Judicial Council *of* California

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 25-011
For business meeting on February 21, 2025

Title
Jury Instructions: Criminal Jury Instructions (2025 Edition)

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

Report Type
Action Required

Effective Date
February 21, 2025

Date of Report
January 29, 2025

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Executive Summary

The Advisory Committee on Criminal Jury Instructions recommends approving for publication the new and 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 2025 edition of *Judicial Council of California Criminal Jury Instructions* (*CALCRIM*).

Recommendation

The Advisory Committee on Criminal Jury Instructions recommends that the Judicial Council, effective February 21, 2025, approve the following changes to the criminal jury instructions prepared by the committee:

1. Revisions to the user guide;

2. Addition of CALCRIM No. 2242; and

3. Revisions to CALCRIM Nos. 505, 540B, 540C, 571, 600, 703, 840, 841, 860, 861, 862, 863, 875, 876, 890, 891, 900, 901, 902, 903, 904, 905, 906, 907, 908, 915, 916, 925, 926, 945,

946, 947, 948, 949, 950, 951, 1201, 1500, 1501, 1502, 1515, 1520, 1600, 1820, 2130, 2441, 2503, 2622, 2650, 2720, 2721, 2723, 3224, 3225, 3226, 3227, 3228, 3229, 3230, 3231, 3232, 3233, 3234, 3406, 3470, 3500, 3501, and 3502.

The proposed new and revised jury instructions are attached at pages 10–299.

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 proposing twice a year to the council additions and other changes to *CALCRIM.* The council approved the last *CALCRIM* release at its September 2024 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.

User Guide

A superior court judge requested that the committee add the pronouns "they" and "their" to each CALCRIM instruction that contains the option of "his/her" or "he/she" to be gender-identity inclusive. The committee has previously considered similar suggestions but has refrained from incorporating gender-neutral pronouns into every applicable instruction out of concern that the option of "they/their" could inadvertently be applied in codefendant cases, resulting in inaccurate and possibly confusing instructions. In response to these previous suggestions, the committee instead added a section in the user guide in 2020 entitled "Personal Pronouns." This section clarifies that the personal pronoun options of "he/she" and "his/her" are not intended to be limiting options and that attorneys and courts should ensure that they are using an individual's personal pronouns. To provide further explanation, the committee proposes adding the following sentence: "The court has the option to change the pronouns to 'they/them' with care given to avoiding confusion in multiple defendant cases."

CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*; No. 571, *Voluntary Manslaughter: Imperfect Self-Defense or Imperfect Defense of Another—*

[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."

Lesser Included Offense*; and No. 3470, *Right to Self-Defense or Defense of Another (Non-Homicide)

CALCRIM No. 571 contains a definition of *imminent danger* based on language from *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187, overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082. A superior court judge, who is also a committee member, suggested adding this definition to Nos. 505 and 3470, pointing out that the principle of imminent danger applies equally to imperfect and perfect self-defense. (See *People v. Aris, supra,* at pp. 1187–1188.) The committee agreed with this suggestion but first modified the definition in No. 571 by replacing "when the fatal wound occurred" with "when the defendant used [deadly] force." For No. 505, the committee added this revised definition and deleted the related issue that discusses the definition of *imminent danger* articulated in *Aris*. For No. 3470, which is an instruction that applies only in nonhomicide cases, the committee added the revised definition without the bracketed word "deadly."

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

In September 2024, the Judicial Council approved a revision to CALCRIM No. 520 that added a related issue about youth as a factor for implied malice, based on *People v. Pittman* (2023) 96 Cal.App.5th 400, 416–418 [314 Cal.Rptr.3d 409].[2] During the committee's discussion of this addition, several members noted that *Pittman* mentions several cases that discuss youth as a factor for reckless indifference. The committee decided that these cases—specifically *People v. Oliver* (2023) 90 Cal.App.5th 466, 485–488 [307 Cal.Rptr.3d 6], *People v. Mitchell* (2022) 81 Cal.App.5th 575, 591–595 [297 Cal.Rptr.3d 223], and *In re Harper* (2022) 76 Cal.App.5th 450, 466–470 [291 Cal.Rptr.3d 543]—would be helpful updates to the authority section of the felony murder instructions. In addition to these three cases, the committee also added *People v. Jimenez* (2024) 103 Cal.App.5th 994, 1001–1008 [323 Cal.Rptr.3d 549], a more recent case that contains a detailed summary about this youthful offender case law.

CALCRIM No. 840, *Inflicting Injury on Spouse, Cohabitant, or Fellow Parent Resulting in Traumatic Condition*

This instruction contains a definition of *traumatic condition* that is based on Penal Code section 273.5(d).[3] Unlike the statute, the instruction's current definition does not mention strangulation or suffocation. Instead, the bench notes direct the user to consider instructing with the special

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[2] Judicial Council of Cal., Advisory Com. Rep., *Jury Instructions: Criminal Jury Instructions (2024 Supplement)*, (Aug. 20, 2024), p. 3, *https://jcc.legistar.com/View.ashx?M=F&ID=13259676&GUID=B32EFA41-4044-499C-A882-CF0A372577DE*.

[3] Penal Code section 273.5(d) states: "As used in this section, 'traumatic condition' means a condition of the body, such as a wound, or external or internal injury, including, but not limited to, injury as a result of strangulation or suffocation, whether of a minor or serious nature, caused by a physical force. For purposes of this section, 'strangulation' and 'suffocation' include impeding the normal breathing or circulation of the blood of a person by applying pressure on the throat or neck."

statutory definition if there is evidence of strangulation or suffocation. A committee member suggested revising the definition of *traumatic condition* in the instruction to include injury as a result of strangulation or suffocation. When adding this language, the committee also decided to update the entire definition to better track the statute. Finally, the committee added *People v. Reid* (2024) 105 Cal.App.5th 446 [325 Cal.Rptr.3d 820] to the authority section. *Reid*, which reviews a preliminary hearing finding of probable cause for a violation of Penal Code section 273.5(a), contains a helpful discussion about the traumatic condition element.

CALCRIM Nos. 841, 860, 861, 862, 863, 875, 876, 890, 891, 900, 901, 902, 903, 904, 905, 906, 907, 908, 915, 916, 925, 926, 945, 946, 947, 948, 949, 950, 951, 2503, 2720, 2721, 2723, (assault and battery instructions)

In September 2024, the Judicial Council approved a revision to No. 960, which expanded the definition of *indirect touching* to include the phrase "by touching something held by or attached to the other person."[4] This expansion was based on *In re B.L.* (2015) 239 Cal.App.4th 1491, 1495–1497 [192 Cal.Rptr.3d 154], which held that knocking a walkie-talkie out of a person's hand constitutes a battery against that person. When the revision to No. 960 was out for public comment, the committee became aware that 33 other instructions contained the same bracketed *indirect touching* definition. The committee has now updated the *indirect touching* language in all 33 instructions to conform with the revision in No. 960. The committee also made additional changes in the bench notes: for the battery instructions, the committee added *In re B.L.* as well as *People v. Dealba* (2015) 242 Cal.App.4th 1142, 1144, 1153 [195 Cal.Rptr.3d 848] to the authority section;[5] and for the assault instructions, the committee instead added a related issue note. Separately, for Nos. 2720 and 2721, the committee updated the lesser included offense sections with *People v. Milward* (2011) 52 Cal.4th 580, 588–589 [129 Cal.Rptr.3d 145, 257 P.3d 748] and *People v. McDaniel* (2008) 159 Cal.App.4th 736, 747 [71 Cal.Rptr.3d 845].[6]

CALCRIM No. 1201, *Kidnapping: Child or Person Incapable of Consent*

In *People v. Lewis*, the California Supreme Court held:

> a defendant acting with an illegal intent or purpose may be liable for kidnapping under [Penal Code] section 207 if he or she uses physical force to take and carry away a person who, because of intoxication or other mental condition, is unable to consent to the movement. The quantum of force required is no greater than the

[4] Judicial Council of Cal., Advisory Com. Rep., *Jury Instructions: Criminal Jury Instructions (2024 Supplement)*, (Aug. 20, 2024), p. 5, *https://jcc.legistar.com/View.ashx?M=F&ID=13259676&GUID=B32EFA41-4044-499C-A882-CF0A372577DE*.

[5] These two cases were also added to No. 960's authority section during the September 2024 revision. *Dealba* held that a touching occurred when the defendant, while driving a car, intentionally struck the victim's vehicle without making direct contact with the victim herself.

[6] *Milward* held that Penal Code section 245(a)(1) is a lesser included offense of Penal Code section 4500; *McDaniel* held that Penal Code section 240 is a lesser included offense of Penal Code section 4501.

amount of physical force required to take and carry the victim away a substantial distance.[7]

Last year, the committee added this case to the authority section with the entry "Force Required to Kidnap Adult Unable to Consent Due to Intoxication or Other Mental Condition."[8] In March 2024, an appellate court considered this new relaxed force standard and "invite[d] the Judicial Council to adopt … [i]nstructions explaining under what circumstances a jury can apply the relaxed/constructive force standard and explaining what level of incapacitation or unconsciousness is required to trigger the relaxed force or constructive force standard … ." (*People v. Lewis* (2024) 100 Cal.App.5th 349, 361–362 [318 Cal.Rptr.3d 898].)

In response to this request, the committee made several changes to the instruction, including adding "person with a mental impairment" to element 3 and adding a new element 5 that states: "The defendant knew or reasonably should have known that _____ <*insert name of alleged victim*> was a (child/person with a mental impairment) who was incapable of giving legal consent to the movement." The committee also inserted two new explanatory sentences: "A *mental impairment* includes impairment due to intoxication" and "The amount of force required to move an unresisting (child/person with a mental impairment) who is incapable of giving legal consent is the amount of physical force sufficient to take and carry that (child/person) a substantial distance."[9] The committee also removed Alternative 4A from the elements and reframed it as an optional sentence enhancement. Finally, the committee made related updates to the bench notes.

CALCRIM No. 1500, *Aggravated Arson*; No. 1501, *Arson: Great Bodily Injury*; No. 1502, *Arson: Inhabited Structure or Property*; No. 1515, *Arson*; and No. 1520, *Attempted Arson*

The arson instructions contain a definition of *maliciously* based on Penal Code section 450(e).[10] An appellate defense attorney proposed that the committee modify this definition in light of two California Supreme Court cases: *People v. Atkins* (2001) 25 Cal.4th 76 [104 Cal.Rptr.2d 738, 18 P.3d 660] and *In re V.V.* (2011) 51 Cal.4th 1020 [125 Cal.Rptr.3d 421, 252 P.3d 979]. In *Atkins*, the court held that arson requires "a general intent to willfully commit the act of setting on fire under such circumstances that the direct, natural, and highly probable consequences would be the burning of the relevant structure or property." (*People v. Atkins, supra,* 25 Cal.4th at p. 89.) Later, in *V.V.*, the court noted that arson's malice requirement is satisfied when "the willful and intentional act is committed under circumstances that create an obvious fire hazard." (*In re V.V.,*

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[7] *People v. Lewis* (2023) 14 Cal.5th 876, 899 [309 Cal.Rptr.3d 699, 530 P.3d 1107].

[8] The Judicial Council approved this update in March 2024. (See Judicial Council of Cal., Advisory Com. Rep., *Jury Instructions: Criminal Jury Instructions (2024 Edition)*, (Jan. 19, 2024), p. 4, *http://jcc.legistar.com/View.ashx?M=F&ID=12698835&GUID=EBC0D18A-CEBB-4760-83BA-0F1E03405CE2*.)

[9] The committee considered adding an explanation of "what level of incapacitation or unconsciousness is required to trigger the relaxed force or constructive force standard" (as requested by *People v. Lewis, supra,* 100 Cal.App.5th at p. 362) but ultimately decided that this was a fact-specific inquiry and therefore better left to counsel argument.

[10] Penal Code section 450(e) states: " 'Maliciously' imports a wish to vex, defraud, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law."

supra, 51 Cal.4th at p. 1031, fn. 6.) Based on these two cases, the committee revised the definition of *maliciously* to clarify that the wrongful act must occur "under circumstances that the direct, natural, and highly probable consequences would be the burning of the structure or property." The committee also added these cases to the authority section. For No. 1502, the committee added a related issue based on *People v. Buckner* (2023) 97 Cal.App.5th 724, 728–730 [315 Cal.Rptr.3d 769], which that held that the defendant's house was inhabited at the time of the arson even though the defendant was the sole occupant and did not intend to return after starting the fire.

CALCRIM No. 1600, *Robbery*

A committee member suggested modifying this instruction to better address a type of robbery in which property initially taken without force or fear is subsequently retained through force or fear. This type of robbery is commonly known as an "*Estes* robbery," which refers to *People v. Estes* (1983) 147 Cal.App.3d 23 [194 Cal.Rptr. 909]. In *Estes*, the court affirmed a robbery conviction where the defendant had stolen items from a store and then used force against a security guard who confronted the defendant in the parking lot. (*Id.* at pp. 25–26.) The *Estes* court held: "a robbery occurs when defendant uses force or fear in resisting attempts to regain the property or in attempting to remove the property from the owner's immediate presence regardless of the means by which defendant originally acquired the property." (*Id.* at pp. 27–28.) In *People v. Gomez* (2008) 43 Cal.4th 249, 259 [74 Cal.Rptr.3d 123, 179 P.3d 917], the California Supreme Court approved *Estes*'s analysis of robbery, noting that "the later use of force to retain the property in the victim's presence renders the actions a robbery." Later, in *People v. McKinnon* (2011) 52 Cal.4th 610, 686 [130 Cal.Rptr.3d 590, 259 P.3d 1186], the court cited *Gomez* with approval in stating that "[a] defendant who does not use force or fear in the initial taking of the property may nonetheless be guilty of robbery if he uses force or fear to retain it or carry it away in the victim's presence." In response to the proposal, the committee added the words "retain [or] resist an attempt to regain" in element 5 as alternatives to "take." The committee also updated the bench note about when to use these alternatives and added citations to *Gomez* and *McKinnon*.

CALCRIM No. 1820, *Felony Unlawful Taking or Driving of Vehicle*

This instruction covers felony offenses of Vehicle Code section 10851(a), which prohibits driving or taking another's vehicle without the owner's consent.[11] To account for these two different theories of liability, the instruction is divided into *Alternative A—taking with intent to deprive* and *Alternative B—posttheft driving*.[12] A bench note in the instruction explains

[11] Specifically, Vehicle Code section 10851(a) states: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense … ."

[12] Because only Alternative A describes a theft offense, the vehicle's value must exceed $950 under this alternative for the offense to qualify as a felony. (See Pen. Code, § 490.2.)

> a defendant cannot be convicted of grand theft of a vehicle and unlawfully taking the vehicle in the absence of any evidence showing a substantial break between the taking and the use of the vehicle. (*People v. Kehoe* (1949) 33 Cal.2d 711, 715 [204 P.2d 321]; see *People v. Malamut* (1971) 16 Cal.App.3d 237, 242 [93 Cal.Rptr. 782] [finding substantial lapse between theft and driving].) In such cases, give CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited*.

A superior court judge suggested that the committee add the substantial break requirement to Alternative B to more clearly define posttheft driving. The committee agreed and added a new element 3 that states: "The driving occurred after a substantial break from the original theft of the vehicle." The committee also added a new authority section entry, "Substantial Break Requirement," which cites three cases that articulate this principle.[13]

New CALCRIM No. 2242, *Altering, Counterfeiting, Defacing, Destroying, Etc. Vehicle Identification Numbers*

In *People v. Killian* (2024) 100 Cal.App.5th 191 [319 Cal.Rptr.3d 13], an appellate court examined the elements of Vehicle Code section 10802, which prohibits knowingly tampering with vehicle identification numbers "with the intent to misrepresent the identity or prevent the identification of motor vehicles or motor vehicle parts, for the purpose of sale, transfer, import, or export." *Killian* held that, despite the statute's plural term "vehicle identification numbers," this offense includes tampering with a single vehicle identification number. (*Id.* at p. 211.) *Killian* also held that the defendant's role as buyer, seller, transferor, or transferee is not determinative because the defendant need only "harbor[] an objective to facilitate a conveyance of the motor vehicle or motor vehicle part itself or an interest thereto (whether or not accompanied by consideration)" to satisfy the mental state of "for the purpose of sale [or] transfer." (*Id.* at p. 214.) Based on *Killian*, the committee drafted a new instruction for this offense.

CALCRIM No. 2622, *Intimidating a Witness*

This instruction covers violations of Penal Code section 136.1(a) and (b), which prohibit intimidating or dissuading a witness or victim under specified circumstances. In *People v. Reynoza* (2024) 15 Cal.5th 982 [320 Cal.Rptr.3d 299, 546 P.3d 564], the California Supreme Court held: "Where criminal charges have already been filed, postcharging dissuasion alone does not constitute an offense under § 136.1, subd. (b)(2)." Separately, *People v. Morones* (2023) 95 Cal.App.5th 721, 736–738 [313 Cal.Rptr.3d 688] reversed two convictions for offenses under this statute, finding that "defendant's repeated and consistent attempts to get his children to lie to law enforcement regarding their victimization" did not violate Penal Code section 136.1(a)(2) or (b)(1) where defendant merely sought to alter "future statements or testimony to his favor" rather

[13] The three cases are *People v. Bullard* (2020) 9 Cal.5th 94, 110 [260 Cal.Rptr.3d 153, 460 P.3d 262]; *People v. Lara* (2019) 6 Cal.5th 1128, 1137 [245 Cal.Rptr.3d 426, 438 P.3d 251]; and *People v. Martell* (2019) 42 Cal.App.5th 225, 234 [255 Cal.Rptr.3d 277].

than to prevent testimony or dissuade a report of victimization. Based on *Reynoza*, the committee revised Alternative 1C to add "[Before the charge[s] (was/were) filed]" and a bench note that states: "Give the bracketed language at the beginning of Alternative 1C when there is a factual dispute whether the conduct occurred after the filing of charges." The committee also added *Reynoza* and *Morones* to a new authority section entry entitled "Postcharging Dissuasion Alone Does Not Violate Penal Code Section 136.1(a)(2), (b)(1) & (b)(2)."

CALCRIM No. 2650, *Threatening a Public Official*

A committee member proposed that this instruction should align with No. 1300, *Criminal Threat*, by incorporating No. 1300's bracketed language that the defendant intended the threat be communicated to the victim. Case law has interpreted Penal Code section 422 to require this intent in situations where the defendant communicated the threat to a third party instead of directly to the victim.[14] Although no published case has interpreted Penal Code section 76 in the same manner, the committee recognized that the textual similarities between the two statutes support a similar reading.[15] As a result, the committee added the bracketed language, a bench note explaining when to use the bracketed language, and a commentary explaining the committee's reasoning for the added requirement.

CALCRIM Nos. 3224–3234 (aggravating sentencing factors)

These instructions contain a commentary about the "distinctively worse than the ordinary" requirement—specifically, whether this requirement raises constitutional vagueness concerns under *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569]. Last year, *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202] weighed in on this issue by expressing the opinion that the aggravating factor scheme in California Rules of Court, rule 4.421 does not present the same problem as *Johnson*. The committee added a discussion about *Chavez Zepeda* to this commentary.[16]

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.

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[14] See *People v. Felix* (2001) 92 Cal.App.4th 905, 913 [112 Cal.Rptr.2d 311] and *In re Ryan D.* (2002) 100 Cal.App.4th 854, 861–862 [123 Cal.Rptr.2d 193].)

[15] Penal Code section 422(a) prohibits, in relevant part: "willfully threaten[ing] to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat … ." Likewise Penal Code section 76(a) prohibits, in relevant part, "knowingly and willingly threaten[ing] the life of, or threaten[ing] serious bodily harm to [specified public officials, their staff, and their immediate family] with the specific intent that the statement is to be taken as a threat … ."

[16] In response to a public comment, the committee slightly edited this discussion to better capture the opinion's discussion about rule 4.421.

Comments

The proposed additions and revisions to *CALCRIM* circulated for public comment from October 21 through November 22, 2024. The committee received responses from three commenters: a superior court judge, a superior court, and a county bar association. The committee made changes in response to five comments, including a comment that suggested more specific guidance for a proposed new bench note in No. 600, *Attempted Murder*. The committee also clarified the new paragraph of the commentary in the aggravating factor instructions (Nos. 3224–3234). The remaining three comments suggested minor changes, with which the committee agreed. The text of all comments received and the committee's responses are included in a chart of comments attached at pages 300–304.

Alternatives considered

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

Fiscal and Operational Impacts

No implementation costs are associated with this proposal.

Attachments and Links

1. Full text of revised *CALCRIM* instructions, including table of contents, at pages 10–299
2. Chart of comments, at pages 300–304

CALCRIM Proposed Changes: Table of Contents

Instruction Number	Instruction Title
2622	Intimidating a Witness
2650	Threatening a Public Official
2720, 2721, 2723	Assault by Prisoner Serving Life Sentence; Assault by Prisoner; Battery by Prisoner on Nonprisoner
3224–3234	Aggravating Factors
3406	Mistake of Fact
3470	Right to Self-Defense or Defense of Another (Non-Homicide)
3500, 3501, 3502	Unanimity; Unanimity: When Generic Testimony of Offense Presented; Unanimity: When Prosecution Elects One Act Among Many

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

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

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

Judicial Council Instructions Endorsed by Rule of Court
Rule 2.1050 of the California Rules of Court provides:

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

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

Using the Instructions

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

Multiple-Defendant and Multiple-Count Cases
These instructions were drafted for the common case in which a single defendant is on trial. The HotDocs document assembly program from the Judicial Council's official publisher, LexisNexis, will modify the instructions for use in multi-defendant cases. It will also allow the user to name the defendants charged in a particular instruction if the instruction applies only to some of the defendants on trial in the case.
It is impossible to predict the possible fact combinations that may be present when a crime is charged multiple times or committed by different defendants against different victims involving different facts.

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

Thus, when an instruction is being used for more than one count and the factual basis for the instruction is different for the different counts, the user will need to modify the instruction as appropriate.

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

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

Alternatives vs. Options
When the user must choose one of two or more options in order to complete the instruction, the choice of necessary alternatives is presented in parentheses thus: *When the defendant acted, George Jones was performing (his/her) duties as a school employee.*

The instructions use brackets to provide optional choices that may be necessary or appropriate, depending on the individual circumstances of the case: *[If you find that George Jones threatened or harmed the defendant [or others] in the past, you may consider that information in evaluating the defendant's beliefs.]*

Finally, both parentheses and brackets may appear in the same sentence to indicate options that arise depending on which necessary alternatives are selected: *[It is not required that the person killed be the (victim/intended victim) of the (felony/ [or] felonies).].*

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

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

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

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

Burden of Production/Burden of Proof

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

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

Sentencing Factors and Enhancements

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

Personal Pronouns

Many instructions include an option to insert the personal pronouns "he/she," "his/her," or "him/her." The committee does not intend these options to be limiting. It is the policy of the State of California that nonbinary people are entitled to full legal recognition and equal treatment under the law. In accordance with this policy, attorneys and courts should ensure that they are using an individual's personal pronouns. The court has the option to change the pronouns to "they/them" with care given to avoiding confusion in multiple defendant cases.

Revision Dates

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

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

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

1. **The defendant reasonably believed that (he/she/ [or] someone else/ [or] _____ <*insert name or description of third party*>) was in imminent danger of being killed or suffering great bodily injury [or was in imminent danger of being a victim of (_____ <*insert inherently forcible and atrocious crime such as rape or mayhem*>/ <*insert noninherently forcible and atrocious crime such as robbery*> under circumstances in which (he/she) reasonably believed that (he/she) would suffer great bodily injury or death)];**

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

AND

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

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

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

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and

consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

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

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

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

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

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

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

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

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

New January 2006; Revised February 2012, August 2012, September 2020, March 2022, September 2022, February 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on self-defense when: "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rtpr.2d 870, 960 P.2d 1094] [addressing duty to instruct on voluntary manslaughter as lesser included offense, but also discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [249 Cal.Rptr. 897] [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses].)

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

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

Forcible and atrocious crimes are generally those crimes whose character and manner reasonably create a fear of death or serious bodily harm. (*People v. Ceballos* (1974) 12 Cal.3d 470, 479 [116 Cal.Rptr. 233, 526 P.2d 241].) In *Ceballos*, the court identified murder, mayhem, rape, and robbery as examples of forcible and atrocious crimes. (*Id.* at p. 478.) However, as noted in *People v. Morales* (2021) 69 Cal.App.5th 978, 992–993 [284 Cal.Rptr.3d 693], *Ceballos* involved a burglary, not a robbery, and contemplated the traditional common law robbery, which, unlike the modern understanding of robbery in California, did not include situations where very little force or threat of force is involved. *Morales* concluded that "[a] robbery therefore cannot trigger the right to use deadly force in self-defense unless the circumstances of the robbery gave rise to a reasonable belief that the victim would suffer great bodily injury or death." (*Id.* at p. 992.)

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

Related Instructions

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

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

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

AUTHORITY

- Justifiable Homicide. Pen. Code, §§ 197–199.
- Fear. Pen. Code, § 198.
- Lawful Resistance. Pen. Code, §§ 692–694.
- Burden of Proof. Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements. *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Forcible and Atrocious Crimes. *People v. Ceballos, supra,* 12 Cal.3d at pp. 478–479; *People v. Morales, supra,* 69 Cal.App.5th at pp. 992–993.
- Imminence. *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167], overruled on other grounds in *People v. Humphrey, supra,* 13 Cal.4th at p. 1089.
- No Duty to Retreat. *People v. Hughes* (1951) 107 Cal.App.2d 487, 493 [237 P.2d 64]; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22 [132 P.2d 51].
- Reasonable Belief. *People v. Humphrey, supra,* 13 Cal.4th at p. 1082; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].
- Must Act Under Influence of Fear Alone. Pen. Code, § 198.
- This Instruction Upheld. *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1306 [132 Cal.Rptr.3d 248]; *People v. Genovese* (2008) 168 Cal.App.4th 817, 832 [85 Cal.Rptr.3d 664].

COMMENTARY

Penal Code section 197, subdivision 1 provides that self-defense may be used in response to threats of death or great bodily injury, or to resist the commission of a felony. (Pen. Code, § 197, subd. 1.) However, in *People v. Ceballos, supra,* 12 Cal.3d at pp. 477–479, the court held that although the latter part of section 197 appears to apply when a person resists the commission of any felony, it should be read in light of common law principles that require the felony to be: "some atrocious crime attempted to be committed by force." (*Id.* at p. 478.) This instruction is therefore written to provide that self-defense may be used in response to threats of great bodily injury or death or to resist the commission of forcible and atrocious crimes.

RELATED ISSUES

Imperfect Self-Defense

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

No Defense for Initial Aggressor

An aggressor whose victim fights back in self-defense may not invoke the doctrine of self-defense against the victim's legally justified acts. (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1 [30 Cal.Rptr.2d 33, 872 P.2d 574].) If the aggressor attempts to break off the fight and communicates this to the victim, but the victim continues to attack, the aggressor may use self-defense against the victim to the same extent as if he or she had not been the initial aggressor. (Pen. Code, § 197, subd. 3; *People v. Trevino* (1988) 200 Cal.App.3d 874, 879 [246 Cal.Rptr. 357];

see CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.) In addition, if the victim responds with a sudden escalation of force, the aggressor may legally defend against the use of force. (*People v. Quach* (2004) 116 Cal.App.4th 294, 301–302 [10 Cal.Rptr.3d 196]; see CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.)

Transferred Intent Applies

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

~~***Definition of "Imminent"***~~

~~In *People v. Aris, supra,* 215 Cal.App.3d at p. 1187, overruled on other grounds in *People v. Humphrey, supra,* 13 Cal.4th at p. 1089, the jury requested clarification of the term "imminent." In response, the trial court instructed:~~

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

~~*(Ibid.)*~~

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

Reasonable Person Standard Not Modified by Evidence of Mental Impairment

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

Reasonable Person Standard and Physical Limitations

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

SECONDARY SOURCES

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

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

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

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

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

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

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

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

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

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

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

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

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

AND

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

[OR]

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

AND

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

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

AND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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*New January 2006; Revised April 2010, August 2013, February 2015, September 2019, April 2020, September 2020, September 2023, February 2025**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

People v. Cavitt, supra, 33 Cal.4th at pp. 203–204; *People v. Wilkins, supra,* 56 Cal.4th at p. 347.

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

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

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

Related Instructions—Other Causes of Death

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

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

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

Related Instructions

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

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

AUTHORITY

- Felony Murder: First Degree. Pen. Code, § 189.
- Specific Intent to Commit Felony Required. *People v. Gutierrez (*2002) 28 Cal.4th 1083, 1140 [124 Cal.Rptr.2d 373, 52 P.3d 572].
- Infliction of Fatal Injury. *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Defendant Must Join Felonious Enterprise Before or During Killing of Victim. *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].
- Logical Nexus Between Felony and Killing. *People v. Dominguez* (2006) 39 Cal.4th 1141; *People v. Cavitt, supra,* 33 Cal.4th at pp. 197–206.
- Merger Doctrine Does Not Apply to First Degree Felony Murder. *People v. Farley* (2009) 46 Cal.4th 1053, 1118-1120 [96 Cal.Rptr.3d 191, 210 P.3d 361].
- Reckless Indifference to Human Life. *In re Scoggins* (2020) 9 Cal.5th 667, 676–677 [264 Cal.Rptr.3d 804, 467 P.3d 198]; *People v. Clark, supra,* 63 Cal.4th at pp. 614–620; *People v. Banks, supra,* 61 Cal.4th at pp. 807–811 [189 Cal.Rptr.3d 208, 351 P.3d 330]; *People v. Estrada, supra,* 11 Cal.4th at p. 578; *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127].
- Major Participant. *People v. Banks*, *supra,* ~~(2015)~~ 61 Cal.4th ~~788,~~at pp. 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. Jimenez* (2024) 103 Cal.App.5th 994, 1001–1008 [323 Cal.Rptr.3d 549]; *People v. Oliver* (2023) 90 Cal.App.5th 466, 485–488 [307 Cal.Rptr.3d 6]; *People v. Jones* (2022) 86 Cal.App.5th 1076, 1091–1093 [302 Cal.Rptr.3d 847] [20-year-old defendant]; *People v. Keel* (2022) 84 Cal.App.5th 546, 558–559 [300 Cal.Rptr.3d 483] [juvenile defendant]; *People v. Mitchell* (2022) 81 Cal.App.5th 575, 591–595 [297 Cal.Rptr.3d 223]; *In re Harper* (2022) 76 Cal.App.5th 450, 466–470 [291 Cal.Rptr.3d 543]; *People v. Ramirez* (2021) 71 Cal.App.5th 970, 987 [286 Cal.Rptr.3d 771] [juvenile defendant]; *In re Moore* (2021) 68 Cal.App.5th 434, 454 [283 Cal.Rptr.3d 584] [juvenile defendant].

RELATED ISSUES

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

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (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 engages in criminal activity that a reasonable person would know involves a grave risk of death and he or she knows that the activity involves a grave risk of death.]

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

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

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

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

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

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

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

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

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*New January 2006; Revised April 2010, August 2013, September 2019, April 2020, September 2023, February 2025**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

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

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

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

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

If the defendant was a nonkiller who fled, leaving behind an accomplice who killed, see *People v. Cavitt* (2004) 33 Cal.4th 187, 206, fn. 7 [14 Cal.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 the prosecutor is proceeding under both malice and felony-murder theories, or is proceeding under multiple felony-murder theories, give CALCRIM No. 548, *Murder: Alternative Theories*. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain, supra,* 10 Cal.4th at pp. 35–37 [error to instruct on malice when felony murder only theory].)

