettor who does not expressly intend to aid a killing can still be convicted of second degree murder if the person knows that his or her conduct endangers the life of another and acts with conscious disregard for life." (*People v. Gentile, supra,* 10 Cal.5th at pp. 850–851.) Unlike imputed malice, which involves vicarious liability, implied malice involves the concept of natural and probable consequences, which is still permissible because implied malice "is based upon the natural and probable consequences of a defendant's *own* act committed with knowledge of and disregard for the risk of death the act carries." (*People v. Vargas, supra,* 84 Cal.App.5th at p. 953 fn. 6.) Therefore, aiding and abetting implied malice murder remains a valid theory of liability, notwithstanding the statutory changes effected by Senate Bill 1437 (Stats. 2018, ch. 1015) and Senate Bill 775 (Stats. 2021, ch. 551). (See *People v. Reyes, supra,* 14 Cal.5th at pp. 990–991.)

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

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

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

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

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

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

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

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

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

AND

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

[OR]

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

AND

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

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

AND

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

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

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

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

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

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

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

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

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

<*The following instructions can be given when reckless indifference and major participant under Pen. Code, § 189(e)(3) applies.>*
[A person *acts with reckless indifference to human life* when he or she ~~knowingly~~ engages in criminal activity that a reasonable person would ~~he or she~~ know~~s~~ involves a grave risk of death and he or she knows that the activity involves a grave risk of death.]

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

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

[● Did the defendant try to minimize the possibility of violence?]
[● How old was the defendant?]
[● _____<*insert any other relevant factors*>]]

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

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

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

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

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

New January 2006; Revised April 2010, August 2013, February 2015, September 2019, April 2020, September 2020, September 2023

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, or did not join the conspiracy or aid and abet the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127 [287

P.2d 497]; *People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769].) Give the bracketed sentence that begins with "The defendant must have (intended to commit." For an instruction specially tailored to robbery-murder cases, see *People v. Turner* (1990) 50 Cal.3d 668, 691 [268 Cal.Rptr. 706, 789 P.2d 887].

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

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

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

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

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

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

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

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

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

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

Related Instructions—Other Causes of Death

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

When the alleged victim dies during the course of the felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants, give CALCRIM No. 540C, *Felony Murder: First Degree—Other Acts Allegedly Caused Death*. (Cf. *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [simultaneous or coincidental death is not killing].)

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

Related Instructions

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

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

AUTHORITY

- Felony Murder: First Degree. Pen. Code, § 189.
- Specific Intent to Commit Felony Required. *People v. Gutierrez (*2002) 28 Cal.4th 1083, 1140 [124 Cal.Rptr.2d 373, 52 P.3d 572].
- Infliction of Fatal Injury. *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Defendant Must Join Felonious Enterprise Before or During Killing of Victim. *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].
- Logical Nexus Between Felony and Killing. *People v. Dominguez* (2006) 39 Cal.4th 1141~~]~~; *People v. Cavitt, supra,* ~~(2004)~~ 33 Cal.4th at pp.~~187,~~ 197–206~~]~~.
- Merger Doctrine Does Not Apply to First Degree Felony Murder. *People v. Farley* (2009) 46 Cal.4th 1053, 1118-1120 [96 Cal.Rptr.3d 191, 210 P.3d 361].
- Reckless Indifference to Human Life. *In re Scoggins* (2020) 9 Cal.5th 667, 676–677 [264 Cal.Rptr.3d 804, 467 P.3d 198]; *People v. Clark, supra,* ~~(2016)~~ 63 Cal.4th at pp.~~522,~~ 614–620~~[203 Cal.Rptr.3d 407, 372 P.3d 811]~~; *People v. Banks, supra,* ~~(2015)~~ 61 Cal.4th at pp.~~788,~~ 807–811 [189 Cal.Rptr.3d 208, 351 P.3d 330]; *People v. Estrada, supra,* ~~(1995)~~ 11 Cal.4th at p.~~568,~~ 578~~[46 Cal.Rptr.2d 586, 904 P.2d 1197]~~; *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127].
- Major Participant. *People v. Banks* (2015) 61 Cal.4th 788, 803–808 [189 Cal.Rptr.3d 208, 351 P.3d 330].
- Objective Criminal Negligence Standard for Peace Officer Exception. *People v. Sifuentes* (2022) 83 Cal.App.5th 217, 229–230 [299 Cal.Rptr.3d 320].
- Defendant's Youth Can Be Relevant Factor When Determining Reckless Indifference. *People v. Jones* (2022) 86 Cal.App.5th 1076, 1091–1093 [302 Cal.Rptr.3d 847] [20-year-old defendant]; *People v. Keel* (2022) 84 Cal.App.5th 546, 558–559 [300 Cal.Rptr.3d 483] [juvenile defendant]; *People v. Ramirez* (2021) 71 Cal.App.5th 970, 987 [286 Cal.Rptr.3d 771] [juvenile defendant]; *In re Moore* (2021) 68 Cal.App.5th 434, 454 [283 Cal.Rptr.3d 584] [juvenile defendant].

RELATED ISSUES

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

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

SECONDARY SOURCES

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

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

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

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

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

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

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

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

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

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

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

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

AND

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

[OR]

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

AND

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

[OR]

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

AND

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

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

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

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

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

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

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

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

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

<The following instructions can be given when reckless indifference and major participant under Pen. Code, § 189(e)(3) applies.>
[A person *acts with reckless indifference to human life* when he or she ~~knowingly~~ engages in criminal activity that a reasonable person would ~~he or she~~ know~~s~~ involves a grave risk of death and he or she knows that the activity involves a grave risk of death.]

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

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

[● How long did the crime last?]
[● Was the defendant aware of anything that would make a coparticipant likely to kill?]
[● Did the defendant try to minimize the possibility of violence?]
[● How old was the defendant?]
[● _____<*insert any other relevant factors*>]]

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

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

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

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

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

New January 2006; Revised April 2010, August 2013, September 2019, April 2020, September 2023

BENCH NOTES

Instructional Duty

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

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

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

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

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

If the prosecution's theory is that the defendant aided and abetted or conspired to commit the felony, select one of these options in element 1 and the corresponding intent requirement in element 2. Give bracketed element 3. Give the bracketed sentence at the beginning of the instruction that begins with "The defendant may be guilty of murder." In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on any underlying felonies and on aiding and abetting and/or conspiracy with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may

also need to modify the instruction to state "the perpetrator committed," rather than "the defendant," in the instructions on the underlying felony.

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

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

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

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

> **There must be a logical connection between the cause of death and the** _____ *<insert felony or felonies from Pen. Code, § 189>* **[or attempted** _____ *<insert felony or felonies from Pen. Code, § 189>***]. The connection between the cause of death and the** _____ *<insert felony or felonies from Pen. Code, § 189>* **[or attempted**

_____ <*insert felony or felonies from Pen. Code, § 189*>**] must involve more than just their occurrence at the same time and place.]**

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

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

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Related Instructions—Other Causes of Death

This instruction should be used only when the alleged victim dies during the course of the felony as a result of a heart attack, fire, or a similar cause rather than as a result of some act of force or violence committed against the victim by one of the participants in the felony. (Cf. *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542] [arson causing death of accomplice]; *People v. Stamp, supra,* ~~(1969)~~ 2 Cal.App.3d at pp.~~203,~~ 209–211 ~~[82 Cal.Rptr. 598]~~ [heart attack caused by robbery]; *People v. Hernandez, supra,* ~~(1985)~~ 169 Cal.App.3d at p.~~282,~~ 287 ~~[215 Cal.Rptr. 166]~~ [same]; but see *People v. Gunnerson, supra,* ~~(1977)~~ 74 Cal.App.3d at pp.~~370,~~ 378–381 ~~[141 Cal.Rptr. 488]~~ [simultaneous or coincidental death is not killing].)

