



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on February 26, 2016

Title	Agenda Item Type
Jury Instructions: Revisions to Criminal Jury Instructions	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
<i>Judicial Council of California Criminal Jury Instructions</i>	February 26, 2016
Recommended by	Date of Report
Advisory Committee on Criminal Jury Instructions	January 20, 2016
Hon. Sandy R. Kriegler, Chair	Contact
	Robin Seeley, 415-865-7710
	robin.seeley@jud.ca.gov

Executive Summary

The Advisory Committee on Criminal Jury Instructions recommends approval of the proposed revisions to the *Judicial Council of California Criminal Jury Instructions (CALCRIM)*. These changes will keep *CALCRIM* current with statutory and case authority.

Recommendation

The Advisory Committee on Criminal Jury Instructions recommends that the Judicial Council, effective February 26, 2016, approve for publication under rule 2.1050 of the California Rules of Court the criminal jury instructions prepared by the committee. Once approved by the Judicial Council, the revised instructions will be published in the next official edition of the *Judicial Council of California Criminal Jury Instructions*.

A table of contents and the proposed revisions to the criminal jury instructions are attached at pages 5–108.

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 and its charge.¹ In August 2005, the council voted to approve the *CALCRIM* instructions under what is now rule 2.1050 of the California Rules of Court. Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CALCRIM*.

The council approved the last *CALCRIM* release at its August 2015 meeting.

Rationale for Recommendation

The committee recommends proposed revisions to the following instructions: 207, 334, 335, 336, 361, 375, 548, 625, 703, 736, 840, 841, 935, 938, 985, 1300, 1400, 1401, 1863, 2300, 2302, 2352, 2542, and 3472.

The committee revised the instructions based on comments or suggestions from justices, judges, and attorneys; proposals by staff and committee members; and recent developments in the law. Below is a summary of some of the proposed changes.

Citation updates to CALCRIM Nos. 207, 334, 335, 336, 361, 736, 1300, 1400, 1401, 1863, and 2542

Eleven of the 24 instructions in this proposal simply had the citations of newly decided cases added to the notes. Because these revisions do not change the language of the instructions, they tend to be uncontroversial.

CALCRIM No. 548, Murder: Alternative Theories

In order to avoid any potential confusion between different theories vs. different degrees of murder, the committee decided to add the underlined text to CALCRIM No. 548:

You may not find the defendant guilty of murder unless all of you agree that the People have proved that the defendant committed murder under at least one of these theories. You do not all need to agree on the same theory[, but you must unanimously agree whether the murder is in the first or second degree].

The brackets around the new language indicate that it is optional, to be given in the court's discretion.

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."

CALCRIM No. 703, Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder

In response to *People v. Banks* (2015) 61 Cal.4th 788, 807–809 (189 Cal.Rptr.3d 208, 351 P.3d 330), the committee revised this instruction to include the factors to consider in determining whether the defendant was a “major participant” in a special circumstances felony murder in which he or she was not the actual killer.

CALCRIM Sexual Battery series, Nos. 935, 938

People v. Andrews (2015) 234 Cal.App.4th 590, 602, held that the court has a sua sponte duty to instruct on the defense of actual and reasonable but mistaken belief in the victim’s consent in sexual battery cases. The committee therefore added that defense to the sexual battery instructions.

CALCRIM Possession for Sale instructions, Nos. 2302, 2352

In response to a comment from a deputy district attorney, the committee revised these instructions to make clear that the defendant need not have possessed the controlled substance with the intent to sell it personally. The requisite intent may include intending that someone else actually sell it.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CALCRIM* circulated for comment from November 9 to December 28, 2015. One comment was received and then withdrawn. Therefore no comment chart is provided. The current proposal is uncontroversial, so the dearth of comments is not surprising.

Rule 2.1050 of the California Rules of Court requires the committee to regularly update, amend, and add topics to *CALCRIM* and to submit its recommendations to the council for approval. The proposed revised instructions are necessary to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee considered no alternative actions.

Implementation Requirements, Costs, and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will print a new edition and pay royalties to the Judicial Council. The council’s contract with West Publishing provides additional royalty revenue.

The official publisher will also make the revised content available free of charge to all judicial officers in both print and HotDocs document assembly software. With respect to commercial publishers, the council will register the copyright of this work and continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions

freely available for use and reproduction by parties, attorneys, and the public, the council provides a broad public license for their noncommercial use and reproduction.

Attachments

1. Full text of revised *CALCRIM* instructions, including table of contents, at pages 5–108

CALCRIM Proposed Revisions

Instruction Number	Instruction Title
207	Proof Need Not Show Actual Date
334, 335, 336	Accomplice Testimony Series and In-Custody Informant
361	Failure to Explain or Deny Adverse Testimony
375	Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.
548	Murder: Alternative Theories
625	Voluntary Intoxication: Effects on Homicide Crimes
703	Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder
736, 1400, 1401, 2542	Criminal Street Gang Series
840, 841	Inflicting Injury on Spouse, Cohabitant, or Fellow Parent Resulting in Traumatic Condition; Simple Battery: Against Spouse, Cohabitant, or Fellow Parent
935, 938	Sexual Battery Series
985	Brandishing Imitation Firearm
1300	Criminal Threat
1863	Defense to Theft or Robbery: Claim of Right
2300, 2302, 2352	Sale, Transportation for Sale, etc., of Controlled Substance; Possession for Sale of Controlled Substance, Possession for Sale of Marijuana
3472	Right to Self-Defense: May Not Be Contrived

207. Proof Need Not Show Actual Date

It is alleged that the crime occurred on [or about] _____ <insert alleged date>. The People are not required to prove that the crime took place exactly on that day but only that it happened reasonably close to that day.

New January 2006; Revised February 2014

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give this instruction. This instruction should not be given: (1) when the evidence demonstrates that the offense was committed at a specific time and place and the defendant has presented a defense of alibi or lack of opportunity; or (2) when two similar offenses are charged in separate counts. (*People v. Jennings* (1991) 53 Cal.3d 334, 358–359 [279 Cal.Rptr. 780, 807 P.2d 1009]; *People v. Jones* (1973) 9 Cal.3d 546, 557 [108 Cal.Rptr. 345, 510 P.2d 705], overruled on other grounds in *Hernandez v. Municipal Court* (1989) 49 Cal.3d 713 [263 Cal.Rptr. 513, 781 P.2d 547]; *People v. Barney* (1983) 143 Cal.App.3d 490, 497–498 [192 Cal.Rptr. 172]; *People v. Gavin* (1971) 21 Cal.App.3d 408, 415–416 [98 Cal.Rptr. 518]; *People v. Deletto* (1983) 147 Cal.App.3d 458, 474–475 [195 Cal.Rptr. 233].)