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

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

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

People v. Cavitt, supra, 33 Cal.4th at pp. 203–204; *People v. Wilkins*, *supra,* ~~(2013)~~ 56 Cal.4th ~~333,~~at p. 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 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 203~~at pp.,~~ 209–211 [82 Cal.Rptr. 598] [heart attack caused by robbery]; *People v. Hernandez*~~, *supra,*~~ (1985) 169 Cal.App.3d 282,~~at p.~~ 287 [215 Cal.Rptr. 166] [same]; but see *People v. Gunnerson*~~, *supra,*~~ (1977) 74 Cal.App.3d 370,~~at pp.~~ 378–381[141 Cal.Rptr. 488] [simultaneous or coincidental death is not killing].)

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

AUTHORITY

- Felony Murder: First Degree. Pen. Code, § 189.
- Specific Intent to Commit Felony Required. *People v. Gutierrez (*2002) 28 Cal.4th 1083, 1140 [124 Cal.Rptr.2d 373, 52 P.3d 572].
- Infliction of Fatal Injury. *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Defendant Must Join Felonious Enterprise Before or During Killing of Victim. *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].
- Death Caused by Felony but Not by Act of Force or Violence Against Victim. *People v. Billa, supra,* 31 Cal.4th at p. 1072 [arson causing death of accomplice]; *People v. Stamp*, *supra,* ~~(1969)~~ 2 Cal.App.3d ~~203,~~at pp. 209–211 ~~[82 Cal.Rptr. 598]~~ [heart attack caused by robbery]; *People v. Hernandez*, *supra,* ~~(1985)~~ 169 Cal.App.3d ~~282,~~at p. 287 ~~[215 Cal.Rptr. 166]~~ [same]; but see *People v. Gunnerson*, *supra,* ~~(1977)~~ 74 Cal.App.3d ~~370,~~at pp. 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,* 33 Cal.4th at pp. 197–206.
- Merger Doctrine Does Not Apply to First Degree Felony Murder. *People v. Farley* (2009) 46 Cal.4th 1053, 1118-1120 [96 Cal.Rptr.3d 191, 210 P.3d 361].
- Reckless Indifference to Human Life. *In re Scoggins* (2020) 9 Cal.5th 667, 676–677 [264 Cal.Rptr.3d 804, 467 P.3d 198]; *People v. Clark, supra,* 63 Cal.4th at pp. 614–620; *People v. Banks, supra,* 61 Cal.4th at pp. 807–811; *People v. Estrada, supra,* 11 Cal.4th at p. 578; *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127].
- Major Participant. *People v. Banks, supra,* 61 Cal.4th at pp. 803–808.
- Objective Criminal Negligence Standard for Peace Officer Exception. *People v. Sifuentes* (2022) 83 Cal.App.5th 217, 229–230 [299 Cal.Rptr.3d 320].
- Defendant's Youth Can Be Relevant Factor When Determining Reckless Indifference. *People v. Jimenez* (2024) 103 Cal.App.5th 994, 1001–1008 [323 Cal.Rptr.3d 549]; *People v. Oliver* (2023) 90 Cal.App.5th 466, 485–488 [307 Cal.Rptr.3d 6]; *People v. Jones* (2022) 86 Cal.App.5th 1076, 1091-1093 [302 Cal.Rptr.3d 847] [20-year-old defendant]; *People v. Keel* (2022) 84 Cal.App.5th 546, 558–559 [300 Cal.Rptr.3d 483] [juvenile defendant]; *People v. Mitchell* (2022) 81 Cal.App.5th 575, 591–595 [297 Cal.Rptr.3d 223]; *In re Harper* (2022) 76 Cal.App.5th 450, 466–470 [291 Cal.Rptr.3d 543]; *People v. Ramirez* (2021) 71 Cal.App.5th 970, 987 [286 Cal.Rptr.3d 771] [juvenile

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

RELATED ISSUES

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

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (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

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

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

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

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

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

AND

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

BUT

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

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

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

<*The following definition may be given if requested.*>
[~~A d~~D~~anger~~ is *imminent* if, when the defendant used [deadly] force~~fatal wound occurred~~, the danger actually existed or the defendant actually believed it existed. ~~-~~The danger must seem immediate and present, so that it

must be instantly dealt with. -It may not be merely prospective or in the near future.]

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

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

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

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

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

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

New January 2006; Revised August 2012, February 2015, September 2020, March 2022, September 2022, March 2024, * *February 2025*
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

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

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

Related Instructions

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

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

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

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

AUTHORITY

- Elements. Pen. Code, § 192(a).
- "Imperfect Self-Defense" Defined. *People v. Flannel* (1979) 25 Cal.3d 668, 680–683 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Barton, supra,* 12 Cal.4th at p. 201; *In re Christian S.* (1994) 7 Cal.4th 768, 773 [30 Cal.Rptr.2d 33, 872 P.2d 574]; see *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197–198 [272 Cal.Rptr. 693] [insufficient evidence to support defense of another person].
- Imperfect Defense of Others. *People v. Randle* (2005) 35 Cal.4th 987, 995-1000 [28 Cal.Rptr.3d 725, 111 P.3d 987], overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172 [91 Cal.Rptr.3d 106, 203 P.3d 425].
- Availability of Imperfect Self-Defense. *People v. Enraca* (2012) 53 Cal.4th 735, 761 [137 Cal.Rptr.3d 117, 269 P.3d 543] [not available]; *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179–1180 [39 Cal.Rptr.3d 433] [available].
- Imperfect Self-Defense Does Not Apply When Defendant's Belief in Need for Self-Defense ~~i~~Is Entirely Delusional. *People v. Elmore* (2014) 59 Cal.4th 121, 145 [172 Cal.Rptr.3d 413, 325 P.3d 951].
- This Instruction Upheld. *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1306 [132 Cal.Rptr.3d 248]; *People v. Genovese* (2008) 168 Cal.App.4th 817, 832 [85 Cal.Rptr.3d 664].
- Defendant Relying on Imperfect Self-Defense Must Actually, Although Not Reasonably, Associate Threat With Victim. *People v. Minifie* (1996) 13 Cal.4th 1055, 1069 [56 Cal.Rptr.2d 133, 920 P.2d 1337] [in dicta].

LESSER INCLUDED OFFENSES

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

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

RELATED ISSUES

Intimate Partner Battering and Its Effects

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

Blakeley *Not Retroactive*

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

Inapplicable to Felony Murder

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

Fetus

Manslaughter does not apply to the death of a fetus. (*People v. Carlson* (1974) 37 Cal.App.3d 349, 355 [112 Cal.Rptr. 321].) While the Legislature has included the

killing of a fetus, as well as a human being, within the definition of murder under Penal Code section 187, it has "left untouched the provisions of section 192, defining manslaughter [as] the 'unlawful killing of a human being.' " (37 Cal.App.3d at p. 355~~*Ibid.*~~.)

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

Reasonable Person Standard Not Modified by Evidence of Mental Impairment

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

Reasonable Person Standard and Physical Limitations

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 242–244.

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

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

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

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; repeat the relevant paragraphs for each victim.*>

[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, March 2024, * *February 2025*
** Denotes changes only to bench notes and other commentaries.*

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 when substantial evidence exists that the defendant intended to kill a primary target; the defendant concurrently intended to achieve that goal by killing all others in the fatal zone created by the defendant; and the alleged attempted murder victim was in that zone. (See *People v. Mumin* (2023) 15 Cal.5th 176, 203 [312 Cal.Rptr.3d 255, 534 P.3d 1].) "The use or attempted use of force that merely *endangered* everyone in the area is insufficient to support a kill zone instruction." (*People v. Canizales* (2019) 7 Cal.5th 591, 608 [248 Cal.Rptr.3d 370, 442 P.3d 686], original italics.)

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.)

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].)

If the evidence supports a claim of accident during the course of lawful self-defense, give CALCRIM No. 510, *Excusable Homicide: Accident*, modified for a charge of attempted murder. (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 54

[86 Cal.Rptr.3d 534].) If the evidence supports a claim of accident as to other, nonhomicide charges, give CALCRIM No. 3404, *Accident*.

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. Mumin, supra,* 15 Cal.5th at p. 193; *People v. Canizales, supra,* 7 Cal.5th at pp. 607–608; *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,* 40 Cal.3d at p. 386.)

> 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,* 28 Cal.4th at p. 331.) "[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.*)

SECONDARY SOURCES

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

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

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

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

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

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

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

AND

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

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

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

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

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

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

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

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

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

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

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*New January 2006; Revised April 2008, February 2016, August 2016, September 2019, April 2020, September 2023, February 2025**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

In *People v. Banks, supra,* 61 Cal.4th at pp. 803–808, the court identified certain factors to guide the jury in its determination of whether the defendant was a major participant, but stopped short of holding that the court has a sua sponte duty to instruct on those factors. The trial court should determine whether the *Banks* factors need be given.

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

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

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

AUTHORITY

- Accomplice Intent Requirement, Felony Murder. Pen. Code, § 190.2(d).
- Reckless Indifference to Human Life. *In re Scoggins* (2020) 9 Cal.5th 667, 676–677 [264 Cal.Rptr.3d 804, 467 P.3d 198]; *People v. Clark, supra,* 63 Cal.4th at pp. 614–620; *People v. Banks, supra,* 61 Cal.4th at pp. 807–811; *People v. Estrada, supra,* 11 Cal.4th at p. 578; *Tison v. Arizona, supra,* 481 U.S. at pp. 157–158.

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

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (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).

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

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

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

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

[AND]

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

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

[AND

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

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

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

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

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

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

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

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

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

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

AND

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

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

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

If there is evidence that the traumatic condition resulted from strangulation or suffocation, give the bracketed language about strangulation and suffocation. ~~consider instructing according to the special definition provided in Pen. Code, § 273.5(c).~~

~~The amendment to Penal Code section 273.5(b) adding "someone with whom the offender has, or previously had, an engagement or dating relationship as defined in Penal Code section 243(f)(10)" to the list of potential victims became effective on January 1, 2014.~~

AUTHORITY

- Elements. Pen. Code, § 273.5(a).
- "Traumatic Condition" Defined. Pen. Code, § 273.5(~~d~~e); *People v. Reid* (2024) 105 Cal.App.5th 446, 456–457 [325 Cal.Rptr.3d 820]; *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952 [217 Cal.Rptr. 616].
- "Willful" Defined. Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- "Cohabitant" Defined. *People v. Holifield* (1988) 205 Cal.App.3d 993, 1000 [252 Cal.Rptr. 729]; *People v. Ballard* (1988) 203 Cal.App.3d 311, 318–319 [249 Cal.Rptr. 806].
- Direct Application of Force. *People v. Jackson* (2000) 77 Cal.App.4th 574, 580 [91 Cal.Rptr.2d 805].
- Duty to Define Traumatic Condition. *People v. Burns* (1948) 88 Cal.App.2d 867, 873–874 [200 P.2d 134].
- Strangulation and Suffocation. Pen. Code, § 273.5(d).
- General Intent Crime. See *People v. Thurston* (1999) 71 Cal.App.4th 1050, 1055 [84 Cal.Rptr.2d 221]; *People v. Campbell* (1999) 76 Cal.App.4th 305, 307–309 [90 Cal.Rptr.2d 315]; contra *People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1402 [7 Cal.Rptr.2d 495] [dictum].
- Simultaneous Cohabitation. *People v. Moore*, *supra*, ~~(1996)~~ 44 Cal.App.4th at p.~~1323,~~ 1335 ~~[52 Cal.Rptr.2d 256]~~.
- "Dating Relationship" Defined. Pen. Code, § 243(f)(10).

LESSER INCLUDED OFFENSES

- Attempted Infliction of Corporal Injury~~Punishment~~ on Spouse. Pen. Code, §§ 664, 273.5(a); *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1627, 1628 [47 Cal.Rptr.2d 769] [attempt requires intent to cause traumatic condition, but does not require a resulting "traumatic condition"].
- Misdemeanor Battery. Pen. Code, §§ 242, 243(a); see *People v. Gutierrez*, *supra*, ~~(1985)~~ 171 Cal.App.3d at p.~~944,~~ 952 ~~[217 Cal.Rptr. 616]~~.

- Battery Against Spouse, Cohabitant, or Fellow Parent. Pen. Code, § 243(e)(1); see *People v. Jackson*, *supra*, ~~(2000)~~ 77 Cal.App.4th at p.~~574,~~ 580 ~~[91 Cal.Rptr.2d 805]~~.
- Simple Assault. Pen. Code, §§ 240, 241(a); *People v. Van Os* (1950) 96 Cal.App.2d 204, 206 [214 P.2d 554].

RELATED ISSUES

Continuous Course of Conduct

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

Multiple Acts of Abuse

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

Prospective Parents of Unborn Children

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

Termination of Parental Rights

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 64–67.

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

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

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

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

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

[AND]

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

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

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

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

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

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

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

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

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

Give the bracketed paragraph on indirect touching if relevant~~that is an issue~~.

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

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

AUTHORITY

- Elements. Pen. Code, § 243(e)(1).
- "Willfully" Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Contact With Object Held in Another Person's Hand May Constitute Touching. *In re B.L.* (2015) 239 Cal.App.4th 1491, 1495–1497 [192 Cal.Rptr.3d 154].
- Hitting a Vehicle Occupied by Another Person May Constitute Touching. *People v. Dealba* (2015) 242 Cal.App.4th 1142, 1144, 1153 [195 Cal.Rptr.3d 848].
- "Cohabitant" Defined. Pen. Code, § 13700(b); *People v. Holifield* (1988) 205 Cal.App.3d 993, 1000 [252 Cal.Rptr. 729]; *People v. Ballard* (1988) 203 Cal.App.3d 311, 318–319 [249 Cal.Rptr. 806].
- "Dating Relationship" Defined. Pen. Code, § 243(f)(10).
- Simultaneous Cohabitation. *People v. Moore*, *supra*, ~~(1996)~~ 44 Cal.App.4th at p.~~1323,~~ 1335 ~~[52 Cal.Rptr.2d 256]~~.

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 19.

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

842–849. Reserved for Future Use

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

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

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

<Alternative 1A—force with weapon>

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

[OR]

<Alternative 1B—force without weapon>

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

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

2. The defendant did that act willfully;

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

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

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

[AND]

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

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

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

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

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

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

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

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

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

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

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

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

AND

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

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

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

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

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

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

New January 2006; Revised April 2011, February 2012, February 2013, September 2019, April 2020, September 2020, March 2022, February 2025

BENCH NOTES

Instructional Duty

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

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

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace*

Officer. In addition, give CALCRIM No. 2672, *Lawful Performance: Resisting Unlawful Arrest With Force*, if requested.

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

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

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

Give the bracketed paragraph on indirect touching if relevant.

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

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

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

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

The court may give the bracketed sentence that begins, "The duties of a _____ <*insert title . . . .*> include," on request. The court may insert a description of the officer's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

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

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

AUTHORITY

- Elements. Pen. Code, §§ 240, 245(c) & (d)(1)–(3).
- "Assault Weapon" Defined. Pen. Code, §§ 30510, 30515.
- "Firearm" Defined. Pen. Code, § 16520.
- "Machine Gun" Defined. Pen. Code, § 16880.
- "Semiautomatic Pistol" Defined. Pen. Code, § 17140.
- ".50 BMG Rifle" Defined. Pen. Code, § 30530.
- "Peace Officer" Defined. Pen. Code, § 830 et seq.
- "Firefighter" Defined. Pen. Code, § 245.1.
- "Willful" Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- "Deadly Weapon" Defined. *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- "Inherently Deadly" Defined. *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar, supra,* ~~(1997)~~ 16 Cal.4th at pp.~~1023,~~ 1028–1029 ~~[68 Cal.Rptr.2d 655, 945 P.2d 1204]~~.
- Examples of Noninherently Deadly Weapon. *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez, supra,* ~~(2018)~~ 4 Cal.5th ~~1055,~~at p. 1065 ~~[232 Cal.Rptr.3d 51, 416 P.3d 42]~~ [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

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

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

Dual Convictions Prohibited

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

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

SECONDARY SOURCES

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

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

861. Assault on Firefighter or Peace Officer With Stun Gun or Less Lethal Weapon (Pen. Code, §§ 240, 244.5(c))

The defendant is charged [in Count __] with assault with a (stun gun/ [or] less lethal weapon) on a (firefighter/peace officer) [in violation of Penal Code section 244.5(c)].

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

1. **The defendant did an act with a (stun gun/[or] less lethal weapon) that by its nature would directly and probably result in the application of force to a person;**

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

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

4. **When the defendant acted, (he/she) had the present ability to apply force with a (stun gun/[or] less lethal weapon) to a person;**

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

[AND]

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

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

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

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

[A _____is a less lethal weapon.]

[_____is less lethal ammunition.]

[A *less lethal weapon* is any device that is either designed to or that has been converted to expel or propel less lethal ammunition by any action, mechanism, or process for the purpose of incapacitating, immobilizing, or stunning a human being through the infliction of any less than lethal impairment of physical condition, function, or senses, including physical pain or discomfort. It is not necessary that the weapon leave any lasting or permanent incapacitation, discomfort, pain, or other injury or disability in order to qualify as a *less lethal weapon*.]

[*Less lethal ammunition* is any ammunition that is designed to be used in any less lethal weapon or any other kind of weapon, including, but not limited to, firearms, pistols, revolvers, shotguns, rifles, and spring, compressed air, and compressed gas weapons. When used in a less lethal weapon or other weapon, *less lethal ammunition* is designed to immobilize or incapacitate or stun a human being by inflicting less than lethal impairment of physical condition, function, or senses, including physical pain or discomfort.]

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

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

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

New January 2006; Revised August 2009, April 2011, February 2012, February 2025

BENCH NOTES

Instructional Duty

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

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

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of

the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. In addition, give CALCRIM No. 2672, *Lawful Performance: Resisting Unlawful Arrest With Force*, if requested.

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

The court may give the bracketed sentence that begins, "The duties of a _____ <*insert title . . . .*> include," on request. The court may insert a description of the officer's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

Give the bracketed paragraph on indirect touching if relevant.

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

AUTHORITY

- Elements. Pen. Code, §§ 240, 244.5.
- "Firefighter" Defined. Pen. Code, § 245.1.
- "Peace Officer" Defined. Pen. Code, § 830 et seq.
- "Willful" Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].

- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- "Less Lethal Weapon" Defined. Pen. Code, § 16780.
- "Less Lethal Ammunition" Defined. Pen. Code, § 16770.

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

SECONDARY SOURCES

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

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

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

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

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

<Alternative 1A—force with weapon>

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

<Alternative 1B—force without weapon>

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

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

2. The defendant did that act willfully;

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

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

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

[AND]

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

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

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

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

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

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

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

New January 2006; Revised April 2011, February 2013, September 2019, September 2020, March 2022, February 2025

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

Give the bracketed paragraph on indirect touching if relevant.

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

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

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

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

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

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

AUTHORITY

- Elements. Pen. Code, §§ 240, 245, 245.3.
- "Custodial Officer" Defined. Pen. Code, § 831.
- "Local Detention Facility" Defined. Pen. Code, § 6031.4.
- "Willful" Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- "Deadly Weapon" Defined. *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar, supra,* ~~(1997)~~ 16 Cal.4th at pp.~~1023,~~ 1028–1029 ~~[68 Cal.Rptr.2d 655, 945 P.2d 1204]~~.
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].

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

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

SECONDARY SOURCES

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

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

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

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

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

<Alternative 1A—force with weapon>

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

<Alternative 1B—force without weapon>

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

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

2. The defendant did that act willfully;

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

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

<Alternative 5A—transportation personnel>

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

<Alternative 5B—passenger>

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

[AND]

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

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

[AND

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

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

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

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

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

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

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in

deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[Voluntary intoxication is not a defense to assault.]

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

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

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

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

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

New January 2006; Revised February 2013, September 2019, September 2020, March 2022, February 2025

BENCH NOTES

Instructional Duty

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

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

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

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

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

Give the bracketed paragraph on indirect touching if relevant.

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

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

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

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

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

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

AUTHORITY

- Elements. Pen. Code, §§ 240, 245, 245.2.
- "Willful" Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- "Deadly Weapon" Defined. *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar*, *supra,* ~~(1997)~~ 16 Cal.4th ~~1023,~~at pp. 1028–1029 ~~[68 Cal.Rptr.2d 655, 945 P.2d 1204]~~.
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

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

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

SECONDARY SOURCES

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

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

864–874. Reserved for Future Use

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

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

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

<Alternative 1A—force with weapon>

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

<Alternative 1B—force without weapon>

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

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

2. The defendant did that act willfully;

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

[AND]

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

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

[AND

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

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

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

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

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

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

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

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

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

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

AND

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

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

New January 2006; Revised June 2007, August 2009, October 2010, February 2012, February 2013, August 2013, September 2019, September 2020, March 2022, February 2025

BENCH NOTES

Instructional Duty

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

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

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

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

Give the bracketed paragraph on indirect touching if relevant.

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

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

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

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

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

If the charging document names more than one victim, modification of this instruction may be necessary to clarify that each victim must have been subject to the application of force. (*People v. Velasquez* (2012) 211 Cal.App.4th 1170, 1176–1177 [150 Cal.Rptr.3d 612].)The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46

Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

AUTHORITY

- Elements. Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- To Have Present Ability to Inflict Injury, Gun Must Be Loaded Unless Used as Club or Bludgeon. *People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3 [82 Cal.Rptr.2d 413, 971 P.2d 618].
- This Instruction Affirmed. *People v. Golde* (2008) 163 Cal.App.4th 101, 122–123 [77 Cal.Rptr.3d 120].
- "Assault Weapon" Defined. Pen. Code, §§ 30510, 30515.
- "Semiautomatic Pistol" Defined. Pen. Code, § 17140.
- "Firearm" Defined. Pen. Code, § 16520.
- "Machine Gun" Defined. Pen. Code, § 16880.
- ".50 BMG Rifle" Defined. Pen. Code, § 30530.
- "Willful" Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- "Deadly Weapon" Defined. *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar, supra,* ~~(1997)~~ 16 Cal.4th ~~1023,~~at pp. 1028–1029 ~~[68 Cal.Rptr.2d 655, 945 P.2d 1204]~~.
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- "Inherently Deadly" Defined. *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar, supra,* ~~(1997)~~ 16 Cal.4th ~~1023,~~at pp. 1028–1029 ~~[68 Cal.Rptr.2d 655, 945 P.2d 1204]~~.
- Examples of Noninherently Deadly Weapon. *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez, supra,* ~~(2018)~~ 4 Cal.5th ~~1055,~~at p. 1065 ~~[232 Cal.Rptr.3d 51, 416 P.3d 42]~~ [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.

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

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

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

SECONDARY SOURCES

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

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

876. Assault With Stun Gun or Less Lethal Weapon (Pen. Code, §§ 240, 244.5(b))

The defendant is charged [in Count __] with assault with a (stun gun/[or] less lethal weapon) [in violation of Penal Code section 244.5(b)].

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

1. **The defendant did an act with a (stun gun/[or] less lethal weapon) that by its nature would directly and probably result in the application of force to a person;**

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

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

[AND]

4. **When the defendant acted, (he/she) had the present ability to apply force with a (stun gun/[or] less lethal weapon) to a person(;/.)**

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

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

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

[A *less lethal weapon* is any device that is either designed to or that has been converted to expel or propel less lethal ammunition by any action, mechanism, or process for the purpose of incapacitating, immobilizing, or stunning a human being through the infliction of any less than lethal impairment of physical condition, function, or senses, including physical pain or discomfort. It is not necessary that the weapon leave any lasting

or permanent incapacitation, discomfort, pain, or other injury or disability in order to qualify as a *less lethal weapon*.]

[*Less lethal ammunition* is any ammunition that is designed to be used in any less lethal weapon or any other kind of weapon, including, but not limited to, firearms, pistols, revolvers, shotguns, rifles, and spring, compressed air, and compressed gas weapons. When used in a less lethal weapon or other weapon, *less lethal ammunition* is designed to immobilize or incapacitate or stun a human being by inflicting less than lethal impairment of physical condition, function, or senses, including physical pain or discomfort.]
Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

New January 2006; Revised August 2009, February 2012, February 2025

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 5 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give the bracketed paragraph on indirect touching if relevant.

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

AUTHORITY

- Elements. Pen. Code, §§ 240, 244.5.
- "Willful" Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- "Less Lethal Weapon" Defined. Pen. Code, § 16780.
- "Less Lethal Ammunition" Defined. Pen. Code, § 16770.

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 53.

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

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

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

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

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

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

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

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

[AND]

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

[AND

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

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

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

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

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

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

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

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

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

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

New January 2006; Revised April 2010, October 2010, August 2012, March 2022, February 2025

BENCH NOTES

Instructional Duty

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

The court has a **sua sponte** duty to give a *Mayberry* consent instruction if the defense is supported by substantial evidence and is consistent with the defense raised at trial. (*People v. May* (1989) 213 Cal.App.3d 118, 124–125 [261 Cal.Rptr. 502]; see *People v. Mayberry* (1975) 15 Cal.3d 143 [125 Cal.Rptr. 745, 542 P.2d 1337]; see also CALCRIM No. 1000, *Rape by Force, Fear, or Threats* [alternative paragraph on reasonable and actual belief in consent].)

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

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

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

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

Give the bracketed paragraph on indirect touching if relevant.

Related Instructions

CALCRIM No. 915, *Simple Assault*.

AUTHORITY

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

LESSER INCLUDED OFFENSES

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

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

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

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

Abandonment

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

SECONDARY SOURCES

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

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91,

Sentencing, § 91.60 (Matthew Bender).

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

891. Assault With Intent to Commit Mayhem (Pen. Code, § 220(a))

The defendant is charged [in Count __] with assault with intent to commit mayhem [in violation of Penal Code section 220(a)].

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

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

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

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

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

AND

5. **When the defendant acted, (he/she) intended to commit mayhem**.

The defendant intended to commit mayhem if (he/she) intended to unlawfully and maliciously:

[1. Remove a part of someone's body(;/.)]

[OR]

[2. Disable or make useless a part of someone's body by inflicting a more than slight or temporary disability(;/.)]

[OR]

[3. Permanently disfigure someone(;/.)]

[OR]

[4. Cut or disable someone's tongue(;/.)]

[OR]

[5. Slit someone's (nose[,]/ear[,]/ [or] lip) (;/.)]

[OR]

[6. Put out someone's eye or injure someone's eye in a way that would so significantly reduce (his/her) ability to see that the eye would be useless for the purpose of ordinary sight.]

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

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

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

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

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

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

[A disfiguring injury may be *permanent* even if it can be repaired by medical procedures.]

New January 2006; Revised April 2010, February 2025

BENCH NOTES

Instructional Duty

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

Do not use this instruction if defendant is charged with having committed this crime during the commission of a first degree burglary. Use CALCRIM No. 890, *Assault With Intent to Commit Specified Crimes [While Committing First Degree Burglary]* instead.

Depending on the evidence, select the appropriate elements of mayhem. (See *People v. May* (1989) 213 Cal.App.3d 118, 129 [261 Cal.Rptr. 502] [in context of assault to commit rape].) See generally CALCRIM No. 801, *Mayhem*.

Give the bracketed paragraph on indirect touching if relevant.

The last bracketed sentence may be given on request if there is evidence of a disfiguring injury that may be repaired by medical procedures. (See *People v. Hill* (1994) 23 Cal.App.4th 1566, 1574–1575 [28 Cal.Rptr.2d 783] [not error to instruct that injury may be permanent even though cosmetic repair may be medically feasible].)

Related Instructions

CALCRIM No. 915, *Simple Assault*.

AUTHORITY

- Elements. Pen. Code, § 220.
- Elements for Assault. Pen. Code, § 240; *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Elements for Mayhem. Pen. Code, § 203.
- Court Must Instruct on Elements of Intended Crime. *People v. May*, *supra,* ~~(1989)~~ 213 Cal.App.3d ~~118,~~at p. 129 ~~[261 Cal.Rptr. 502]~~ [in context of assault to commit rape].

LESSER INCLUDED OFFENSES

- Attempted Mayhem. Pen. Code, §§ 663, 203.
- Simple Assault. Pen. Code, § 240; see *People v. Greene* (1973) 34 Cal.App.3d 622, 653 [110 Cal.Rptr. 160] [in context of charged assault with intent to commit rape].

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

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

Abandonment

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

SECONDARY SOURCES

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.11, 142.16 (Matthew Bender).

892–899. Reserved for Future Use

900. Assault on Firefighter, Peace Officer or Other Specified Victim (Pen. Code, §§ 240, 241)

The defendant is charged [in Count __] with assault on a (firefighter/peace officer/_____ <*insert description of other person from Pen. Code, § 241(b/c)*>) [in violation of Penal Code section 241(b/c)].

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

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

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

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

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

5. **When the defendant acted, the person assaulted was lawfully performing (his/her) duties as a (firefighter/peace officer/_____ <*insert description of other person from Pen. Code, § 241(b) or (c)*>);**

[AND]

6. **When the defendant acted, (he/she) knew, or reasonably should have known, that the person assaulted was a (firefighter/peace officer/_____ <*insert description of other person from Pen. Code, § 241(b) or (c)*>) (who was performing (his/her) duties/ providing emergency medical care)(;/.)**

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

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

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

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

New January 2006; Revised April 2008, April 2011, February 2025

BENCH NOTES

Instructional Duty

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

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

Select the option in element six for "providing emergency medical care" if the victim is a physician or nurse engaged in rendering emergency medical care.

Give the bracketed paragraph on indirect touching if relevant.

In order to be "engaged in the performance of his or her duties," a peace officer must be acting lawfully. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) "[D]isputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element." *(Ibid.)* The court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must also instruct that the People have the burden of proving the lawfulness of an arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) Give the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

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

The court may give the bracketed sentence that begins with "The duties of a _____ <*insert title of peace officer specified in Pen. Code, § 830 et seq.*> include" on request. The court may insert a description of the officer's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1222.)

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

AUTHORITY

- Elements. Pen. Code, §§ 240, 241.
- "Firefighter" Defined. Pen. Code, § 245.1.
- "Peace Officer" Defined. Pen. Code, § 830 et seq.
- "Willfully" Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

LESSER INCLUDED OFFENSES

- Simple Assault. Pen. Code, § 240.

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

Resisting Arrest

"[A] person may not use force to resist any arrest, lawful or unlawful, except that he may use reasonable force to defend life and limb against excessive force . . . ." (*People v. Curtis* (1969) 70 Cal.2d 347, 357 [74 Cal.Rptr. 713, 450 P.2d 33].) "[I]f the arrest is ultimately determined factually to be unlawful [but the officer did not use excessive force], the defendant can be validly convicted only of simple assault or battery," not assault or battery of a peace officer. (*Id.* at pp. 355–356.) See CALCRIM No. 2672, *Lawful Performance: Resisting Unlawful Arrest With Force*.

SECONDARY SOURCES

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

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

901. Assault on Custodial Officer (Pen. Code, §§ 240, 241.1)

The defendant is charged [in Count __] with assault on a custodial officer [in violation of Penal Code section 241.1].