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

AUTHORITY

- Felony Murder: First Degree. Pen. Code, § 189.
- Specific Intent to Commit Felony Required. *People v. Gutierrez (*2002) 28 Cal.4th 1083, 1140 [124 Cal.Rptr.2d 373, 52 P.3d 572].
- Infliction of Fatal Injury. *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Defendant Must Join Felonious Enterprise Before or During Killing of Victim. *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].
- Death Caused by Felony but Not by Act of Force or Violence Against Victim. *People v. Billa, supra,* ~~(2003)~~ 31 Cal.4th at p.~~1064,~~ 1072 ~~[6 Cal.Rptr.3d 425, 79 P.3d 542]~~ [arson causing death of accomplice]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598] [heart attack caused by robbery]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166] [same]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [simultaneous or coincidental death is not killing].
- Logical Nexus Between Felony and Killing. *People v. Dominguez* (2006) 39 Cal.4th 1141 [47 Cal.Rptr.3d 575, 140 P.3d 866]; *People v. Cavitt, supra,* ~~(2004)~~ 33 Cal.4th at pp.~~187,~~ 197–206 ~~[14 Cal.Rptr.3d 281, 91 P.3d 222]~~.
- Merger Doctrine Does Not Apply to First Degree Felony Murder. *People v. Farley* (2009) 46 Cal.4th 1053, 1118-1120 [96 Cal.Rptr.3d 191, 210 P.3d 361].
- Reckless Indifference to Human Life. *In re Scoggins* (2020) 9 Cal.5th 667, 676–677 [264 Cal.Rptr.3d 804, 467 P.3d 198]; *People v. Clark, supra,* ~~(2016)~~ 63 Cal.4th at pp.~~522,~~ 614–620 ~~[203 Cal.Rptr.3d 407, 372 P.3d 811]~~; *People v. Banks, supra,* ~~(2015)~~ 61 Cal.4th ~~788,~~at pp. 807–811 ~~[189 Cal.Rptr.3d 208, 351 P.3d 330]~~; *People v. Estrada, supra,* ~~(1995)~~ 11 Cal.4th at p.~~568,~~ 578 ~~[46 Cal.Rptr.2d 586, 904 P.2d 1197]~~; *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127].
- Major Participant. *People v. Banks, supra,* ~~(2015)~~ 61 Cal.4th at pp.~~788,~~ 803–808 ~~[189 Cal.Rptr.3d 208, 351 P.3d 330]~~.
- Objective Criminal Negligence Standard for Peace Officer Exception. *People v. Sifuentes* (2022) 83 Cal.App.5th 217, 229–230 [299 Cal.Rptr.3d 320].
- Defendant's Youth Can Be Relevant Factor When Determining Reckless Indifference. *People v. Jones* (2022) 86 Cal.App.5th 1076, 1091-1093 [302 Cal.Rptr.3d 847] [20-year-old defendant]; *People v. Keel* (2022) 84 Cal.App.5th 546, 558–559 [300 Cal.Rptr.3d 483] [juvenile defendant]; *People v. Ramirez* (2021) 71 Cal.App.5th 970, 987 [286 Cal.Rptr.3d 771] [juvenile

defendant]; *In re Moore* (2021) 68 Cal.App.5th 434, 454 [283 Cal.Rptr.3d 584] [juvenile defendant].

RELATED ISSUES

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

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

SECONDARY SOURCES

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

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

541–547. Reserved for Future Use

563. Conspiracy to Commit Murder (Pen. Code, § 182)

(The defendant[s]/Defendant[s] _____ <*insert name[s]*>**) (is/are) charged [in Count __] with conspiracy to commit first degree murder [in violation of Penal Code section 182].**

To prove that (the/a) defendant is guilty of this crime, the People must prove that:

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

2. **At the time of the agreement, the defendant and [one or more of] the other alleged member[s] of the conspiracy intended that one or more of them would intentionally and unlawfully kill;**

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

AND

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

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

To decide whether (the/a) defendant and [one or more of] the other alleged member[s] of the conspiracy intended to commit *murder in the first degree*, please refer to Instructions 520 (*First or Second Degree Murder With Malice Aforethought*) and 521 (*First Degree Murder*) which define that crime.

When deciding whether (the/a) defendant and [one or more of] the other alleged member[s] of the conspiracy intended to commit *murder in the first degree*, do not consider implied malice. Conspiracy to commit murder requires an intent to kill.

The People must prove that the members of the alleged conspiracy had an agreement and intent to commit murder. The People do not have to prove that any of the members of the alleged conspiracy actually met or came to a detailed or formal agreement to commit that crime. An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime.

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

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

[You must make a separate decision as to whether each defendant was a member of the alleged conspiracy.]

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

<Give when evidence of group membership is used to prove the conspiracy.>
[Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the murder~~crime~~ is not a member of the conspiracy.]

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

New January 2006; Revised August 2006, ~~;~~ ~~Revised~~ April 2010, February 2014, September 2020, September 2023

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime when the defendant is charged with conspiracy. (See *People v. Morante* (1999) 20 Cal.4th 403, 416 [84 Cal.Rptr.2d 665, 975 P.2d 1071].) Use this

instruction only if the defendant is charged with conspiracy to commit murder. If the defendant is charged with conspiracy to commit another crime, give CALCRIM No. 415, *Conspiracy*. If the defendant is not charged with conspiracy but evidence of a conspiracy has been admitted for another purpose, do not give either instruction. Give CALCRIM No. 416, *Evidence of Uncharged Conspiracy*.

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

In elements 1 and 3, insert the names or descriptions of alleged coconspirators if they are not defendants in the trial. (See *People v. Liu* (1996) 46 Cal.App.4th 1119, 1131 [54 Cal.Rptr.2d 578].) See also the Commentary section below.

Give the bracketed sentence that begins with "You must all agree that at least one overt act alleged" if multiple overt acts are alleged in connection with a single conspiracy. (See *People v. Russo* (2001) 25 Cal.4th 1124, 1135–1136 [108 Cal.Rptr.2d 436, 25 P.3d 641].)

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

Do not cross-reference the murder instructions unless they have been modified to delete references to implied malice. Otherwise, a reference to implied malice could confuse jurors, because conspiracy to commit murder may not be based on a theory of implied malice. (*People v. Swain* (1996) 12 Cal.4th 593, 602-603, 607 [49 Cal.Rptr.2d 390, 909 P.2d 994].)

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

Where the defendant is alleged to have been part of a gang-related conspiracy, consider adding an admonition to distinguish evidence of gang rivalry violent conduct from evidence to support a conviction for conspiracy to commit murder. (*People v. Ware* (2022) 14 Cal.5th 151, 174 [301 Cal.Rptr.3d 511, 520 P.3d 601].) For example, "The defendant is alleged to have been part of a gang-related conspiracy. Evidence of gang rivalry violent conduct alone may or may not support a conviction for conspiracy to commit murder."

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

Defenses—Instructional Duty

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

If the case involves an issue regarding the statute of limitations or evidence of withdrawal by the defendant, a unanimity instruction may be required. (*People v. Russo, supra,* ~~(2001)~~ 25 Cal.4th at p.~~1124,~~ 1136, fn. 2 ~~[108 Cal.Rptr.2d 436, 25 P.3d 641]~~; see also Related Issues section to CALCRIM No. 415, *Conspiracy*, and CALCRIM 3500, *Unanimity*.)

Related Instructions

CALCRIM No. 415, *Conspiracy*.

CALCRIM No. 520, *Murder With Malice Aforethought*.

CALCRIM No. 521, *First Degree Murder*

AUTHORITY

- Elements. Pen. Code, §§ 182(a), 183; *People v. Ware, supra,* 14 Cal.5th at p. 163; *People v. Morante, supra,* ~~(1999)~~ 20 Cal.4th at p.~~403,~~ 416 ~~[84 Cal.Rptr.2d 665, 975 P.2d 1071]~~; *People v. Swain, supra,* ~~(1996)~~ 12 Cal.4th at p.~~593,~~ 600 ~~[49 Cal.Rptr.2d 390, 909 P.2d 994]~~; *People v. Liu, supra,* ~~(1996)~~ 46 Cal.App.4th at p.~~1119,~~ 1128 ~~[54 Cal.Rptr.2d 578]~~.
- Overt Act Defined. Pen. Code, § 184; *People v. Saugstad* (1962) 203 Cal.App.2d 536, 549–550 [21 Cal.Rptr. 740]; *People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8 [134 Cal.Rptr. 784, 557 P.2d 75].
- Elements of Underlying Offense. *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608]; *People v. Cortez, supra,* ~~(1998)~~ 18 Cal.4th ~~1223,~~at pp. 1238–1239 ~~[77 Cal.Rptr.2d 733, 960 P.2d 537]~~.
- Express Malice Murder. *People v. Swain, supra,* ~~(1996)~~ 12 Cal.4th at pp.~~593,~~ 602–~~–~~603, 607 ~~[49 Cal.Rptr.2d 390, 909 P.2d 994]~~.
- Premeditated First Degree Murder. *People v. Cortez, supra,* ~~(1998)~~ 18 Cal.4th at p.~~1223,~~ 1232 ~~[77 Cal.Rptr.2d 733, 960 P.2d 537]~~.
- Unanimity on Specific Overt Act Not Required. *People v. Russo, supra,* ~~(2001)~~ 25 Cal.4th at pp.~~1124,~~ 1133–1135 ~~[108 Cal.Rptr.2d 436, 25 P.3d 641]~~.
- No Conspiracy to Commit Second Degree Murder. *People v. Beck and Cruz* (2019) 8 Cal.5th 548, 641 [256 Cal.Rptr.3d 1, 453 P.3d 1038].