AUTHORITY

- [Instructional Requirements](#) ▶ Pen. Code, § 955; *People v. Jennings* (1991) 53 Cal.3d 334, 358–359 [279 Cal.Rptr. 780, 807 P.2d 1009]; *People v. Jones* (1973) 9 Cal.3d 546, 557 [108 Cal.Rptr. 345, 510 P.2d 705]; *People v. Barney* (1983) 143 Cal.App.3d 490, 497–498 [192 Cal.Rptr. 172]; *People v. Gavin* (1971) 21 Cal.App.3d 408, 415–416 [98 Cal.Rptr. 518]; *People v. Deletto* (1983) 147 Cal.App.3d 458, 474–475 [195 Cal.Rptr. 233].
- [This Instruction Correctly States the Law](#) ▶ *People v. Rojas* (2015) 237 Cal.App.4th 1298, 1304 [188 Cal.Rptr.3d 811].

Secondary Sources

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 40, *Accusatory Pleadings*, § 40.07[2] (Matthew Bender).

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

208–219. Reserved for Future Use

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

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

1. He or she personally committed the crime;

OR

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

AND

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

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

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

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

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

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

- 1. The nature and effect of the criminal conduct;**
- 2. That the conduct was wrongful and forbidden;**

AND

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

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

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

- 1. The accomplice’s (statement/ [or] testimony) is supported by other evidence that you believe;**
- 2. That supporting evidence is independent of the accomplice’s (statement/ [or] testimony);**

AND

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

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

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

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

New January 2006; Revised January 2007, April 2010 *[insert date of council approval]*

BENCH NOTES

Instructional Duty

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

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

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

When the witness is a codefendant whose testimony includes incriminating statements, the court **should not** instruct that the witness is an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555 [58 Cal.Rptr. 340, 426 P.2d 908].) Instead, the court should give this instruction, informing the jury that it must decide whether the testifying codefendant is an accomplice. In addition, the court should instruct that when the jury considers this testimony as it relates to the testifying codefendant’s defense, the jury should evaluate the testimony using the general rules of credibility, but if the jury considers testimony as incriminating

evidence against the non-testifying codefendant, the testimony must be corroborated and should be viewed with caution. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 105 [17 Cal.Rptr.3d 710, 96 P.3d 30].)

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

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

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

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

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

AUTHORITY

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

- Accomplice Includes Co-perpetrator ▶ *People v. Felton* (2004) 122 Cal.App.4th 260, 268 [18 Cal.Rptr.3d 626].
- Definition of Accomplice as Aider and Abettor ▶ *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- Extent of Corroboration Required ▶ *People v. Szeto* (1981) 29 Cal.3d 20, 27 [171 Cal.Rptr. 652, 623 P.2d 213].
- One Accomplice May Not Corroborate Another ▶ *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15 [117 P.2d 437], disapproved on other grounds in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301, fn. 11 [124 Cal.Rptr. 204, 540 P.2d 44] and *People v. Dillon* (1983) 34 Cal.3d 441, 454, fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697].
- Presence or Knowledge Insufficient ▶ *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].
- Testimony of Feigned Accomplice Need Not Be Corroborated ▶ *People v. Salazar* (1962) 201 Cal.App.2d 284, 287 [20 Cal.Rptr. 25]; but see *People v. Brocklehurst* (1971) 14 Cal.App.3d 473, 476 [92 Cal.Rptr. 340]; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193 [120 Cal.Rptr. 136].
- Uncorroborated Accomplice Testimony May Establish Corpus Delicti ▶ *People v. Williams* (1988) 45 Cal.3d 1268, 1317 [248 Cal.Rptr. 834, 756 P.2d 221].
- Witness an Accomplice as a Matter of Law ▶ *People v. Williams* (1997) 16 Cal.4th 635, 679 [66 Cal.Rptr.2d 573, 941 P.2d 752].
- In-Custody Informant Testimony and Accomplice Testimony May Corroborate Each Other ▶ *People v. Huggins* (2015) 235 Cal.App.4th 715, 719-720 [185 Cal.Rptr.3d 672].

Secondary Sources

3 Witkin, *California Evidence* (4th ed. 2000) Presentation, §§ 98, 99, 105.

5 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Criminal Trial, § 654.

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

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

RELATED ISSUES

Out-of-Court Statements

The out-of court statement of a witness *may* constitute “testimony” within the meaning of Penal Code section 1111, and may require corroboration. (*People v. Williams* (1997) 16 Cal.4th 153, 245 [66 Cal.Rptr.2d 123, 940 P.2d 710]; *People v. Belton* (1979) 23 Cal.3d 516, 526 [153 Cal.Rptr. 195, 591 P.2d 485].) The Supreme Court has quoted with approval the following summary of the corroboration requirement for out-of-court statements:

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

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

Incest With a Minor

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

Liable to Prosecution When Crime Committed

The test for determining if a witness is an accomplice is not whether that person is subject to trial when he or she testifies, but whether he or she was liable to prosecution for the same offense at the time the acts were committed. (*People v. Gordon* (1973) 10 Cal.3d 460, 469 [110 Cal.Rptr. 906, 516 P.2d 298].) However,

the fact that a witness was charged for the same crime and then granted immunity does not necessarily establish that he or she is an accomplice. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90 [270 Cal.Rptr. 817, 793 P.2d 23].)

Threats and Fear of Bodily Harm

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

Defense Witness

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

335. Accomplice Testimony: No Dispute Whether Witness Is Accomplice

If the crime[s] of _____ <insert charged crime[s]> (was/were) committed, then _____ <insert name[s] of witness[es]> (was/were) [an] accomplice[s] to (that/those) crime[s].

You may not convict the defendant of _____ <insert crime[s]> based on the (statement/ [or] testimony) of an accomplice alone. You may use the (statement)/ [or] testimony) of an accomplice to convict the defendant only if:

- 1. The accomplice’s (statement/ [or] testimony) is supported by other evidence that you believe;**
- 2. That supporting evidence is independent of the accomplice’s (statement/ [or] testimony);**

AND

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

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

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

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

BENCH NOTES

Instructional Duty

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

“Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed.” (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 104 [17 Cal.Rptr.3d 710, 96 P.3d 30].) Give this instruction only if the court concludes that the witness is an accomplice as a matter of law or the parties agree about the witness’s status as an accomplice. (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1161 [123 Cal.Rptr.2d 322] [only give instruction “ ‘if undisputed evidence established the complicity’ ”].) If there is a dispute about whether the witness is an accomplice, give CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*.