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

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

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

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

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

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

[AND]

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

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

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

New January 2006; Revised April 2011, February 2025

BENCH NOTES

Instructional Duty

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

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

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the

court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) If lawful performance is an issue, give the appropriate portions of CALCRIM No. 2671, *Lawful Performance: Custodial Officer*.

Give the bracketed paragraph on indirect touching if relevant.

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

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

AUTHORITY

- Elements. Pen. Code, §§ 240, 241.1.
- "Custodial Officer" Defined. Pen. Code, § 831.
- "Local Detention Facility" Defined. Pen. Code, § 6031.4.
- "Willful" Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

SECONDARY SOURCES

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

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

902. Assault on Military Personnel (Pen. Code, §§ 240, 241.8)

The defendant is charged [in Count __] with assault on a member of the United States Armed Forces [in violation of Penal Code section 241.8].

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

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

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

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

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

5. **The person assaulted was a member of the United States Armed Forces at the time of the assault;**

[AND]

6. **The defendant knew the other person was a member of the United States Armed Forces and assaulted the other person because of that person's service(;/.)**

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

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

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

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

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

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

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

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

A _____ *<insert description, e.g., "private in the United States Army">* **is a *member of the United States Armed Forces.***

A person commits an assault *because of someone's service in the Armed Forces* if:

1. **That person is biased against the assaulted person based on the assaulted person's military service;**

AND

2. **That bias caused the person to commit the alleged assault.**

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

[Voluntary intoxication is not a defense to assault.]

New January 2006; Revised March 2017, February 2025

BENCH NOTES

Instructional Duty

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

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

Give the bracketed paragraph on indirect touching if relevant.

The jury must determine whether the alleged victim is a member of the United States Armed Forces. (See *People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of member of the armed forces. However, the court may not instruct the jury that the alleged victim was a member of the armed forces as a matter of law. *(Ibid.)*

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

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

AUTHORITY

- Elements. Pen. Code, §§ 240, 241.8.
- "Willfully" Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

LESSER INCLUDED OFFENSES

- Simple Assault. Pen. Code, § 240.

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

SECONDARY SOURCES

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

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

903. Assault on School District Peace Officer (Pen. Code, §§ 240, 241.4)

The defendant is charged [in Count __] with assault on a school district peace officer [in violation of Penal Code section 241.4].

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

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

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

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

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

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

[AND]

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

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

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

A *school district peace officer* is a peace officer who is a member of a police department of a school district under Education Code section 38000.

New January 2006; Revised April 2011, February 2025

BENCH NOTES

Instructional Duty

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

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

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of

the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. In addition, give CALCRIM No. 2672, *Lawful Performance: Resisting Unlawful Arrest With Force*, if requested.

Give the bracketed paragraph on indirect touching if relevant.

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

AUTHORITY

- Elements. Pen. Code, §§ 240, 241.4; Educ. Code, § 38000.
- "Willful" Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

COMMENTARY

A school district peace officer is anyone so designated by the superintendent of the school district, but is not vested with general police powers. (See Educ. Code, § 38000(a).) The scope of authority for school district peace officers is set forth in Penal Code section 830.32. (See Educ. Code, § 38001.)

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

SECONDARY SOURCES

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11; Ch. 144, *Crimes Against Order*, § 144.02 (Matthew Bender).

904. Assault on School Employee (Pen. Code, §§ 240, 241.6)

The defendant is charged [in Count __] with assault on a school employee [in violation of Penal Code section 241.6].

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

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

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

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

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

5. **When the defendant acted, (he/she) knew, or reasonably should have known, that the person assaulted was a school employee [and that (he/she) was performing (his/her) duties as a school employee];**

[AND]

6. **(When the defendant acted, the person assaulted was performing (his/her) duties[,]/ [or] (The/the) defendant acted in retaliation for something the school employee had done in the course of (his/her) duties)(;/.)**

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

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

A *school employee* is any person employed as a permanent or probationary certificated or classified employee of a school district on a part-time or full-time basis, including a substitute teacher, student teacher, or school board member.

[It is not a defense that an assault took place off campus or outside of school hours.]

New January 2006; Revised March 2017, February 2025

BENCH NOTES

Instructional Duty

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

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

Give the bracketed paragraph on indirect touching if relevant.

If the sole motivation alleged for the assault is retaliation, **do not** give CALCRIM No. 370, *Motive*, do not give the bracketed clause in element 5, and give only the second option in element 6. (See *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165 [197 Cal.Rptr.3d 317]; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1127 [38 Cal.Rptr.2d 335].)

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

AUTHORITY

- Elements. Pen. Code, §§ 240, 241.6.
- "Willful" Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 21, 23, 80.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11; Ch. 144, *Crimes Against Order*, § 144.02 (Matthew Bender).

905. Assault on Juror (Pen. Code, §§ 240, 241.7)

The defendant is charged [in Count __] with assault on a juror [in violation of Penal Code section 241.7].

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

1. **The defendant was a party to a case for which a jury had been selected;**

2. **The defendant did an act that by its nature would directly and probably result in the application of force to someone who had been sworn as a juror [or alternate juror] to decide that case;**

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

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

[AND]

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

<Give element 6 when instructing on self-defense or defense of another>
[AND

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

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

The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or

her clothing, is enough. The touching does not have to cause pain or injury of any kind.

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

[It is not a defense that an assault was committed after the trial was completed.]

New January 2006; Revised February 2025

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 6 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give the bracketed paragraph on indirect touching if relevant.

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

AUTHORITY

- Elements. Pen. Code, §§ 240, 241.7.

- "Willful" Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

COMMENTARY

Unlike other statutes penalizing assault on a particular person, Penal Code section 241.7 does not state that the defendant must have known that the person assaulted was a juror. Thus, the committee has not included knowledge among the elements.

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 78.

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

906. Assault Committed on School or Park Property (Pen. Code, §§ 240, 241.2)

The defendant is charged [in Count __] with assaulting a person on (school/park) property [in violation of Penal Code section 241.2].

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

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

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

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

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

[AND]

5. **When the defendant acted, (he/she) was on (school/park) property.**

<Give element 6 when instructing on self-defense or defense of another.>
[AND

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

[A *school* is any (elementary school/junior high school/four-year high school/senior high school/adult school [or any branch thereof]/opportunity school/continuation high school/regional occupational center/evening high school/technical school/community college).]

[A *park* is any publicly maintained or operated park. It does not include any facility that is being used for professional sports or commercial events.]

New January 2006; Revised February 2025

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 6 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give the bracketed paragraph on indirect touching if relevant.

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

AUTHORITY

- Elements. Pen. Code, §§ 240, 241.2.
- "Willful" Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 24.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11; Ch. 144, *Crimes Against Order*, § 144.02 (Matthew Bender).

907. Assault Committed on Public Transportation Provider's Property or Vehicle (Pen. Code, §§ 240, 241.3)

The defendant is charged [in Count __] with assaulting a person on a public transportation provider's (property/vehicle) [in violation of Penal Code section 241.3].

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

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

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

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

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

[AND]

5. **When the defendant acted, (he/she) was on (the property of a public transportation provider/a motor vehicle of a public transportation provider)(;/.)**

<Give element 6 when instructing on self-defense or defense of another>
[AND

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

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

The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or

her clothing, is enough. The touching does not have to cause pain or injury of any kind.

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

A *public transportation provider* is a public or private operator of a (bus/taxicab/streetcar/cable car/trackless trolley/school bus/ [or] other motor vehicle) that transports people for (money/hire).

[A *motor vehicle* includes a vehicle that runs on stationary rails or on a track or rail suspended in the air.]

[The property of the transportation provider includes the entire station where public transportation is available and the parking lot reserved for those who use the system.]

New January 2006; Revised February 2025

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 6 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give the bracketed paragraph on indirect touching if relevant.

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

AUTHORITY

- Elements. Pen. Code, §§ 240, 241.3.
- "Willful" Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 6–7 (assault generally).

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

908. Assault Under Color of Authority (Pen. Code, § 149)

The defendant is charged [in Count __] with (assaulting/ [or] beating) a person under color of authority and without lawful necessity [in violation of Penal Code section 149].

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

1. **The defendant was a *public officer*;**

2. **The defendant willfully [and unlawfully] (did an act that by its nature would directly and probably result in the application of force to _____**<*insert name of alleged victim*>**/touched _____**<*insert name of alleged victim*> **in a harmful or offensive manner);**

<*instruct with elements 3 and 4 for assault*>

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

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

(3/5). When the defendant (did the act/touched _____ <*insert name of alleged victim*> **in a harmful or offensive manner), the defendant was performing or purporting to perform (his/her) duties as a *public officer*;**

[AND]

(4/6). When the defendant (did the act/touched _____ <*insert name of alleged victim*>**), (he/she) acted *without lawful necessity*(;/.)**

[AND]

[(5/7). When the defendant (did the act/touched _____ <*insert name of alleged victim*>**), (he/she) did not act in (self-defense/ [or]defense of someone else).]**

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

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

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

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

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

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

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

***Without lawful necessity* means more force than was reasonably necessary under the circumstances.**

***Under color of authority* means clothed in the authority of law or when acting under pretense of law.**

[Special rules control the use of force by a peace officer.]

[A peace officer may use reasonable nondeadly force to arrest or detain someone, to prevent escape, to overcome resistance, or in self-defense.]

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

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

   OR

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

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

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

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

   AND

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

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

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

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

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

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

New September 2022; Revised March 2023, February 2025

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 5/7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

The court may instruct the jury on the appropriate definition of "public officer" from the statute. However, the court may not instruct the jury that the defendant was a public officer as a matter of law.

The court may give the bracketed sentence that begins "The duties of a _____ *<insert title . . . >* include" on request.

Give the bracketed paragraph on indirect touching if relevant.

AUTHORITY

- Elements. Pen. Code, § 149.
- Objectively Reasonable Force to Effect Arrest. Pen. Code, § 835a(b).
- Violation of Statute Does Not Include Detention Without Lawful Authority. *People v. Lewelling* (2017) 16 Cal.App.5th 276, 298 [224 Cal.Rptr.3d 255].
- "Willful" Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Public Officer. See, e.g., Pen. Code, §§ 831(a) [custodial officer], 831.4 [sheriff's or police security officer], 831.5 [custodial officer], 831.6

[transportation officer], 3089 [county parole officer]; *In re Frederick B.* (1987) 192 Cal.App.3d 79, 89–90 [237 Cal.Rptr. 338], disapproved on other grounds in *In re Randy G.* (2001) 26 Cal.4th 556, 567, fn. 2 [110 Cal.Rptr.2d 516, 28 P.3d 239] ["public officers" is broader category than "peace officers"]; *In re Eddie D.* (1991) 235 Cal.App.3d 417, 421–422 [286 Cal.Rptr. 684]; *In re M.M.* (2012) 54 Cal.4th 530, 536–539 [142 Cal.Rptr.3d 869, 278 P.3d 1221]; see also Pen. Code, § 836.5(a) [authority to arrest without warrant].

- Public Officer Includes De Facto Officer. *People v. Cradlebaugh* (1914) 24 Cal.App. 489, 491–492.
- "Peace Officer" Defined. Pen. Code, § 830 et seq.
- Without Lawful Necessity. *People v. Dukes* (1928) 90 Cal.App. 657, 661–662; *People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1140 & fn.20 [142 Cal.Rptr.3d 423]; *People v. Lewelling, supra,* 16 Cal.App.5th at pp. 298–299; *People v. Perry* (2019) 36 Cal.App.5th 444 [248 Cal.Rptr.3d 522].
- Color of Authority. *People v. Plesniarski* (1971) 22 Cal.App.3d 108, 114 [99 Cal.Rptr. 196].

COMMENTARY

Graham Factors

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

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

Sexual Battery

Officer convicted of sexually assaulting an arrestee was properly convicted of both sexual battery and assault under color of authority because the latter offense is not

a necessarily included offense in the former. (See *People v. Alford* (1991) 235 Cal.App.3d 799, 804–805 [286 Cal.Rptr. 762].)

909–914. Reserved for Future Use

915. Simple Assault (Pen. Code, § 240)

The defendant is charged [in Count __] with assault [in violation of Penal Code section 240].

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

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

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

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

[AND]

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

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

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

New January 2006; Revised February 2014, February 2025

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 5 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give the bracketed paragraph on indirect touching if relevant.

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

AUTHORITY

- Elements. Pen. Code, § 240.
- "Willful" Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197]; *People v. Wright* (2002) 100 Cal.App.4th 703, 706 [123 Cal.Rptr.2d 494].

- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- This Instruction Upheld. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1193–1195 [67 Cal.Rptr.3d 871].

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

Transferred Intent

The doctrine of transferred intent does not apply to general intent crimes such as assault. (*People v. Lee* (1994) 28 Cal.App.4th 1724, 1737 [34 Cal.Rptr.2d 723].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 6–12, 16.

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

916. Assault by Conditional Threat

The defendant is charged [in Count __] with assault committed by a conditional threat to use force.

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

1. **The defendant willfully threatened to use force on another person unless that person immediately did an act that the defendant demanded;**

2. **The defendant intended to use force immediately to compel the other person to do the act;**

3. **The defendant had no right to demand that the other person do the act;**

4. **When the defendant made the threat, (he/she) had the present ability to use force on the other person;**

[AND]

5. **The defendant placed (himself/herself) in a position to compel performance of the act (he/she) demanded and took all steps necessary to carry out (his/her) intention(;/.)**

<Give element 6 when instructing on self-defense or defense of another.>
[AND

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

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

[The term *use force* means to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. It is enough if the touching makes contact with the person, including through his or her clothing. The touching need not cause pain or injury of any kind.]

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

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

New January 2006; Revised February 2025

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 6 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give the bracketed paragraph on indirect touching if relevant.

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

AUTHORITY

- Elements. *People v. McMakin* (1857) 8 Cal. 547, 548–549; *People v. McCoy* (1944) 25 Cal.2d 177, 192–193 [153 P.2d 315]; *People v. Lipscomb* (1993) 17 Cal.App.4th 564, 570 [21 Cal.Rptr.2d 445]; see also *People v. Page* (2004) 123 Cal.App.4th 1466, 1473 [20 Cal.Rptr.3d 857].
- Mental State for Assault. *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 45.

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

925. Battery Causing Serious Bodily Injury (Pen. Code, §§ 242, 243(d))

The defendant is charged [in Count __] with battery causing serious bodily injury [in violation of Penal Code section 243(d)].

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

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

[AND]

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

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

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

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

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

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

[_____ <~~I~~*i*nsert description of injury when appropriate; see Bench Notes> **is a serious bodily injury.]**

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

New January 2006; Revised February 2013, February 2025

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3, the bracketed words "and unlawfully" in element 1, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

If there is sufficient evidence of reasonable parental discipline, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3, the bracketed words "and unlawfully" in element 1, and CALCRIM No. 3405, *Parental Right to Punish a Child*.

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

Give the ~~final~~ bracketed paragraph on~~if~~ indirect touching if relevant~~is an issue~~.

AUTHORITY

- Elements. Pen. Code, §§ 242, 243(d); see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- "Serious Bodily Injury" Defined. Pen. Code, § 243(f)(4); *People v. Burroughs* (1984) 35 Cal.3d 824, 831 [201 Cal.Rptr. 319, 678 P.2d 894] [serious bodily injury and great bodily injury are essentially equivalent elements], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675]; *People v. Taylor* (2004) 118 Cal.App.4th 11, 25, fn. 4 [12 Cal.Rptr.3d 693].
- "Willful" Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Defense of Parental Discipline. *People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1051 [12 Cal.Rptr.2d 33].

- Medical Treatment Not an Element. *People v. Wade* (2012) 204 Cal.App.4th 1142, 1148–1150 [139 Cal.Rptr.3d 529].
- Contact With Object Held in Another Person's Hand May Constitute Touching. *In re B.L.* (2015) 239 Cal.App.4th 1491, 1495–1497 [192 Cal.Rptr.3d 154].
- Hitting a Vehicle Occupied by Another Person May Constitute Touching. *People v. Dealba* (2015) 242 Cal.App.4th 1142, 1144, 1153 [195 Cal.Rptr.3d 848].

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Battery. Pen. Code, § 242.

Assault by means of force likely to produce great bodily injury is not a lesser included offense. (Pen. Code, § 245; *In re Jose H.* (2000) 77 Cal.App.4th 1090, 1095 [92 Cal.Rptr.2d 228].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 13–15, 39.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.35 (Matthew Bender).

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

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

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

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

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

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

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

[AND]

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

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

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

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

(4/5). The defendant did not act (in self-defense/ [or] in defense of someone else).]

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

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

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

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

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

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

New January 2006; Revised February 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. This instruction should be used when the alleged victim is not a peace officer. If the alleged victim is a peace officer, use CALCRIM No. 945, *Battery Against Peace Officer*.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 2, the bracketed words "and unlawfully" in element 1, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

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

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

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

Give the ~~final~~ bracketed paragraph on~~if~~ indirect touching if relevant~~is an issue~~.

AUTHORITY

- Elements. Pen. Code, §§ 242, 243(b)–(c)(1); see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- "Willful" Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- "Injury" Defined. Pen. Code, § 243(f)(6); *People v. Longoria* (1995) 34 Cal.App.4th 12, 17 [40 Cal.Rptr.2d 213].
- Contact With Object Held in Another Person's Hand May Constitute Touching. *In re B.L.* (2015) 239 Cal.App.4th 1491, 1495–1497 [192 Cal.Rptr.3d 154].
- Hitting a Vehicle Occupied by Another Person May Constitute Touching. *People v. Dealba* (2015) 242 Cal.App.4th 1142, 1144, 1153 [195 Cal.Rptr.3d 848].

COMMENTARY

People v. Longoria, *supra*, ~~(1995)~~ 34 Cal.App.4th ~~12,~~at p. 17 ~~[40 Cal.Rptr.2d 213]~~, explains the meaning of injury as defined in the statute:

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

sustained an "injury" within the meaning of section 243, subdivision (c). The test is objective and factual.

LESSER INCLUDED OFFENSES

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 13–15, 21–23, 70–74.

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

927–934. Reserved for Future Use

945. Battery Against Peace Officer (Pen. Code, §§ 242, 243(b), (c)(2))

The defendant is charged [in Count __] with battery against a peace officer [in violation of Penal Code section 243].

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

1. _____ *<insert officer's name, excluding title>* **was a peace officer performing the duties of (a/an)** _____ *<insert title of peace officer specified in Pen. Code, § 830 et seq.>***;**

2. **The defendant willfully [and unlawfully] touched** _____ *<insert officer's name, excluding title>* **in a harmful or offensive manner;**

[AND]

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

<Give element 4 when instructing on felony battery against a peace officer.>
[AND

4. _____*<insert officer's name, excluding title>* **suffered injury as a result of the touching(;/.)]**

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

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

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

<Do not give this paragraph when instructing on felony battery against a peace officer.>

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

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

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

[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 Game">* **is a *peace officer* if** _____ *<insert description of facts necessary to make employee a peace officer, e.g, "designated by the director of the agency as a peace officer">*.**]**

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

[It does not matter whether _____ *<insert officer's name, excluding title>* **was actually on duty at the time.]**

[A _____ *<insert title of peace officer specified in Pen. Code, § 830 et seq.>* **is also performing the duties of a peace officer if (he/she) is in a police uniform and performing the duties required of (him/her) as a peace officer and, at the same time, is working in a private capacity as a part-time or casual private security guard or (patrolman/patrolwoman).]**

New January 2006; Revised August 2006, December 2008, October 2010, February 2025

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 5, the bracketed words "and unlawfully" in element 2, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. In addition, give CALCRIM No. 2672, *Lawful Performance: Resisting Unlawful Arrest With Force*, if requested.

Give the bracketed paragraph on indirect touching if relevant~~that is an issue~~.

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

The court may give the bracketed sentence that begins, "The duties of a _____ <*insert title . . .*> include," on request. The court may insert a description of the officer's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

Give the bracketed language about a peace officer working in a private capacity if relevant. (Pen. Code, § 70.)

AUTHORITY

- Elements. Pen. Code, §§ 242, 243(b), (c)(2); see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- "Peace Officer" Defined. Pen. Code, § 830 et seq.
- "Willful" Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- "Physical Injury" Defined. Pen. Code, § 243(f)(5); *People v. Longoria* (1995) 34 Cal.App.4th 12, 17–18 [40 Cal.Rptr.2d 213].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Contact With Object Held in Another Person's Hand May Constitute Touching. *In re B.L.* (2015) 239 Cal.App.4th 1491, 1495–1497 [192 Cal.Rptr.3d 154].
- Hitting a Vehicle Occupied by Another Person May Constitute Touching. *People v. Dealba* (2015) 242 Cal.App.4th 1142, 1144, 1153 [195 Cal.Rptr.3d 848].

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

See the Related Issues sections to CALCRIM No. 960, *Simple Battery* and 2670, *Lawful Performance: Peace Officer*.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 5.

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

946. Battery Against Custodial Officer (Pen. Code, §§ 242, 243.1)

The defendant is charged [in Count __] with battery against a custodial officer [in violation of Penal Code section 243.1].

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

1. **_____** *<insert officer's name, excluding title>* **was a custodial officer performing the duties of a custodial officer;**

2. **The defendant willfully [and unlawfully] touched _____** *<insert officer's name, excluding title>* **in a harmful or offensive manner;**

[AND]

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

<Give element 4 when instructing on self-defense or defense of another.>
[AND

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

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

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

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

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

New January 2006; Revised April 2011, August 2016, February 2025

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 4, the bracketed words "and unlawfully" in element 2, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

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

Give the bracketed paragraph on indirect touching if relevant~~that is an issue~~.

The jury must determine whether the alleged victim is a custodial officer. (See *People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135] [discussing definition of "peace officer"].) The court may instruct the jury on the appropriate definition of "custodial officer" from the statute. *(Ibid.)* However, the court may not instruct the jury that the alleged victim was a custodial officer as a matter of. *(Ibid.)*

If there is a dispute about whether the site of an alleged crime is a local detention facility, see Penal Code section 6031.4.

AUTHORITY

- Elements. Pen. Code, §§ 242, 243.1; see *In re Rochelle B.* (1996) 49 Cal.App.4th 1212, 1221 [57 Cal.Rptr.2d 851] [section 243.1 applies only to batteries committed against custodial officers in adult penal institutions];

People v. Martinez (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].

- "Custodial Officer" Defined. Pen. Code, § 831.
- "Local Detention Facility" Defined. Pen. Code, § 6031.4.
- "Willful" Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Contact With Object Held in Another Person's Hand May Constitute Touching. *In re B.L.* (2015) 239 Cal.App.4th 1491, 1495–1497 [192 Cal.Rptr.3d 154].
- Hitting a Vehicle Occupied by Another Person May Constitute Touching. *People v. Dealba* (2015) 242 Cal.App.4th 1142, 1144, 1153 [195 Cal.Rptr.3d 848].
- Statute Constitutional. *People v. Wilkinson* (2004) 33 Cal.4th 821, 840–841 [16 Cal.Rptr.3d 420, 94 P.3d 551].

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Battery on Person Not Confined. Pen. Code, § 243.15.

RELATED ISSUES

See the Related Issues sections to CALCRIM No. 960, *Simple Battery* and CALCRIM No. 2671, *Lawful Performance: Custodial Officer*.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 13–15, 72–74.

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

947. Simple Battery Against~~on~~ Military Personnel (Pen. Code, §§ 242, 243.10)

The defendant is charged [in Count __] with battery against a member of the United States Armed Forces [in violation of Penal Code section 243.10].

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

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

2. _____ *<insert name of complaining witness>* **was a member of the United States Armed Forces at the time of the touching;**

[AND]

3. **The defendant knew** _____ *<insert name of complaining witness>* **was a member of the United States Armed Forces and touched** _____ *<insert name of complaining witness>* **in a harmful or offensive manner because of** _____ *<insert name of complaining witness>***'s service(;/.)**

<Give element 4 when instructing on self-defense or defense of another.>
[AND

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

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

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

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

A _____ *<insert description, e.g., "private in the United States Army">* **is a member of the United States Armed Forces.**

A person commits a battery *because of* someone's service in the armed forces if:

1. **He or she is biased against the person battered based on that person's military service;**

AND

2. **That bias caused him or her to commit the alleged battery.**

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

New January 2006; Revised March 2017, February 2025

BENCH NOTES

Instructional Duty

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

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

Give the bracketed paragraph on indirect touching if relevant~~that is an issue~~.

The jury must determine whether the alleged victim is a member of the armed forces. (See *People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "member of the armed forces." However, the court may not instruct the jury that the alleged victim was a member of the armed forces as a matter of law. *(Ibid.)*

Do not give CALCRIM No. 370, *Motive*, with this instruction because motive is an element of this crime. (See *People v. Valenti* (2016) 243 Cal.App.4th 1140,

1165 [197 Cal.Rptr.3d 317]; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1127 [38 Cal.Rptr.2d 335].)

AUTHORITY

- Elements. Pen. Code, §§ 242, 243.10.
- "Willfully" Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Contact With Object Held in Another Person's Hand May Constitute Touching. *In re B.L.* (2015) 239 Cal.App.4th 1491, 1495–1497 [192 Cal.Rptr.3d 154].
- Hitting a Vehicle Occupied by Another Person May Constitute Touching. *People v. Dealba* (2015) 242 Cal.App.4th 1142, 1144, 1153 [195 Cal.Rptr.3d 848].

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 19.

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

948. Battery Against Transportation Personnel or Passenger (Pen. Code, §§ 242, 243.3)

The defendant is charged [in Count __] with battery against (a/an) (operator/driver/passenger/station agent/ticket agent) of (a/an) _____ *<insert name of vehicle or transportation entity specified in Pen. Code, § 243.3>* **[in violation of Penal Code section 243.3].**

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

1. _____ *<insert name>* **was (a/an) (operator/driver/station agent/ticket agent/passenger) of (a/an) _____** *<insert name of vehicle or transportation entity specified in Pen. Code, § 243.3>***;**

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

<Give element 3 when alleged victim is an operator, driver, station agent, or ticket agent>

[3. When the defendant acted, _____ *<insert name>* **was performing (his/her) duties as (a/an) (operator/driver/station agent/ticket agent) of (a/an) _____** *<insert name of vehicle or transportation entity specified in Pen. Code, § 243.3>***;]**

[AND]

4. **When the defendant acted, (he/she) knew, or reasonably should have known, that _____** *<insert name>* **was (a/an) (operator/driver/station agent/ticket agent/passenger) of (a/an) _____** *<insert name of vehicle or transportation entity specified in Pen. Code, § 243.3>* **[and that _____** *<insert name>* **was performing (his/her) duties](;/)**

<Give element 5 when the defendant is charged with felony battery based on injury.>

[AND]

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

<Give element 6 when instructing on self-defense or defense of another.>
[AND

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

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

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

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

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

New January 2006; Revised February 2025

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 6, the bracketed words "and unlawfully" in element 2, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

If the alleged victim was an operator, driver, station agent, or ticket agent of a statutorily specified vehicle or transportation entity, give bracketed element 3 and the bracketed language in element 4. If the alleged victim was a passenger, omit bracketed element 3 and the bracketed language in element 4.

Give bracketed element 5 and the bracketed definition of "injury" if the defendant is charged with felony battery based on an injury to the alleged victim. (See Pen. Code, § 243.3.)

Give the ~~final~~ bracketed paragraph on ~~if~~ indirect touching if~~is~~ relevant ~~an issue~~.

AUTHORITY

- Elements. Pen. Code, §§ 242, 243.3; see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- "Injury" Defined. Pen. Code, § 243(f)(6); *People v. Longoria* (1995) 34 Cal.App.4th 12, 17 [40 Cal.Rptr.2d 213].
- "Willful" Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Contact With Object Held in Another Person's Hand May Constitute Touching. *In re B.L.* (2015) 239 Cal.App.4th 1491, 1495–1497 [192 Cal.Rptr.3d 154].
- Hitting a Vehicle Occupied by Another Person May Constitute Touching. *People v. Dealba* (2015) 242 Cal.App.4th 1142, 1144, 1153 [195 Cal.Rptr.3d 848].

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Battery. Pen. Code, § 242.

If the defendant is charged with felony battery on transportation personnel or passenger based on an injury to the alleged victim, then the misdemeanor battery on the specified victim is a lesser included offense. (See Pen. Code, § 243.3.)

RELATED ISSUES

See the Related Issues sections to CALCRIM No. 960, *Simple Battery*.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 13–15, 21, 23, 79.

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

949. Battery Against School Employee [in violation of Penal Code section 243.3]

The defendant is charged [in Count __] with battery against a school employee [in violation of Penal Code section 243.6].

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

1. **_____** *<Insert name>* **was a school employee;**

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

<Alternative 3A—performing duties>
[3. When the defendant acted, _____*<insert name>* **was performing (his/her) duties as a school employee;]**

<Alternative 3B—retaliation>
[3. When the defendant acted, (he/she) was retaliating against _____ *<insert name>* **because of something _____** *<insert name>* **had done while performing (his/her) duties as a school employee;]**

[AND]

4. **When the defendant acted, (he/she) knew, or reasonably should have known, that _____** *<insert name>* **was a school employee(;/.)**

<Give element 5 when the defendant is charged with felony battery based on injury.>
[AND]

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

<Give element 6 when instructing on self-defense or defense of another.>
[AND

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

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

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

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

[It is not a defense that the touching occurred off campus or outside regular school hours.]

A *school employee* is any person employed as a permanent or probationary certificated or classified employee of a school district on a part-time or full-time basis, including a substitute teacher, student teacher, or school board member.

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

New January 2006; Revised February 2025

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 6, the bracketed words "and unlawfully" in element 2, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give alternative 3A or 3B, depending on whether there is evidence that the defendant used force while the employee was performing job duties or used force in retaliation for something the employee previously did while performing job duties. (See Pen. Code, § 243.6.)

Give element 5 and the bracketed definition of "injury" if the defendant is charged with a felony based on an injury to the alleged victim. (See Pen. Code, § 243.6.)

Give the bracketed paragraph on ~~touching if~~ indirect touching if relevant~~is an issue~~.

AUTHORITY

- Elements. Pen. Code, §§ 242, 243.6; *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- "Injury" Defined. Pen. Code, § 243(f)(6); *People v. Longoria* (1995) 34 Cal.App.4th 12, 17 [40 Cal.Rptr.2d 213].
- "School Employee" Defined. Pen. Code, § 245.5(d).
- "Willful" Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Contact With Object Held in Another Person's Hand May Constitute Touching. *In re B.L.* (2015) 239 Cal.App.4th 1491, 1495–1497 [192 Cal.Rptr.3d 154].
- Hitting a Vehicle Occupied by Another Person May Constitute Touching. *People v. Dealba* (2015) 242 Cal.App.4th 1142, 1144, 1153 [195 Cal.Rptr.3d 848].

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Battery. Pen. Code, § 242.

If the defendant is charged with felony battery on a school employee based on an injury to the alleged victim, then the misdemeanor battery on the specified victim is a lesser included offense. (See Pen. Code, § 243.6.)

RELATED ISSUES

See the Related Issues sections to CALCRIM No. 960, *Simple Battery*.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 13–15, 80.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.12; Ch. 144, *Crimes Against Order*, § 144.02 (Matthew Bender).

950. Battery Against a Juror (Pen. Code, §§ 242, 243.7)

The defendant is charged [in Count __] with battery against a juror [in violation of Penal Code section 243.7].