- Admonition in Gang Cases. *People v. Ware, supra,* 14 Cal.5th at p. 166.

COMMENTARY

It is sufficient to refer to coconspirators in the accusatory pleading as "persons unknown." (*People v. Sacramento Butchers' Protective Association* (1910) 12 Cal.App. 471, 483 [107 P. 712]; *People v. Roy* (1967) 251 Cal.App.2d 459, 463 [59 Cal.Rptr. 636]; see 1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Elements, § 87.) Nevertheless, this instruction assumes the prosecution has named at least two members of the alleged conspiracy, whether charged or not.

Conspiracy to commit murder cannot be based on a theory of implied malice. (*People v. Swain, supra,* (1996) 12 Cal.4th at pp. 593, 602–603, 607 [49 Cal.Rptr.2d 390, 909 P.2d 994].) All conspiracy to commit murder is necessarily conspiracy to commit premeditated first degree murder. (*People v. Cortez, supra,* (1998) 18 Cal.4th at p. 1223, 1232 [77 Cal.Rptr. 2d 733, 960 P.2d 537].)

LESSER INCLUDED OFFENSES

There is no crime of conspiracy to commit attempted murder. (*People v. Iniguez* (2002) 96 Cal.App.4th 75, 79 [116 Cal.Rptr.2d 634].)

The court has a **sua sponte** duty to instruct the jury on a lesser included target offense if there is substantial evidence from which the jury could find a conspiracy to commit that offense. (*People v. Horn* (1974) 12 Cal.3d 290, 297 [115 Cal.Rptr. 516, 524 P.2d 1300], disapproved on other ground in *People v. Cortez, supra,* (1998) 18 Cal.4th at pp. 1223, 1237–1238 [77 Cal.Rptr.2d 733, 960 P.2d 537]; *People v. Cook* (2001) 91 Cal.App.4th 910, 918 [111 Cal.Rptr.2d 204]; *People v. Kelley* (1990) 220 Cal.App.3d 1358, 1365–1366, 1370 [269 Cal.Rptr. 900].

There is a split of authority whether a court may look to the overt acts in the accusatory pleadings to determine if it has a duty to instruct on any lesser included offenses to the charged conspiracy. (*People v. Cook, supra,* 91 Cal.App.4th at pp. 919–920, 922 [court may look to overt acts pleaded in charge of conspiracy to determine whether charged offense includes a lesser included offense]; contra, *People v. Fenenbock, supra,* 46 Cal.App.4th at pp. 1708–1709 [court should examine description of agreement in pleading, not description of overt acts, to decide whether lesser offense was necessarily the target of the conspiracy].)

RELATED ISSUES

Multiple Conspiracies

Separately planned murders are punishable as separate conspiracies, even if the separate murders are incidental to a single objective. (*People v. Liu, supra,* (1996) 46 Cal.App.4th at p. 1119, 1133 [54 Cal.Rptr.2d 578].)

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Elements, §§ 82-83.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt,* §§ 141.01[2], 141.02[3], [4][b], [5][c], Ch. 142, *Crimes Against the Person,* § 142.01[2][e] (Matthew Bender).

564–569. Reserved for Future Use

592. Gross Vehicular Manslaughter (Pen. Code, § 192(c)(1))

<If gross vehicular manslaughter is a charged offense, give alternative A; if this instruction is being given as a lesser included offense, give alternative B.>

<Introductory Sentence: Alternative A—Charged Offense>
[The defendant is charged [in Count __] with gross vehicular manslaughter [in violation of Penal Code section 192(c)(1)].]

<Introductory Sentence: Alternative B—Lesser Included Offense>
[Gross vehicular manslaughter is a lesser crime than gross vehicular manslaughter while intoxicated.]

To prove that the defendant is guilty of gross vehicular manslaughter, the People must prove that:

1. **The defendant (drove a vehicle/operated a vessel);**

2. **While (driving that vehicle/operating that vessel), the defendant committed (a/an) (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death);**

3. **The defendant committed the (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) with gross negligence;**

AND

4. **The defendant's grossly negligent conduct caused the death of another person.**

Gross negligence **involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with 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 gross 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.

[*Gross negligence* may include, based on the totality of the circumstances, any of the following:

- **Participating in a sideshow; (and/or)**
- **Participating in a motor vehicle speed contest on a highway; (and/or)**
- **Speeding over 100 miles per hour.]**

[A *sideshow* is an event in which two or more persons block or impede traffic on a highway, for the purpose of performing motor vehicle stunts, motor vehicle speed contests, motor vehicle exhibitions of speed, or reckless driving, for spectators.]

[*Participating in a motor vehicle speed contest* includes a motor vehicle race against another vehicle, a clock, or another timing device.]

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

[A person facing a sudden and unexpected emergency situation not caused by that person's own negligence is required only to use the same care and judgment that an ordinarily careful person would use in the same situation, even if it appears later that a different course of action would have been safer.]

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

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

[The People allege that the defendant committed the following (misdemeanor[s]/ [and] infraction[s]): _____ *<insert misdemeanor[s]/ infraction[s]>***.**

Instruction[s] __ tell[s] you what the People must prove in order to prove that the defendant committed _____ *<insert misdemeanor[s]/infraction[s]>***.]**

[The People [also] allege that the defendant committed the following otherwise lawful act(s) that might cause death: _____ *<insert act[s] alleged>***.]**

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant committed at least one alleged (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) and you all agree on which (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) the defendant committed.]

[The People have the burden of proving beyond a reasonable doubt that the defendant committed gross vehicular manslaughter. If the People have not met this burden, you must find the defendant not guilty of that crime. You must consider whether the defendant is guilty of the lesser crime[s] of _____ *<insert lesser offense[s]>***.]**

New January 2006; Revised February 2015, September 2020, September 2023

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 specify the predicate misdemeanor(s) or infraction(s) alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].) In element 2, instruct on either theory of vehicular manslaughter (misdemeanor/infraction or lawful act committed with negligence) as appropriate. The court **must** also give the appropriate instruction on the elements of the the predicate misdemeanor or infraction.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court

should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, harmless error if was required].) A unanimity instruction is included in a bracketed paragraph for the court to use at its discretion.

If there is sufficient evidence and the defendant requests it, the court should instruct on the imminent peril/sudden emergency doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) Give the bracketed sentence that begins with "A person facing a sudden and unexpected emergency."

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

- Gross Vehicular Manslaughter. Pen. Code, § 192(c)(1).
- Gross Vehicular Manslaughter During Operation of a Vessel. Pen. Code, § 192.5(a).
- Unlawful Act Dangerous Under the Circumstances of Its Commission. *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374].
- Specifying Predicate Unlawful Act. *People v. Milham, supra,* ~~(1984)~~ 159 Cal.App.3d at p.~~487,~~ 506 ~~[205 Cal.Rptr. 688]~~.
- Elements of Predicate Unlawful Act. *People v. Ellis, supra,* ~~(1999)~~ 69 Cal.App.4th at p.~~1334,~~ 1339 ~~[82 Cal.Rptr.2d 409]~~.