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

When the witness is a codefendant whose testimony includes incriminating statements, the court **should not** instruct that the witness is an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555 [58 Cal.Rptr. 340, 426 P.2d 908].) Instead, the court should give CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*, informing the jury that it must decide whether the testifying codefendant is an accomplice. In addition, the court should instruct that when the jury considers this testimony as it relates to the testifying codefendant’s defense, the jury should evaluate the testimony using the general rules of credibility, but if the jury considers testimony as incriminating evidence against the non-testifying codefendant, the testimony must be corroborated and should be viewed with

caution. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 105 [17 Cal.Rptr.3d 710, 96 P.3d 30].)

If the court concludes that the corroboration requirement applies to an out-of-court statement, use the word “statement” throughout the instruction. (See discussion in Related Issues section to CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*.)

AUTHORITY

- Instructional Requirements ▶ Pen. Code, § 1111; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Accomplice May Not Provide Sole Basis for Admission of Other Evidence ▶ *People v. Bowley* (1963) 59 Cal.2d 855, 863 [31 Cal.Rptr. 471, 382 P.2d 591].
- Consideration of Incriminating Testimony ▶ *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Defense Admissions May Provide Necessary Corroboration ▶ *People v. Williams* (1997) 16 Cal.4th 635, 680 [66 Cal.Rptr.2d 573, 941 P.2d 752].
- Definition of Accomplice as Aider and Abettor ▶ *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817 793 P.2d 23].
- Extent of Corroboration Required ▶ *People v. Szeto* (1981) 29 Cal.3d 20, 27 [171 Cal.Rptr. 652, 623 P.2d 213].
- One Accomplice May Not Corroborate Another ▶ *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15 [117 P.2d 437], disapproved on other grounds in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301, fn. 11 [124 Cal.Rptr. 204, 540 P.2d 44] and *People v. Dillon* (1983) 34 Cal.3d 441, 454, fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697].
- Presence or Knowledge Insufficient ▶ *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].
- Testimony of Feigned Accomplice Need Not Be Corroborated ▶ *People v. Salazar* (1962) 201 Cal.App.2d 284, 287 [20 Cal.Rptr. 25]; but see *People v. Brocklehurst* (1971) 14 Cal.App.3d 473, 476 [92 Cal.Rptr. 340]; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193 [120 Cal.Rptr. 136].
- Uncorroborated Accomplice Testimony May Establish Corpus Delicti ▶ *People v. Williams* (1988) 45 Cal.3d 1268, 1317 [248 Cal.Rptr. 834, 756 P.2d 221].

- Witness an Accomplice as a Matter of Law ▶ *People v. Williams* (1997) 16 Cal.4th 635, 679 [66 Cal.Rptr.2d 573, 941 P.2d 752].
- This Instruction Upheld ▶ *People v. Tuggles* (2009) 179 Cal.App.4th 339, 363-367 [100 Cal.Rptr.3d 820].
- In-Custody Informant Testimony and Accomplice Testimony May Corroborate Each Other ▶ *People v. Huggins* (2015) 235 Cal.App.4th 715, 719-720 [185 Cal.Rptr.3d 672].
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Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation, §§ 98, 99, 105.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 654.

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

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

336. In-Custody Informant

View the (statement/ [or] testimony) of an in-custody informant against the defendant with caution and close scrutiny. In evaluating such (a statement/ [or] testimony), you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits. This does not mean that you may arbitrarily disregard such (statement/ [or] testimony), but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case.

<Give the following paragraph if the issue of whether a witness was an in-custody informant is in dispute>

[An *in-custody informant* is someone [, other than (a/an) (codefendant[,]/ [or] percipient witness[,]/ [or] accomplice[,]/ [or] coconspirator,)] whose (statement/ [or] testimony) is based on [a] statement[s] the defendant allegedly made while both the defendant and the informant were held within a correctional institution. If you decide that a (declarant/ [or] witness) was not an in-custody informant, then you should evaluate his or her (statement/ [or] testimony) as you would that of any other witness.]

<Give the first bracketed phrase if the issue of whether a witness was an in-custody informant is in dispute>

[If you decide that a (declarant/ [or] witness) was an in-custody informant, then] (Y/)you may not convict the defendant of _____ <insert charged crime[s]> based on the (statement/ [or] testimony) of that in-custody informant alone. [Nor may you find a special circumstance true/ [or] use evidence in aggravation based on the (statement/ [or] testimony) of that in-custody informant alone.]

You may use the (statement/ [or] testimony) of an in-custody informant only if:

- 1. The (statement/ [or] testimony) is supported by other evidence that you believe;**
- 2. That supporting evidence is independent of the (statement/ [or] testimony) ;**
AND
- 3. That supporting evidence connects the defendant to the commission of the crime[s] [or to the special circumstance/ [or] to evidence in**

aggravation]. The supporting evidence is not sufficient if it merely shows that the charged crime was committed [or proves the existence of a special circumstance/ [or] evidence in aggravation].

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

[Do not use the (statement/ [or] testimony) of an in-custody informant to support the (statement/ [or] testimony) of another in-custody informant unless you are convinced that _____ <insert name of party calling in-custody informant as witness> has proven it is more likely than not that the in-custody informant has not communicated with another in-custody informant on the subject of the testimony.

[A *percipient witness* is someone who personally perceived the matter that he or she testified about.

<Insert the name of the in-custody informant if his or her statue is not in dispute>
[_____ <insert name of witness> is an in-custody informant.]

[_____ <insert name of institution> is a correctional institution.]

New January 2006; Revised August 2012 ***<insert date of council approval>***

BENCH NOTES

Instructional Duty

The court must give this instruction on request. (Pen. Code, § 1127a.)

The court should also be aware of the following statutory provisions relating to in-custody informants: Penal Code sections 1127a(c) [prosecution must disclose consideration given to witness]; 1191.25 [prosecution must notify victim of in-custody informant]; and 4001.1 [limitation on payments to in-custody informants and action that may be taken by in-custody informant].

If there is no issue over whether the witness is an in-custody informant and the parties agree, the court may instruct the jury that the witness “is an in-custody

informant.” If there is an issue over whether the witness is an in-custody informant, give the bracketed definition of the term.

The committee awaits guidance from courts of review on the issue of whether this instruction applies to witnesses other than those called by the People. Until the issue is resolved, the committee provides this version consistent with the language of the new statute.