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

1. **The defendant was a party to a case for which a jury had been selected;**

2. **_____** *<insert name>* **had been sworn as a juror [or alternate juror] to decide that case;**

[AND]

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

<Give element 4 when instructing on self-defense or defense of another>
[AND

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

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

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

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

[The touching may have taken place either while the case was pending or after it was concluded.]

New January 2006; Revised February 2025

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 4, the bracketed words "and unlawfully" in element 3, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give the ~~final~~ bracketed paragraph on ~~touching if~~ indirect touching if relevant~~is an issue~~.

AUTHORITY

- Elements. Pen. Code, §§ 242, 243.7; see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- "Willful" Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Contact With Object Held in Another Person's Hand May Constitute Touching. *In re B.L.* (2015) 239 Cal.App.4th 1491, 1495–1497 [192 Cal.Rptr.3d 154].
- Hitting a Vehicle Occupied by Another Person May Constitute Touching. *People v. Dealba* (2015) 242 Cal.App.4th 1142, 1144, 1153 [195 Cal.Rptr.3d 848].

LESSER INCLUDED OFFENSES

- Assault. Pen. Code, § 240.
- Battery. Pen. Code, § 242.

COMMENTARY

Unlike other statutes penalizing battery on a particular person, Penal Code section 243.7 does not state that the defendant must have known that the person assaulted was a juror. Thus, the committee has not included knowledge among the elements.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 13–15, 78.

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

951. Battery Committed on School, Park, or Hospital Property (Pen. Code, §§ 242, 243.2)

The defendant is charged [in Count __] with battery against a person on (school property/park property/hospital grounds) [in violation of Penal Code section 243.2].

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

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

[AND]

2. **When the defendant acted, (he/she) was on (school property/park property/the grounds of a hospital)(;/.)**

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

3. **The defendant did not act (in self-defense[,]/ [or] in defense of someone else[,]/ [or] while reasonably disciplining a child).]**

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

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

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

[A *school* is any (elementary school/junior high school/four-year high school/senior high school/adult school [or any branch thereof]/opportunity

school/continuation high school/regional occupational center/evening high school/technical school/community college).]

[A *park* is any publicly maintained or operated park. It does not include any facility that is being used for professional sports or commercial events.]

[A *hospital* is any facility for the diagnosis, care, and treatment of human illness that is (licensed/specifically exempt from licensing) under state law.]

New January 2006; Revised February 2025

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3, the bracketed words "and unlawfully" in element 1, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give the bracketed paragraph on indirect touching if relevant~~that is an issue~~. Give any of the bracketed definitions on request depending on the facts in the case.

Related Instructions

CALCRIM No. 960, *Simple Battery*.

CALCRIM No. 906, *Assault Committed on School or Park Property*.

AUTHORITY

- Elements. Pen. Code, §§ 240, 243.2.
- "Willful" Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Contact With Object Held in Another Person's Hand May Constitute Touching. *In re B.L.* (2015) 239 Cal.App.4th 1491, 1495–1497 [192 Cal.Rptr.3d 154].

- Hitting a Vehicle Occupied by Another Person May Constitute Touching. *People v. Dealba* (2015) 242 Cal.App.4th 1142, 1144, 1153 [195 Cal.Rptr.3d 848].

RELATED ISSUES

~~***Touching of Something Attached to or Closely Connected with Person***~~

~~The committee could not locate any authority on whether it is sufficient to commit a battery if the defendant touches something attached to or closely connected with the person. Thus, the committee has not included this principle in the instruction.~~

Labor Dispute

Penal Code section 243.2 does not apply to conduct arising during the course of an otherwise lawful labor dispute. (Pen. Code, § 243.2(c).)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 24–25.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.02 (Matthew Bender).

952–959. Reserved for Future Use

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

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

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

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

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

~~[AND]~~

~~*<Section 207(e)>*~~

~~[~~3. When ~~T~~the defendant moved the (child/person with a mental impairment), the defendant had ~~with~~ an illegal intent or ~~for~~ an illegal purpose~~(;/.)]~~

~~[AND]~~

~~*<Alternative 4A—alleged victim under 14 years.>*~~

~~[4. The child was under 14 years old at the time of the movement(;/.)]~~

~~*<Alternative 4B—alleged victim has mental impairment.>*~~

~~[(3/~~4~~).~~ _____ <~~I~~*insert name of alleged victim~~complaining witness~~>* **was a (child/person with~~suffered from~~ a mental impairment) who was~~that made (him/her)~~ incapable of giving legal consent to the movement~~;/.~~]**

AND

5. **The defendant knew or reasonably should have known that _____ <*insert name of alleged victim*> was a (child/person with a mental impairment) who was incapable of giving legal consent to the movement.**

[A *mental impairment* includes impairment due to intoxication.]

The amount of force required to move an unresisting (child/person with a mental impairment) who is incapable of giving legal consent is the amount of physical force sufficient to take and carry that (child/person) a substantial distance.

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

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

Sentencing factor for child under 14 years old (Pen. Code, § 208(b)).>
[If you find the defendant guilty of kidnapping *<insert name of alleged victim>***, you must then decide whether** *<insert name of alleged victim>* **was under 14 years old at the time of the kidnapping.]**

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

New January 2006; Revised April 2008, April 2020, September 2020, October 2021, March 2022, March 2024, February 2025*
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

~~Give alternative 4A if~~If the defendant is charged with the enhancement of kidnapping a person under 14 years of age~~.~~ (Pen. Code, § 208(b) and there is evidence that the defendant is ~~.) Do not use this bracketed language if~~ a biological parent, a natural father, an adoptive parent, or someone with access to the child by a court order ~~takes the child~~, the court may need to instruct on that issue. ~~(*Ibid.*)~~
~~Give alternative 4B if the alleged victim has a mental impairment.~~

In the paragraph defining "substantial distance," give the bracketed sentence listing factors that the jury may consider, when evidence permits, in evaluating the totality of the circumstances. (*People v. Martinez* (1999) 20 Cal.4th 225, 237 [83 Cal.Rptr.2d 533, 973 P.2d 512], overruled on other grounds in *People v. Fontenot* (2019) 8 Cal.5th 57, 70 [251 Cal.Rptr.3d 341, 447 P.3d 252].) ~~However, in the case of simple kidnapping, if the movement was for a substantial distance, the jury does not need to consider any other factors. (*People v. Martinez, supra*, 20 Cal.4th at p. 237; see *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058].)~~

Give this instruction when the defendant is charged under Penal Code section 207(a) with using force to kidnap an unresisting infant or child, or person with a mental impairment, who was incapable of consenting to the movement. (See, e.g., *In re Michele D.* (2002) 29 Cal.4th 600, 610 [128 Cal.Rptr.2d 92, 59 P.3d 164]; see also 2003 Amendments to Pen. Code, § 207(e) [codifying holding of *In re Michele D.*].) Give CALCRIM No. 1200, *Kidnapping: For Child Molestation*, when the defendant is charged under Penal Code section 207(b) with kidnapping a child without the use of force for the purpose of committing a lewd or lascivious act.

Give the final bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

There is no sua sponte duty to define "illegal intent" or "illegal purpose." (*People v. Singh* (2019) 42 Cal.App.5th 175, 181–183 [254 Cal.Rptr.3d 871].)

Related Instructions

A defendant may be prosecuted for both the crimes of child abduction and kidnapping. Child abduction or stealing is a crime against the parents, while kidnapping is a crime against the child. (*In re Michele D.*, *supra*, ~~(2002)~~ 29 Cal.4th ~~600,~~at p. 614 ~~[128 Cal.Rptr.2d 92, 59 P.3d 164]~~; *People v. Campos* (1982) 131 Cal.App.3d 894, 899 [182 Cal.Rptr. 698].) See CALCRIM No. 1250, *Child Abduction: No Right to Custody*.

For instructions relating to defenses to kidnapping, see CALCRIM No. 1225, *Defense to Kidnapping: Protecting Child From Imminent Harm.*

AUTHORITY

- Elements. Pen. Code, § 207(a), (e).
- Punishment If Victim Under 14 Years of Age. Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206] [ignorance of victim's age not defense].

- Asportation Requirement. See *People v. Martinez*, *supra,* ~~(1999)~~ 20 Cal.4th ~~225,~~at pp. 235–237 ~~[83 Cal.Rptr.2d 533, 973 P.2d 512]~~ [adopting modified two-pronged asportation test from *People v. Rayford* (1994) 9 Cal.4th 1, 12–14 [36 Cal.Rptr.2d 317, 884 P.2d 1369] and *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225]].
- Force Required to Kidnap Unresisting Infant or Child. *In re Michele D.*, *supra,* ~~(2002)~~ 29 Cal.4th ~~600,~~at p. 610 ~~[128 Cal.Rptr.2d 92, 59 P.3d 164]~~; Pen. Code, § 207(e).
- Force Required to Kidnap Adult Incapable of~~Unable to~~ Giving Legal Consent Due to Intoxication or Other Mental Condition. *People v. Lewis* (2023) 14 Cal.5th 876, 899 [309 Cal.Rptr.3d 699, 530 P.3d 1107].
- Movement Must Be for Illegal Purpose or Intent if Victim Incapable of Giving Legal Consent. *In re Michele D.*, *supra,* ~~(2002)~~ 29 Cal.4th ~~600,~~at pp. 610–611 ~~[128 Cal.Rptr.2d 92, 59 P.3d 164]~~; *People v. Oliver* (1961) 55 Cal.2d 761, 768 [12 Cal.Rptr. 865, 361 P.2d 593]; but see *People v. Hartland* (2020) 54 Cal.App.5th 71, 80 [268 Cal.Rptr.3d 1] [an illegal purpose or intent is not required for an intoxicated and resisting adult victim].
- Substantial Distance Requirement. *People v. Daniels* (1993) 18 Cal.App.4th 1046, 1053 [22 Cal.Rptr.2d 877]; *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058] [since movement must be more than slight or trivial, it must be substantial in character].
- Deceit Alone Does Not Substitute for Force. *People v. Nieto* (2021) 62 Cal.App.5th 188, 195 [276 Cal.Rptr.3d 379].

COMMENTARY

Penal Code section 207(a) uses the term "steals" in defining kidnapping not in the sense of a theft, but in the sense of taking away or forcible carrying away. (*People v. McCullough* (1979) 100 Cal.App.3d 169, 176 [160 Cal.Rptr. 831].) The instruction uses "take and carry away" as the more inclusive terms, but the statutory terms "steal," "hold," "detain" and "arrest" may be used if any of these more closely matches the evidence.

LESSER INCLUDED OFFENSES

Attempted kidnapping is not a lesser included offense of simple kidnapping under subdivision (a) of section 207, but the jury may be instructed on attempted kidnapping if supported by the evidence. (*People v. Fontenot* (2019) 8 Cal.5th 57, 65–71 [251 Cal.Rptr.3d 341, 447 P.3d 252] [discussing Pen. Code, § 1159].)

RELATED ISSUES

Victim Must Be Alive

A victim must be alive when kidnapped. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 498 [117 Cal.Rptr.2d 45, 40 P.3d 754].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 286–289.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.38[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person* § 142.14[1], [2][a] (Matthew Bender).

1500. Aggravated Arson (Pen. Code, § 451.5)

If you find the defendant guilty of arson [as charged in Count[s] __], you must then decide whether[, for each crime of arson,] the People have proved the additional allegation that the arson was aggravated. [You must decide whether the People have proved this allegation for each crime of arson and return a separate finding for each crime of arson.]

To prove this allegation, the People must prove that:

1. **The defendant acted willfully, maliciously, deliberately, and with premeditation;**

2. **The defendant acted with intent to injure one or more persons, or to damage property under circumstances likely to injure one or more persons, or to damage one or more structures or inhabited dwellings(;/.)**

AND

<Alternative 3A—prior arson conviction(s) within 10 years>

[3A. The defendant was convicted of arson on _____ *<insert date of conviction>*. *<Repeat for each prior conviction alleged>*.]

[OR]

<Alternative 3B—loss exceeding $10.1 million>

[3B. The fire caused property damage and other losses exceeding $10.1 million not including damage to, or destruction of, inhabited dwellings[, including the cost of fire suppression].]

[OR]

<Alternative 3C—destroyed five or more inhabited structures>

[3C. The fire damaged or destroyed five or more inhabited dwellings.]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

As used here, ~~S~~someone acts *maliciously* when he or she intentionally does a wrongful act under circumstances that the direct, natural, and highly probable consequences would be the burning of the (structure/ [or] property) or when he or she acts with the unlawful intent to disturb, defraud, annoy, or injure someone else.

The defendant acted *deliberately* if (he/she) carefully weighed the considerations for and against (his/her) choice and, knowing the consequences, decided to commit the arson. The defendant acted with *premeditation* if (he/she) decided to commit the arson before committing the act that caused the arson.

[The length of time the person spends considering whether to commit arson does not alone determine whether the arson is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to commit arson made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated. On the other hand, a cold, calculated decision to commit arson can be reached quickly. The test is the extent of the reflection, not the length of time.]

[A (dwelling/ [or] structure) is *inhabited* if someone lives there and either is present or has left but intends to return.]

[A (dwelling/ [or] structure) is *inhabited* if someone used it as a dwelling and left only because a natural or other disaster caused him or her to leave.]

[A (dwelling/ [or] structure) is not *inhabited* if the former residents have moved out and do not intend to return, even if some personal property remains inside.]

[A *dwelling* includes any (structure/garage/office/_____) that is attached to the house and functionally connected with it.]

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised August 2015, April 2020, March 2024, February 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the sentencing factor if the defendant is charged with aggravated arson.

If the prosecution alleges that the defendant was previously convicted of arson within ten years of the current offense, give alternative A in element 3. If the prosecution alleges that the fire caused more than 10.1 million dollars in damage exclusive of damage to, or destruction of, inhabited dwellings, give alternative B in element 3. If the prosecution alleges that the fire damaged five or more inhabited dwellings, give alternative C in element 3.

The definitions of "deliberation" and "premeditation" and the bracketed paragraph that begins with "The length of time" are derived from the first degree murder instruction because no recorded case construes their meaning in the context of Penal Code section 451.5. (See CALCRIM No. 521, *Murder: Degrees*.)

Give the bracketed definitions of inhabited dwelling or structure if relevant.

If there is an issue as to whether the fire *caused* the property damage, give CALCRIM No. 240, *Causation*.

AUTHORITY

- Enhancement. Pen. Code, § 451.5.
- "Inhabited~~dation~~" Defined. Pen. Code, § 45~~9~~0(d).
- "Structure" Defined. Pen. Code, § 450(a).
- "Maliciously" Defined. Pen. Code, § 450(e); *People v. Atkins* (2001) 25 Cal.4th 76, 88 [104 Cal.Rptr.2d 738, 18 P.3d 660]; *In re V.V.* (2011) 51 Cal.4th 1020, 1031, fn. 6 [125 Cal.Rptr.3d 421, 252 P.3d 979].
- House Not Inhabited Means Former Residents Not Returning. *People v. Cardona* (1983) 142 Cal.App.3d 481, 483 [191 Cal.Rptr. 109].

LESSER INCLUDED OFFENSES

Arson under section 451 is not a lesser included offense of aggravated arson. (*People v. Shiga* (2019) 34 Cal.App.5th 466, 483 [246 Cal.Rptr.3d 198].)

RELATED ISSUES

See the Related Issues section to CALCRIM No. 1515, *Arson*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property §§ 268–273.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

1501. Arson: Great Bodily Injury (Pen. Code, § 451)

The defendant is charged [in Count __] with arson that caused great bodily injury [in violation of Penal Code section 451].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant set fire to or burned [or (counseled[,]/ [or] helped[,]/ [or] caused) the burning of] (a structure/forest land/property);**

2. **(He/She) acted willfully and maliciously;**

AND

3. **The fire caused great bodily injury to another person.**

To *set fire to or burn* means to damage or destroy with fire either all or part of something, no matter how small the part.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

As used here, ~~S~~someone acts *maliciously* when he or she intentionally does a wrongful act under circumstances that the direct, natural, and highly probable consequences would be the burning of the (structure/ [or] property) or when he or she acts with the unlawful intent to defraud, annoy, or injure someone else.

***Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

[A *structure* is any (building/bridge/tunnel/power plant/commercial or public tent).]

[*Forest land* means brush-covered land, cut-over land, forest, grasslands, or woods.]

[*Property* means personal property or land other than forest land.]

[A person does not commit arson if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire

also injures someone else or someone else's structure, forest land, or property.]

New January 2006; Revised February 2013, March 2020, September 2020, February 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

Related Instructions

If attempted arson is charged, do not instruct generally on attempts but give CALCRIM No. 1520, *Attempted Arson*. (Pen. Code, § 455.)

AUTHORITY

- Elements. Pen. Code, § 451.
- Great Bodily Injury. Pen. Code, § 12022.7(f).
- "Structure," and "Forest Land," ~~and Maliciously~~ Defined. Pen. Code, § 450.
- "Maliciously" Defined. Pen. Code, § 450(e); *People v. Atkins* (2001) 25 Cal.4th 76, 88 [104 Cal.Rptr.2d 738, 18 P.3d 660]; *In re V.V.* (2011) 51 Cal.4th 1020, 1031, fn. 6 [125 Cal.Rptr.3d 421, 252 P.3d 979].
- "To Burn" Defined. *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–167 [270 Cal.Rptr. 389].

LESSER INCLUDED OFFENSES

- Arson. Pen. Code, § 451.
- Attempted Arson. Pen. Code, § 455.
- Unlawfully Causing a Fire. *People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [226 Cal.Rptr. 810], disapproved of in *People v. Barton* (1995) 12 Cal.4th 186 [47 Cal.Rptr.2d 569, 906 P.2d 531] on its holding that failure to

instruct on this crime as a lesser included offense of arson was invited error because defense counsel objected to such instruction; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324 [3 Cal.Rptr.2d 816].

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1515, *Arson*.

Dual Convictions Prohibited

A single act of arson cannot result in convictions under different subdivisions of Penal Code section 451. (*People v. Shiga* (2019) 34 Cal.App.5th 466, 475 [246 Cal.Rptr.3d 198].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 268–276.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.47[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

1502. Arson: Inhabited Structure or Property (Pen. Code, § 451(b))

The defendant is charged [in Count __] with arson that burned an (inhabited structure /[or] inhabited property) [in violation of Penal Code section 451(b)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant set fire to or burned [or (counseled[,]/ [or] helped[,]/ [or] caused) the burning of] (a structure/[or] property);**

2. **(He/She) acted willfully and maliciously;**

AND

3. **The fire burned an (inhabited structure /[or] inhabited property).**

To *set fire to or burn* means to damage or destroy with fire either all or part of something, no matter how small the part.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

As used here, ~~S~~someone acts *maliciously* when he or she intentionally does a wrongful act under circumstances that the direct, natural, and highly probable consequences would be the burning of the (structure/ [or] property) or when he or she acts with the unlawful intent to defraud, annoy, or injure someone else.

A *structure* is any (building/bridge/tunnel/power plant/commercial or public tent.)

A (structure /[or] property) is *inhabited* if someone uses it as a dwelling, whether or not someone is inside at the time of the fire. An (inhabited structure /[or] inhabited property) does not include the land on which it is located.

[*Property* means personal property or land other than forest land.]

New January 2006; Revised February 2013, August 2016, March 2017, September 2019, April 2020, February 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Related Instructions

If attempted arson is charged, do not instruct generally on attempts but give CALCRIM No. 1520, *Attempted Arson*. (Pen. Code, § 455.)

AUTHORITY

- Elements. Pen. Code, § 451(b).
- "Inhabited" Defined. Pen. Code, § 450(d); *People v. Jones* (1988) 199 Cal.App.3d 543 [245 Cal.Rptr. 85].
- Inhabitant Must Be Alive at Time of Arson. *People v. Vang* (2016) 1 Cal.App.5th 377, 382–387 [204 Cal.Rptr.3d 455].
- "Structure" ~~and Maliciously~~ Defined. Pen. Code, § 450(a).
- "Maliciously" Defined. Pen. Code, § 450(e); *People v. Atkins* (2001) 25 Cal.4th 76, 88 [104 Cal.Rptr.2d 738, 18 P.3d 660]; *In re V.V.* (2011) 51 Cal.4th 1020, 1031, fn. 6 [125 Cal.Rptr.3d 421, 252 P.3d 979].
- "To Burn" Defined. *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–167 [270 Cal.Rptr. 389].

LESSER INCLUDED OFFENSES

- Arson. Pen. Code, § 451.
- Attempted Arson. Pen. Code, § 455.
- Unlawfully Causing a Fire. *People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [226 Cal.Rptr. 810], disapproved of in *People v. Barton* (1995) 12 Cal.4th 186 [47 Cal.Rptr.2d 569, 906 P.2d 531] on its holding that failure to instruct on this crime as a lesser included offense of arson was invited error because defense counsel objected to such instruction; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324 [3 Cal.Rptr.2d 816].

RELATED ISSUES

Inhabited Apartment

Defendant's conviction for arson of an inhabited structure was proper where he set fire to his estranged wife's apartment several days after she had vacated it. Although his wife's apartment was not occupied, it was in a large apartment building where many people lived; it was, therefore, occupied for purposes of the arson statute. (*People v. Green* (1983) 146 Cal.App.3d 369, 378–379 [194 Cal.Rptr. 128].)

House Inhabited at Time of Fire

Defendant's conviction for arson of an inhabited structure was proper where he set fire to his own home. The house was occupied for purposes of the arson statute because the defendant lived there at the time of the fire although he did not intend to return. (*People v. Buckner* (2023) 97 Cal.App.5th 724, 728–730 [315 Cal.Rptr.3d 769].)

Dual Convictions Prohibited

A single act of arson cannot result in convictions under different subdivisions of Penal Code section 451. (*People v. Shiga* (2019) 34 Cal.App.5th 466, 475 [246 Cal.Rptr.3d 198].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 268–276.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.47[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

1503–1514. Reserved for Future Use

1515. Arson (Pen. Code, § 451(c) & (d))

The defendant is charged [in Count __] with arson [in violation of Penal Code section 451(c/d)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant set fire to or burned [or (counseled[,]/ [or] helped[,]/ [or] caused) the burning of] (a structure/forest land/property);**

AND

2. **(He/She) acted willfully and maliciously.**

To *set fire to or burn* means to damage or destroy with fire either all or part of something, no matter how small the part.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

As used here, ~~S~~someone acts *maliciously* when he or she intentionally does a wrongful act under circumstances that the direct, natural, and highly probable consequences would be the burning of the (structure/ [or] property) or when he or she acts with the unlawful intent to defraud, annoy, or injure someone else.

[A *structure* is any (building/bridge/tunnel/power plant/commercial or public tent).]

[*Forest land* means brush-covered land, cut-over land, forest, grasslands, or woods.]

[*Property* means personal property or land other than forest land.]

[A person does not commit arson if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire also injures someone else or someone else's structure, forest land, or property.]

New January 2006; Revised February 2013, August 2016, April 2020, February 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Related Instructions

If it is also alleged that the fire caused great bodily injury or burned an inhabited structure or property, see CALCRIM No. 1501, *Arson: Great Bodily Injury* and CALCRIM No. 1502, *Arson: Inhabited Structure*.

If attempted arson is charged, do not instruct generally on attempts but give CALCRIM No. 1520, *Attempted Arson*. (Pen. Code, § 455.)

AUTHORITY

- Elements. Pen. Code, § 451(c~~–~~d).
- "Structure~~,~~" and "Forest Land~~,~~" ~~and Maliciously~~ Defined. Pen. Code, § 450; see *People v. Labaer* (2001) 88 Cal.App.4th 289, 293–294 [105 Cal.Rptr.2d 629] ["structure" does not require finished or completed building].
- "Maliciously" Defined. Pen. Code, § 450(e); *People v. Atkins* (2001) 25 Cal.4th 76, 88 [104 Cal.Rptr.2d 738, 18 P.3d 660]; *In re V.V.* (2011) 51 Cal.4th 1020, 1031, fn. 6 [125 Cal.Rptr.3d 421, 252 P.3d 979].
- General Intent Crime. *People v. Atkins*, *supra,* ~~(2001)~~ 25 Cal.4th ~~76,~~at pp. 83–84, 86 ~~[104 Cal.Rptr.2d 738, 18 P.3d 660]~~ [evidence of voluntary intoxication not admissible to negate mental state].
- "Property" Defined. *In re L.T.* (2002) 103 Cal.App.4th 262, 264–265 [126 Cal.Rptr.2d 778].
- "To Burn" Defined. *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–167 [270 Cal.Rptr. 389].

LESSER INCLUDED OFFENSES

- Attempted Arson. Pen. Code, § 455.
- Unlawfully Causing a Fire. *People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [226 Cal.Rptr. 810], disapproved of in *People v. Barton* (1995) 12 Cal.4th 186 [47 Cal.Rptr.2d 569, 906 P.2d 531] on its holding that failure to instruct on this crime as a lesser included offense of arson was invited error because defense counsel objected to such instruction; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324 [3 Cal.Rptr.2d 816].

RELATED ISSUES

Fixtures

Fire damage to fixtures within a building may satisfy the burning requirement if the fixtures are an integral part of the structure. (*In re Jesse L.*, *supra,* ~~(1990)~~ 221 Cal.App.3d ~~161,~~at pp. 167–168 ~~[270 Cal.Rptr. 389]~~; *People v. Lee* (1994) 24 Cal.App.4th 1773, 1778 [30 Cal.Rptr.2d 224] [whether wall-to-wall carpeting is a fixture is question of fact for jury].)

Property: Clothing

Arson includes burning a victim's clothing. (*People v. Reese* (1986) 182 Cal.App.3d 737, 739–740 [227 Cal.Rptr. 526].)

Property: Trash

Burning trash that does not belong to the defendant is arson. There is no requirement for arson that the property belong to anyone. (*In re L.T.*, *supra,* ~~(2002)~~ 103 Cal.App.4th ~~262,~~at p. 264 ~~[126 Cal.Rptr.2d 778]~~.)

Dual Convictions Prohibited

A single act of arson cannot result in convictions under different subdivisions of Penal Code section 451. (*People v. Shiga* (2019) 34 Cal.App.5th 466, 475 [246 Cal.Rptr.3d 198].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 268–276.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

1516–1519. Reserved for Future Use

1520. Attempted Arson (Pen. Code, § 455)

The defendant is charged [in Count __] with the crime of attempted arson [in violation of Penal Code section 455].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant attempted to set fire to or burn [or (counseled[,]/ [or] helped[,]/ [or] caused) the attempted burning of] (a structure/forest land/property);**

AND

2. **(He/She) acted willfully and maliciously.**

A person *attempts to set fire to or burn* (a structure/forest land/property) when he or she places any flammable, explosive, or combustible material or device in or around it with the intent to set fire to it.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

As used here, ~~S~~someone acts *maliciously* when he or she intentionally does a wrongful act under circumstances that the direct, natural, and highly probable consequences would be the burning of the (structure/ [or] property) or when he or she acts with the unlawful intent to defraud, annoy, or injure someone else.

[A *structure* is any (building/bridge/tunnel/power plant/commercial or public tent).]

[*Forest land* is any brush-covered land, cut-over land, forest, grasslands, or woods.]

[*Property* means personal property or land other than forest land.]

New January 2006; Revised September 2018, March 2023, February 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. Attempted arson is governed by Penal Code section 455, not the general attempt statute found in section 664. (*People v. Alberts* (1995) 32 Cal.App.4th 1424, 1427–1428 [37 Cal.Rptr.2d 401] [defendant was convicted under §§ 451 and 664; the higher sentence was reversed because § 455 governs attempted arson].)

AUTHORITY

- Elements. Pen. Code, § 455.
- "Structure~~,~~" and "Forest Land~~,~~" ~~and Maliciously"~~ Defined. Pen. Code, § 450.
- "Maliciously" Defined. Pen. Code, § 450(e); *People v. Atkins* (2001) 25 Cal.4th 76, 88 [104 Cal.Rptr.2d 738, 18 P.3d 660]; *In re V.V.* (2011) 51 Cal.4th 1020, 1031, fn. 6 [125 Cal.Rptr.3d 421, 252 P.3d 979].
- This Instruction Upheld. *People v. Rubino* (2017) 18 Cal.App.5th 407, 412–413 [227 Cal.Rptr.3d 75].

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 268–276.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

1521–1529. Reserved for Future Use

1600. Robbery (Pen. Code, § 211)

The defendant is charged [in Count _____] with robbery [in violation of Penal Code section 211].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant took property that was not (his/her) own;**

2. **The property was in the possession of another person;**

3. **The property was taken from the other person or (his/her) immediate presence;**

4. **The property was taken against that person's will;**

5. **The defendant used force or fear to (take/ [or] retain/ [or] resist an attempt to regain) the property or to prevent the person from resisting;**

AND

6. **When the defendant used force or fear, (he/she) intended (to deprive the owner of the property permanently/ [or] to remove the property from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property).**

The defendant's intent to take the property must have been formed before or during the time (he/she) used force or fear. If the defendant did not form this required intent until after using the force or fear, then (he/she) did not commit robbery.

<*Give the following bracketed paragraph if the second degree is the only possible degree of the charged crime for which the jury may return a verdict.*>

[If you find the defendant guilty of robbery, it is robbery of the second degree.]

[A person *takes* something when he or she gains possession of it and moves it

some distance. The distance moved may be short.]

[The property taken can be of any value, however slight.] [Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[A (store/ [or] business) (employee/ _____ <*insert description*>) who is on duty has possession of the (store/ [or] business) owner's property.]

[*Fear*, as used here, means fear of (injury to the person himself or herself[,]/ [or] injury to the person's family or property[,]/ [or] immediate injury to someone else present during the incident or to that person's property).]

An act is accomplished by *fear* if the other person is actually afraid. The other person's actual fear may be inferred from the circumstances.

[Property is within a person's *immediate presence* if it is sufficiently within his or her physical control that he or she could keep possession of it if not prevented by force or fear.]

[An act is done *against a person's will* if that person does not consent to the act. In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]

New January 2006; Revised August 2009, October 2010, April 2011, August 2013, August 2014, March 2017, September 2018, March 2022, February 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

To have the requisite intent for theft, the defendant must either intend to deprive the owner permanently or to deprive the owner of a major portion of the property's value or enjoyment. (See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1].) Select the appropriate language in element 5.

There is no sua sponte duty to define the terms "possession," "fear," and

"immediate presence." (*People v. Anderson* (1966) 64 Cal.2d 633, 639 [51 Cal.Rptr. 238, 414 P.2d 366] [fear]; *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708 [286 Cal.Rptr. 394] [fear].) These definitions are discussed in the Commentary below.

If second degree robbery is the only possible degree of robbery that the jury may return as their verdict, do not give CALCRIM No. 1602, *Robbery: Degrees*.

Give the bracketed definition of "against a person's will" on request.

If the use of force or fear is not contemporaneous with the original taking~~there is an issue as to whether the defendant used force or fear during the commission of the robbery~~, the court should use the "retain" or "resist an attempt to regain" options in element 5~~may need to instruct on this point~~. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 686–687 [130 Cal.Rptr.3d 590, 259 P.3d 1186]; *People v. Gomez* (2008) 43 Cal.4th 249, 255–265 [74 Cal.Rptr.3d 123, 179 P.3d 917]; *People v. Estes* (1983) 147 Cal.App.3d 23, 28 [194 Cal.Rptr. 909].) See CALCRIM No. 3261, *While Committing~~In Commission of~~ a Felony: Defined—Escape Rule*.