- Unanimity Instruction. *People v. Gary, supra,* ~~(1987)~~ 189 Cal.App.3d at p.~~1212,~~ 1218 ~~[235 Cal.Rptr. 30]~~, overruled on other grounds in *People v. Flood, supra,* ~~(1998)~~ 18 Cal.4th at p.~~470,~~ 481 ~~[76 Cal.Rptr.2d 180, 957 P.2d 869]~~; *People v. Durkin, supra,* ~~(1988)~~ 205 Cal.App.3d Supp. at p.~~9,~~ 13 ~~[252 Cal.Rptr. 735]~~; *People v. Mitchell, supra,* ~~(1986)~~ 188 Cal.App.3d at p.~~216,~~ 222 ~~[232 Cal.Rptr. 438]~~; *People v. Leffel, supra,* ~~(1988)~~ 203 Cal.App.3d at pp.~~575,~~ 586–587 ~~[249 Cal.Rptr. 906]~~.
- Gross Negligence. *People v. Bennett* (1992) 54 Cal.3d 1032, 1036 [2 Cal.Rptr.2d 8, 819 P.2d 849].
- Examples of Gross Negligence. Pen. Code, § 192(e)(2).
- "Motor Vehicle Speed Contest" Defined. Veh. Code, § 23109(a).
- "Sideshow" Defined. Veh. Code, § 23109(i)(2)(A).
- Causation. *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Imminent Peril/Sudden Emergency Doctrine. *People v. Boulware, supra,* ~~(1940)~~ 41 Cal.App.2d at p.~~268,~~ 269 ~~[106 P.2d 436]~~.

LESSER INCLUDED OFFENSES

- Vehicular Manslaughter With Ordinary Negligence. Pen. Code, § 192(c)(2); see *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1165–1166 [123 Cal.Rptr.2d 322].
- Manslaughter During Operation of a Vessel Without Gross Negligence. Pen. Code, § 192.5(b).

RELATED ISSUES

Predicate Act Need Not Be Inherently Dangerous

"[T]he offense which constitutes the 'unlawful act' need not be an inherently dangerous misdemeanor or infraction. Rather, to be an 'unlawful act' within the meaning of section 192(c)(1), the offense must be dangerous under the circumstances of its commission. An unlawful act committed with gross negligence would necessarily be so." (*People v. Wells, supra,* ~~(1996)~~ 12 Cal.4th at p.~~979,~~ 982 ~~[50 Cal.Rtpr.2d 699, 911 P.2d 1374]~~.)

Lawful Act in an Unlawful Manner: Negligence

The statute uses the phrase "lawful act which might produce death, in an unlawful manner." (Pen. Code, § 192(c)(1).) "[C]ommitting a lawful act in an unlawful manner simply means to commit a lawful act with negligence, that is, without

reasonable caution and care." (*People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].) Because the instruction lists the negligence requirement as element 3, the phrase "in an unlawful manner" is omitted from element 2 as repetitive.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 262–268.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04, Ch. 142, *Crimes Against the Person,* § 142.02[1][a], [2][c], [4] (Matthew Bender).

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

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

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

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

AND

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

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

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

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

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

<*Give when kill zone theory applies*>
[A person may intend to kill a primary target and also [a] secondary target[s] within a zone of fatal harm or "kill zone." A "kill zone" is an area in which

the defendant used lethal force that was designed and intended to kill everyone in the area around the primary target.

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

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

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

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

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

New January 2006; Revised December 2008, August 2009, April 2011, August 2013, September 2019, April 2020, September 2023

BENCH NOTES

Instructional Duty

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

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

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

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

~~Penal Code section 188, as amended by Statutes 2018, ch. 1015 (S.B. 1437), became effective January 1, 2019. The amendment added "malice shall not be imputed to a person based solely on his or her participation in a crime." The natural and probable consequences doctrine as the basis for attempted murder may be affected by this statutory change.~~ A verdict of attempted murder may not be based on the natural and probable consequences doctrine. (Pen. Code, § 188(a)(3); *People v. Sanchez* (2022) 75 Cal.App.5th 191, 196 [290 Cal.Rptr.3d 390].)

Related Instructions

CALCRIM Nos. 3470–3477, Defense Instructions.

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

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

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

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

AUTHORITY

- Attempt Defined. Pen. Code, §§ 21a, 663, 664.
- Murder Defined. Pen. Code, § 187.
- Specific Intent to Kill Required. *People v. Guerra* (1985) 40 Cal.3d 377, 386 [220 Cal.Rptr. 374, 708 P.2d 1252].
- Fetus Defined. *People v. Davis* (1994) 7 Cal.4th 797, 814–815 [30 Cal.Rptr.2d 50, 872 P.2d 591]; *People v. Taylor* (2004) 32 Cal.4th 863, 867 [11 Cal.Rptr.3d 510, 86 P.3d 881].
- Kill Zone Explained. *People v. Canizales* (2019) 7 Cal.5th 591, 607-608 [248 Cal.Rptr.3d 370, 442 P.3d 686]; *People v. Stone* (2009) 46 Cal.4th 131, 137–138 [92 Cal.Rptr.3d 362, 205 P.3d 272].
- This Instruction Correctly States the Law of Attempted Murder. *People v. Lawrence* (2009) 177 Cal.App.4th 547, 556-557 [99 Cal.Rptr.3d 324].

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Specific Intent Required

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

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

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

Solicitation

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

Single Bullet, Two Victims

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

No Attempted Involuntary Manslaughter

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

Transferred and Concurrent Intent

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

Kill Zone Theory

Give the kill zone instruction "only in those cases where the court concludes there is sufficient evidence to support a jury determination that the *only* reasonable inference from the circumstances of the offense is that a defendant intended to kill everyone in the zone of fatal harm. The use or attempted use of force that merely *endangered* everyone in the area is insufficient to support a kill zone instruction." (*People v. Canizales*, *supra*, ~~(2019)~~ 7 Cal.5th at p.~~591,~~ 608 ~~[248 Cal.Rptr.3d 370, 442 P.3d 686]~~.)

SECONDARY SOURCES

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

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

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

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

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

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

1. **The defendant took at least one direct but ineffective step toward killing a person.**

2. **The defendant intended to kill when (he/she) acted.**

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

AND

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

BUT

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

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

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

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have actually believed there was imminent danger of death or great bodily injury to (himself/herself/ [or] someone else).

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

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

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

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

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

New January 2006; Revised August 2009, October 2010, February 2012, February 2013, September 2020, September 2023

BENCH NOTES

Instructional Duty

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

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].)

Perfect Self-Defense

Most courts hold that an instruction on imperfect self-defense **is required** in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant's belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. (See *People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86 [31 Cal.Rptr.2d 475], overruled in part in *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675]; see also *People v. De Leon* (1992) 10 Cal.App.4th 815, 824 [12 Cal.Rptr.2d 825].) The court in *People v. Rodriguez* disagreed, however, and found that an imperfect self-defense instruction was not required sua sponte on the facts of the case where the defendant's version of the crime "could only lead to an acquittal based on justifiable homicide," and when the prosecutor's version of the crime could only lead to a conviction of first degree murder. (*People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1275 [62 Cal.Rptr.2d 345]; see also *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961] [in a rape prosecution, the court was not required to give a mistake-of-fact instruction where the two sides gave wholly divergent accounts with no middle ground to support a mistake-of-fact instruction].)

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

Related Instructions

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

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

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

AUTHORITY

- Attempt Defined. Pen. Code, §§ 21a, 664.
- Manslaughter Defined. Pen. Code, § 192.
- Attempted Voluntary Manslaughter. *People v. Van Ronk* (1985) 171

Cal.App.3d 818, 824–825 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].

- Imperfect Self-Defense Defined. *People v. Flannel* (1979) 25 Cal.3d 668, 680–683 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Barton*, *supra*, ~~(1995)~~ 12 Cal.4th at p.~~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].
- Availability of Imperfect Self-Defense. *People v. Enraca* (2012) 53 Cal.4th 735, 761 [137 Cal.Rptr.3d 117, 269 P.3d 543] [not available]; *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179–1180 [39 Cal.Rptr.3d 433] [available].
- This Instruction Upheld. *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1307 [132 Cal.Rptr.3d 248].

RELATED ISSUES

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 224.