If the court concludes that the corroboration requirement applies to an out-of-court statement, use the word “statement” throughout the instruction. (See discussion in Related Issues section to CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice.*)

Related Instruction

CALCRIM No. 337, *Witness in Custody or Physically Restrained.*

AUTHORITY

- [Instructional Duty](#) ▶ Pen. Code, §§ 1111.5, 1127a.
- [In-Custody Informant Testimony and Accomplice Testimony May Corroborate Each Other](#) ▶ *People v. Huggins* (2015) 235 Cal.App.4th 715, 719-720 [185 Cal.Rptr.3d 672].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trials, § 653.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 30, *Confessions and Admissions*, § 30.32[2] (Matthew Bender).

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

361. Failure to Explain or Deny Adverse Testimony

If the defendant failed in (his/her) testimony to explain or deny evidence against (him/her), and if (he/she) could reasonably be expected to have done so based on what (he/she) knew, you may consider (his/her) failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt.

If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure.

New January 2006; Revised April 2010 *[insert date of council approval]*

BENCH NOTES

Instructional Duty

No authority imposes a duty to give this instruction sua sponte. This instruction should only be given when the defendant testifies and the privilege against self-incrimination has not been successfully invoked. (*People v. Mask* (1986) 188 Cal.App.3d 450, 455 [233 Cal.Rptr. 181]; *People v. Haynes* (1983) 148 Cal.App.3d 1117, 1118 [196 Cal.Rptr. 450].)

Before an instruction on this principle may be given, the trial court **must** ascertain as a matter of law: (1) if a question was asked that called for an explanation or denial of incriminating evidence; (2) if the defendant knew the facts necessary to answer the question or if some circumstance precluded the defendant from knowing such facts; and (3) if the defendant failed to deny or explain the incriminating evidence when answering the question. (*People v. Saddler* (1979) 24 Cal.3d 671, 682–683 [156 Cal.Rptr. 871, 597 P.2d 130] [instruction erroneously given because there was no evidence that defendant failed to deny or explain incriminating evidence]; *People v. Marsh* (1985) 175 Cal.App.3d 987, 994 [221 Cal.Rptr. 311] [same]; *People v. De Larco* (1983) 142 Cal.App.3d 294, 309 [190 Cal.Rptr.757] [same]; see also *People v. Marks* (1988) 45 Cal.3d 1335, 1346 [248 Cal.Rptr. 874, 756 P.2d 260].)

Contradiction of the state's evidence is not by itself a failure to deny or explain. (*People v. Marks* (1988) 45 Cal.3d 1335, 1346 [248 Cal.Rptr. 874, 756 P.2d 260]; *People v. Peters* (1982) 128 Cal.App.3d 75, 86 [180 Cal.Rptr. 76].) Failure to recall is not an appropriate basis for this instruction. (*People v. De Larco* (1983) 142 Cal.App.3d 294, 309 [190 Cal.Rptr.757].)

One court has cautioned against giving this instruction unless both parties agree and there is a significant omission on the part of the defendant to explain or deny adverse evidence. (*People v. Haynes* (1983) 148 Cal.App.3d 1117, 1119–1120 [196 Cal.Rptr. 450].)

AUTHORITY

- Instructional Requirements ▶ Evid. Code, § 413.
- Cautionary Language ▶ *People v. Saddler* (1979) 24 Cal.3d 671, 683 [156 Cal.Rptr. 871, 597 P.2d 130].
- This Instruction Upheld ▶ [*People v. Vega* \(2015\) 236 Cal.App.4th 484, 494-500 \[186 Cal.Rptr.3d 671\]](#); *People v. Rodriguez* (2009) 170 Cal.App.4th 1062, 1068 [88 Cal.Rptr.3d 749].

Secondary Sources

2 Witkin, California Evidence (4th ed. 2000) Witnesses, §§ 440, 441.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 80, *Defendant's Trial Rights*, § 80.08[6][a][i], Ch. 83, *Evidence*, § 83.01[2][b], Ch. 85, *Submission to Jury and Verdict*, §§ 85.01[5], 85.04[2][b] (Matthew Bender).

RELATED ISSUES

Bizarre or Implausible Answers

If the defendant's denial or explanation is bizarre or implausible, several courts have held that the question whether his or her response is reasonable should be given to the jury with an instruction regarding adverse inferences. (*People v. Mask* (1986) 188 Cal.App.3d 450, 455 [233 Cal.Rptr.181]; *People v. Roehler* (1985) 167 Cal.App.3d 353, 392–393 [213 Cal.Rptr. 353].) However, in *People v. Kondor* (1988) 200 Cal.App.3d 52, 57 [245 Cal.Rptr. 750], the court stated, “the test for giving the instruction [on failure to deny or explain] is not whether the defendant's testimony is believable. [The instruction] is unwarranted when a defendant explains or denies matters within his or her knowledge, no matter how improbable that explanation may appear.”

Facts Beyond the Scope of Examination

If the defendant has limited his or her testimony to a specific factual issue, it is error for the prosecutor to comment, or the trial court to instruct, on his or her

failure to explain or deny other evidence against him or her that is beyond the scope of this testimony. (*People v. Tealer* (1975) 48 Cal.App.3d 598, 604–607 [122 Cal.Rptr. 144].)

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

<Introductory Sentence Alternative A—evidence of other offense admitted>

[The People presented evidence that the defendant committed ((another/other) offense[s]/the offense[s] of _____ <insert description of alleged offense[s]>) that (was/were) not charged in this case.]

<Introductory Sentence Alternative B—evidence of other act admitted>

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

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

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

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

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

<A. Identity>

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

<B. Intent>

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

<C. Motive>

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

<D. Knowledge>

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

<E. Accident>

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

<F. Common Plan>

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

<G. Consent>

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

<H. Other Purpose>

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

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

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

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

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

| New January 2006; Revised April 2008 [insert date of council approval](#)

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

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

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

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

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

AUTHORITY

- Evidence Admissible for Limited Purposes ▶ Evid. Code, § 1101(b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393–394 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Balcom* (1994) 7 Cal.4th 414, 422 [27 Cal.Rptr.2d 666, 867 P.2d 777].
- Degree of Similarity Required ▶ *People v. Ewoldt* (1994) 7 Cal.4th 380, 402–404 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Balcom* (1994) 7 Cal.4th 414, 424 [27 Cal.Rptr.2d 666, 867 P.2d 777].