AUTHORITY

- Elements. Pen. Code, § 211.
- "Fear" Defined. Pen. Code, § 212; see *People v. Collins* (2021) 65 Cal.App.5th 333, 340–341 [279 Cal.Rptr.3d 407]; *People v. Cuevas* (2001) 89 Cal.App.4th 689, 698 [107 Cal.Rptr.2d 529] [victim must actually be afraid].
- "Immediate Presence" Defined. *People v. Hayes* (1990) 52 Cal.3d 577, 626–627 [276 Cal.Rptr. 874, 802 P.2d 376].
- Intent. *People v. Green* (1980) 27 Cal.3d 1, 52–53 [164 Cal.Rptr. 1, 609 P.2d 468], overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99]; see *Rodriguez v. Superior Court* (1984) 159 Cal.App.3d 821, 826 [205 Cal.Rptr. 750] [same intent as theft].
- Intent to Deprive Owner of Main Value. See *People v. Avery, supra, ~~(2002)~~* 27 Cal.4th ~~49,~~at pp. 57–58 ~~[115 Cal.Rptr.2d 403, 38 P.3d 1]~~ [in context of theft]; *People v. Zangari* (2001) 89 Cal.App.4th 1436, 1447 [108 Cal.Rptr.2d 250] [same].
- "Possession" Defined. *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618].
- Constructive Possession by Employee. *People v. Scott* (2009) 45 Cal.4th 743, 751 [89 Cal.Rptr.3d 213, 200 P.3d 837].

- Constructive Possession by Subcontractor/Janitor. *People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 523 [3 Cal.Rptr.3d 835].
- Constructive Possession by Person With Special Relationship. *People v. Weddles* (2010) 184 Cal.App.4th 1365, 1369–1370 [109 Cal.Rptr.3d 479].
- Felonious Taking Not Satisfied by Theft by False Pretense. *People v. Williams* (2013) 57 Cal.4th 776, 784–789 [161 Cal.Rptr.3d 81, 305 P.3d 1241].
- Constructive Possession and Immediate Presence of Funds in Account of Robbery Victims Using ATM. *People v. Mullins* (2018) 19 Cal.App.5th 594, 603 [228 Cal.Rptr.3d 198].

COMMENTARY

The instruction includes definitions of "possession," "fear," and "immediate presence" because those terms have meanings in the context of robbery that are technical and may not be readily apparent to jurors. (See *People v. McElheny* (1982) 137 Cal.App.3d 396, 403 [187 Cal.Rptr. 39]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221].)

"Possession" was defined in the instruction because either actual or constructive possession of property will satisfy this element, and this definition may not be readily apparent to jurors. (*People v. Bekele*, *supra*, ~~(1995)~~ 33 Cal.App.4th ~~1457,~~at p. 1461 ~~[39 Cal.Rptr.2d 797]~~ [defining possession], disapproved on other grounds in *People v. Rodriguez*, *supra*, ~~(1999)~~ 20 Cal.4th ~~1,~~at pp. 13–14 ~~[82 Cal.Rptr.2d 413, 971 P.2d 618]~~; see also *People v. Nguyen* (2000) 24 Cal.4th 756, 761, 763 [102 Cal.Rptr.2d 548, 14 P.3d 221] [robbery victim must have actual or constructive possession of property taken; disapproving *People v. Mai* (1994) 22 Cal.App.4th 117, 129 [27 Cal.Rptr.2d 141]].)

"Fear" was defined in the instruction because the statutory definition includes fear of injury to third parties, and this concept is not encompassed within the common understanding of fear. "Force" was not defined because its definition in the context of robbery is commonly understood. (See *People v. Mungia*, *supra*, ~~(1991)~~ 234 Cal.App.3d ~~1703,~~at p. 1709 ~~[286 Cal.Rptr. 394]~~ ["force is a factual question to be determined by the jury using its own common sense"].)

"Immediate presence" was defined in the instruction because its definition is related to the use of force and fear and to the victim's ability to control the property. This definition may not be readily apparent to jurors.

LESSER INCLUDED OFFENSES

- Attempted Robbery. Pen. Code, §§ 664, 211; *People v. Webster* (1991) 54 Cal.3d 411, 443 [285 Cal.Rptr. 31, 814 P.2d 1273].

- Grand Theft. Pen. Code, §§ 484, 487g; *People v. Webster, supra*, at p. 443; *People v. Ortega* (1998) 19 Cal.4th 686, 694, 699 [80 Cal.Rptr.2d 489, 968 P.2d 48]; see *People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1411–1413 [116 Cal.Rptr.2d 1] [insufficient evidence to require instruction].
- Grand Theft Automobile. Pen. Code, § 487(d); *People v. Gamble* (1994) 22 Cal.App.4th 446, 450 [27 Cal.Rptr.2d 451] [construing former Pen. Code, § 487h]; *People v. Escobar* (1996) 45 Cal.App.4th 477, 482 [53 Cal.Rptr.2d 9] [same].
- Petty Theft. Pen. Code, §§ 484, 488; *People v. Covington* (1934) 1 Cal.2d 316, 320 [34 P.2d 1019].
- Petty Theft With Prior. Pen. Code, § 666; *People v. Villa* (2007) 157 Cal.App.4th 1429, 1433–1434 [69 Cal.Rptr.3d 282].

When there is evidence that the defendant formed the intent to steal after the application of force or fear, the court has a **sua sponte** duty to instruct on any relevant lesser included offenses. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055–1057 [60 Cal.Rptr.2d 225, 929 P.2d 544] [error not to instruct on lesser included offense of theft]); *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 350–352 [216 Cal.Rptr. 455, 702 P.2d 613] [same].)

On occasion, robbery and false imprisonment may share some elements (e.g., the use of force or fear of harm to commit the offense). Nevertheless, false imprisonment is not a lesser included offense, and thus the same conduct can result in convictions for both offenses. (*People v. Reed* (2000) 78 Cal.App.4th 274, 281–282 [92 Cal.Rptr.2d 781].)

RELATED ISSUES

Asportation—Felonious Taking

To constitute a taking, the property need only be moved a small distance. It does not have to be under the robber's actual physical control. If a person acting under the robber's direction, including the victim, moves the property, the element of taking is satisfied. (*People v. Martinez* (1969) 274 Cal.App.2d 170, 174 [79 Cal.Rptr. 18]; *People v. Price* (1972) 25 Cal.App.3d 576, 578 [102 Cal.Rptr. 71].)

Claim of Right

If a person honestly believes that he or she has a right to the property even if that belief is mistaken or unreasonable, such belief is a defense to robbery. (*People v. Butler* (1967) 65 Cal.2d 569, 573 [55 Cal.Rptr. 511, 421 P.2d 703]; *People v. Romo* (1990) 220 Cal.App.3d 514, 518 [269 Cal.Rptr. 440] [discussing defense in context of theft]; see CALCRIM No. 1863, *Defense to Theft or Robbery: Claim of Right*.) This defense is only available for robberies when a specific piece of

property is reclaimed; it is not a defense to robberies perpetrated to settle a debt, liquidated or unliquidated. (*People v. Tufunga* (1999) 21 Cal.4th 935, 945–950 [90 Cal.Rptr.2d 143, 987 P.2d 168].)

Fear

A victim's fear may be shown by circumstantial evidence. (*People v. Davison* (1995) 32 Cal.App.4th 206, 212 [38 Cal.Rptr.2d 438].) Even when the victim testifies that he or she is not afraid, circumstantial evidence may satisfy the element of fear. (*People v. Renteria* (1964) 61 Cal.2d 497, 498–499 [39 Cal.Rptr. 213, 393 P.2d 413]; *People v. Collins*, *supra*, ~~(2021)~~ 65 Cal.App.5th ~~333,~~at p. 341 ~~[279 Cal.Rptr.3d 407]~~.)

Force—Amount

The force required for robbery must be more than the incidental touching necessary to take the property. (*People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246 [53 Cal.Rptr.2d 256] [noting that force employed by pickpocket would be insufficient], disapproved on other grounds in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fns. 2, 3 [15 Cal.Rptr.3d 262, 92 P.3d 841].) Administering an intoxicating substance or poison to the victim in order to take property constitutes force. (*People v. Dreas* (1984) 153 Cal.App.3d 623, 628–629 [200 Cal.Rptr. 586]; see also *People v. Wright* (1996) 52 Cal.App.4th 203, 209–210 [59 Cal.Rptr.2d 316] [explaining force for purposes of robbery and contrasting it with force required for assault].)

Force—When Applied

The application of force or fear may be used when taking the property or when carrying it away. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8 [282 Cal.Rptr. 450, 811 P.2d 742]; *People v. Pham* (1993) 15 Cal.App.4th 61, 65–67 [18 Cal.Rptr.2d 636]; *People v. Estes*, *supra*, ~~(1983)~~ 147 Cal.App.3d ~~23,~~at pp. 27–28 ~~[194 Cal.Rptr. 909]~~.)

Immediate Presence

Property that is 80 feet away or around the corner of the same block from a forcibly held victim is not too far away, as a matter of law, to be outside the victim's immediate presence. (*People v. Harris* (1994) 9 Cal.4th 407, 415–419 [37 Cal.Rptr.2d 200, 886 P.2d 1193]; see also *People v. Prieto* (1993) 15 Cal.App.4th 210, 214 [18 Cal.Rptr.2d 761] [reviewing cases where victim is distance away from property taken].) Property has been found to be within a person's immediate presence when the victim is lured away from his or her property and force is subsequently used to accomplish the theft or escape (*People v. Webster*, *supra*, ~~(1991)~~ 54 Cal.3d ~~411,~~at pp. 440–442 ~~[285 Cal.Rptr. 31, 814 P.2d 1273]~~) or when the victim abandons the property out of fear (*People v. Dominguez* (1992) 11 Cal.App.4th 1342, 1348–1349 [15 Cal.Rptr.2d 46].)

Multiple Victims

Multiple counts of robbery are permissible when there are multiple victims even if only one taking occurred. (*People v. Ramos* (1982) 30 Cal.3d 553, 589 [180 Cal.Rptr. 266, 639 P.2d 908], reversed on other grounds *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446, 77 L.Ed.2d 1171]; *People v. Miles* (1996) 43 Cal.App.4th 364, 369, fn. 5 [51 Cal.Rptr.2d 87] [multiple punishment permitted].) Conversely, a defendant commits only one robbery, no matter how many items are taken from a single victim pursuant to a single plan. (*People v. Brito* (1991) 232 Cal.App.3d 316, 325–326, fn. 8 [283 Cal.Rptr. 441].)

Value

The property taken can be of small or minimal value. (*People v. Simmons* (1946) 28 Cal.2d 699, 705 [172 P.2d 18]; *People v. Thomas* (1941) 45 Cal.App.2d 128, 134–135 [113 P.2d 706].) The property does not have to be taken for material gain. All that is necessary is that the defendant intended to permanently deprive the person of the property. (*People v. Green*, *supra,* ~~(1980)~~ 27 Cal.3d ~~1,~~at p. 57 ~~[164 Cal.Rptr. 1, 609 P.2d 468]~~, disapproved on other grounds in *People v. Hall*, *supra,* ~~(1986)~~ 41 Cal.3d ~~826,~~at p. 834, fn. 3 ~~[226 Cal.Rptr. 112, 718 P.2d 99]~~.)

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, § 85.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.10 (Matthew Bender).

1820. Felony Unlawful Taking or Driving of Vehicle (Veh. Code, § 10851(a), (b))

The defendant is charged [in Count __] with unlawfully taking or driving a vehicle [in violation of Vehicle Code section 10851].

To prove that the defendant is guilty of this crime, the People must prove that:

<*Alternative A—taking with intent to deprive*>

[1. The defendant took someone else's vehicle without the owner's consent;

2. When the defendant took the vehicle, (he/she) intended to deprive the owner of possession or ownership of the vehicle for any period of time;

AND

3. The vehicle was worth more than $950.]

[OR]

<*Alternative B— posttheft driving*>

[1. The defendant drove someone else's vehicle without the owner's consent;

~~**AND**~~

2. When the defendant drove the vehicle, (he/she) intended to deprive the owner of possession or ownership of the vehicle for any period of time;~~.

AND

3. The driving occurred after a substantial break from the original theft of the vehicle.]

[Even if you conclude that the owner had allowed the defendant or someone else to take or drive the vehicle before, you may not conclude that the owner consented to the driving or taking on _____<*insert date of alleged crime*> **based on that previous consent alone.]**

[A *taking* requires that the vehicle be moved for any distance, no matter how small.]

[A *vehicle* includes a (passenger vehicle/motorcycle/motor scooter/bus/schoolbus/commercial vehicle/truck tractor/ [and] trailer/ [and] semitrailer/_____ <*insert other type of vehicle*>**).]**

<*Sentencing Factor: Ambulance, Police Vehicle, Fire Dept. Vehicle*>
[If you find the defendant guilty of unlawfully taking or driving a vehicle, you must then decide whether the People have proved the additional allegation that the defendant took or drove an emergency vehicle on call. To prove this allegation, the People must prove that:

1. **The vehicle was (an ambulance/a distinctively marked law enforcement vehicle/a distinctively marked fire department vehicle);**

2. **The vehicle was on an emergency call when it was taken;**

AND

3. **The defendant knew that the vehicle was on an emergency call.**

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.]

<*Sentencing Factor: Modified for Disabled Person*>
[If you find the defendant guilty of unlawfully taking or driving a vehicle, you must then decide whether the People have proved the additional allegation that the defendant took or drove a vehicle modified for a disabled person. To prove this allegation, the People must prove that:

1. **The vehicle was modified for the use of a disabled person;**

2. **The vehicle displayed a distinguishing license plate or placard issued to disabled persons;**

AND

3. **The defendant knew or reasonably should have known that the vehicle was so modified and displayed the distinguishing plate or placard.**

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.]

New January 2006; Revised September 2018, March 2021, February 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges that the vehicle was an emergency vehicle or was modified for a disabled person, the court has a **sua sponte** duty to instruct on the sentencing factor. (Veh. Code, § 10851(b); see Veh. Code, § 10851(d) [fact issues for jury].)

If the defendant is charged with unlawfully driving or taking an automobile and with receiving the vehicle as stolen property, and there is evidence of only one act or transaction, the trial court has a **sua sponte** duty to instruct the jury that the defendant cannot be convicted of both stealing the vehicle and receiving a stolen vehicle. (*People v. Black* (1990) 222 Cal.App.3d 523, 525 [271 Cal.Rptr. 771]; *People v. Strong* (1994) 30 Cal.App.4th 366, 376 [35 Cal.Rptr.2d 494].) In such cases, give CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited*.

Similarly, a defendant cannot be convicted of grand theft of a vehicle and unlawfully taking the vehicle in the absence of any evidence showing a substantial break between the taking and the use of the vehicle. (*People v. Kehoe* (1949) 33 Cal.2d 711, 715 [204 P.2d 321]; see *People v. Malamut* (1971) 16 Cal.App.3d 237, 242 [93 Cal.Rptr. 782] [finding substantial lapse between theft and driving].) In such cases, give CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited*.

The bracketed paragraph that begins with "Even if you conclude that" may be given on request if there is evidence that the owner of the vehicle previously agreed to let the defendant or another person drive or take the vehicle. (Veh. Code, § 10851(c).)

The bracketed sentence defining "taking" may be given on request if there is a question whether a vehicle that was taken was moved any distance. (*People v. White* (1945) 71 Cal.App.2d 524, 525 [162 P.2d 862].)

The definition of "vehicle" may be given on request. (See Veh. Code, § 670 ["vehicle" defined].)

AUTHORITY

- Elements. Veh. Code, § 10851(a), (b); *De Mond v. Superior Court* (1962) 57 Cal.2d 340, 344 [368 P.2d 865].
- "Ambulance" Defined. Veh. Code, § 165(a).
- "Owner" Defined. Veh. Code, § 460.
- Application to Trolley Coaches. Veh. Code, § 21051.
- Expiration of Owner's Consent to Drive. *People v. Hutchings* (1966) 242 Cal.App.2d 294, 295 [51 Cal.Rptr. 415].
- "Taking" Defined. *People v. White, supra,* ~~(1945)~~ 71 Cal.App.2d ~~524,~~at p. 525 ~~[162 P.2d 862]~~ [any removal, however slight, constitutes taking]; *People v. Frye* (1994) 28 Cal.App.4th 1080, 1088 [34 Cal.Rptr.2d 180] [taking is limited to removing vehicle from owner's possession].
- Vehicle Value Must Exceed $950 for Felony Taking With Intent to Temporarily or Permanently Deprive. *People v. Bullard* (2020) 9 Cal.5th 94, 109 [260 Cal.Rptr.3d 153, 460 P.3d 262]; *People v. Page* (2017) 3 Cal.5th 1175, 1183–1187 [225 Cal.Rptr.3d 786, 406 P.3d 319].
- Substantial Break Requirement. *People v. Bullard, supra,* 9 Cal.5th at p. 110; *People v. Lara* (2019) 6 Cal.5th 1128, 1137 [245 Cal.Rptr.3d 426, 438 P.3d 251]; *People v. Martell* (2019) 42 Cal.App.5th 225, 234 [255 Cal.Rptr.3d 277].

LESSER INCLUDED OFFENSES

- Attempted Unlawful Driving or Taking of Vehicle. Pen. Code, § 664; Veh. Code, § 10851(a), (b).

RELATED ISSUES

Other Modes of Transportation

The "joyriding" statute, Penal Code section 499b, now only prohibits the unlawful taking of bicycles, motorboats, or vessels. The unlawful taking or operation of an aircraft is a felony, as prohibited by Penal Code section 499d.

Community Property

A spouse who takes a community property vehicle with the intent to temporarily, not permanently, deprive the other spouse of its use is not guilty of violating Vehicle Code section 10851. (*People v. Llamas* (1997) 51 Cal.App.4th 1729, 1739–1740 [60 Cal.Rptr.2d 357].)

Consent Not Vitiated by Fraud

The fact that an owner's consent was obtained by fraud or misrepresentation does not supply the element of nonconsent. (*People v. Cook* (1964) 228 Cal.App.2d 716, 719 [39 Cal.Rptr. 802].)

Theft-Related Convictions

A person cannot be convicted of taking a vehicle and receiving it as stolen property unless the jury finds that the defendant unlawfully drove the vehicle, as opposed to unlawfully taking it, and there is other evidence that establishes the elements of receiving stolen property. (*People v. Jaramillo* (1976) 16 Cal.3d 752, 757–759 [129 Cal.Rptr. 306, 548 P.2d 706]; *People v. Cratty* (1999) 77 Cal.App.4th 98, 102–103 [91 Cal.Rptr.2d 370]; *People v. Strong*, *supra,* ~~(1994)~~ 30 Cal.App.4th ~~366,~~at pp. 372–374 ~~[35 Cal.Rptr.2d 494]~~.)

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 107–113.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.10A, Ch. 143, *Crimes Against Property*, § 143.01[1][j], [2][c], [4][c] (Matthew Bender).

2130. Refusal—Consciousness of Guilt (Veh. Code, § 23612)

The law requires that any driver who has been [lawfully] arrested submit to a chemical test at the request of a peace officer who has reasonable cause to believe that the person arrested was driving under the influence.

<Give for refusal by words or conduct>
[If the defendant refused to submit after a peace officer asked (him/her) to do so and explained the test's nature to the defendant, then the defendant's conduct may show that (he/she) was aware of (his/her) guilt. If you conclude that the defendant refused to submit to such a test, it is up to you to decide the meaning and importance of the refusal. However, evidence that the defendant refused to submit to a chemical test cannot prove guilt by itself.]

<Give for refusal by silence>
[A defendant's silence in response to an officer's request to (submit to a chemical test/ [or] complete a chemical test) may be a refusal. If you conclude that the defendant's silence was a refusal, it is up to you to decide its meaning and importance. However, evidence that the defendant refused to submit to a chemical test cannot prove guilt by itself.]

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*New January 2006; Revised August 2009, March 2017, February 2025**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

The court may instruct the jury that refusal to submit to a chemical analysis for blood alcohol content may demonstrate consciousness of guilt. (*People v. Sudduth* (1966) 65 Cal.2d 543, 547 [55 Cal.Rptr. 393, 421 P.2d 401].) There is no sua sponte duty to give this instruction.

Do not give this instruction if the defendant is exempted from the implied consent law because the defendant has hemophilia or is taking anticoagulants. (See Veh. Code, § 23612(b) & (c).)

The implied consent statute states that "[t]he testing shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe the person was driving a motor vehicle in violation of Section 23140, 23152, or 23153." (Veh. Code, § 23612(a)(1)(C).) If there is a factual issue as to whether the defendant was lawfully arrested or whether the officer had reasonable

cause to believe the defendant was under the influence, the court should consider whether this entire instruction, or the bracketed word "lawfully" is appropriate and/or whether the jury should be instructed on these additional issues. For an instruction on lawful arrest and reasonable cause, see CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

AUTHORITY

- Implied Consent Statute. Veh. Code, § 23612.
- Instruction Constitutional. *People v. Sudduth*, *supra,* ~~(1966)~~ 65 Cal.2d at p.~~543,~~ 547 ~~[55 Cal.Rptr. 393, 421 P.2d 401]~~.
- Silence in Response to Request May Constitute Refusal. *Garcia v. Department of Motor Vehicles* (2010) 185 Cal.App.4th 73, 82–84 [109 Cal.Rptr.3d 906].
- This Instruction Upheld. *People v. Bolourchi* (2024) 103 Cal.App.5th 243, 261–270 [325 Cal.Rptr.3d 3].

RELATED ISSUES

Silence

Silence in response to repeated requests to submit to a chemical analysis constitutes a refusal. (*Lampman v. Dept. of Motor Vehicles* (1972) 28 Cal.App.3d 922, 926 [105 Cal.Rptr. 101].)

Inability to Complete Chosen Test

If the defendant selects one test but is physically unable to complete that test, the defendant's refusal to submit to an alternative test constitutes a refusal. (*Cahall v. Dept. of Motor Vehicles* (1971) 16 Cal.App.3d 491, 496 [94 Cal.Rptr. 182]; *Kessler v. Dept. of Motor Vehicles* (1992) 9 Cal.App.4th 1134, 1139 [12 Cal.Rptr.2d 46].)

Conditions Placed on Test by Defendant

"It is established that a *conditional* consent to a test constitutes a refusal to submit to a test within the meaning of section 13353." (*Webb v. Miller* (1986) 187 Cal.App.3d 619, 626 [232 Cal.Rptr. 50] [request by defendant to see chart in wallet constituted refusal, italics in original]; *Covington v. Dept. of Motor Vehicles* (1980) 102 Cal.App.3d 54, 57 [162 Cal.Rptr. 150] [defendant's response that he would only take test with attorney present constituted refusal].) However, in *Ross v. Dept. of Motor Vehicles* (1990) 219 Cal.App.3d 398, 402–403 [268 Cal.Rptr. 102], the court held that the defendant was entitled under the implied consent statute to request to see the identification of the person drawing his blood. The court found the request reasonable in light of the risks of HIV infection from

improper needle use. (*Id.* at p. 403.) Thus, the defendant could not be penalized for refusing to submit to the test when the technician declined to produce identification. *(Ibid.)*

Defendant Consents After Initial Refusal

"Once the driver refuses to take any one of the three chemical tests, the law does not require that he later be given one when he decides, for whatever reason, that he is ready to submit. [Citations.] [¶] . . . Simply stated, one offer plus one rejection equals one refusal; and, one suspension." (*Dunlap v. Dept. of Motor Vehicles* (1984) 156 Cal.App.3d 279, 283 [202 Cal.Rptr. 729].)

Defendant Refuses Request for Urine Sample Following Breath Test

In *People v. Roach* (1980) 108 Cal.App.3d 891, 893 [166 Cal.Rptr. 801], the defendant submitted to a breath test revealing a blood alcohol level of 0.08 percent. The officer then asked the defendant to submit to a urine test in order to detect the presence of drugs, but the defendant refused. *(Ibid.)* The court held that this was a refusal under the implied consent statute. *(Ibid.)*

Sample Taken by Force After Refusal

"[T]here was no voluntary submission on the part of respondent to any of the blood alcohol tests offered by the arresting officer. The fact that a blood sample ultimately was obtained and the test completed is of no significance." (*Cole v. Dept. of Motor Vehicles* (1983) 139 Cal.App.3d 870, 875 [189 Cal.Rptr. 249].)

Refusal Admissible Even If Faulty Admonition

Vehicle Code section 23612 requires a specific admonition to the defendant regarding the consequences of refusal to submit to a chemical test. If the officer fails to properly advise the defendant in the terms required by statute, the defendant may not be subject to the mandatory license suspension or the enhancement for willful refusal to complete a test. (See *People v. Brannon* (1973) 32 Cal.App.3d 971, 978 [108 Cal.Rptr. 620]; *People v. Municipal Court (Gonzales)* (1982) 137 Cal.App.3d 114, 118 [186 Cal.Rptr. 716].) However, the refusal is still admissible in criminal proceedings for driving under the influence. (*Ibid.* ~~*People v. Municipal Court (Gonzales), supra,* 137 Cal.App.3d at p. 118~~.) Thus, the court in *People v. Municipal Court (Gonzales), supra,* 137 Cal.App.3d at p. 118, held that the defendant's refusal was admissible despite the officer's failure to advise the defendant that refusal would be used against him in a court of law, an advisement specifically required by the statute. (See Veh. Code, § 23612(a)(4).)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 293–303.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[2][f] (Matthew Bender).

2242. Altering, Counterfeiting, Defacing, Destroying, Etc. Vehicle Identification Numbers (Veh. Code, § 10802)

The defendant is charged [in Count __] with (altering[,]/ [or] counterfeiting[,]/ [or] defacing[,]/ [or] destroying[,]/ [or] disguising[,]/ [or] falsifying[,]/ [or] forging[,]/ [or] obliterating[,]/ [or] removing) [a] vehicle identification number[s] [in violation of Vehicle Code section 10802].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant knowingly (altered[,]/ [or] counterfeited[,]/ [or] defaced[,]/ [or] destroyed[,]/ [or] disguised[,]/ [or] falsified[,]/ [or] forged[,]/ [or] obliterated[,]/ [or] removed) [a] vehicle identification number[s];**

2. **When the defendant did (that/those) act[s], (he/she) intended to (misrepresent the identity/ [or] prevent the identification) of ([a] motor vehicle[s]/ [or] [a] motor vehicle part[s]);**

AND

3. **The defendant did (that/those) act[s] for the purpose of (sale/ [or] transfer/ [or] import/ [or] export) of the (motor vehicle[s]/ [or] motor vehicle part[s]).**

A *vehicle identification number* is the distinguishing number, letter, or mark used by the manufacturer or the Department of Motor Vehicles to uniquely identify a motor vehicle or a motor vehicle part for registration.

[For the purpose of (sale/ [or] transfer) of the motor vehicle[s] or motor vehicle part[s], the defendant need not have intended to act as seller, buyer, transferor, or transferee.]

[The People allege that the defendant (altered[,]/ [or] counterfeited[,]/ [or] defaced[,]/ [or] destroyed[,]/ [or] disguised[,]/ [or] falsified[,]/ [or] forged[,]/ [or] obliterated[,]/ [or] removed) the vehicle identification number[s] on the following (motor vehicle[s]/ [(and/or)] motor vehicle part[s]): _____ <*insert description when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (altered[,]/ [or] counterfeited[,]/ [or] defaced[,]/ [or] destroyed[,]/

[or] disguised[,]/ [or] falsified[,]/ [or] forged[,]/ [or] obliterated[,]/ [or] removed) at least one of these vehicle identification numbers and you all agree on which vehicle identification number[s] (he/she) (altered[,]/ [or] counterfeited[,]/ [or] defaced[,]/ [or] destroyed[,]/ [or] disguised[,]/ [or] falsified[,]/ [or] forged[,]/ [or] obliterated[,]/ [or] removed).]

New February 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant altered the vehicle identification numbers of multiple motor vehicles or motor vehicle parts, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

AUTHORITY

- Elements. Veh. Code, § 10802.
- "Vehicle Identification Number" Defined. Veh. Code, § 671.
- Tampering of Vehicle Identification Number on Single Motor Vehicle or Motor Vehicle Part Violates Statute. *People v. Killian* (2024) 100 Cal.App.5th 191, 211 [319 Cal.Rptr.3d 13].
- Purpose of Sale or Transfer. *People v. Killian, supra,* 100 Cal.App.5th at p. 214.
- No Aider and Abettor Liability for Conduct After Tampering Complete. *People v. Joiner* (2000) 84 Cal.App.4th 946, 952, 966–968 [101 Cal.Rptr.2d 270].
- Unanimity Instruction if Multiple Items. *People v. Sutherland, supra,* 17 Cal.App.4th at p. 619, fn. 6.

2441. Use of False Compartment to Conceal Controlled Substance
(Health & Saf. Code, § 11366.8)

The defendant is charged [in Count ___] with ((possessing/using/controlling)/ [or] (designing/constructing/building/altering/fabricating/installing/attaching)) a false compartment with the intent to (store/conceal/smuggle/transport) a controlled substance in a vehicle [in violation of Health and Safety Code section 11366.8].

To prove that the defendant is guilty of this crime, the People must prove that:

<A. Possessed, Used, Controlled>

1. **[The defendant (possessed/used/controlled) a false compartment with the intent to (store/conceal/smuggle/transport) a controlled substance in the false compartment in a vehicle(;/.)]**

[OR

<B. Designed, Built, etc.>

2. **][The defendant (designed/constructed/built/altered/fabricated/installed/attached) a false compartment (for/in/to) a vehicle with the intent to (store/conceal/smuggle/transport) a controlled substance in it.]**

A *false compartment* is any box, container, space, or enclosure that is added or attached to the original factory equipment of a vehicle and intended or designed to (conceal[,]/hide[,]/ [or] [otherwise] prevent discovery of) any controlled substance ~~within or attached to a vehicle~~. A false compartment may be ((a/an) (false/modified/altered) fuel tank[,]/original factory equipment of a vehicle that is (modified/altered/changed)[,]/ [or] a compartment, space, or box that is added to, or made or created from, existing compartments, spaces, or boxes within a vehicle).

A *vehicle* includes any car, truck, bus, aircraft, boat, ship, yacht, or vessel.

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

New January 2006; Revised February 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give either optional paragraph A, B, or both, depending on the charged crime and the evidence proffered at trial.

AUTHORITY

- Elements. Health & Saf. Code, § 11366.8.
- False Compartment ~~Does Not~~ Requires Modification of the Original Factory Equipment. *People v. Arias* (2008) 45 Cal.4th 169, 182 [85 Cal.Rptr.3d 1, 195 P.3d 103]~~*People v. Gonzalez* (2004) 116 Cal.App.4th 1405, 1414 [11 Cal.Rptr.3d 434]~~.
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 156.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][o] (Matthew Bender).

2442–2499. Reserved for Future Use

2503. Possession of Deadly Weapon With Intent to Assault (Pen. Code, § 17500)

The defendant is charged [in Count __] with possessing a deadly weapon with intent to assault [in violation of Penal Code section 17500].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant possessed a deadly weapon on (his/her) person;**

2. **The defendant knew that (he/she) possessed the weapon;**

AND

3. **At the time the defendant possessed the weapon, (he/she) intended to assault someone.**

A person intends to assault someone else if he or she intends to do an act that by its nature would directly and probably result in the application of force to a person.