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

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

605–619. Reserved for Future Use

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

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

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

1. **The defendant's participation in the crime began before or during the killing;**

2. **The defendant was a major participant in the crime;**

AND

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

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

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

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

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

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

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

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

If the defendant was not the actual killer, then the People have the burden of proving beyond a reasonable doubt that (he/she) acted with either the intent to kill or with reckless indifference to human life and was a major participant in the crime for the special circumstance[s] of _____ <*insert felony*

murder special circumstance[s]> **to be true. If the People have not met this burden, you must find (this/these) special circumstance[s] (has/have) not been proved true [for that defendant].**

New January 2006; Revised April 2008, February 2016, August 2016, September 2019, April 2020, September 2023

BENCH NOTES

Instructional Duty

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

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

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

Proposition 115 modified the intent requirement of the special circumstance law, codifying the decisions of *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [240 Cal.Rptr. 585, 742 P.2d 1306], and *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127]. The current law provides that the actual killer does not have to act with intent to kill unless the special circumstance specifically requires intent. (Pen. Code, § 190.2(b).) If the felony-murder special circumstance is charged, then the People must prove that a defendant who was not the actual killer was a major participant and acted with intent to kill or with reckless indifference to human life. (Pen. Code, § 190.2(d)**;** *People v. Banks* (2015) 61 Cal.4th 788, 807-809 [189 Cal.Rptr.3d 208, 351 P.3d 330]; *People v. Estrada* (1995) 11 Cal.4th 568, 571 [46 Cal.Rptr.2d 586, 904 P.2d 1197].)

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

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

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

In *People v. Banks*, *supra,* ~~(2015)~~ 61 Cal.4th at pp.~~788,~~ 803–~~–~~808 ~~[189 Cal.Rptr.3d 208, 351 P.3d 330]~~, the court identified certain factors to guide the jury in its determination of whether the defendant was a major participant, but stopped short of holding that the court has a sua sponte duty to instruct on those factors. The trial court should determine whether the *Banks* factors need be given.

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

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

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

AUTHORITY

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

- Reckless Indifference to Human Life. *In re Scoggins* (2020) 9 Cal.5th 667, 676–677 [264 Cal.Rptr.3d 804, 467 P.3d 198]; *People v. Clark*, *supra,* ~~(2016)~~ 63 Cal.4th at pp.~~522,~~ 614–~~620~~ ~~[203 Cal.Rptr.3d 407, 372 P.3d 811]~~; *People v. Banks*, *supra,* ~~(2015)~~ 61 Cal.4th at pp.~~788,~~ 807–~~811~~ ~~[189 Cal.Rptr.3d 208, 351 P.3d 330]~~; *People v. Estrada*, *supra,* ~~(1995)~~ 11 Cal.4th ~~568,~~at p. 578 ~~[46 Cal.Rptr.2d 586, 904 P.2d 1197]~~; *Tison v. Arizona*, *supra,* ~~(1987)~~ 481 U.S. at pp.~~137,~~ 157–158 ~~[107 S.Ct. 1676, 95 L.Ed.2d 127]~~.
- Constitutional Standard for Intent by Accomplice. *Tison v. Arizona*, *supra,* ~~(1987)~~ 481 U.S. at pp.~~137,~~ 157–158 ~~[107 S.Ct. 1676, 95 L.Ed.2d 127]~~.
- Major Participant. *People v. Banks*, *supra,* ~~(2015)~~ 61 Cal.4th at pp.~~788,~~ 803–808 ~~[189 Cal.Rptr.3d 208, 351 P.3d 330]~~.
- Defendant's Youth Can Be Relevant Factor When Determining Reckless Indifference. *People v. Jones* (2022) 86 Cal.App.5th 1076, 1091–1093 [302 Cal.Rptr.3d 847] [20-year-old defendant]; *People v. Keel* (2022) 84 Cal.App.5th 546, 558–559 [300 Cal.Rptr.3d 483] [juvenile defendant]; *People v. Ramirez* (2021) 71 Cal.App.5th 970, 987 [286 Cal.Rptr.3d 771] [juvenile defendant]; *In re Moore* (2021) 68 Cal.App.5th 434, 454 [283 Cal.Rptr.3d 584] [juvenile defendant].

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 536, 543.

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

733. Special Circumstances: Murder With Torture (Pen. Code, § 190.2(a)(18))

The defendant is charged with the special circumstance of murder involving the infliction of torture [in violation of Penal Code section 190.2(a)(18)].

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

1. **The defendant intended to kill** _____ *<insert name of decedent>***;**

2. **The defendant also intended to inflict extreme physical pain and suffering on** _____ *<insert name of decedent>* **while that person was still alive;**

3. **The defendant intended to inflict such pain and suffering on** _____ *<insert name of decedent>* **for the calculated purpose of revenge, extortion, persuasion, or any other sadistic reason;**

AND

<Alternative A—on or after June 6, 1990>

[4. The defendant did an act involving the infliction of extreme physical pain and suffering on _____ *<insert name of decedent>***.]**

<Alternative B—before June 6, 1990>

[4. The defendant in fact inflicted extreme physical pain on _____ *<insert name of decedent>***.]**

There is no requirement that the person killed be aware of the pain.

New January 2006; Revised February 2013, September 2023

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].)

In element 4, always give alternative 4A unless the homicide occurred prior to June 6, 1990. (*People v. Davenport* (1985) 41 Cal.3d 247, 271 [221 Cal.Rptr. 794, 710 P.2d 861].) If the homicide occurred prior to June 6, 1990, give alternative 4B. For homicides after that date, alternative 4B should not be given. (*People v. Crittenden* (1994) 9 Cal.4th 83, 140, fn. 14 [36 Cal.Rptr.2d 474, 885 P.2d 887].)

AUTHORITY

- Special Circumstance. Pen. Code, § 190.2(a)(18).
- Must Specifically Intend to Torture. *People v. Davenport*, *supra*, ~~(1985)~~ 41 Cal.3d at pp.~~247,~~ 265–266 ~~[221 Cal.Rptr. 794, 710 P.2d 861]~~; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1255 [278 Cal.Rptr. 640, 805 P.2d 899].
- Causation Not Required. *People v. Crittenden*, *supra*, ~~(1994)~~ 9 Cal.4th at pp.~~83,~~ 141–142 ~~[36 Cal.Rptr.2d 474, 885 P.2d 887]~~.
- Pain Not an Element. *People v. Davenport*, *supra*, ~~(1985)~~ 41 Cal.3d at p.~~247,~~ 271 ~~[221 Cal.Rptr. 794, 710 P.2d 861]~~; *People v. Crittenden*, *supra*, ~~(1994)~~ 9 Cal.4th at p.~~83,~~ 140, fn. 14. ~~[36 Cal.Rptr.2d 474, 885 P.2d 887]~~
- Intent to Torture Need Not be Deliberate~~,~~ and Premeditated. *People v. Cole* (2004) 33 Cal.4th 1158, 1227–1228 [17 Cal.Rptr.3d 532, 95 P.3d 811].
- Prolonged Pain Not Required. *People v. Cole*, *supra*, ~~(2004)~~ 33 Cal.4th at pp.~~1158,~~ 1227–1228 ~~[17 Cal.Rptr.3d 532, 95 P.3d 811]~~.
- Spatial and Temporal Nexus. *People v. Gonzales* (2012) 54 Cal.4th 1234, 1278 [144 Cal.Rptr.3d 757, 281 P.3d 834].

RELATED ISSUES

Causation Not Required for Special Circumstance

"[T]he prosecution was not required to prove that the acts of torture inflicted upon [the victim] were the cause of his death" in order to prove the torture-murder special circumstance. (*People v. Crittenden*, *supra*, ~~(1994)~~ 9 Cal.4th at p.~~83,~~ 142 ~~[36 Cal.Rptr.2d 474, 885 P.2d 887]~~.) Causation is required for first degree murder by torture. *(Ibid.)* However, the torture-murder special circumstance only "requires 'some proximity in time [and] space between the murder and torture.'" (*People v. Bemore* (2000) 22 Cal.4th 809, 843 [94 Cal.Rptr.2d 840, 996 P.2d 1152] [quoting *People v. Barnett* (1998) 17 Cal.4th 1044, 1161 [74 Cal.Rptr.2d 121, 954 P.2d 384]].) It applies "where the death involved the infliction of torture, regardless of whether the acts constituting the torture were the cause of death." (*People v. Jennings* (2010) 50 Cal.4th 616, 647 [114 Cal.Rptr.3d 133, 237 P.3d 474].) The defendant must intend to kill during the torture, but "not necessarily at the moment

of a particular fatal blow." (*People v. Superior Court (Fernandez)* (2023) 88 Cal.App.5th 26, 39, fn. 7 [304 Cal.Rptr.3d 488].)