- Analysis Under Evidence Code Section 352 Required ▶ *People v. Ewoldt* (1994) 7 Cal.4th 380, 404 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Balcom* (1994) 7 Cal.4th 414, 426–427 [27 Cal.Rptr.2d 666, 867 P.2d 777].
- Instructional Requirements ▶ *People v. Collie* (1981) 30 Cal.3d 43, 63–64 [177 Cal.Rptr. 458, 634 P.2d 534]; *People v. Morrisson* (1979) 92 Cal.App.3d 787, 790 [155 Cal.Rptr. 152].
- Other Crimes Proved by Preponderance of Evidence ▶ *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708].
- Potential Conflict With Circumstantial Evidence Instruction ▶ *People v. James* (2000) 81 Cal.App.4th 1343, 1358–1359 [96 Cal.Rptr.2d 823].

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, §§ 74–95.

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

RELATED ISSUES

Circumstantial Evidence—Burden of Proof

Evidence of other offenses is circumstantial evidence that the defendant committed the offense charged. (See *People v. James* (2000) 81 Cal.App.4th 1343, 1358, fn. 9 [96 Cal.Rptr.2d 823].) Courts have recognized a potential conflict between the preponderance standard required to prove uncharged offenses and the reasonable doubt standard required to prove each underlying fact when the case is based primarily on circumstantial evidence. (See *People v. Medina* (1995) 11 Cal.4th 694, 763–764 [47 Cal.Rptr.2d 165, 906 P.2d 2]; *People v. James, supra*, 81 Cal.App.4th at p. 1358, fn. 9.) The court must give the general circumstantial evidence instruction (CALCRIM No. 223, *Direct and Circumstantial Evidence: Defined*) “only when the prosecution relies on circumstantial evidence to prove the defendant’s guilt from a pattern of incriminating circumstances, not when circumstantial evidence serves solely to corroborate direct evidence.” (*People v. James, supra*, 81 Cal.App.4th at p. 1359.) Thus, if evidence of other offenses is offered to corroborate direct evidence that the defendant committed the crime, no conflict exists. However, when the prosecution’s case rests substantially or entirely on circumstantial evidence, there will be a conflict between this instruction and CALCRIM No. 223. (*People v. James, supra*, 81 Cal.App.4th at p. 1358, fn. 9; *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [101

Cal.Rptr.2d 624]; *People v. Jeffries* (2000) 83 Cal.App.4th 15, 23–24, fn. 7 [98 Cal.Rptr.2d 903].) No case has determined how this conflict should be resolved. If this issue arises in a particular case, the court should consider the authorities cited and determine whether it is necessary to modify this instruction. (*People v. Younger, supra*, 84 Cal.App.4th at p. 1382; *People v. Jeffries, supra*, 83 Cal.App.4th at p. 24, fn. 7.)

Issue in Dispute

The “defendant’s plea of not guilty does put the elements of the crime in issue for the purpose of deciding the admissibility of evidence of uncharged misconduct, unless the defendant has taken some action to narrow the prosecution’s burden of proof.” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Rowland* (1992) 4 Cal.4th 238, 260 [14 Cal.Rptr.2d 377, 841 P.2d 897].) The defense may seek to “narrow the prosecution’s burden of proof” by stipulating to an issue. (*People v. Bruce* (1989) 208 Cal.App.3d 1099, 1103–1106 [256 Cal.Rptr. 647].) “[T]he prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state’s case of its persuasiveness and forcefulness.” (*People v. Scheid* (1997) 16 Cal.4th 1, 16–17 [65 Cal.Rptr.2d 348, 939 P.2d 748].) However, an offer to stipulate may make the evidence less probative and more cumulative, weighing in favor of exclusion under Evidence Code section 352. (*People v. Thornton* (2000) 85 Cal.App.4th 44, 49 [101 Cal.Rptr.2d 825] [observing that offer “not to argue” the issue is insufficient].) The court must also consider whether there could be a “reasonable dispute” about the issue. (See *People v. Balcom* (1994) 7 Cal.4th 414, 422–423 [27 Cal.Rptr.2d 666, 867 P.2d 777] [evidence of other offense not admissible to show intent to rape because if jury believed witness’s account, intent could not reasonably be disputed]; *People v. Bruce, supra*, 208 Cal.App.3d at pp. 1103–1106 [same].)

Subsequent Offenses Admissible

Evidence of a subsequent as well as a prior offense is admissible. (*People v. Balcom* (1994) 7 Cal.4th 414, 422–423, 425 [27 Cal.Rptr.2d 666, 867 P.2d 777].)

Offenses Not Connected to Defendant

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

548. Murder: Alternative Theories

The defendant has been prosecuted for murder under two theories: (1) malice aforethought, and (2) felony murder.

Each theory of murder has different requirements, and I will instruct you on both.

You may not find the defendant guilty of murder unless all of you agree that the People have proved that the defendant committed murder under at least one of these theories. You do not all need to agree on the same theory [, but you must unanimously agree whether the murder is in the first or second degree].

New January 2006; Revised August 2014 [insert date of council approval]

BENCH NOTES

Instructional Duty

This instruction is designed to be given when murder is charged on theories of malice and felony murder to help the jury distinguish between the two theories. This instruction should be given after the court has given any applicable instructions on defenses to homicide and **before** CALCRIM No. 520, *Murder With Malice Aforethought*.

~~The court may need to modify the final sentence of this instruction if the prosecution relies on mutually exclusive theories of homicide that support different degrees of murder. (*People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1025 [164 Cal.Rptr.3d. 880].)~~

If there is evidence of multiple acts from which the jury might conclude that the defendant killed the decedent, the court may be required to give CALCRIM No. 3500, *Unanimity*. (See *People v. Dellinger* (1984) 163 Cal.App.3d 284, 300–302 [209 Cal.Rpt. 503] [error not to instruct on unanimity where evidence that the victim was killed either by blunt force or by injection of cocaine].) Review the Bench Notes for CALCRIM No. 3500 discussing when a unanimity instruction is required.

AUTHORITY

- Unanimity on Degrees of Crime and Lesser Included Offenses. ▶ [Pen. Code §](#)

1157; *People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1025 [164 Cal.Rptr.3d. 880]; *People v. Aikin* (1971) 19 Cal.App.3d 685, 704 [97 Cal.Rptr. 251], disapproved on other grounds in *People v. Lines* (1975) 13 Cal.3d 500, 512 [119 Cal.Rptr. 225].

- Alternate Theories May Support Different Degrees of Murder. ▶ *People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1025 [164 Cal.Rptr.3d. 880].

625. Voluntary Intoxication: Effects on Homicide Crimes (Pen. Code, § 29.4)

You may consider evidence, if any, of the defendant’s voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill[,] [or] [the defendant acted with deliberation and premeditation[,] [[or] the defendant was unconscious when (he/she) acted[,] [or the defendant _____ <insert other specific intent required in a homicide charge or other charged offense>.]