[A *deadly weapon* is any object, instrument, or weapon [that is inherently deadly or one] that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[The term *deadly weapon* is defined in another instruction to which you should refer.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed[,] [and] [where the person who possessed the object was going][,] [and] [whether the object was changed from its standard form] and any other evidence that indicates that the object would be used for a dangerous, rather than a harmless, purpose.]

The term *application of force* means to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

[The touching can be done indirectly (by causing an object [or someone else] to touch the other person/ [or] by touching something held by or attached to the other person).]

[The People are not required to prove that the defendant actually touched someone.]

[The People allege that the defendant possessed the following weapons: _____ <*insert description of each weapon when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant possessed at least one of these weapons and you all agree on which weapon (he/she) possessed.]

New January 2006; Revised February 2012, February 2013, September 2019, September 2020, March 2022, February 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant possessed multiple weapons and the possession was "fragmented as to time [or] space," the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph that begins with "The People allege that the defendant possessed the following weapons," inserting the items alleged.

Give the bracketed paragraph on indirect touching if relevant.

Give the definition of deadly weapon unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Give the bracketed phrase "that is inherently deadly or one" and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a

matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317–318 [240 Cal.Rptr.3d 156].)

Give the bracketed paragraph that begins with "In deciding whether" if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

Defenses—Instructional Duty

Evidence of voluntary intoxication or mental impairment may be admitted to show that the defendant did not form the required mental state. (See *People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364].) The court has no sua sponte duty to instruct on these defenses; however, the trial court must give these instructions on request if supported by the evidence. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588] [on duty to instruct generally]; *People v. Stevenson* (1978) 79 Cal.App.3d 976, 988 [145 Cal.Rptr. 301] [instructions applicable to possession of weapon with intent to assault].) See Defenses and Insanity, CALCRIM No. 3400 et seq.

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

AUTHORITY

- Elements. Pen. Code, § 17500.
- "Deadly Weapon" Defined. *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar, supra,* ~~(1997)~~ 16 Cal.4th ~~1023,~~at pp. 1028–1029 ~~[68 Cal.Rptr.2d 655, 945 P.2d 1204]~~.
- Objects With Innocent Uses. *People v. Aguilar, supra,* ~~(1997)~~ 16 Cal.4th ~~1023,~~at pp. 1028–1029 ~~[68 Cal.Rptr.2d 655, 945 P.2d 1204]~~; *People v. Godwin, supra,* ~~(1996)~~ 50 Cal.App.4th ~~1562,~~at pp. 1573–1574 ~~[58 Cal.Rptr.2d 545]~~.
- "Knowledge" Required. See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885].

- Assault. Pen. Code, § 240; see also *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- "Inherently Deadly" Defined. *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar*, *supra*, ~~(1997)~~ 16 Cal.4th ~~1023,~~at pp. 1028–1029 ~~[68 Cal.Rptr.2d 655, 945 P.2d 1204]~~.
- Examples of Noninherently Deadly Weapon. *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez*, *supra*, ~~(2018)~~ 4 Cal.5th ~~1055,~~at p. 1065 ~~[232 Cal.Rptr.3d 51, 416 P.3d 42]~~ [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 189.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1] (Matthew Bender).

2622. Intimidating a Witness (Pen. Code, § 136.1(a) & (b))

The defendant is charged [in Count __] with intimidating a witness [in violation of Penal Code section 136.1].

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—attending or giving testimony>

[1. The defendant maliciously (tried to (prevent/ [or] discourage)/(prevented/ [or] discouraged)) _____ *<insert name/description of person defendant allegedly sought to influence>* **from (attending/ [or] giving testimony at) _____** *<insert type of judicial proceeding or inquiry authorized by law>***;]**

<Alternative 1B—report of victimization>

[1. The defendant (tried to (prevent/ [or] discourage)/(prevented/ [or] discouraged)) _____ *<insert name/description of person defendant allegedly sought to influence>* **from making a report that (he/she/someone else) was a victim of a crime to _____** *<insert type of official specified in Pen. Code, § 136.1(b)(1)>***;]**

<Alternative 1C—causing prosecution>

[1. [Before the charge[s] (was/were) filed,] (T/t)he defendant (tried to (prevent/ [or] discourage)/(prevented/ [or] discouraged)) _____ *<insert name/description of person defendant allegedly sought to influence>* **from cooperating or providing information so that a (complaint/indictment/information/probation violation/parole violation) could be sought and prosecuted, and from helping to prosecute that action;]**

<Alternative 1D—causing arrest>

[1. The defendant (tried to (prevent/ [or] discourage)/(prevented/ [or] discouraged)) _____ *<insert name/description of person defendant allegedly sought to influence>* **from (arresting[,]/ [or] (causing/ [or] seeking) the arrest of [,]) someone in connection with a crime;]**

2. _____ *<insert name/description of person defendant allegedly sought to influence>* **was a (witness/ [or] crime victim);**

AND

3. **The defendant knew (he/she) was (trying to (prevent/ [or] discourage)/(preventing/ [or] discouraging)) _____** *<insert name/description of person defendant allegedly sought to influence>* **from _____** *<insert appropriate description from element 1>* **and intended to do so.**

[A person acts *maliciously* when he or she unlawfully intends to annoy, harm, or injure someone else in any way, or intends to interfere in any way with the orderly administration of justice.]

[As used here, *witness* means someone [or a person the defendant reasonably believed to be someone]:

<Give the appropriate bracketed paragraph[s].>

- **[Who knows about the existence or nonexistence of facts relating to a crime(;/.)]**

  [OR]

- **[Whose declaration under oath has been or may be received as evidence(;/.)]**

  [OR]

- **[Who has reported a crime to a (peace officer[,]/ [or] prosecutor[,]/ [or] probation or parole officer[,]/ [or] correctional officer[,]/ [or] judicial officer)(;/.)]**

  [OR

- **Who has been served with a subpoena issued under the authority of any state or federal court.]]**

[A person is a *victim* if there is reason to believe that a federal or state crime is being or has been committed or attempted against him or her.]

[It is not a defense that the defendant was not successful in preventing or discouraging the (victim/ [or] witness).]

[It is not a defense that no one was actually physically injured or otherwise intimidated.]

New January 2006; Revised September 2020, March 2023, February 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In element 1, alternative 1A applies to charges under Penal Code section 136.1(a), which prohibits "knowingly and maliciously" preventing or attempting to prevent a witness or victim from giving testimony. If the court instructs with alternative 1A, the court should also give the bracketed definition of "maliciously." (See *People v. Serrano* (2022) 77 Cal.App.5th 902, 912–913 [292 Cal.Rptr.3d 865].)

Alternatives 1B through 1D apply to charges under Penal Code section 136.1(b). Because the offense always requires specific intent, the committee has included the knowledge requirement with the specific intent requirement in element 3. (*People v. Ford* (1983) 145 Cal.App.3d 985, 990 [193 Cal.Rptr. 684]; see also *People v. Womack* (1995) 40 Cal.App.4th 926, 929–930 [47 Cal.Rptr.2d 76].)

Give the bracketed language at the beginning of Alternative 1C when there is a factual dispute whether the conduct occurred after the filing of charges.

If the defendant is charged with one of the sentencing factors in Penal Code section 136.1(c), give CALCRIM No. 2623, *Intimidating a Witness: Sentencing Factors*. If the defendant is charged with the sentencing factor based on a prior conviction, the court must give both CALCRIM No. 2623 and CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the court has granted a bifurcated trial on the prior conviction or the defendant has stipulated to the conviction.

Note that Penal Code section 136.1(a)(3) states, "For purposes of this section, evidence that the defendant was a family member who interceded in an effort to protect the witness or victim shall create a presumption that the act was without malice." It is unclear whether the court must instruct on this presumption.

AUTHORITY

- Elements. Pen. Code, § 136.1(a) & (b).
- "Malice" Defined. Pen. Code, § 136(1).
- "Witness" Defined. Pen. Code, § 136(2).

- "Victim" Defined. Pen. Code, § 136(3).
- Specific Intent Required. *People v. Ford, supra,* 145 Cal.App.3d at p. 990; see also *People v. Womack, supra,* 40 Cal.App.4th at pp. 929–930.
- Malice Not Required for Violations of Penal Code Section 136.1(b). *People v. Brackins* (2019) 37 Cal.App.5th 56, 66–67 [249 Cal.Rptr.3d 261].
- Postcharging Dissuasion Alone Does Not Violate Penal Code Section 136.1(a)(2), (b)(1) & (b)(2). *People v. Reynoza* (2024) 15 Cal.5th 982, 1013 [320 Cal.Rptr.3d 299, 546 P.3d 564] [Pen. Code, § 136.1(b)(2)]; *People v. Morones* (2023) 95 Cal.App.5th 721, 738 [313 Cal.Rptr.3d 688] [Pen. Code, § 136.1(a)(2), (b)(1)].

LESSER INCLUDED OFFENSES

A violation of Penal Code section 136.1(a) or (b) is a felony-misdemeanor, punishable by a maximum of three years in state prison. If the defendant is also charged with one of the sentencing factors in Penal Code section 136.1(c), then the offense is a felony punishable by two, three, or four years. If the defendant is charged under Penal Code section 131.6(c), then the offenses under subdivisions (a) and (b) are lesser included offenses. The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has proved the sentencing factor alleged. If the jury finds that this allegation has not been proved, then the offense should be set at the level of the lesser offense.

The misdemeanor offense of knowingly inducing a false statement to a law enforcement official in violation of Penal Code section 137(c) is not a lesser included offense of Penal Code section 137(b) because the latter offense lacks the element that the defendant must actually cause a false statement to be made. (*People v. Miles* (1996) 43 Cal.App.4th 575, 580 [51 Cal.Rptr.2d 52].)

RELATED ISSUES

Penal Code Sections 137(b), 136.1, and 138

Because one cannot "influence" the testimony of a witness if the witness does not testify, a conviction under Penal Code section 137(b) is inconsistent with a conviction under Penal Code section 136.1 or 138, which requires that a defendant prevent, rather than influence, testimony. (*People v. Womack, supra,* 40 Cal.App.4th at p. 931.)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, §§ 5, 6.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses,* § 82.07, Ch. 84, *Motions at Trial,* § 84.11 (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.23[6][e], 91.43 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.13[4][b]; Ch. 144, *Crimes Against Order,* § 144.03[2], [4] (Matthew Bender).

2650. Threatening a Public Official (Pen. Code, § 76)

The defendant is charged [in Count __] with threatening a public official [in violation of Penal Code section 76].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willingly (threatened to kill/ [or] threatened to cause serious bodily harm to) (a/an) _____** *<insert title of person specified in Pen. Code, § 76(a)>* **[or a member of the immediate family of (a/an) _____** *<insert title of person specified in Pen. Code, § 76(a)>***];**

2. **When the defendant acted, (he/she) intended that (his/her) statement be understood~~taken~~ as a threat [and intended that it be communicated to _____** *<insert name of alleged victim>***];**

3. **When the defendant acted, (he/she) knew that the person (he/she) threatened was (a/an) _____** *<insert title of person specified in Pen. Code, § 76(a)>* **[or a member of the immediate family of (a/an) _____** *<insert title of person specified in Pen. Code, § 76(a)>***];**

4. **When the defendant acted, (he/she) had the apparent ability to carry out the threat;**

[AND]

5. **The person threatened reasonably feared for (his/her) safety [or for the safety of (his/her) immediate family](;/.)**

<Give element 6 if directed at a person specified in Pen. Code, § 76(d) or (e).>
[AND

6. **The threat was directly related to the _____'s** *<insert title of person specified in Pen. Code, § 76(d) or (e)>* **performance of (his/her) job duties.]**

A threat may be oral or written and may be implied by a pattern of conduct or a combination of statements and conduct.

[When the person making the threat is an incarcerated prisoner with a stated release date, the *ability to carry out the threat* includes the ability to do so in the future.]

[*Serious bodily harm* includes serious physical injury or serious traumatic condition.]

[*Immediate family* includes a spouse, parent, or child[, or anyone who has regularly resided in the household for the past six months].]

[*Staff of a judge* includes court officers and employees[, as well as commissioners, referees, and retired judges sitting on assignment].]

[The defendant does not have to communicate the threat directly to the intended victim, but may do so through someone else.]

[Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act [or intend to have someone else do so].]

New January 2006; Revised February 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

When the threat is not conveyed directly, give the appropriate bracketed language in element two. (See *People v. Felix* (2001) 92 Cal.App.4th 905, 913 [112 Cal.Rptr.2d 311] [Pen. Code, § 422]; *In re Ryan D.* (2002) 100 Cal.App.4th 854, 861–862 [123 Cal.Rptr.2d 193] [insufficient evidence minor intended to convey threat to victim].)

AUTHORITY

- Elements and Definitions. Pen. Code, § 76.

- Reasonable Fear by Victim Is Element. *People v. Andrews* (1999) 75 Cal.App.4th 1173, 1178 [89 Cal.Rptr.2d 683].
- Statute Constitutional. *People v. Gudger* (1994) 29 Cal.App.4th 310, 321 [34 Cal.Rptr.2d 510].
- This Instruction Upheld. *People v. Barrios* (2008) 163 Cal.App.4th 270, 278 [77 Cal.Rptr.3d 456].

COMMENTARY

Similar to Penal Code section 422, Penal Code section 76 requires that the defendant had "the specific intent that the statement…be taken as a threat." Case law has interpreted Penal Code section 422 to require that, when a defendant communicates a threat to a third party, the defendant must have specifically intended to convey the threat to the victim. (See *People v. Choi* (2021) 59 Cal.App.5th 753, 762 [274 Cal.Rptr.3d 6].) No published case has interpreted Penal Code section 76 in the same manner as Penal Code section 422. However, based on the textual similarities between the two statutes, the committee has included the additional requirement that when the defendant has not directly communicated the threat to the victim, the defendant must have intended to convey the threat to the victim.

LESSER INCLUDED OFFENSES

An offense under Penal Code section 71, threatening a public officer to prevent him or her from performing his or her duties, may be a lesser included offense. However, there is no case law on this issue.

RELATED ISSUES

Threat Must Convey Intent to Carry Out

"Although there is no requirement in section 76 of specific intent to execute the threat, the statute requires the defendant to have the specific intent that the statement be taken as a threat and also to have the apparent ability to carry it out, requirements which convey a sense of immediacy and the reality of potential danger and sufficiently proscribe only true threats, meaning threats which 'convincingly express an intention of being carried out.' . . . [¶]. . . Thus, section 76 . . . adequately expresses the notion that the threats proscribed are only those 'so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution.' " [citations omitted] (*People v. Gudger*, *supra,* ~~(1994)~~ 29 Cal.App.4th ~~310,~~at pp.

320–321 ~~[34 Cal.Rptr.2d 510]~~; see also *In re George T.* (2004) 33 Cal.4th 620, 637–638 [16 Cal.Rptr.3d 61, 93 P.3d 1007].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, § 16.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.11A[1][b] (Matthew Bender).

2720. Assault by Prisoner Serving Life Sentence (Pen. Code, § 4500)

The defendant is charged [in Count __] with assault with (force likely to produce great bodily injury/a deadly weapon) with malice aforethought, while serving a life sentence [in violation of Penal Code section 4500].

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—force with weapon>

[1. The defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;]

<Alternative 1B—force without weapon>

[1. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and the force used was likely to produce great bodily injury;]

2. The defendant did that act willfully;

3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;

4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;

5. The defendant acted with malice aforethought;

[AND]

<Alternative 6A—defendant sentenced to life term>

[6. When (he/she) acted, the defendant had been sentenced to a maximum term of life in state prison [in California](;/.)]

<Alternative 6B—defendant sentenced to life and to determinate term>

[6. When (he/she) acted, the defendant had been sentenced to both a specific term of years and a maximum term of life in state prison [in California](;/.)]

<Give element 7 when self-defense or defense of another is an issue raised by the evidence.>

[AND

7. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

[The touching can be done indirectly (by causing an object [or someone else] to touch the other person/ [or] by touching something held by or attached to the other person).]

[The People are not required to prove that the defendant actually touched someone.]

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[A *deadly weapon* is any object, instrument, or weapon [that is inherently deadly or dangerous or one] that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[The term (*great bodily injury/deadly weapon*) is defined in another instruction.]

There are two kinds of *malice aforethought*, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for this crime.

The defendant acted with *express malice* if (he/she) unlawfully intended to kill the person assaulted.

The defendant acted with *implied malice* if:

1. **(He/She) intentionally committed an act.**

2. **The natural and probable consequences of the act were dangerous to human life.**

3. **At the time (he/she) acted, (he/she) knew (his/her) act was dangerous to human life.**

AND

4. **(He/She) deliberately acted with conscious disregard for human life.**

Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act is committed. It does not require deliberation or the passage of any particular period of time.

[A person is *sentenced to a term in a state prison* if he or she is (sentenced to confinement in _____ <*insert name of institution from Pen. Code, § 5003*>/committed to the Department of Corrections and Rehabilitation[, Division of Juvenile Justice,]) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *sentenced to a term in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is *not sentenced to a term in a state prison*.]]

New January 2006; Revised February 2013, August 2016, September 2019, September 2020, March 2022, February 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In element 1, give alternative 1A if it is alleged the assault was committed with a deadly weapon. Give alternative 1B if it is alleged that the assault was committed with force likely to produce great bodily injury.

In element 6, give alternative 6A if the defendant was sentenced to only a life term. Give element 6B if the defendant was sentenced to both a life term and a determinate term. (*People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836].)

~~Give the bracketed definition of "application of force and apply force" on request.~~

Give the bracketed paragraph on indirect touching if relevant.

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Give the bracketed phrase "that is inherently deadly or one" and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317–318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with "In deciding whether" if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

On request, give the bracketed definition of "sentenced to a term in state prison." Within that definition, give the bracketed portion that begins with "regardless of the purpose," or the bracketed second or third sentence, if requested and relevant based on the evidence.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

Penal Code section 4500 provides that the punishment for this offense is death or life in prison without parole, unless "the person subjected to such assault does not die within a year and a day after" the assault. If this is an issue in the case, the court should consider whether the time of death should be submitted to the jury for a specific factual determination pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

Defense—Instructional Duty

As with murder, the malice required for this crime may be negated by evidence of heat of passion or imperfect self-defense. (*People v. St. Martin* (1970) 1 Cal.3d 524, 530–531 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781 [73 Cal.Rptr. 10, 447, P.2d 106].) If the evidences raises an issue about one or both of these potential defenses, the court has a **sua sponte** duty to give the appropriate instructions, CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion–Lesser Included Offense*, or CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense–Lesser Included Offense*. The court must modify these instructions for the charge of assault by a life prisoner.

Related Instructions

CALCRIM No. 875, *Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury*.

CALCRIM No. 520, *Murder With Malice Aforethought*.

AUTHORITY

- Elements of Assault by Life Prisoner. Pen. Code, § 4500.
- Elements of Assault With Deadly Weapon or Force Likely. Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- "Willful" Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

- "Deadly Weapon" Defined. *People v. Aguilar, supra,* ~~(1997)~~ 16 Cal.4th ~~1023,~~at pp. 1028–1029 ~~[68 Cal.Rptr.2d 655, 945 P.2d 1204]~~.
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Malice Equivalent to Malice in Murder. *People v. St. Martin, supra,* ~~(1970)~~ 1 Cal.3d ~~524,~~at pp. 536–537 ~~[83 Cal.Rptr. 166, 463 P.2d 390]~~; *People v. Chacon, supra,* ~~(1968)~~ 69 Cal.2d ~~765,~~at pp. 780–781 ~~[73 Cal.Rptr. 10, 447 P.2d 106]~~.
- "Malice" Defined. Pen. Code, § 188; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1217–1222 [264 Cal.Rptr. 841, 783 P.2d 200]; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103–105 [13 Cal.Rptr.2d 864, 840 P.2d 969].
- Ill Will Not Required for Malice. *People v. Sedeno* (1974) 10 Cal.3d 703, 722 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1].
- Undergoing Sentence of Life. *People v. Superior Court of Monterey (Bell), supra,* ~~(2002)~~ 99 Cal.App.4th ~~1334,~~at p. 1341 ~~[121 Cal.Rptr.2d 836]~~.
- "Inherently Deadly" Defined. *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar, supra,* ~~(1997)~~ 16 Cal.4th ~~1023,~~at pp. 1028–1029 ~~[68 Cal.Rptr.2d 655, 945 P.2d 1204]~~.
- Examples of Noninherently Deadly Weapon. *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez, supra,* ~~(2018)~~ 4 Cal.5th ~~1055,~~at p. 1065 ~~[232 Cal.Rptr.3d 51, 416 P.3d 42]~~ [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

LESSER INCLUDED OFFENSES

- Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury—Not a Prisoner. Pen. Code, § 245; *People v. Milward* (2011) 52 Cal.4th 580, 588–589 [129 Cal.Rptr.3d 145, 257 P.3d 748]~~see *People v. St. Martin* (1970) 1 Cal.3d 524, 536 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009]~~.
- Assault. Pen. Code, § 240; see *People v. McDaniel* (2008) 159 Cal.App.4th 736, 747 [71 Cal.Rptr.3d 845] [Pen. Code, § 4501]~~*People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009]~~.

~~Note: In *People v. Noah* (1971) 5 Cal.3d 469, 476–477 [96 Cal.Rptr. 441, 487 P.2d 1009], the court held that assault by a prisoner not serving a life sentence, Penal Code section 4501, is not a lesser included offense of assault by a prisoner~~

~~serving a life sentence, Penal Code section 4500. The court based its on conclusion on the fact that Penal Code section 4501 includes as an element of the offense that the prisoner was not serving a life sentence. However, Penal Code section 4501 was amended, effective January 1, 2005, to remove this element. The trial court should, therefore, consider whether Penal Code section 4501 is now a lesser included offense to Penal Code section 4500.~~

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

Status as Life Prisoner Determined on Day of Alleged Assault

Whether the defendant is sentenced to a life term is determined by his or her status on the day of the assault. (*People v. Superior Court of Monterey (Bell), supra,* ~~(2002)~~ 99 Cal.App.4th ~~1334,~~ at p. 1341 ~~[121 Cal.Rptr.2d 836]~~; *Graham v. Superior Court* (1979) 98 Cal.App.3d 880, 890 [160 Cal.Rptr. 10].) It does not matter if the conviction is later overturned or the sentence is later reduced to something less than life. (*People v. Superior Court of Monterey (Bell), supra,* 99 Cal.App.4th at p. 1341; *Graham v. Superior Court, supra,* 98 Cal.App.3d at p. 890.)

Undergoing Sentence of Life

This statute applies to "[e]very person undergoing a life sentence . . . ." (Pen. Code, § 4500.) In *People v. Superior Court of Monterey (Bell), supra,* ~~(2002)~~ 99 Cal.App.4th ~~1334,~~at p. 1341 ~~[121 Cal.Rptr.2d 836]~~, the defendant had been sentenced both to life in prison and to a determinate term and, at the time of the assault, was still technically serving the determinate term. The court held that he was still subject to prosecution under this statute, stating "a prisoner who commits an assault is subject to prosecution under section 4500 for the crime of assault by a life prisoner if, on the day of the assault, the prisoner was serving a sentence which potentially subjected him to actual life imprisonment, and therefore the prisoner might believe he had 'nothing left to lose' by committing the assault." *(Ibid.)*

Error to Instruct on General Definition of Malice and General Intent

"Malice," as used in Penal Code section 4500, has the same meaning as in the context of murder. (*People v. St. Martin, supra,* ~~(1970)~~ 1 Cal.3d ~~524,~~at pp. 536–537 ~~[83 Cal.Rptr. 166, 463 P.2d 390]~~; *People v. Chacon, supra,* ~~(1968)~~ 69 Cal.2d ~~765,~~at pp. 780–781 ~~[73 Cal.Rptr. 10, 447 P.2d 106]~~.) Thus, it is error to give the general definition of malice found in Penal Code section 7, subdivision 4. (*People v. Jeter* (2005) 125 Cal.App.4th 1212, 1217 [23 Cal.Rptr.3d 402].) It is also error to instruct that Penal Code section 4500 is a general intent crime. *(Ibid.)*

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 58–60.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.11[3] (Matthew Bender).

2721. Assault by Prisoner (Pen. Code, § 4501)

The defendant is charged [in Count __] with assault with (force likely to produce great bodily injury/a deadly weapon) while serving a state prison sentence [in violation of Penal Code section 4501].

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—force with weapon>

[1. The defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;]

<Alternative 1B—force without weapon>

[1. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and the force used was likely to produce great bodily injury;]

2. The defendant did that act willfully;

3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;

4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;

[AND]

5. When (he/she) acted, the defendant was confined in a [California] state prison(;/.)

<Give element 6 when self-defense or defense of another is an issue raised by the evidence.>

[AND

6. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

[The touching can be done indirectly (by causing an object [or someone else] to touch the other person/ [or] by touching something held by or attached to the other person).]

[The People are not required to prove that the defendant actually touched someone.]

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[A *deadly weapon* is any object, instrument, or weapon [that is inherently deadly or dangerous or one] that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[The term (*great bodily injury/deadly weapon*) is defined in another instruction.]

A person is *confined in a state prison* if he or she is (confined in _____ <*insert name of institution from Pen. Code, § 5003*>/committed to the Department of Corrections and Rehabilitation[, Division of Juvenile Justice,]) by an order made according to law[, regardless of both the purpose of the

(confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *confined in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is not *confined in a state prison*.]

New January 2006; Revised August 2016, September 2019, September 2020, March 2022, February 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 6 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In element 1, give alternative 1A if it is alleged the assault was committed with a deadly weapon. Give alternative 1B if it is alleged that the assault was committed with force likely to produce great bodily injury.

~~Give the bracketed definition of "application of force and apply force" on request.~~

Give the bracketed paragraph on indirect touching if relevant.

Give the bracketed phrase "that is inherently deadly or one" and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317–318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with "In deciding whether" if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

In the definition of "serving a sentence in a state prison," give the bracketed portion that begins with "regardless of the purpose," or the bracketed second or third sentence, if requested and relevant based on the evidence.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533–535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

Related Instructions

CALCRIM No. 875, *Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury*.

AUTHORITY

- Elements of Assault by Prisoner. Pen. Code, § 4501.
- Elements of Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury. Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- "Willful" Defined. Pen. Code, § 7 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- "Deadly Weapon" Defined. *People v. Aguilar, supra,* ~~(1997)~~ 16 Cal.4th ~~1023,~~at pp. 1028–1029 ~~[68 Cal.Rptr.2d 655, 945 P.2d 1204]~~.
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- "Confined in State Prison" Defined. Pen. Code, § 4504.
- Underlying Conviction Need Not Be Valid. *Wells v. California* (9th Cir. 1965) 352 F.2d 439, 442.
- "Inherently Deadly" Defined. *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar, supra,* ~~(1997)~~ 16 Cal.4th ~~1023,~~at pp. 1028–1029 ~~[68 Cal.Rptr.2d 655, 945 P.2d 1204]~~.
- Examples of Noninherently Deadly Weapon. *People v. Aledamat* (2019) 8 Cal.5th 1, 6 [251 Cal.Rptr.3d 371, 447 P.3d 277] [box cutter]; *People v. Perez,*

supra, (2018) 4 Cal.5th 1055,at p. 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42] [vehicle]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [153 P.2d 315] [knife].

LESSER INCLUDED OFFENSES

- Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury—Not a Prisoner. Pen. Code, § 245; see *People v. Milward* (2011) 52 Cal.4th 580, 588–589 [129 Cal.Rptr.3d 145, 257 P.3d 748] [Pen. Code, § 4501]see *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].
- Assault. Pen. Code, § 240; *People v. McDaniel* (2008) 159 Cal.App.4th 736, 747 [71 Cal.Rptr.3d 845]*People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].

RELATED ISSUES

See the Authority section in CALCRIM No. 960, *Simple Battery*, regarding indirect touching.

Not Serving a Life Sentence

Previously, this statute did not apply to an inmate "undergoing a life sentence." (See *People v. Noah* (1971) 5 Cal.3d 469, 477 [96 Cal.Rptr. 441, 487 P.2d 1009].) The statute has been amended to remove this restriction, effective January 1, 2005. If the case predates this amendment, the court must add to the end of element 5, "for a term other than life."

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 61, 63.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.11[3] (Matthew Bender).

2723. Battery by Prisoner on Nonprisoner (Pen. Code, § 4501.5)

The defendant is charged [in Count __] with battery on someone who was not a prisoner [in violation of Penal Code section 4501.5].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully touched** _____ *<insert name of person allegedly battered, excluding title of law enforcement agent>* **in a harmful or offensive manner;**

2. **When (he/she) acted, the defendant was serving a sentence in a [California] state prison;**

[AND]

3. _____ *<insert name of person allegedly battered, excluding title of law enforcement agent>* **was not serving a sentence in state prison(;/.)**

<Give element 4 when self-defense or defense of another is an issue raised by the evidence.>
[AND

4. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

[The touching can be done indirectly (by causing an object [or someone else] to touch the other person/ [or] by touching something held by or attached to the other person).]

A person is *serving a sentence in a state prison* if he or she is (confined in _____ <*insert name of institution from Pen. Code, § 5003*>/committed to the Department of (Corrections and Rehabilitation, Division of Juvenile Justice/Corrections and Rehabilitation)) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *serving a sentence in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is not *serving a sentence in a state prison*.]

<When lawful performance is an issue, give the following paragraph and Instruction 2671, Lawful Performance: Custodial Officer.>
[A custodial officer is not lawfully performing his or her duties if he or she is using unreasonable or excessive force in his or her duties. Instruction 2671 explains when force is unreasonable or excessive.]

New January 2006; Revised August 2016, March 2017, February 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 4 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

The court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (See *People v. Coleman* (1978) 84 Cal.App.3d 1016, 1022–1023 [149 Cal.Rptr. 134]; *People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) If there is evidence of excessive force, give bracketed element 4, the last bracketed paragraph, and the appropriate portions of CALCRIM No. 2671, *Lawful Performance: Custodial Officer*.

Give the bracketed paragraph on indirect touching if relevant~~that is an issue~~.

In the definition of "serving a sentence in a state prison," give the bracketed portion that begins with "regardless of the purpose," or the bracketed second or third sentence, if requested and relevant based on the evidence.

Related Instructions

CALCRIM No. 960, *Simple Battery*.

AUTHORITY

- Elements of Battery by Prisoner on Nonprisoner. Pen. Code, § 4501.5.
- Elements of Battery. Pen. Code, § 242; see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- "Willful" Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Contact With Object Held in Another Person's Hand May Constitute Touching. *In re B.L.* (2015) 239 Cal.App.4th 1491, 1495–1497 [192 Cal.Rptr.3d 154].
- Hitting a Vehicle Occupied by Another Person May Constitute Touching. *People v. Dealba* (2015) 242 Cal.App.4th 1142, 1144, 1153 [195 Cal.Rptr.3d 848].
- "Confined in State Prison" Defined. Pen. Code, § 4504.
- Underlying Conviction Need Not Be Valid. *Wells v. California* (9th Cir. 1965) 352 F.2d 439, 442.

LESSER INCLUDED OFFENSES

- Simple Battery. Pen. Code, § 242.
- Assault. Pen. Code, § 240.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 13–16, 57.