Instruction on Voluntary Intoxication

"[A] court should instruct a jury in a torture-murder case, when evidence of intoxication warrants it, that intoxication is relevant to the specific intent to inflict cruel suffering." (*People v. Pensinger*, *supra,* ~~(1991)~~ 52 Cal.3d at p.~~1210,~~ 1242 ~~[278 Cal.Rptr. 640, 805 P.2d 899]~~; see CALCRIM No. 625, *Voluntary Intoxication: Effects on Homicide Crimes*.)

Pain Not an Element

As with first degree murder by torture, all that is required for the special circumstance is the calculated *intent to cause pain* for the purpose of revenge, extortion, persuasion, or any other sadistic purpose. Prior to June 6, 1990, the special circumstance stated "torture requires proof of the infliction of extreme physical pain." (Pre-June 6, 1990, Pen. Code, § 190.2(a)(18).) Proposition 115 eliminated this language. Thus, for all homicides after June 6, 1990, there is no requirement under the special circumstance that the victim actually suffer pain. (*People v. Pensinger*, *supra,* ~~(1991)~~ 52 Cal.3d at p.~~1210,~~ 1239 ~~[278 Cal.Rptr. 640, 805 P.2d 899]~~; *People v. Davenport*, *supra,* ~~(1985)~~ 41 Cal.3d at p.~~247,~~ 271 ~~[221 Cal.Rptr. 794, 710 P.2d 861]~~; *People v. Crittenden*, *supra,* ~~(1994)~~ 9 Cal.4th at p.~~83,~~ 140, fn. 14 ~~[36 Cal.Rptr.2d 474, 885 P.2d 887]~~.)

Deliberate~~,~~ and Premeditated Intent to Inflict Pain Not Required

"[P]remeditated and deliberate intent to torture is not an element of the torture-murder special circumstance." (*People v. Cole*, *supra,* ~~(2004)~~ 33 Cal.4th at p.~~1158,~~ 1227 ~~[17 Cal.Rptr.3d 532, 95 P.3d 811]~~ [italics omitted].)

Prolonged Pain Not Required

"We have held that by enacting the torture-murder special circumstance statute (§ 190.2, subd. (a)(18)), the electorate meant to foreclose any requirement that the defendant be proved to have intended to inflict *prolonged* pain." (*People v. Cole*, *supra,* ~~(2004)~~ 33 Cal.4th at p.~~1158,~~ 1228 ~~[17 Cal.Rptr.3d 532, 95 P.3d 811]~~ [italics in original, citation and internal quotation marks omitted].)

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 525-526.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.13[18], 87.14 (Matthew Bender).

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

763. Death Penalty: Factors to Consider—Not Identified as Aggravating or Mitigating (Pen. Code, § 190.3)

In reaching your decision, you must consider and weigh the aggravating and mitigating circumstances or factors shown by the evidence.

An *aggravating circumstance or factor* is any fact, condition, or event relating to the commission of a crime, above and beyond the elements of the crime itself, that increases the wrongfulness of the defendant's conduct, the enormity of the offense, or the harmful impact of the crime. An aggravating circumstance may support a decision to impose the death penalty.

A *mitigating circumstance or factor* is any fact, condition, or event that makes the death penalty less appropriate as a punishment, even though it does not legally justify or excuse the crime. A mitigating circumstance is something that reduces the defendant's blameworthiness or otherwise supports a less severe punishment. A mitigating circumstance may support a decision not to impose the death penalty.

Under the law, you must consider, weigh, and be guided by specific factors, where applicable, some of which may be aggravating and some of which may be mitigating. I will read you the entire list of factors. Some of them may not apply to this case. If you find there is no evidence of a factor, then you should disregard that factor.

The factors are:

(a) The circumstances of the crime[s] of which the defendant was convicted in this case and any special circumstances that were found true.

(b) Whether or not the defendant has engaged in violent criminal activity other than the crime[s] of which the defendant was convicted in this case. *Violent criminal activity* is criminal activity involving the unlawful use, attempt to use, or direct or implied threat to use force or violence against a person. [The other violent criminal activity alleged in this case will be described in these instructions.]

(c) Whether or not the defendant has been convicted of any prior felony other than the crime[s] of which (he/she) was convicted in this case.

(d) Whether the defendant was under the influence of extreme mental or emotional disturbance when (he/she) committed the crime[s] of which (he/she) was convicted in this case.

(e) Whether the victim participated in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether the defendant reasonably believed that circumstances morally justified or extenuated (his/her) conduct in committing the crime[s] of which (he/she) was convicted in this case.

(g) Whether at the time of the murder the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether, at the time of the offense, the defendant's capacity to appreciate the criminality of (his/her) conduct or to follow the requirements of the law was impaired as a result of mental disease, defect, or intoxication.

(i) The defendant's age at the time of the crime[s] of which (he/she) was convicted in this case.

(j) Whether the defendant was an accomplice to the murder and (his/her) participation in the murder was relatively minor.

(k) Any other circumstance, whether related to these charges or not, that lessens the gravity of the crime[s] even though the circumstance is not a legal excuse or justification. These circumstances include sympathy or compassion for the defendant or anything you consider to be a mitigating factor, regardless of whether it is one of the factors listed above.

[You must disregard any jury instruction given to you in the guilt [and sanity] phase[s] of this trial if it conflicts with your consideration and weighing of these factors.]

Do not consider the absence of a mitigating factor as an aggravating factor.

[You may not consider as an aggravating factor anything other than the factors contained in this list that you conclude are aggravating in this case. You must not take into account any other facts or circumstances as a basis for imposing the death penalty.]

[Even if a fact is both a "special circumstance" and also a "circumstance of the crime," you may consider that fact only once as an aggravating factor in your weighing process. Do not double-count that fact simply because it is both a "special circumstance" and a "circumstance of the crime."]
[Although you may consider sympathy or compassion for the defendant, you may not let sympathy for the defendant's family influence your decision. [However, you may consider evidence about the impact the defendant's execution would have on (his/her) family if that evidence demonstrates some positive quality of the defendant's background or character.]]

New January 2006; Revised August 2006, June 2007, April 2008, December 2008, March 2021, March 2023, September 2023

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury on the factors to consider in reaching a decision on the appropriate sentence. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604–605 [98 S.Ct. 2954, 57 L.Ed.2d 973]; *People v. Benson* (1990) 52 Cal.3d 754, 799 [276 Cal.Rptr. 827, 802 P.2d 330].)

Although not required, "[i]t is . . . the better practice for a court to instruct on all the statutory penalty factors, directing the jury to be guided by those that are applicable on the record." (*People v. Marshall* (1990) 50 Cal.3d 907, 932 [269 Cal.Rptr. 269, 790 P.2d 676], cert. den. *sub nom.* ~~sub nom.~~ *Marshall v. California* (1991) 498 U.S. 1110]; *People v. Miranda* (1987) 44 Cal.3d 57, 104–105 [241 Cal.Rptr. 594, 744 P.2d 1127]; *People v. Melton* (1988) 44 Cal.3d 713, 770 [244 Cal.Rptr. 867, 750 P.2d 741].) The jury must be instructed to consider only those factors that are "applicable." (*Williams v. Calderon* (1998) 48 F.Supp.2d 979, 1023.)

When the court will be instructing the jury on prior violent criminal activity in aggravation, give the bracketed sentence that begins with "The other violent criminal activity alleged in this case." (See *People v. Robertson* (1982) 33 Cal.3d 21, 55 [188 Cal.Rptr. 77, 655 P.2d 279]; *People v. Yeoman* (2003) 31 Cal.4th 93, 151 [2 Cal.Rptr.3d 186, 72 P.3d 1166].) The court also has a **sua sponte** duty to give CALCRIM No. 764, *Death Penalty: Evidence of Other Violent Crimes* in addition to this instruction.

When the court will be instructing the jury on prior felony convictions, the court also has a **sua sponte** duty to give CALCRIM No. 765, *Death Penalty: Conviction for Other Felony Crimes* in addition to this instruction.

On request, the court must instruct the jury not to double-count any "circumstances of the crime" that are also "special circumstances." (*People v. Melton, supra,* 44 Cal.3d at p. 768.) When requested, give the bracketed paragraph that begins with "Even if a fact is both a 'special circumstance' and also a 'circumstance of the crime'."