A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

You may not consider evidence of voluntary intoxication for any other purpose.

New January 2006; Revised August 2014

BENCH NOTES

Instructional Duty

With the statutory elimination of diminished capacity as a defense, there is no sua sponte duty to instruct on the effect of voluntary intoxication on the mental states required for homicide. (Pen. Code, § 28(b); *People v. Saille* (1991) 54 Cal.3d 1103, 1119–1120 [2 Cal.Rptr.2d 364, 820 P.2d 588].) However, subsequent cases affirm that voluntary intoxication can be used to negate an element of the crime that must be proven by the prosecution. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 982 [61 Cal.Rptr.2d 39]; *People v. Visciotti* (1992) 2 Cal.4th 1, 56–57 [5 Cal.Rptr.2d 495, 825 P.2d 388].) Such an instruction is a “pinpoint” instruction, which must be given on request when there is sufficient evidence supporting the theory. (*People v. Saille, supra*, 54 Cal.3d at p. 1120.)

Include the bracketed language regarding unconsciousness if the court also gives CALCRIM No. 626, *Voluntary Intoxication Causing Unconsciousness: Effects on Homicide Crimes*.

If the defendant is charged with a homicide crime that has as an element an additional specific intent requirement other than intent to kill, include the required

intent in the last bracketed portion of the second sentence. For example, if the defendant is charged with torture murder, include “whether the defendant intended to inflict extreme and prolonged pain.” Or, if the defendant is charged with felony-murder, insert intent to commit the felony where indicated. Similarly, if the defendant is also charged with a nonhomicide crime with a specific intent requirement, include that intent requirement. For example, if the defendant is charged with murder and robbery, include “whether the defendant intended to ~~take property by force or fear~~permanently deprive the owner of the property.”

AUTHORITY

- Voluntary Intoxication Defined. ▶ Pen. Code, § 29.4(c).
- Unconsciousness Not Required. ▶ *People v. Ray* (1975) 14 Cal.3d 20, 28–29 [120 Cal.Rptr. 377, 533 P.2d 1017], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675].
- No Sua Sponte Duty to Instruct. ▶ *People v. Saille* (1991) 54 Cal.3d 1103, 1120 [2 Cal.Rptr.2d 364, 820 P.2d 588].
- Evidence of Intoxication Inapplicable to Implied Malice. ▶ Pen. Code, § 29.4(b); *People v. Martin* (2000) 78 Cal.App.4th 1107, 1114–1115 [93 Cal.Rptr.2d 433].
- Applies to Attempted Murder. ▶ *People v. Castillo* (1997) 16 Cal.4th 1009, 1016 [68 Cal.Rptr.2d 648, 945 P.2d 1197].
- Voluntary Intoxication Relevant to Knowledge. ▶ *People v. Reyes* (1997) 52 Cal.App.4th 975, 982–986 [61 Cal.Rptr.2d 39].
- This Instruction Upheld. ▶ *People v. Turk* (2008) 164 Cal.App.4th 1361, 1381 [80 Cal.Rptr.3d 473]; *People v. Timms* (2007) 151 Cal.App.4th 1292, 1298 [60 Cal.Rptr.3d 677].

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Defenses, §§ 26–30.

3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice, Ch. 73, Defenses and Justifications*, §§ 73.01[4], 73.04 (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][e], [f], [2][b], [3][c] (Matthew Bender).

RELATED ISSUES

General Instruction on Voluntary Intoxication

This instruction is a specific application of CALCRIM No. 3426, *Voluntary Intoxication*, to homicide.

Unconsciousness

Unconsciousness (as defined in CALCRIM No. 3425, *Unconsciousness*) is not required. (*People v. Ray* (1975) 14 Cal.3d 20, 28–29 [120 Cal.Rptr. 377, 533 P.2d 1017], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675].)

Not Applicable in Murder Cases Based Exclusively on Implied Malice

This instruction is inapplicable to cases where the murder charge is exclusively based on a theory of *implied* malice, because voluntary intoxication can only negate *express* malice. (Pen. Code, § 29.4(b); *People v. Martin* (2000) 78 Cal.App.4th 1107, 1114–1115 [93 Cal.Rptr.2d 433].) Drunk-driving second degree murder is one type of case that is typically based exclusively on an implied malice theory.

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

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

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

1. The defendant's participation in the crime began before or during the killing;
2. The defendant was a major participant in the crime;

AND

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

[A person *acts with reckless indifference to human life* when he or she knowingly engages in criminal activity that he or she knows 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 was a major participant, consider all the evidence. Among the factors you may consider are:**

1. What role did the defendant play in planning the criminal enterprise that led to the death[s]?
2. What role did the defendant play in supplying or using lethal weapons?
3. What awareness did the defendant have of particular dangers posed by the nature of the crime, any weapons used, or past experience or conduct of the other participant[s]?
4. Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder?
5. Did the defendant's own actions or inactions play a particular role in the death?
6. What did the defendant do after lethal force was used?
7. *<insert any other relevant factors.>*

No one of these factors is necessary, nor is any one of them necessarily enough, to determine whether the defendant was a major participant.]

If the defendant was not the actual killer, then the People have the burden of proving beyond a reasonable doubt that (he/she) acted with either the intent to kill or with reckless indifference to human life and was a major participant in the crime for the special circumstance[s] of _____ *<insert felony murder special circumstance[s]>* to be true. If the People have not met this burden, you must find (this/these) special circumstance[s] (has/have) not been proved true [for that defendant].

New January 2006; Revised April 2008 *<insert date of council approval>*

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.*)

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* (2003) 30 Cal.4th 1084, 1117 [135 Cal.Rptr.2d 370, 70 P.3d 359].) In such cases, the court should give both the bracketed paragraph stating that the People do not have to prove intent to kill or reckless indifference on the part of the actual killer, and the bracketed paragraph that begins with “[I]f you decide that the defendant is guilty of first degree murder, but you cannot agree whether the defendant was the actual killer”

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. 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 about 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.

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

AUTHORITY

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

- Reckless Indifference to Human Life ▶ *People v. Estrada* (1995) 11 Cal.4th 568, 578 [46 Cal.Rptr.2d 586, 904 P.2d 1197]; *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127].
- Constitutional Standard for Intent by Accomplice ▶ *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127].
- Major Participant ▶ *People v. Banks* (2015) 61 Cal.4th 788, 803-808 [189 Cal.Rptr.3d 208, 351 P.3d 330]

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 453, 460.