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, § 69.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.12 (Matthew Bender).

2724–2734. Reserved for Future Use

3224. Aggravating Factor: Great Violence, Great Bodily Harm, or High Degree of Cruelty, Viciousness, or Callousness

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<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged [in Count[s] __[,]][or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the crime[s][in Count[s] __] involved (great violence[,]/ [or]great bodily harm[,]/ [or]threat[s] of great bodily harm[,]/ [or][(other/an)] act[s] revealing a high degree of cruelty, viciousness, or callousness).]

<Introductory paragraph for bifurcated trial>
[The People have alleged that the crime[s][in Count[s] __] involved (great violence[,]/ [or]great bodily harm[,]/ [or]threat[s] of great bodily harm[,]/ [or][(other/an)] act[s] revealing a high degree of cruelty, viciousness, or callousness).]

To prove this allegation, the People must prove that:

1. **During the commission of the crime[s], the defendant (used great violence[,]/ [or]inflicted great bodily harm[,]/ [or]threatened to inflict great bodily harm[,]/ [or]committed (other/an) act[s] showing a high degree of cruelty, viciousness, or callousness);**

   AND

2. **The (type/level) of (violence[,]/ [or]bodily harm[,]/ [or]threat of bodily harm[,]/ [or]cruelty, viciousness, or callousness) was distinctively worse than what was necessary to commit the crime[s].**

[For the crime to have been committed with (great violence[,]/ [or]cruelty[,]/ [or]viciousness[,]/ [or]callousness), no one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed the crime with (great violence[,]/ [or]cruelty[,]/ [or]viciousness[,]/ [or]callousness).]

[*Great bodily harm* means significant or substantial physical injury, as opposed to minor or moderate harm.]

[*Threat of great bodily harm* means the threat of significant or substantial physical injury. It is a threatened injury that would result in greater than minor or moderate harm.]

[*Viciousness* means dangerously aggressive or marked by violence or ferocity. *Viciousness* is not the same as violence. For example, some acts which may be described as vicious do not involve violence at all, but rather involve acts such as deceit and slander. On the other hand, many violent acts do not indicate viciousness, but instead show frustration, justifiable rage, or self-defense.]

[An act discloses *cruelty* when it demonstrates the deliberate infliction of physical or mental suffering.]

[An act discloses *callousness* when it demonstrates a lack of sympathy for the suffering of, or harm to, the victim[s].]

You may not find the allegation true unless all of you agree that the People have proved at least one of the following: that the defendant (used great violence[,]/ [or]inflicted great bodily harm[,]/ [or]threatened to inflict great bodily harm[,]/ [or]committed[other] acts showing a high degree of cruelty, viciousness, or callousness). However, you need not all agree on the act[s] or conduct that [constitutes the (use of great violence[,]/ [or]infliction of great bodily harm[,]/ [or]threat to inflict great bodily harm)][or][show a high degree of cruelty, viciousness, or callousness.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New March 2023; Revised March 2024, February 2025**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(1).
- "Aggravating Fact" Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Force, Violence, or Threat Beyond What ~~i~~Is Necessary to Accomplish Criminal Purpose. *People v. Karsai* (1982) 131 Cal.App.3d 224, 239 [182 Cal.Rptr. 406]; see also *People v. Cortez* (1980) 103 Cal.App.3d 491, 496 [163 Cal.Rptr. 1]; *People v. Harvey* (1984) 163 Cal.App.3d 90, 116 [208 Cal.Rptr. 910]; *People v. Garcia* (1989) 209 Cal.App.3d 790, 793–794 [257 Cal.Rptr. 495].
- Viciousness Not Equivalent ~~T~~to Violence. *People v. Reed* (1984) 157 Cal.App.3d 489, 492 [203 Cal.Rptr. 659].
- Actual Bodily Harm Not Required. *People v. Duran* (1982) 130 Cal.App.3d 987, 990 [182 Cal.Rptr. 17].

COMMENTARY

Distinctively Worse Than the Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* because comparing the defendant's conduct with other ways in which the same offense has been or may be committed "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense" and thus does not raise a constitutional concern. (See *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202].)

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3225. Aggravating Factor: Armed or Used Weapon

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged [in Count[s] __~~[,]~~][or of attempting to commit (that/those) crime[s]][or the lesser crime~~s~~[s] of _____ *<insert lesser offense[s]>***], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the defendant was armed with or used a weapon, to wit: _____** *<insert description of weapon>***, during commission of the crime[s] in Count[s] _____.]**

<Introductory paragraph for bifurcated trial>
[The People have alleged that the defendant was armed with or used a weapon, to wit: _____ *<insert description of weapon>***, during commission of the crime[s][in Count[s] _____].]**

To prove this allegation, the People must prove that the defendant, while committing the crime[s][in Count[s] __], (knowingly carried a weapon[,]/ [or]knowingly had a weapon available for use[,]/ [or]intentionally displayed a weapon in a menacing manner[,]/ [or]intentionally (fired/ [or]attempted to fire) a weapon[,]/ [or]intentionally (struck[,]/ [or]stabbed[,]/ [or]slashed[,]/ [or]hit][,]/ [or]attempted to (strike[,]/ [or]stab[,]/ [or]slash[,]/ [or]hit) another person with a weapon).~~]~~

[A device, instrument, or object that is capable of being used to inflict injury or death may be a *weapon*. In determining whether _____*<insert description>*** was a *weapon*, you may consider the totality of circumstances, including the manner in which it was used or possessed.]**

You may not find the allegation true unless all of you agree that the People have proved that the defendant was either armed or used a weapon. However, all of you do not need to agree on which act[s] or conduct constitutes the arming or use of a weapon.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New March 2023; Revised March 2024, * *February 2025**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S.270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

Give the bracketed portion that defines weapon if the object is not a weapon as a matter of law and is capable of innocent uses.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(2).
- "Aggravating Fact" Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Arming Includes Available for Use. *People v. Garcia* (1986) 183 Cal.App.3d 335, 350 [228 Cal.Rptr. 87].

COMMENTARY

Distinctively Worse Than the Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* because comparing the defendant's conduct with other ways in which the same offense has been or may be committed "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense" and thus does not raise a constitutional concern. (See *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202].)

Penal Code section 12022

Consistent with the language of rule 4.421(a)(2), the instruction has been drafted with the assumption that the defendant is personally armed. The armed enhancement contained in Penal Code section 12022(a)(1) provides: "This additional term shall apply to a person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm." Whether there is a relationship between the rule of court and Penal Code section 12022(a)(1) has not been addressed by case law.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3226. Aggravating Factor: Particularly Vulnerable Victim

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]][or of attempting to commit (that/those) crime[s]][or the lesser crime~~s~~[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that _____*<insert name of victim>* was a particularly vulnerable victim.]

<Introductory paragraph for bifurcated trial>
[The People have alleged[in Count[s] __] that _____*<insert name of victim>* was a particularly vulnerable victim.]

To prove this allegation, the People must prove that:

1. **_____ *<insert name of victim>* suffered/ [or]was threatened with suffering) a loss, injury, or harm as the result of the crime[s];**

AND

2. **_____*<insert name of victim>* was particularly vulnerable.**

***Particularly vulnerable* includes being defenseless, unguarded, unprotected, or otherwise susceptible to the defendant's criminal act to a special or unusual degree.**

In determining whether _____ *<insert name of victim>* was *particularly vulnerable*, you should consider all of the circumstances surrounding the commission of the crime, including the characteristics of _____ *<insert name of victim>* and the manner and setting in which the crime was committed.

[You may not find vulnerability based solely on _____ *<insert element of the offense>*, which is an element of _____*<insert offense>*.]

You may not find the allegation true unless all of you agree that the People have proved that the victim was particularly vulnerable. However, you do not have to agree on which facts show that the victim was particularly vulnerable.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime[and for each victim].

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New March 2023; Revised March 2024, February 2025**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Pen. Code section 1170.85(b) states: "Upon conviction of any felony it shall be considered a circumstance in aggravation in imposing a term under subdivision (b) of Section 1170 if the victim of an offense is particularly vulnerable, or unable to defend himself or herself, due to age or significant disability." If this section is applicable, the instruction should be modified to reflect the victim's alleged inability to defend himself or herself based on age or significant disability.

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crime and victim the aggravating factor pertains to if it applies to one or more specific counts or victims.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(3).

- "Aggravating Fact" Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- "Victim" Defined. *People v. Simon* (1983) 144 Cal.App.3d 761, 765 [193 Cal.Rptr. 28].
- "Particularly Vulnerable" Defined. *People v. DeHoyos* (2013) 57 Cal.4th 79, 154–155 [158 Cal.Rptr.3d 797, 303 P.3d 1]; *People v. Spencer* (1996) 51 Cal.App.4th 1208, 1223 [59 Cal.Rptr.2d 627]; *People v. Price* (1984) 151 Cal.App.3d 803, 814 [199 Cal.Rptr. 99]; *People v. Ramos* (1980) 106 Cal.App.3d 591, 607 [165 Cal.Rptr. 179]; *People v. Smith* (1979) 94 Cal.App.3d 433, 436 [156 Cal.Rptr. 502].
- Vulnerability Cannot Be Based Solely on Age if Age Is Element of Offense. *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1693–1694 [53 Cal.Rptr.2d 282], disapproved on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123 [65 Cal.Rptr.2d 1, 938 P.2d 986]; *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1159 [249 Cal.Rptr. 435], disapproved on other grounds in *People v. Soto* (2011) 51 Cal.4th 229, 244–245 [119 Cal.Rptr.3d 775, 245 P.3d 410]; *People v. Ginese* (1981) 121 Cal.App.3d 468, 476–477 [175 Cal.Rptr. 383]; *People v. Flores* (1981) 115 Cal.App.3d 924, 927 [171 Cal.Rptr. 777].
- Factor in Vehicular Manslaughter. *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1358–1359 [241 Cal.Rptr. 391] [vehicular manslaughter victim cannot be particularly vulnerable]; *People v. Weaver* (2007) 149 Cal.App.4th 1301, 1315–1319 [58 Cal.Rptr.3d 18] [vehicular manslaughter victim can be particularly vulnerable], disapproved on another ground in *People v. Cook* (2015) 60 Cal.4th 922 [183 Cal.Rptr.3d 502, 342 P.3d 404]; *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1182 [214 Cal.Rptr.3d 467] [vehicular manslaughter victim can be particularly vulnerable].).

COMMENTARY

Distinctively Worse Than the Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court

held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* because comparing the defendant's conduct with other ways in which the same offense has been or may be committed "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense" and thus does not raise a constitutional concern. (See *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202].)

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3227. Aggravating Factor: Induced Others to Participate or Occupied Position of Leadership or Dominance

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<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __~~[,]~~] [or of attempting to commit (that/those) crime[s]][or the lesser crime~~s~~[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant induced others to participate in committing the crime[s] or occupied a position of leadership or dominance of other participants in the commission of the crime[s].]

<Introductory paragraph for bifurcated trial>
[The People have alleged[in Count[s] ___] that the defendant induced others to participate in committing the crime[s] or occupied a position of leadership or dominance of other participants in the commission of the crime[s].]

To prove this allegation, the People must prove that:

1. **The defendant induced others to participate in the commission of the crime[s];**

OR

2. **The defendant occupied a position of leadership or dominance over other participants during commission of the crime[s].**

***Induced* means persuaded, convinced, influenced, or instructed.**

You may not find the allegation true unless all of you agree that the People have proved that the defendant either induced others to participate or occupied a position of leadership or dominance. However, all of you do not need to agree on which act[s] or conduct constitutes inducing others to participate or occupying a position of leadership or dominance.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New March 2023; Revised March 2024, * *February 2025**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(4).
- "Aggravating Fact" Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- More Than One Participant Required. *People v. Berry* (1981) 117 Cal.App.3d 184, 198 [172 Cal.Rptr. 756, 763–764].

- Leadership Not Equivalent to Dominance. *People v. Kellett* (1982) 134 Cal.App.3d 949, 961 [185 Cal.Rptr. 1].
- Factor Requires More Than Being Willing Participant. *People v. Searle* (1989) 213 Cal.App.3d 1091, 1097 [261 Cal.Rptr. 898].

COMMENTARY

Distinctively Worse Than the Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* because comparing the defendant's conduct with other ways in which the same offense has been or may be committed "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense" and thus does not raise a constitutional concern. (See *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202].)

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3228. Aggravating Factor: Induced Minor to Commit or Assist

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged [in Count[s] __[,]][or of attempting to commit (that/those) crime[s]][or the lesser crime~~s~~[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the defendant induced a minor to commit or assist in the commission of the crime[s][in Count[s] __].]

<Introductory paragraph for bifurcated trial>
[The People have alleged[in Count[s] __] that the defendant induced a minor to commit or assist in the commission of the crime[s].]

To prove this allegation, the People must prove that:

1. **The defendant induced a minor to commit the crime[s];**

   OR

2. **The defendant induced a minor to assist in the commission of the crime[s].**

Induced **means persuaded, convinced, influenced, or instructed.**

A minor is a person under the age of 18 years.

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

You may not find the allegation true unless all of you agree that the People have proved that the defendant induced a minor either to commit the crime or to assist in the commission of the crime. However, all of you do not need to agree on which act[s] or conduct constitutes the inducement.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New March 2023; Revised March 2024, * *February 2025**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(5).
- "Aggravating Fact" Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

COMMENTARY

Distinctively Worse Than the Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* because comparing the defendant's conduct with other ways in which the same offense has been or may be committed "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense" and thus does not raise a constitutional concern. (See *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202].)

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3229. Aggravating Factor: Threatened, Prevented, Dissuaded, Etc. Witnesses

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<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __~~[,]~~] [or of attempting to commit (that/those) crime[s]][or the lesser crime~~s~~[s] of _____ *<insert lesser offense[s]>***], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the defendant[in Count[s] __] (threatened witnesses[,]/ [or]unlawfully prevented or dissuaded witnesses from testifying[,]/ [or]suborned perjury[,]/ [or]_____***<insert other illegal activity that interfered with the judicial process>*****).]**

<Introductory paragraph for bifurcated trial>
[The People have alleged that the defendant[in Count[s] __] (threatened witnesses[,]/ [or]unlawfully prevented or dissuaded witnesses from testifying[,]/ [or]suborned perjury[,]/ [or]_____*<insert other illegal activity that interfered with the judicial process>*****).]**

To prove this allegation, the People must prove that the defendant (threatened [a]witness[es]/ [or]prevented [a]witness[es] from testifying/ [or]dissuaded [a]witness[es] from testifying/ [or]suborned perjury/[or]_____*<insert other illegal activity that interfered with the judicial process>*****).**

[As used here, *witness* means someone[or a person the defendant reasonably believed to be someone]:

<Give the appropriate bracketed paragraph[s].>

- **[Who knows about the existence or nonexistence of facts relating to a crime(;/.)]**

  [OR]

- **[Whose declaration under oath has been or may be received as evidence(;/.)]**

  [OR]

- **[Who has reported a crime to a (peace officer[,]/ [or] prosecutor[,]/ [or] probation or parole officer[,]/ [or] correctional officer[,]/ [or] judicial officer)(;/.)]**

  [OR

- **Who has been served with a subpoena issued under the authority of any state or federal court.]]**

[A threat may be oral or written and may be implied by a pattern of conduct or a combination of statements and conduct.]

[The defendant does not have to communicate the threat directly to the intended victim, but may do so through someone else.]

[Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act [or intend to have someone else do so].]

[*Dissuaded* means persuaded or advised not to do something.]

[*Suborned perjury* means encouraged, induced, or assisted witnesses to willfully make [a]false statement[s] under oath. In order to find that the defendant suborned perjury, the People must prove, beyond a reasonable doubt, not only that the sworn statement was actually false, but also that the defendant, at the time (he/she) encouraged, induced, or assisted the witness(es) to make the statement, knew that it was false.]

[*Induced* means persuaded, convinced, influenced, or instructed.]

You may not find the allegation true unless all of you agree that the People have proved that the defendant (threatened [a]witness[es]/ [or]prevented [a]witness[es] from testifying/ [or]dissuaded [a]witness[es] from testifying/ [or]suborned perjury/ [or]_____<*insert other illegal activity that interfered with the judicial process*>**). However, all of you do not need to agree on which act[s] or conduct constitutes (threatening [a]witness[es]/ [or]preventing [a]witness[es] from testifying/ [or]dissuading [a]witness[es] from testifying/ [or]suborning perjury/ [or]_____**<*insert other illegal activity that interfered with the judicial process*>**).**

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New March 2023; Revised March 2024, * *February 2025**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Penal Code section 1170.85(a) states: "Upon conviction of any felony assault or battery offense, it shall be considered a circumstance in aggravation of the crime in imposing a term under subdivision (b) of Section 1170 if the offense was committed to prevent or dissuade a person who is or may become a witness from attending upon or testifying at any trial, proceeding, or inquiry authorized by law, or if the offense was committed because the person provided assistance or information to a law enforcement officer, or to a public prosecutor in a criminal or juvenile court proceeding." If this section is applicable, the bracketed catch-all provision of the instruction related to other illegal activity should be modified to reflect the defendant's alleged conduct.

If it is alleged the defendant interfered with the judicial process by committing perjury, the bracketed catch-all provision for other illegal activity should be modified and the trial court should also instruct with CALCRIM No. 2640, *Perjury*. (See *People v. Howard* (1993) 17 Cal.App.4th 999, 1002–1004 [21 Cal.Rptr.2d 676].)

The catch-all provision of other illegal activity can include attempts to dissuade or prevent a witness from testifying. (See *People v. Lewis* (1991) 229 Cal.App.3d 259, 266–267 [280 Cal.Rptr. 128].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(6).
- "Aggravating Fact" Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- "Witness" Defined. Pen. Code, § 136(2).
- "Threat" Defined. Pen. Code, § 76(5).
- Attempted Subornation of Perjury. *People v. Lewis*, *supra,* ~~(1991)~~ 229 Cal.App.3d ~~259,~~at pp. 266–267 ~~[280 Cal.Rptr. 128]~~.

COMMENTARY

Distinctively Worse Than the Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* because comparing the defendant's conduct with other ways in which the same offense has

been or may be committed "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense" and thus does not raise a constitutional concern. (See *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202].)

Perjury

Perjury committed by the defendant can constitute "an illegal activity that interfered with the judicial process." (See *People v. Howard*, *supra,* ~~(1993)~~ 17 Cal.App.4th ~~999,~~at p. 1002 ~~[21 Cal.Rptr.2d 676]~~.) If it is alleged that the defendant committed perjury, the jury must find all the elements of a perjury violation. *Id.* at p. 1004 [holding that the court is constitutionally required to make findings encompassing the elements of perjury: "a willful statement, under oath, of any material matter which the witness knows to be false"]; see also *United States v. Dunnigan* (1993) 507 U.S. 87, 96 [113 S.Ct. 1111, 122 L.Ed.2d 445].) The concern, essentially, is that a sentence may be aggravated if the defendant actually committed perjury by being untruthful, but not if the defendant merely gave inaccurate testimony because of confusion, mistake, faulty memory, or some other reason besides a willful attempt to impede justice. (*Howard*, *supra*, 17 Cal.App.4th at p.1005; *Dunnigan*, *supra*, 507 U.S. at pp. 95–96.)

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3230. Aggravating Factor: Planning, Sophistication, or Professionalism

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<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __~~[],]~~] [or of attempting to commit (that/those) crime[s]][or the lesser crime~~s~~[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the offense was carried out with planning, sophistication, or professionalism.]

<Introductory paragraph for bifurcated trial>
[The People have alleged[in Count[s] __] that the offense was carried out with planning, sophistication, or professionalism.]

To prove this allegation, the People must prove that the defendant's manner of committing the crime involved planning, sophistication, or professionalism.

Whether the manner of committing the crime involves *planning, sophistication, or professionalism* depends on the totality of the circumstances surrounding the offense.

***Planning* refers to conduct before the crime, preparing for its commission.**

***Sophistication* refers to conduct demonstrating knowledge or awareness of the complexities or details involved in committing the crime.**

***Professionalism* refers to conduct demonstrating particular experience or expertise.**

You may not find the allegation true unless all of you agree that the People have proved that the defendant's manner of committing the crime involved planning, sophistication, or professionalism. However, all of you do not need to agree on which act[s] or conduct demonstrates that the manner of committing the crime involves planning, sophistication, or professionalism.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved (this/these) allegation[s] for each crime and return a separate finding for each crime.]

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New March 2023; Revised March 2024, * *February 2025**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where the evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factors. California Rules of Court, rule 4.421(a)(8).
- "Aggravating Fact" Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- "Planning, Sophistication, Professionalism" Defined. *People v. Mathews* (1980) 102 Cal.App.3d 704, 710 [162 Cal.Rptr. 615]; *People v. Stewart* (1983) 140 Cal.App.3d 11, 17 [189 Cal.Rptr. 141]; *People v. Charron* (1987) 193

Cal.App.3d 981, 994–995 [238 Cal.Rptr. 660]; *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1695 [53 Cal.Rptr.2d 282], disapproved on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123 [65 Cal.Rptr.2d 1, 938 P.2d 986].

COMMENTARY

Distinctively Worse Than the Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* because comparing the defendant's conduct with other ways in which the same offense has been or may be committed "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense" and thus does not raise a constitutional concern. (See *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202].)

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3231. Aggravating Factor: Great Monetary Value

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __~~[,]~~] [or of attempting to commit (that/those) crime[s]][or the lesser crime~~s~~[s] of _____ *<insert lesser offense[s]>***], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the crime[s][in Count[s] __] involved [(a/an)] [attempted] [or] [actual] (taking/ [or] damage) of great monetary value.]**

<Introductory paragraph for bifurcated trial>
[The People have alleged that the crime[s][in Count[s] __] involved[(a/an)][attempted][or][actual] (taking/ [or] damage) of great monetary value.]

To prove this allegation, the People must prove that:

1. **During the commission of the crime[s], the defendant (attempted to take/ [or]actually took/damaged)** _____*<insert description of item>*;

   AND

2. **The monetary value of the** _____ *<insert description of item or damage to item>* **was great.**

[In determining whether the *monetary value* was *great*, you may consider all evidence presented on the issue of value.]

You may not find the allegation true unless all of you agree that the People have proved that the (item/damage) that the defendant (attempted to take/took / [or] caused) was of great monetary value. However, all of you do not need to agree on a specific monetary value.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New March 2023; Revised March 2024, *February 2025**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(9).
- "Aggravating Fact" Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Great Monetary Value. *People v. Wright* (1982) 30 Cal.3d 705, 707 & 714 [180 Cal.Rptr. 196, 639 P.2d 267] [losses of $2,300 and $3,250 qualified]; *People v. Berry* (1981) 117 Cal.App.3d 184, 197 [172 Cal.Rptr. 756] [damage

of $450 did not qualify]; *People v. Bejarano* (1981) 114 Cal.App.3d 693, 705–706 [173 Cal.Rptr. 71] [loss of rifle, shotgun, and television did not qualify].

COMMENTARY

Distinctively Worse Than the Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* because comparing the defendant's conduct with other ways in which the same offense has been or may be committed "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense" and thus does not raise a constitutional concern. (See *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202].)

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3232. Aggravating Factor: Large Quantity of Contraband

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]] [or of attempting to commit (that/those) crime[s]][or the lesser crime~~s~~[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the crime[s][in Count[s] __] involved a large quantity of contraband.]

<Introductory paragraph for bifurcated trial>
[The People have alleged that the crime[s][in Count[s] __] involved a large quantity of contraband.]

To prove this allegation, the People must prove that:

1. **The _____ *<insert description of contraband>* was contraband;**

   AND

2. **The quantity of _____*<insert description of contraband>* was large.**

[*Contraband* means illegal or prohibited items.]

In determining whether the quantity was *large*, you may consider all evidence presented on the issue of amount.

You may not find the allegation true unless all of you agree that the People have proved that the quantity of contraband was large. However, all of you do not need to agree on the specific quantity.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New March 2023; Revised March 2024, * *February 2025**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(10).
- "Aggravating Fact" Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

COMMENTARY

Distinctively Worse Than the Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* because comparing the defendant's conduct with other ways in which the same offense has been or may be committed "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense" and thus does not raise a constitutional concern. (See *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202].)

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3233. Aggravating Factor: Position of Trust or Confidence

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]][or of attempting to commit (that/those) crime[s]][or the lesser crime~~s~~[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the defendant took advantage of a position of trust or confidence to commit the crime.]

<Introductory paragraph for bifurcated trial>
[The People have alleged[in Count[s]__] that the defendant took advantage of a position of trust or confidence to commit the crime.]

To prove this allegation, the People must prove that:

1. **(Prior to/During) the commission of the crime, the defendant (had/developed) a relationship with _____** *<insert name of victim or other person>***;**

2. **This relationship allowed the defendant to occupy a position of trust or caused _____***<insert name of victim or other person>* **to have confidence in the defendant;**

   AND

3. **The defendant took advantage of this position of trust or confidence to commit the crime.**

You may not find the allegation true unless all of you agree that the People have proved that the defendant took advantage of a position of trust or confidence with the victim to commit the crime. However, all of you do not need to agree on which act[s] or conduct constitutes the taking advantage of a position of trust or confidence to commit the crime.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New March 2023; Revised March 2024, * *February 2025**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(11).
- "Aggravating Fact" Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Factor Focuses on Special Status to Victim. *People v. DeHoyos* (2013) 57 Cal.4th 79, 155 [158 Cal.Rptr.3d 797, 303 P.3d 1]; *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1262–1263 [131 Cal.Rptr.2d 628] [quasi-paternal

relationship]; *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1694–1695 [53 Cal.Rptr.2d 282] [defendant intentionally cultivated friendship], disapproved on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123 [65 Cal.Rptr.2d 1, 938 P.2d 986]; *People v. Franklin* (1994) 25 Cal.App.4th 328, 337–338 [30 Cal.Rptr.2d 376] [stepfather entrusted with care]; *People v. Clark* (1992) 12 Cal.App.4th 663, 666 [15 Cal.Rptr.2d 709] [stepfather entrusted with care]; *People v. Jones* (1992) 10 Cal.App.4th 1566, 1577 [14 Cal.Rptr.2d 9] [legal parent].

COMMENTARY

Distinctively Worse Than the Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* because comparing the defendant's conduct with other ways in which the same offense has been or may be committed "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense" and thus does not raise a constitutional concern. (See *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202].)

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3234. Aggravating Factor: Serious Danger to Society

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]][or of attempting to commit (that/those) crime[s]][or the lesser crime~~s~~[s] of _____ *<insert lesser offense[s]>*], you must then decide whether the People have proved the additional allegation that _____*<insert name of defendant>* has engaged in violent conduct, to wit:_____ *<insert description of conduct>*, which indicates (he/she) is a serious danger to society.]

<Introductory paragraph for bifurcated trial>
[The People have alleged that _____*<insert name of defendant>* has engaged in violent conduct, to wit:_____ *<insert description of conduct>*, which indicates (he/she) is a serious danger to society.]

To prove this allegation, the People must prove that:

1. **The defendant has engaged in violent conduct;**

   AND

2. **The violent conduct, considered in light of all the evidence presented[and the defendant's background], shows that the defendant is a serious danger to society.**

[To determine whether the defendant is a serious danger to society, you may consider the defendant's conduct before or after commission of the crime[as well as evidence about the defendant's background].]

You may not find the allegation true unless all of you agree that the People have proved that the defendant engaged in violent conduct that shows (he/she) is a serious danger to society. However, all of you do not need to agree on which violent conduct shows that the defendant is a serious danger to society.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's violent conduct was distinctively worse than that posed by an ordinary commission of the underlying crime and that the violent conduct, considered in light of all the evidence presented[and the

defendant's background], shows that the defendant is a serious danger to society.

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New March 2023; Revised March 2024, * *February 2025**
** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify the crime(s) to which the aggravating factor pertains.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request "[e]xcept where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law." (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factors. California Rules of Court, rule 4.421(b)(1).
- "Aggravating Fact" Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Danger to Society: Subsequent Conduct Can Be Considered. *People v. Gonzales* (1989) 208 Cal.App.3d 1170, 1173 [256 Cal.Rptr. 669].

COMMENTARY

Distinctively Worse Than the Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* because comparing the defendant's conduct with other ways in which the same offense has been or may be committed "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense" and thus does not raise a constitutional concern. (See *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202].)

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3406. Mistake of Fact

The defendant is not guilty of _____ *<insert crime[s]>* **if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact.**

If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit _____ *<insert crime[s]>***.**

If you find that the defendant actually believed that _____ *<insert alleged mistaken facts>* **[and if you find that belief was reasonable], (he/she) did not have the specific intent or mental state required for _____** *<insert crime[s]>***.**

If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for _____ *<insert crime[s]>***, you must find (him/her) not guilty of (that crime/those crimes).**

New January 2006; Revised April 2008, December 2008, August 2014, September 2018, September 2022, February 2025

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it, there is substantial evidence supporting the defense, and the instruction is legally correct. (*People v. Anderson* (2011) 51 Cal.4th 989, 996–997 [125 Cal.Rptr.3d 408, 252 P.3d 968]; *People v. Speck* (2022) 74 Cal.App.5th 784, 791 [289 Cal.Rptr.3d 816] [No sua sponte duty to instruct on mistake of fact defense].)

The mistake of fact instruction must negate an element of the crime. (*People v. Speck, supra,* 74 Cal.App.5th at p. 791.)

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389–390 [88 Cal.Rptr.2d 111]; *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's

guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982–983 [38 Cal.Rptr.3d 624, 127 P.3d 40].)

If the defendant is charged with a general intent crime, the trial court must instruct with the bracketed language requiring that defendant's belief be both actual and reasonable.

If the mental state element at issue is either specific criminal intent or knowledge, do not use the bracketed language requiring the belief to be reasonable. (*People v. Hendrix* (2022) 13 Cal.5th 933, 938–939 [297 Cal.Rptr.3d 278, 515 P.3d 22]; *People v. Reyes* (1997) 52 Cal.App.4th 975, 984 & fn. 6 [61 Cal.Rptr.2d 39]; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425–1426 [51 Cal.Rptr.3d 263].)

Mistake of fact is not a defense to the following crimes under the circumstances described below:

1. Involuntary manslaughter (*People v. Velez* (1983) 144 Cal.App.3d 558, 565–566 [192 Cal.Rptr. 686] [mistake of fact re whether gun could be fired]).
2. Furnishing cannabis to a minor (Health & Saf. Code, § 11352; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760–762 [77 Cal.Rptr. 59]).
3. Selling narcotics to a minor (Health & Saf. Code, § 11353; *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454] [specific intent for the crime of selling narcotics to a minor is the intent to sell cocaine, not to sell it to a minor]).
4. Aggravated kidnapping of a child under the age of 14 (Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206]).
5. Unlawful sexual intercourse or oral copulation by person 21 or older with minor under the age of 16 (Pen. Code, §§ 261.5(d), 287(b)(2); *People v. Scott* (2000) 83 Cal.App.4th 784, 800–801 [100 Cal.Rptr.2d 70]).
6. Lewd and lascivious conduct with a child under the age of 14 (Pen. Code, § 288(a); *People v. Olsen* (1984) 36 Cal.3d 638, 645–646 [205 Cal.Rptr. 492, 685 P.2d 52]).