On request, give the bracketed sentence that begins with "You may not let sympathy for the defendant's family." (*People v. Ochoa* (1998) 19 Cal.4th 353, 456 [79 Cal.Rptr.2d 408, 966 P.2d 442].) On request, give the bracketed sentence that begins with "However, you may consider evidence about the impact the defendant's execution." (*Ibid.*)

The bracketed sentence that begins with "You must disregard any jury instruction" may be given unless the jury did not hear a prior phase of the case. (See *People v. Arias* (1996) 13 Cal.4th 92, 171 [51 Cal.Rptr.2d 770, 913 P.2d 980], cert. den. *sub nom.*~~sub nom.~~ *Arias v. California* (1997) 520 U.S. 1251 [117 S.Ct. 2408, 138 L.Ed.2d 175].)

AUTHORITY

- Death Penalty Statute. Pen. Code, § 190.3.
- Jury Must Be Instructed to Consider Any Mitigating Evidence and Sympathy. *Lockett v. Ohio, supra,* 438 U.S. at pp. 604–605; *People v. Benson, supra,* 52 Cal.3d at p. 799; *People v. Easley* (1983) 34 Cal.3d 858, 876 [196 Cal.Rptr. 309, 671 P.2d 813].
- Should Instruct on All Factors. *People v. Marshall, supra,* 50 Cal.3d at p. 932.
- Must Instruct to Consider Only "Applicable Factors." *Williams v. Calderon, supra,* 48 F.Supp.2d at p. 1023; *People v. Marshall, supra,* 50 Cal.3d at p. 932.
- Mitigating Factor Must Be Supported by Evidence. *Delo v. Lashley* (1993) 507 U.S. 272, 275, 277 [113 S.Ct. 1222, 122 L.Ed.2d 620].
- "Aggravating and Mitigating" Defined. *People v. Dyer* (1988) 45 Cal.3d 26, 77–78 [246 Cal.Rptr. 209, 753 P.2d 1]; *People v. Adcox* (1988) 47 Cal.3d 207, 269–270 [253 Cal.Rptr. 55, 763 P.2d 906].
- On Request Must Instruct to Consider Only Statutory Aggravating Factors. *People v. Hillhouse* (2002) 27 Cal.4th 469, 509 [117 Cal.Rptr. 2d 45, 40 P.3d 754], cert. den. *sub nom.*~~sub nom.~~ *Hillhouse v. California* (2003) 537 U.S. 1114 [123 S.Ct. 869, 154 L.Ed.2d 789]; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, fn. 14 [270 Cal.Rptr. 451, 792 P.2d 251].
- Mitigating Factors Are Examples. *People v. Melton, supra,* 44 Cal.3d at p. 760; *Belmontes v. Woodford* (2003) 350 F.3d 861, 897].

- Must Instruct to Not Double-Count. *People v. Melton, supra,* 44 Cal.3d at p. 768.
- Threats of Violence Must Be Directed at Persons. *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1016 [30 Cal.Rptr.2d 818, 874 P.2d 248].
- This Instruction Upheld Against Due Process Challenge to Victim-Impact Factors. *People v. Tran* (2022) 13 Cal.5th 1169, 1220–1221 [298 Cal.Rptr.3d 150, 515 P.3d 1210].
- Mercy Equivalent to Sympathy or Compassion. *People v. Thomas* (2023) 14 Cal.5th 327, 407 [304 Cal.Rptr.3d 1, 523 P.3d 323].

COMMENTARY

Aggravating and Mitigating Factors—Need Not Specify

The court is not required to identify for the jury which factors may be aggravating and which may be mitigating. (*People v. Hillhouse, supra,* 27 Cal.4th at p. 509.) "The aggravating or mitigating nature of the factors is self-evident within the context of each case." *(Ibid.)* However, the court is required on request to instruct the jury to consider only the aggravating factors listed. (*Ibid.*; *People v. Gordon, supra,* ~~(1990)~~ 50 Cal.3d ~~1223,~~at p. 1275, fn. 14 ~~[270 Cal.Rptr. 451, 792 P.2d 251]~~.) In *People v. Hillhouse,* the California Supreme Court stated, "we suggest that, on request, the court merely tell the jury it may not consider in aggravation anything other than the aggravating statutory factors." The committee has rephrased this for clarity and included in the text of this instruction, "You may not consider as an aggravating factor anything other than the factors contained in this list that you conclude are aggravating in this case." (*People v. Hillhouse*, *supra,* 27 Cal.4th at p. 509, fn. 6.)

Although the court is not required to specify which factors are the aggravating factors, it is not error for the court to do so. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1269 [74 Cal.Rptr.2d 212, 954 P.2d 475].) In ~~*People v.* Musselwhite, *supra,* 17 Cal.4th at p. 1269,~~ decided prior to *Hillhouse*, the Supreme Court held that the trial court properly instructed the jury that "*only* factors (a), (b) and (c) of section 190.3 could be considered in aggravation . . . " (*Id.* (italics in original).)

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 545, 549–550, 563, 568, 571–572, 584–591.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.23, 87.24 (Matthew Bender).

1801. Grand and Petty Theft (Pen. Code, §§ 486, 487–488, 490.2, 491)

If you conclude that the defendant committed a theft, you must decide whether the crime was grand theft or petty theft.

[The defendant committed petty theft if (he/she) stole (property/ [(and/or)] services[)] worth $950 or less.]

[The defendant committed grand theft if the value of the (property/ [(and/or)] services[)] is more than $950.]

[Theft of property from the person is grand theft if the value of the property is more than $950. Theft is *from the person* if the property taken was in the clothing of, on the body of, or in a container held or carried by, that person.]

[Theft of (an automobile/ a horse/_____<*insert other item listed in statute*>**) is grand theft if the value of the property is more than $950.]**

[Theft of a firearm is grand theft.]

[Theft of (fruit/nuts/_____<*insert other item listed in statute*>**) worth more than $950 is grand theft.]**

[Theft of (fish/shellfish/aquacultural products/_____<*insert other item listed in statute*>**) worth more than $950 is grand theft if (it/they) (is/are) taken from a (commercial fishery/research operation).]**

[The value of _____ <*insert relevant item enumerated in Pen. Code, § 487(b)(1)(B)*>**may be established by evidence proving that on the day of the theft, the same items of the same variety and weight as those stolen had a wholesale value of more than $950.]**

[The value of (property/services) is the fair (market value of the property/market wage for the services performed).]

<*Fair Market Value—Generally*>
[*Fair market value* is the highest price the property would reasonably have been sold for in the open market at the time of, and in the general location of, the theft.]

<*Fair Market Value—Urgent Sale*>

[*Fair market value* is the price a reasonable buyer and seller would agree on if the buyer wanted to buy the property and the seller wanted to sell it, but neither was under an urgent need to buy or sell.]

The People have the burden of proving beyond a reasonable doubt that the theft was grand theft rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of grand theft.

New January 2006; Revised February 2012, August 2015, April 2020, September 2023

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction if grand theft has been charged.

If grand theft is based on multiple thefts arising from one overall plan, give CALCRIM No. 1802, *Theft: As Part of Overall Plan*

When the People allege the defendant has a prior conviction for an offense listed in Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration pursuant to subdivision (c) of section 290, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial* or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

If the evidence raises an issue that the value of the property may be inflated or deflated because of some urgency on the part of either the buyer or seller, the second bracketed paragraph on fair market value should be given.

AUTHORITY

- Determination of Grand vs. Petty Theft. Pen. Code, §§ 486, 487–488, 490.2, 491.
- Value/Nature of Property/Theft Ff~~f~~rom the Person. Pen. Code, §§ 487(b)~~–~~–(c~~d~~), 487a.
- Theft of a Ff~~f~~irearm I~~i~~s G~~g~~rand T~~t~~heft. Pen. Code, §§ 487(d)(2), 490.2(c)

RELATED ISSUES

Proposition 47 (Penal Code Section 490.2)

After the passage of Proposition 47 in 2014, theft is defined in Penal Code section 487 as a misdemeanor unless the value of the property taken exceeds $950. ~~(~~Pen.

Code, § 490.2.) This represents a change from the way grand theft was defined under Penal Code section 487(b)–(d) before the enactment of Proposition 47. In 2016, Proposition 63 added subdivision (c) to Penal Code section, § 490.2 (excepting theft of a firearm).