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

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

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

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

1. The defendant intentionally killed _____ *<insert name of victim>*;
2. At the time of the killing, the defendant was an active participant in a criminal street gang;
3. The defendant knew that members of the gang engage in or have engaged in a pattern of criminal gang activity;

AND

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

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

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

<If criminal street gang has already been defined>

[A criminal street gang is defined in another instruction to which you should refer.]

<If criminal street gang has not already been defined in another instruction>

[A *criminal street gang* is any ongoing organization, association, or group of three or more persons, whether formal or informal:

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

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

AND

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

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

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

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

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

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

[OR]

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

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

AND

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

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

3. The most recent crime occurred within three years of one of the earlier crimes;

AND

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

[The crimes, if any, that establish a pattern of criminal gang activity, need not be gang-related.]

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

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

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

New January 2006; Revised August 2006, June 2007, February 2014 [*insert date of council approval*]

BENCH NOTES

Instructional Duty

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

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

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

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

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

On request, give the bracketed paragraph that begins with “You may not find that there was a pattern of criminal gang activity.” (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758]; see also Related Issues section to CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.)

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

Related Instructions

CALCRIM No. 562, *Transferred Intent*.

CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.

AUTHORITY

- Special Circumstance ▶ Pen. Code, § 190.2(a)(22).

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

Secondary Sources

3 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Punishment, § 443.

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

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

RELATED ISSUES

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

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

1400. Active Participation in Criminal Street Gang (Pen. Code, § 186.22(a))

The defendant is charged [in Count __] with participating in a criminal street gang [in violation of Penal Code section 186.22(a)].

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

1. The defendant actively participated in a criminal street gang;
2. When the defendant participated in the gang, (he/she) knew that members of the gang engage in or have engaged in a pattern of criminal gang activity;

AND

3. The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by:
 - a. directly and actively committing a felony offense;

OR

- b. aiding and abetting a felony offense.

At least two members of that same gang must have participated in committing the felony offense. The defendant may count as one of those members if you find that the defendant was a member of the gang.

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

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

<If criminal street gang has already been defined.>

[A *criminal street gang* is defined in another instruction to which you should refer.]

<If criminal street gang has not already been defined in another instruction.>
[A **criminal street gang** is any ongoing organization, association, or group of three or more persons, whether formal or informal:

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

AND

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

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

<Give this paragraph only when the conduct that establishes the pattern of criminal gang activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition.>

[To decide whether the organization, association, or group has, as one of its primary activities, the commission of _____ *<insert felony or felonies from Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>* please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

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

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

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

1A. (any combination of two or more of the following crimes/[,][or] two or more occurrences of [one or more of the following crimes]:)

_____ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>*;

[OR]

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

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

AND

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

- 2. At least one of those crimes was committed after September 26, 1988;**
- 3. The most recent crime occurred within three years of one of the earlier crimes;**

AND

- 4. The crimes were committed on separate occasions or were personally committed by two or more persons.]**

<Give this paragraph only when the conduct that establishes the pattern of criminal gang activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition.>

[To decide whether a member of the gang [or the defendant] committed _____ *<insert felony or felonies from Pen. Code, § 186.22(e)(1)–(33)>* **please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

The People need not prove that every perpetrator involved in the pattern of criminal gang activity, if any, was a member of the alleged criminal street gang at the time when such activity was taking place.

[The crimes, if any, that establish a pattern of criminal gang activity, need not be gang-related.]

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

[You may not find that there was a pattern of criminal gang activity unless all of you agree that two or more crimes that satisfy these requirements were

committed, but you do not have to all agree on which crimes were committed.]

As the term is used here, a *willful act* is one done willingly or on purpose.

Felonious criminal conduct means committing or attempting to commit [any of] the following crime[s]: _____ <insert felony or felonies by gang members that the defendant is alleged to have furthered, assisted, promoted or directly committed>.

[To decide whether a member of the gang [or the defendant] committed _____ <insert felony or felonies listed immediately above>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

To prove that the defendant aided and abetted felonious criminal conduct by a member of the gang, the People must prove that:

1. A member of the gang committed the crime;
2. The defendant knew that the gang member intended to commit the crime;
3. Before or during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime;

AND

4. The defendant's words or conduct did in fact aid and abet the commission of the crime.

Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

[If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor.]

[If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is

present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.]

[A person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed. To withdraw, a person must do two things:

- 1. He or she must notify everyone else he or she knows is involved in the commission of the crime that he or she is no longer participating. The notification must be made early enough to prevent the commission of the crime;**

AND

- 2. He or she must do everything reasonably within his or her power to prevent the crime from being committed. He or she does not have to actually prevent the crime.**

The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you may not find the defendant guilty under an aiding and abetting theory.]

New January 2006; Revised August 2006, June 2007, December 2008, August 2012, February 2013, August 2013, February 2014, August 2014 *[insert date of council approval]*

BENCH NOTES

Instructional Duty

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

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

In element 1A of the paragraph defining a “pattern of criminal gang activity,” insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of same offense, or single incident with multiple participants committing one or more

specified offenses, are sufficient]) if the alleged crime or crimes are listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). Give on request the bracketed phrase “any combination of” if two or more different crimes are inserted in the blank. If one or more of the alleged crimes are listed in Penal Code section 186.22(e)(26)–(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). (See Pen. Code, § 186.22(j) [“A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone.”].)

In the definition of “felonious criminal conduct,” insert the felony or felonies the defendant allegedly aided and abetted. (See *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].) Note that a defendant’s misdemeanor conduct in the charged case, which is elevated to a felony by operation of Penal Code section 186.22(a), is not sufficient to satisfy the felonious criminal conduct requirement of an active gang participation offense charged under subdivision (a) of section 186.22 or of active gang participation charged as an element of felony firearm charges under section 12025(b)(3) or 12031(a)(2)(C). *People v. Lamas* (2007) 42 Cal.4th 516, 524 [67 Cal.Rptr.3d 179, 169 P.3d 102].

The court should also give the appropriate instructions defining the elements of crimes inserted in the list of alleged “primary activities,” or the definition of “pattern of criminal gang activity” that have not been established by prior convictions or sustained juvenile petitions. The court should also give the appropriate instructions defining the elements of all crimes inserted in the definition of “felonious criminal conduct.”

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

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

On request, give the bracketed paragraph that begins with “You may not find that there was a pattern of criminal gang activity.” (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758]; see also Related Issues section below on Unanimity.)

On request, the court must give a limiting instruction on the gang evidence. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880, 94

P.3d 1080].) If requested, give CALCRIM No. 1403, *Limited Purpose of Evidence of Gang Activity*.