AUTHORITY

- Instructional Requirements. Pen. Code, § 26(3).
- Burden of Proof. *People v. Mayberry* (1975) 15 Cal.3d 143, 157 [125 Cal.Rptr 745, 542 P.2d 1337].
- This Defense Applies to Attempted Lewd and Lascivious Conduct With Minor Under 14. *People v. Hanna* (2013) 218 Cal.App.4th 455, 461 [160 Cal.Rptr.3d 210].

RELATED ISSUES

Mistake of Fact Based on Involuntary Intoxication

A mistake of fact defense can be based on involuntary intoxication. (*People v. Scott* (1983) 146 Cal.App.3d 823, 829–833 [194 Cal.Rptr. 633].) In *Scott*, the court held that the defendant was entitled to an instruction on mistake of fact, as a matter of law, where the evidence established that he unknowingly and involuntarily ingested a hallucinogen. As a result he acted under the delusion that he was a secret agent in a situation where it was necessary to steal vehicles in order to save his own life and possibly that of the President. The court held that although defendant's mistake of fact was irrational, it was reasonable because of his delusional state and had the mistaken facts been true, his actions would have been justified under the doctrine of necessity. The court also stated that mistake of fact would not have been available if defendant's mental state had been caused by voluntary intoxication. (*Ibid.*; see also *People v. Kelly* (1973) 10 Cal.3d 565, 573 [111 Cal.Rptr. 171, 516 P.2d 875] [mistake of fact based on voluntary intoxication is not a defense to a general intent crime].)

Mistake of Fact Based on Mental Disease

Mistake of fact is not a defense to general criminal intent if the mistake is based on mental disease. (*People v. Gutierrez* (1986) 180 Cal.App.3d 1076, 1084 [225 Cal.Rptr. 885]; see *People v. Castillo* (1987) 193 Cal.App.3d 119, 124–125 [238 Cal.Rptr. 207].) In *Gutierrez*, the defendant was charged with inflicting cruel injury on a child, a general intent crime, because she beat her own children under the delusion that they were evil birds she had to kill. The defendant's abnormal mental state was caused in part by mental illness. (*People v. Gutierrez, supra,* 180 Cal.App.3d at pp. 1079–1080.) The court concluded that evidence of her mental illness was properly excluded at trial because mental illness could not form the basis of her mistake of fact defense. (*Id.* at pp. 1083–1084.)

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, § 47.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.06 (Matthew Bender).

3470. Right to Self-Defense or Defense of Another (Non-Homicide)

Self-defense is a defense to _____<*insert list of pertinent crimes charged*>. **The defendant is not guilty of (that/those crime[s]) if (he/she) used force against the other person in lawful (self-defense/ [or] defense of another). The defendant acted in lawful (self-defense/ [or] defense of another) if:**

1. **The defendant reasonably believed that (he/she/ [or] someone else/ [or] _____** <*insert name of third party*>**) was in imminent danger of suffering bodily injury [or was in imminent danger of being touched unlawfully];**

2. **The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;**

AND

3. **The defendant used no more force than was reasonably necessary to defend against that danger.**

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was (imminent danger of bodily injury to (himself/herself/ [or] someone else)/ [or] an imminent danger that (he/she/ [or] someone else) would be touched unlawfully). Defendant's belief must have been reasonable and (he/she) must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful (self-defense/ [or] defense of another).

<The following definition may be given if requested.>
[Danger is *imminent* if, when the defendant used force, the danger actually existed or the defendant reasonably believed it existed. The danger must seem immediate and present, so that it must be instantly dealt with. It may not be merely prospective or in the near future.]

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar

knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

[The slightest touching can be unlawful if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

[The defendant's belief that (he/she/ [or] someone else) was threatened may be reasonable even if (he/she) relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.]

[If you find that _____ *<insert name of victim>* **threatened or harmed the defendant [or others] in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]**

[If you find that the defendant knew that _____ *<insert name of victim>* **had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]**

[Someone who has been threatened or harmed by a person in the past is justified in acting more quickly or taking greater self-defense measures against that person.]

[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with _____*<insert name of victim>***, you may consider that threat in deciding whether the defendant was justified in acting in (self-defense/ [or] defense of another).]**

[A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of (death/bodily injury/_____ *<insert crime>***) has passed. This is so even if safety could have been achieved by retreating.]**

The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful (self-defense/ [or] defense of another). If the People have not met this burden, you must find the defendant not guilty of _____ *<insert crime(s) charged>***.**

New January 2006; Revised June 2007, April 2008, August 2009, February 2012, August 2012, March 2022, February 2025

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case. When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389–390 [88 Cal.Rptr.2d 111]; *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982–983 [38 Cal.Rptr.3d 624, 127 P.3d 40].)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of "antecedent threats and assaults against the defendant on the reasonableness of defendant's conduct." (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488 [1 Cal.Rptr.3d 774].) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475 [198 Cal.Rptr. 819]; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068 [56 Cal.Rptr.2d 133, 920 P.2d 1337]; see also CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.)

Related Instructions

CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

CALCRIM Nos. 3471–3477, Defense Instructions: Defense of Self, Another, Property.

CALCRIM No. 851, *Testimony on Intimate Partner Battering and Its Effects: Offered by the Defense*.

CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute: Self-Defense*.

AUTHORITY

- Instructional Requirements. *People v. Moody* (1943) 62 Cal.App.2d 18 [143 P.2d 978]; *People v. Myers* (1998) 61 Cal.App.4th 328, 335, 336 [71 Cal.Rptr.2d 518].
- Lawful Resistance. Pen. Code, §§ 692, 693, 694; Civ. Code, § 50; see also *People v. Myers*, *supra,* ~~(1998)~~ 61 Cal.App.4th at p.~~328,~~ 335 ~~[71 Cal.Rptr.2d 518]~~.
- Burden of Proof. Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements. *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Imminence. *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167] (overruled on other grounds in *People v. Humphrey*, *supra,* ~~(1996)~~ 13 Cal.4th ~~1073,~~at p. 1089 ~~[56 Cal.Rptr.2d 142, 921 P.2d 1]~~).
- No Duty to Retreat. *People v. Hughes* (1951) 107 Cal.App.2d 487, 494 [237 P.2d 64]; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22 [132 P.2d 51].
- Temporary Possession of Firearm by Felon in Self-Defense. *People v. King* (1978) 22 Cal.3d 12, 24 [148 Cal.Rptr. 409, 582 P.2d 1000].
- Duty to Retreat Limited to Felon in Possession Cases. *People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1343–1346 [29 Cal.Rptr.3d 226].
- Inmate Self-Defense. *People v. Saavedra* (2007) 156 Cal.App.4th 561 [67 Cal.Rptr.3d 403].
- Reasonable Belief. *People v. Humphrey*, *supra,* ~~(1996)~~ 13 Cal.4th ~~1073,~~at p. 1082 ~~[56 Cal.Rptr.2d 142, 921 P.2d 1]~~; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].

RELATED ISSUES

Brandishing Weapon in Defense of Another

The defense of others is a defense to a charge of brandishing a weapon under Penal Code section 417(a)(2). (*People v. Kirk* (1986) 192 Cal.App.3d Supp. 15, 19 [238 Cal.Rptr. 42].)

Reasonable Person Standard Not Modified by Evidence of Mental Impairment

In *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519 [14 Cal.Rptr.3d 473], the court rejected the argument that the reasonable person standard for self-defense should be the standard of a mentally ill person like the defendant. "The common law does not take account of a person's mental capacity when determining

whether he has acted as the reasonable person would have acted. The law holds 'the mentally deranged or insane defendant accountable for his negligence as if the person were a normal, prudent person.' (Prosser & Keeton, Torts (5th ed. 1984) § 32, p. 177.)" (*Ibid.*; see also Rest.2d Torts, § 283B.)

Reasonable Person Standard and Physical Limitations

A defendant's physical limitations are relevant when deciding the reasonable person standard for self-defense. (*People v. Horn* (2021) 63 Cal.App.5th 672, 686 [277 Cal.Rptr.3d 901].) See also CALCRIM No. 3429, *Reasonable Person Standard for Physically Disabled Person*.

See also the Related Issues section of CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, §§ 68, 71–73, 86–87.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.11, 73.12 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 124, *Jurisdiction and Disposition Hearings,* § 124.04 (Matthew Bender).

3500. Unanimity

The defendant is charged with _____ <*insert description of alleged offense*> [in Count __] [sometime during the period of _____ to _____][, and the court has also instructed you on the lesser crime[s] of _____ <*insert description of lesser crime(s)*>].

The People have presented evidence of more than one act to prove that the defendant committed the~~is~~ charged offense [and the lesser crime[s]]. You must not find the defendant guilty [of _____ <*insert description of charged and lesser crimes requiring unanimity*>] unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed.

New January 2006; Revised February 2025

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give a unanimity instruction if the prosecution presents evidence of multiple acts to prove a single count. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 [108 Cal.Rptr.2d 436, 25 P.3d 641]; *People v. Diedrich* (1982) 31 Cal.3d 263, 282 [182 Cal.Rptr. 354, 643 P.2d 971]; *People v. Madden* (1981) 116 Cal.App.3d 212, 218 [171 Cal.Rptr. 897]; *People v. Alva* (1979) 90 Cal.App.3d 418, 426 [153 Cal.Rptr. 644].) The committee has addressed unanimity in those instructions where the issue is most likely to arise. If a case raises a unanimity issue and other instructions do not adequately cover the point, give this instruction.

The Supreme Court has stated the rule as follows: "[W]hen the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty." (*People v. Russo, supra,* 25 Cal.4th at p. 1132; see also *People v. Sutherland* (1993) 17 Cal.App.4th 602, 618–619 [21 Cal.Rptr.2d 751] [unanimity required in forgery case where prosecution alleges forgery of multiple documents under single count, but not where defendant charged with forging and uttering single document].)

The court has no sua sponte duty to instruct on unanimity if the offense constitutes a "continuous course of conduct." (*People v. Maury* (2003) 30 Cal.4th 342, 423 [133 Cal.Rptr.2d 561, 68 P.3d 1]; *People v. Madden, supra,* 116 Cal.App.3d at p. 218.) "This exception arises in two contexts. The first is when the acts are so closely connected that they form part of one and the same transaction, and thus one offense. The second is when . . . the statute contemplates a continuous course of conduct of a series of acts over a period of time." (*People v. Napoles* (2002) 104 Cal.App.4th 108, 115–116 [127 Cal.Rptr.2d 777], quoting *People v. Avina* (1993) 14 Cal.App.4th 1303, 1309 [18 Cal.Rptr.2d 511]; internal quotation marks and citations omitted].) The court should carefully examine the statute under which the defendant is charged, the pleadings, and the evidence presented to determine whether the offense constitutes a continuous course of conduct. (*Ibid.*) [noting that child abuse may be a continuous course of conduct or a single, isolated incident]; see also *People v. Madden, supra,* 116 Cal.App.3d at p. 218 [distinguishing "continuous crime spree" and finding repeated sexual offenses did not constitute continuous course of conduct]; *People v. Wolfe* (2003) 114 Cal.App.4th 177, 185 [7 Cal.Rptr.3d 483] [unanimity instruction required where acts fragmented in time or space]; *People v. Rae* (2002) 102 Cal.App.4th 116, 123 [125 Cal.Rptr.2d 312] [elder abuse offense did constitute continuous course of conduct]; *People v. Cortez* (1992) 6 Cal.App.4th 1202, 1209 [8 Cal.Rptr.2d 580] [kidnapping is a continuous course of conduct].)

In addition, "where the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place, the [unanimity] instruction is not necessary to the jury's understanding of the case." (*People v. Beardslee* (1991) 53 Cal.3d 68, 93 [279 Cal.Rptr. 276, 806 P.2d 1311]; see also *People v. Champion* (1995) 9 Cal.4th 879, 932 [39 Cal.Rptr.2d 547, 891 P.2d 93], questioned on unrelated issue in *People v. Ray* (1996) 13 Cal.4th 313, 369, fn. 2 [52 Cal.Rptr.2d 296, 914 P.2d 846].) However, the court should use caution in applying this exception. (See *People v. Brown* (1996) 42 Cal.App.4th 1493, 1500–1501 [50 Cal.Rptr.2d 407]; *People v. Wolfe, supra,* 114 Cal.App.4th at p. 185.) The better practice is to provide a unanimity instruction to the jury when evidence has been admitted of separate acts that could form the basis for one charge.

The jury need not unanimously agree on whether the defendant was an aider and abettor or a direct perpetrator of the offense. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1024–1026 [95 Cal.Rptr.2d 377, 997 P.2d 1044]; *People v. Beardslee, supra,* 53 Cal.3d at p. 93.)

The jury need not unanimously agree on which provocative act the defendant committed when prosecution is pursuing a provocative-act theory of murder. (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 591 [112 Cal.Rptr.2d 401].)

In a conspiracy case, the jury need not unanimously agree on what overt act was committed or who was part of the conspiracy. (*People v. Russo, supra,* 25 Cal.4th at pp. 1135–1136.) However, if a conspiracy case involves an issue about the statute of limitations or evidence of withdrawal by the defendant, a unanimity instruction may be required. (*Id.* at p. 1136, fn. 2.)

In a child molestation case, if the evidence has been presented in the form of "generic testimony" about recurring events without specific dates and times, the court should determine whether it is more appropriate to give CALCRIM No. 3501, *Unanimity: When Generic Testimony of Offense Presented*. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322 [270 Cal.Rptr. 611, 792 P.2d 643].) See discussion below in Related Issues section.

If the prosecution elects one act among many as the basis for the offense, do not give this instruction. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536 [70 Cal.Rptr.2d 878].) Give CALCRIM No. 3502, *Unanimity: When Prosecution Elects One Act Among Many*.

Give the bracketed "sometime during the period" if the information alleges that the charged event happened during a period of time rather than on a single date.

Consider giving the bracketed language about lesser crimes if applicable and to avoid any potential confusion. (See *People v. Fish* (2024) 102 Cal.App.5th 730, 735–737 [321 Cal.Rptr.3d 738].)

AUTHORITY

- Unanimity Required. Cal. Const., art. I, § 16; *People v. Russo, supra,* (2001) 25 Cal.4th 1124,at p. 1132 [108 Cal.Rptr.2d 436, 25 P.3d 641].
- Instruction Required If Multiple Acts Could Support Single Charge. *People v. Russo, supra,* (2001) 25 Cal.4th 1124,at p. 1132 [108 Cal.Rptr.2d 436, 25 P.3d 641]; *People v. Diedrich, supra,* (1982) 31 Cal.3d 263,at p. 282 [182 Cal.Rptr. 354, 643 P.2d 971]; *People v. Madden, supra,* (1981) 116 Cal.App.3d 212,at p. 218 [171 Cal.Rptr. 897]; *People v. Alva, supra,* (1979) 90 Cal.App.3d 418,at p. 426 [153 Cal.Rptr. 644].
- Continuous Course of Conduct. *People v. Maury, supra,* (2003) 30 Cal.4th 342,at p. 423 [133 Cal.Rptr.2d 561, 68 P.3d 1]; *People v. Napoles, supra,* (2002) 104 Cal.App.4th 108,at pp. 115–116 [127 Cal.Rptr.2d 777]; *People v. Madden, supra,* (1981) 116 Cal.App.3d 212,at p. 218 [171 Cal.Rptr. 897]; *People v. Wolfe, supra,* (2003) 114 Cal.App.4th 177,at p. 185 [7 Cal.Rptr.3d 483].
- Acts Substantially Identical in Nature. *People v. Beardslee, supra,* (1991) 53 Cal.3d 68,at p. 93 [279 Cal.Rptr. 276, 806 P.2d 1311]; see also *People v. Champion, supra,* (1995) 9 Cal.4th 879,at p. 932 [39 Cal.Rptr.2d 547, 891 P.2d

93], questioned on unrelated issue in *People v. Ray*, *supra*, (1996) 13 Cal.4th 313, at p. 369, fn. 2 [52 Cal.Rptr.2d 296, 914 P.2d 846].

- Aider and Abettor v. Direct Perpetrator. *People v. Jenkins*, *supra*, (2000) 22 Cal.4th 900, at pp. 1024–1026 [95 Cal.Rptr. 2d 377, 997 P.2d 1044]; *People v. Beardslee*, *supra*, (1991) 53 Cal.3d 68, at p. 93 [279 Cal.Rptr. 276, 806 P.2d 1311].
- Provocative-Act Murder. *People v. Briscoe*, *supra*, (2001) 92 Cal.App.4th 568, at p. 591 [112 Cal.Rptr.2d 401].
- Conspiracy. *People v. Russo*, *supra*, (2001) 25 Cal.4th 1124, at pp. 1135–1136 [108 Cal.Rptr.2d 436, 25 P.3d 641].
- Generic Testimony. *People v. Jones*, *supra*, (1990) 51 Cal.3d 294, at pp. 321–322 [270 Cal.Rptr. 611, 792 P.2d 643].
- Must Instruct on Election by Prosecutor. *People v. Melhado*, *supra*, (1998) 60 Cal.App.4th 1529, at p. 1536 [70 Cal.Rptr.2d 878].

RELATED ISSUES

Cases Based on Generic Testimony

In *People v. Jones*, *supra*, (1990) 51 Cal.3d 294at p. 305 [270 Cal.Rptr. 611, 792 P.2d 643], the Court analyzed the due process concerns raised when a witness testifies to numerous, repeated acts of child molestation over a period of time, but the witness is unable to give specifics on time and date. The Court held that prosecutions based on this type of evidence satisfied due process where the testimony met specified criteria. (*Id.* at p. 316.) The Court then addressed what type of unanimity instruction is required in such cases:

> In a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction should be given. (See, e.g., *People v. Gordon* [(1985)] 165 Cal. App.3d [839,] 855–856 [defendant raised separate defenses to the two offenses at issue].) But when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim.

(*Id.* at pp. 321–322; *People v. Matute* (2002) 103 Cal.App.4th 1437, 1448 [127 Cal.Rptr.2d 472].) If the court concludes that the modified jury

instruction is appropriate, do not give this instruction. Give CALCRIM No. 3501, *Unanimity: When Generic Testimony of Offense Presented*.

Instruction That Unanimity Not Required

In *People v. Culuko* (2000) 78 Cal.App.4th 307, 321–323 [92 Cal.Rptr.2d 789], the court held that an instruction stating that the jurors need not agree on whether the defendant was an aider and abettor or a principal was a correct statement of the law and not error to give. However, in *People v. Napoles*, *supra*, ~~(2002)~~ 104 Cal.App.4th ~~108,~~at p. 119 ~~[127 Cal.Rptr.2d 777]~~, the court found that the nonunanimity instruction given in that case was erroneous. The court cautioned against giving any nonunanimity instruction in a case involving a continuous course of conduct offense. (*Id.* at p. 119, fn. 6.) The court stated that if a nonunanimity instruction must be given, the following language would be appropriate:

> The defendant is accused of having [], [in count] by having engaged in a course of conduct between [date] and [date]. The People must prove beyond a reasonable doubt that the defendant engaged in this course of conduct. Each juror must agree that defendant engaged in acts or omissions that prove the required course of conduct. As long as each of you is convinced beyond a reasonable doubt that the defendant committed some acts or omissions that prove the course of conduct, you need not all rely on the same acts or omissions to reach that conclusion.

(Ibid.)

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, §§ 727–731.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 40, *Accusatory Pleadings*, § 40.07[9] (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 84, *Motions at Trial*, § 84.03[2][b], Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21[1][c][iii] (Matthew Bender).

3501. Unanimity: When Generic Testimony of Offense Presented

The defendant is charged with _____ *<insert description[s] of ~~alleged~~ offense[s]>* **[in Count[s] __] sometime during the period of _____ to _____[, and the court has also instructed you on the lesser crime[s] of _____*<insert description of lesser crime(s)>*].**

The People have presented evidence of more than one act to prove that the defendant committed the~~(this/these)~~ charged offense[s] [and the lesser crime[s]]. You must not find the defendant guilty [of _____*<insert description of charged and lesser crime(s)>*] unless:

1. **You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed [for each offense];**

OR

2. **You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period [and have proved that the defendant committed at least the number of offenses charged].**

New January 2006; Revised February 2014, February 2025

BENCH NOTES

Instructional Duty

In *People v. Jones* (1990) 51 Cal.3d 294 [270 Cal.Rptr. 611, 792 P.2d 643], the Court analyzed the due process concerns raised when a witness testifies to numerous, repeated acts of child molestation over a period of time, but the witness is unable to give specifics on time and date. The Court held that prosecutions based on this type of evidence satisfied due process where the testimony met specified criteria. (*Id.* at p. 316.) The Court then addressed what type of unanimity instruction is required in such cases:

> In a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction should be given. (See, e.g., *People v. Gordon* [(1985)] 165 Cal. App.3d [839,] 855–856 [defendant raised separate defenses

> to the two offenses at issue].) But when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim.

(*Id.* at pp. 321–322; *People v. Matute* (2002) 103 Cal.App.4th 1437, 1448 [127 Cal.Rptr.2d 472].) If the court concludes that the modified jury instruction is appropriate, give this instruction. If the court determines that the standard unanimity instruction is appropriate, give CALCRIM No. 3500, *Unanimity*.

Give the bracketed portions when the defendant is charged with numerous charges for the same offense alleged to have occurred during the specified time period. (See *People v. Matute, supra,* 103 Cal.App.4th at p. 1448 [15 rapes charged during 15 months].)

Consider giving the bracketed language about lesser crimes if applicable and to avoid any potential confusion. (See *People v. Fish* (2024) 102 Cal.App.5th 730, 735–737 [321 Cal.Rptr.3d 738].)

AUTHORITY

- Unanimity Required. Cal. Const., art. I, § 16; *People v. Russo* (2001) 25 Cal.4th 1124, 1132 [108 Cal.Rptr.2d 436, 25 P.3d 641].
- Instruction Required ~~I~~if Multiple Acts Could Support Single Charge. *People v. Russo, supra,* ~~(2001)~~ 25 Cal.4th ~~1124,~~at p. 1132 ~~[108 Cal.Rptr.2d 436, 25 P.3d 641]~~; *People v. Diedrich* (1982) 31 Cal.3d 263, 282 [182 Cal.Rptr. 354, 643 P.2d 971]; *People v. Madden* (1981) 116 Cal.App.3d 212, 218 [171 Cal.Rptr. 897]; *People v. Alva* (1979) 90 Cal.App.3d 418, 426 [153 Cal.Rptr. 644].
- Generic Testimony. *People v. Jones, supra,* ~~(1990)~~ 51 Cal.3d ~~294,~~at pp. 321–322 ~~[270 Cal.Rptr. 611, 792 P.2d 643]~~.
- This Instruction Upheld. *People v. Fernandez* (2013) 216 Cal.App.4th 540, 555–558 [157 Cal.Rptr.3d 43].

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 731.

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. 142, *Crimes Against the Person*, § 142.21[1][c][iii] (Matthew Bender).

3502. Unanimity: When Prosecution Elects One Act Among Many

You must not find the defendant guilty of _____ *<insert name of ~~alleged~~ offense>* **[in Count __] [or the lesser crime[s] of** _____ *<insert description of lesser crime(s)>***] unless you all agree that the People have proved specifically that the defendant committed th~~e~~at charged offense [or the lesser crime[s]] [on]** _____ *<insert date or other description of event relied on>*. **[Evidence that the defendant may have committed** _____ *<insert name of offense>* **~~the alleged offense~~ [or the lesser crime[s]] (on another day/ [or] in another manner) is not sufficient for you to find (him/her) guilty of** _____ *<insert description(s) of offense and lesser crime(s)>* **~~the offense charged~~.]**

New January 2006; Revised February 2025

BENCH NOTES

Instructional Duty

If the prosecutor has elected a specific factual basis for the offense alleged but evidence of multiple acts has been admitted, the court has a **sua sponte** duty to instruct on the election unless the prosecutor informs the jury of the election. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534–1536 [70 Cal.Rptr.2d 878].)

Consider giving the bracketed language about lesser crimes if applicable and to avoid any potential confusion. (See *People v. Fish* (2024) 102 Cal.App.5th 730, 735–737 [321 Cal.Rptr.3d 738].)

AUTHORITY

- Election Required on Demand. *People v. Russo* (2001) 25 Cal.4th 1124, 1132 [108 Cal.Rptr.2d 436, 25 P.3d 641]; *People v. Salvato* (1991) 234 Cal.App.3d 872, 882 [285 Cal.Rptr. 837].
- Instructional Requirements. *People v. Melhado, supra, ~~(1998)~~* 60 Cal.App.4th ~~1529,~~at pp. 1534–1536 ~~[70 Cal.Rptr.2d 878]~~.

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 728.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 40, *Accusatory Pleadings*, § 40.07[9] (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][i] (Matthew Bender).

Instruction No.	Commenter	Position	Comment	Committee Response
Not indicated	Hon.Charles R. Brehmer, Superior Court of California, Kern County	NI	Please change the language of Great Bodily Injury from .. “greater than minor or moderate harm” To “greater than minor AND moderate harm” OR “greater than moderate harm”	This comment is outside the scope of the proposed revisions. The committee will consider this suggestion at its next meeting.
Not indicated	Los Angeles County Superior Court, by Robert Oftring	A	In response to the Judicial Council of California’s “ITC CALCRIM-2024-02: Criminal Jury Instructions: Addition and Revisions,” the Superior Court of California, County of Los Angeles (Court) agrees with the proposal and its ability to address its stated purpose. The Court finds that the language in the changes is primarily updating case authority and bench notes for various instructions. Noteworthy changes include: • 500 Homicide series. Rewriting of the definition of "imminent danger". • 1201 series kidnapping. Rewriting of the children or person incapable of consent language. • 1500 arson series. Rewriting of the "maliciously" definition. • 3500 series. Rewriting of the several of the unanimity instructions. The Court does not believe the proposal will have any operational impacts.	No response necessary.

Instruction No.	Commenter	Position	Comment	Committee Response
User Guide, 571, 540B, 540C, 703, 840, 841, 860, 861, 862, 863, 875, 876, 890, 891, 900, 901, 902, 903, 904, 905, 906, 907, 908, 915, 916, 945, 946, 947, 948, 949, 950, 951, 2503, 2720, 2721, 2723, 1201, 1500, 1501, 1502, 1515, 1520, 1600, 1820, 2130, NEW 2242, 2441, 2622, 3224, 3406, 3500, 3501, 3502	Orange County Bar Association, by Christina Zabat-Fran, President.	A		No response necessary.
505	Orange County Bar Association by Christina Zabat-Fran, President.	AM	Moves definition of "imminent" from the commentary into a bracketed portion of the instruction to the jury. Deletes reference to the authority for the definition of imminent.	*People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167] is the source for the instruction's definition of imminence and appears in the authority section under the entry

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

Instruction No.	Commenter	Position	Comment	Committee Response
			It is recommended that the council continue to provide the authority for the definition within the commentary.	"Imminence." The related issue about *Aris* and its definition of imminence is no longer necessary now that the definition has been directly incorporated into the instruction.
600	Orange County Bar Association by Christina Zabat-Fran, President.	AM	1) Clarifies to give relevant kill zone paragraph as to each alleged victim 2) Adds commentary "If the evidence supports a claim of accident during the course of lawful self-defense, in addition to instructing with CALCRIM No. 3404, Accident, the court has a duty to elaborate further. (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 54…" The added comment provides little guidance. The comment should be more specific. *Villanueva* holds that the jury should have been instructed on "Excusable [attempted] Homicide".	In response to this comment, the committee changed the bench note to state: "If the evidence supports a claim of accident during the course of lawful self-defense, give CALCRIM No. 510, *Excusable Homicide: Accident*, modified for a charge of attempted murder. (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 54 [86 Cal.Rptr.3d 534].) If the evidence supports a claim of accident as to other, nonhomicide charges, give CALCRIM No. 3404, *Accident*."
925	Orange County Bar Association by Christina Zabat-Fran, President.	AM	Adds to bracketed section defining unlawful touching: "[or] by touching something held by or attached to the other person." Adds *In re B.L.* (2015) 239 Cal.App.4th 1491 [Contact with object held in another person's hand may constitute touching] and *People v. Dealba* (2015) 242 Cal.App.4th 1142 [Hitting a vehicle occupied by another person may constitute touching] to Authority section. Removes brackets from definition of "serious bodily injury" but does not remove direction in Bench Notes to provide that definition only "IF the defendant disputes that the injury suffered was	The committee appreciates this comment about the discrepancy in the bench note created by the proposed removal of the brackets from the definition of serious bodily injury. In response, the committee decided to retain the brackets and leave the paragraph as it originally appears.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

Instruction No.	Commenter	Position	Comment	Committee Response
			a serious bodily injury." It is unclear why the brackets on the definition of "serious bodily injury" have been removed, as a stipulation that the injury was serious would render it unnecessary. If the brackets are removed, the Bench Notes need to be modified to eliminate reference to the definition as the "first bracketed paragraph," and the next sentence should refer to "the first bracketed paragraph" instead of "the second bracketed paragraph" (see below). Recommend keeping the brackets and the language below: *"Whether the complaining witness suffered a serious bodily injury is a question for the jury to determine. If the defendant disputes that the injury suffered was a serious bodily injury, use the first bracketed paragraph. If the parties stipulate that the injury suffered was a serious bodily injury, use the second bracketed paragraph."*	
926	Orange County Bar Association by Christina Zabat-Fran, President.	AM	Changes title from "Battery *Causing Injury to* Specified Victim…" to "Battery *of* Specified Victim…" Title should be "Battery AGAINST Specified Victim…" to remain consistent with other instructions such as 945, 946, and 947. Adds to bracketed section defining unlawful touching: "[or] by touching something held by or attached to the other person." Adds *In re B.L.* (2015) 239 Cal.App.4th 1491 [Contact with object held in another person's hand may constitute touching] and *People v. Dealba* (2015) 242	The committee agrees with this comment and has changed the title to "Battery Against Specified Victim."

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

Instruction No.	Commenter	Position	Comment	Committee Response
			Cal.App.4th 1142 [Hitting a vehicle occupied by another person may constitute touching] to Authority section. Corrects phrasing in Bench Notes.	
2650	Orange County Bar Association by Christina Zabat-Fran, President.	AM	Needs to add "§" before "422" in caption for *People v. Felix*.	The committee has made this correction.
3225–3234	Orange County Bar Association by Christina Zabat-Fran, President.	N	Comments: Adds comment that one court held that one aggravating factor – specifically the "great violence, great bodily harm, or high degree of cruelty, viciousness, or callousness" does not present a Constitutional problem because it "does not require the decisionmaker to define a single, imaginary fact pattern as the 'ordinary' way of committing the offense." This comment is appropriate for 3224 (Great violence, great bodily harm, ….) but has no application to the other factors that have not been analyzed in a published case.	*Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 88–90 [315 Cal.Rptr.3d 202] discusses the aggravating factor scheme under California Rules of Court, rule 4.421 broadly. Therefore, the proposed new commentary applies to all 11 aggravating factor instructions and not just to No. 3224. In response to this comment, however, the committee has changed the beginning of the proposed sentence to state: "One court has held that the aggravating factor scheme under California Rules of Court, rule 4.421 does not present the same problem as *Johnson* …"
3470	Orange County Bar Association by Christina Zabat-Fran, President.	AM	Adds definition of "imminent." The definition is correct but it is recommended the Council include citations to the authorities in the Commentary (as exist in current CALCRIM 505).	As with No. 505, the authority section in this instruction already contains the citation to *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167] next to the entry "Imminence."