Taking From the Person

To constitute a taking from the person, the property must, in some way, be physically attached to the person. (*People v. Williams* (1992) 9 Cal.App.4th 1465, 1472 [12 Cal.Rptr.2d 243].) Applying this rule, the court in *Williams* held that a purse taken from the passenger seat next to the driver was not a taking from the person. (*Ibid.* [see generally for court's discussion of origins of this rule].) *Williams* was distinguished by the court in *People v. Huggins* (1997) 51 Cal.App.4th 1654, 1656–1657 [60 Cal.Rptr.2d 177], where evidence that the defendant took a purse placed on the floor next to and touching the victim's foot was held sufficient to establish a taking from the person. The victim intentionally placed her foot next to her purse, physically touching it and thereby maintaining dominion and control over it.

Theft of Fish, Shellfish, or Aquacultural Products

Fish taken from public waters are not "property of another" within the meaning of Penal Code section 484 and 487; only the Fish and Game Code applies to such takings. (*People v. Brady* (1991) 234 Cal.App.3d 954, 959, 961–962 [286 Cal.Rptr. 19]; see, e.g., Fish & Game Code, § 12006.6 [unlawful taking of abalone].)

Value of Written Instrument

If the thing stolen is evidence of a debt or some other written instrument, its value is (1) the amount due or secured that is unpaid, or that might be collected in any contingency, (2) the value of the property, title to which is shown in the instrument, or (3) or the sum that might be recovered in the instrument's absence. (Pen. Code, § 492; see *Buck v. Superior Court* (1966) 245 Cal.App.2d 431, 438 [54 Cal.Rptr. 282] [trust deed securing debt]; *People v. Frankfort* (1952) 114 Cal.App.2d 680, 703 [251 P.2d 401] [promissory notes and contracts securing debt]; *People v. Quiel* (1945) 68 Cal.App.2d 674, 678 [157 P.2d 446] [unpaid bank checks]; see also Pen. Code, §§ 493 [value of stolen passage tickets], 494 [completed written instrument need not be issued or delivered].) If evidence of a debt or right of action is embezzled, its value is the sum due on or secured by the instrument. (Pen. Code, § 514.) Section 492 only applies if the written instrument has value and is taken from a victim. (See *People v. Sanders* (1998) 67 Cal.App.4th 1403, 1414, fn. 16 [79 Cal.Rptr.2d 806].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property §§ 4, 8.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01 (Matthew Bender).

1802. Theft: As Part of Overall Plan

If you conclude that the defendant committed more than one theft, you must then decide if the defendant committed ~~multiple petty thefts or a single~~ grand theft. To prove that the defendant is guilty of ~~a single~~ grand theft, the People must prove that:

1. **The defendant committed multiple thefts of (property/ [(and/or)] services) ~~from the same owner or possessor on more than one occasion~~;**

2. **The combined value of the (property/ [(and/or)] services) was over $950;**

AND

3. **In obtaining ~~The defendant obtained~~ the (property/ [(and/or)] services), ~~as part of a single, overall plan or objective~~the defendant was motivated by one intention, one general impulse, and one plan.**

If you conclude that, as to one or more alleged theft, the People have failed to prove grand theft, ~~any multiple~~ the theft[s] you have found proven (is/are) petty theft[s].

New January 2006; Revised February 2012, August 2015, August 2016, September 2023

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aggregating the value of the property or services taken if grand theft is charged on that theory.

The total value of the property taken must exceed $950 to be grand theft. (See Pen. Code, § 490.2.)

When the People allege the defendant has a prior conviction for an offense listed in Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration pursuant to subdivision (~~-~~c) of section 290, give CALCRIM No. 3100, *Prior Conviction: ~~-~~Nonbifurcated Trial* or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

AUTHORITY

- Aggregating Value of Property Taken According to Overall Plan or General Intent. Pen. Code, § 487(e); *People v. Whitmer* (2014) 59 Cal.4th 733, 740–741 [174 Cal.Rptr.3d 594, 329 P.3d 154]; *People v. Bailey* (1961) 55 Cal.2d 514, 518–519 [11 Cal.Rptr. 543, 360 P.2d 39].
- Grand Theft of Property or Services. Pen. Code, § 487(a) [property or services exceeding $950 in value].

RELATED ISSUES

~~***Multiple Victims***~~

~~Where multiple victims are involved, there is disagreement about applying the *Bailey* doctrine and cumulating the charges even if a single plan or intent is demonstrated. (See *People v. Brooks* (1985) 166 Cal.App.3d 24, 30 [210 Cal.Rptr. 90] [auctioneer stole proceeds from property belonging to several people during a single auction; conviction for multiple counts of theft was error]; *People v. Columbia Research Corp.* (1980) 103 Cal.App.3d Supp. 33 [163 Cal.Rptr. 455] [series of petty thefts from numerous victims occurring over 10-month period properly consolidated into single grand theft conviction where defendant employed same scheme to defraud victims of money]; but see *People v. Garcia* (1990) 224 Cal.App.3d 297, 307–309 [273 Cal.Rptr. 666] [defendant filed fraudulent bonds at different times involving different victims; multiple convictions proper]; *In re David D.* (1997) 52 Cal.App.4th 304, 309 [60 Cal.Rptr.2d 552] [stating that *Garcia* "articulately criticized" *Brooks* and *Columbia Research*; declined to apply *Bailey* to multiple acts of vandalism].)~~

Combining Grand Thefts

A defendant "may be convicted of multiple counts of grand theft based on separate and distinct acts of theft, even if committed pursuant to a single overarching scheme." (See *People v. Whitmer, supra,* 59 Cal.4th at p. 741.) Before *Whitmer*, numerous Courts of Appeal had interpreted *Bailey* as permitting only one conviction of grand theft where multiple crimes were unified by a single intent, impulse, and plan. (See, e.g., *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 363–364 [234 Cal.Rptr. 442]; *People v. Brooks* (1985) 166 Cal.App.3d 24, 31 [210 Cal.Rptr. 90]; *People v. Gardner* (1979) 90 Cal.App.3d 42, 47–48 [153 Cal.Rptr. 160]; *People v. Richardson* (1978) 83 Cal.App.3d 853, 866 [148 Cal.Rptr. 120]; *People v. Sullivan* (1978) 80 Cal.App.3d 16, 19 [145 Cal.Rptr. 313].) *Whitmer* disapproved, but did not expressly overrule, this line of appellate cases. (See *People v. Whitmer, supra,* 59 Cal.4th at pp. 740–741.)

~~The *Bailey* doctrine can be asserted by the *defendant* to combine multiple grand thefts committed as part of an overall scheme into a single offense. (See *People v.*~~

~~*Brooks* (1985) 166 Cal.App.3d 24, 31 [210 Cal.Rptr. 90] [multiple grand thefts from single auction fund]; *People v. Gardner* (1979) 90 Cal.App.3d 42, 47–48 [153 Cal.Rptr. 160] [multiple grand theft of hog carcasses]; *People v. Richardson* (1978) 83 Cal.App.3d 853, 866 [148 Cal.Rptr. 120] [multiple attempted grand thefts], disapproved on other grounds in *People v. Saddler* (1979) 24 Cal.3d 671, 682, fn. 8 [156 Cal.Rptr. 871, 597 P.2d 130]; see also *People v. Sullivan* (1978) 80 Cal.App.3d 16, 19 [145 Cal.Rptr. 313] [error to refuse defense instruction about aggregating thefts].)~~

~~A serial thief "may be convicted of multiple counts of grand theft based on separate and distinct acts of theft, even if committed pursuant to a single overarching scheme." [disapproving any interpretation of *People v. Bailey* (1961) 55 Cal.2d 514 [11 Cal.Rptr. 543, 360 P.2d 39] inconsistent with this conclusion.] *People v. Whitmer* (2014) 59 Cal.4th 733, 740–741 [174 Cal.Rptr.3d 594, 329 P.3d 154].~~

~~***Theft Enhancement***~~

~~If there are multiple charges of theft, whether grand or petty theft, the aggregate loss exceeds any of the statutory minimums in Penal Code section 12022.6(a), and the thefts arise from a common scheme or plan, an additional prison term may be imposed. (Pen. Code, § 12022.6(b).) If the aggregate loss exceeds statutory amounts ranging from $50,000 to $2.5 million, an additional term of one to four years may be imposed. (Pen. Code, § 12022.6(a)(1)–(4); see *People v. Daniel* (1983) 145 Cal.App.3d 168, 174–175 [193 Cal.Rptr. 277] [no error in refusing to give unanimity instruction].)~~

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 12, 13.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01[1][i] (Matthew Bender).