Defenses—Instructional Duty

If there is evidence that the defendant was merely present at the scene or only had knowledge that a crime was being committed, the court has a **sua sponte** duty to give the bracketed paragraph that begins with “If you conclude that defendant was present.” (*People v. Boyd* (1990) 222 Cal.App.3d 541, 557 fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].)

If there is sufficient evidence that the defendant withdrew, the court has a **sua sponte** duty to give the final bracketed section on the defense of withdrawal.

Related Instructions

This instruction should be used when a defendant is charged with a violation of Penal Code section 186.22(a) as a substantive offense. If the defendant is charged with an enhancement under 186.22(b), use CALCRIM No. 1401, *Felony or Misdemeanor Committed for Benefit of Criminal Street Gang (Pen. Code, § 186.22(b)(1) (Felony) and § 186.22(d) (Felony or Misdemeanor))*.

For additional instructions relating to liability as an aider and abettor, see the Aiding and Abetting series (CALCRIM No. 400 et seq.).

AUTHORITY

- Elements. ▶ Pen. Code, § 186.22(a); *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1468 [83 Cal.Rptr.2d 307].
- Active Participation Defined. ▶ Pen. Code, § 186.22(i); *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined. ▶ Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].
- Pattern of Criminal Gang Activity Defined. ▶ Pen. Code, § 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236].
- Willful Defined. ▶ Pen. Code, § 7(1).
- Applies to Both Perpetrator and Aider and Abettor. ▶ *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436 [105 Cal.Rptr.2d 837]; *People v. Castenada* (2000) 23 Cal.4th 743, 749–750 [97 Cal.Rptr.2d 906, 3 P.3d 278].

- Felonious Criminal Conduct Defined. ▶ *People v. Albillar* (2010) 51 Cal.4th 47, 54-59 [119 Cal.Rptr.3d 415, 244 P.3d 1062]; *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].
- Separate Intent From Underlying Felony. ▶ *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].
- Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct. ▶ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132-1138 [150 Cal.Rptr.3d 533, 290 P.3d 1143]; *People v. Salcido* (2007) 149 Cal.App.4th 356 [56 Cal.Rptr.3d 912].
- Temporal Connection Between Active Participation and Felonious Criminal Conduct. ▶ *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509 [64 Cal.Rptr.3d 104].
- Crimes Committed After Charged Offense Not Predicates. ▶ *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464-1465 [119 Cal.Rptr.2d 272].
- Conspiracy to Commit This Crime. ▶ *People v. Johnson* (2013) 57 Cal.4th 250, 255, 266-267 [159 Cal.Rptr.3d 70, 303 P.3d 379].
- Proof of Sufficient Connection Among Gang “Subsets” and Umbrella Gang Required ▶ *People v. Prunty* (2015) 62 Cal.4th 59, 81-85 [192 Cal.Rptr.4th 309, 355 P.3d 480].

Secondary Sources

2 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 31-46.

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

COMMENTARY

The jury may consider past offenses as well as circumstances of the charged crime. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739], disapproving *In re Elodio O.* (1997) 56 Cal.App.4th 1175, 1181 [66 Cal.Rptr.2d 95], to the extent it only allowed evidence of past offenses.) A “pattern of criminal gang activity” requires two or more “predicate offenses” during a statutory time period. The charged crime may serve as a predicate offense (*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]), as can another offense committed on the same

occasion by a fellow gang member. (*People v. Loeun* (1997) 17 Cal.4th 1, 9–10 [69 Cal.Rptr.2d 776, 947 P.2d 1313]; see also *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two incidents each with single perpetrator, or single incident with multiple participants committing one or more specified offenses, are sufficient]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484 [67 Cal.Rptr.2d 126].) However, convictions of a perpetrator and an aider and abettor for a single crime establish only one predicate offense (*People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196]), and “[c]rimes occurring *after* the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity.” (*People v. Duran*, *supra*, 97 Cal.App.4th at 1458 [original italics].) The “felonious criminal conduct” need not be gang-related. (*People v. Albillar* (2010) 51 Cal.4th 47, 54-59 [119 Cal.Rptr.3d 415, 244 P.3d 1062].)

LESSER INCLUDED OFFENSES

Predicate Offenses Not Lesser Included Offenses

The predicate offenses that establish a pattern of criminal gang activity are not lesser included offenses of active participation in a criminal street gang. (*People v. Burnell* (2005) 132 Cal.App.4th 938, 944–945 [34 Cal.Rptr.3d 40].)

RELATED ISSUES

Conspiracy

Anyone who actively participates in a criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, assists, or benefits from any felonious criminal conduct by the members, is guilty of conspiracy to commit that felony. (Pen. Code, § 182.5; see Pen. Code, § 182; CALCRIM No. 415, *Conspiracy*.)

Labor Organizations or Mutual Aid Activities

The California Street Terrorism Enforcement and Prevention Act does not apply to labor organization activities or to employees engaged in activities for their mutual aid and protection. (Pen. Code, § 186.23.)

Related Gang Crimes

Soliciting or recruiting others to participate in a criminal street gang, or threatening someone to coerce them to join or prevent them from leaving a gang, are separate crimes. (Pen. Code, § 186.26.) It is also a crime to supply a firearm to someone who commits a specified felony while participating in a criminal street gang. (Pen. Code, § 186.28.)

Unanimity

The “continuous-course-of-conduct exception” applies to the “pattern of criminal gang activity” element of Penal Code section 186.22(a). Thus the jury is not required to unanimously agree on which two or more crimes constitute a pattern of criminal activity. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758].)

1401. Felony or Misdemeanor Committed for Benefit of Criminal Street Gang (Pen. Code, § 186.22(b)(1) (Felony) and § 186.22(d) (Felony or Misdemeanor))

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those crime[s])][,] [or the lesser offense[s] of _____ <insert lesser offense[s]>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant committed that crime (for the benefit of[,]/ at the direction of[,]/ [or] in association with) a criminal street gang. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

[You must also decide whether the crime[s] charged in Count[s] ____ (was/were) committed on the grounds of, or within 1,000 feet of a public or private (elementary/ [or] vocational/ [or] junior high/ [or] middle school/ [or] high) school open to or being used by minors for classes or school-related programs at the time.]

To prove this allegation, the People must prove that:

1. The defendant (committed/ [or] attempted to commit) the crime (for the benefit of[,]/ at the direction of[,]/ [or] in association with) a criminal street gang;

AND

2. The defendant intended to assist, further, or promote criminal conduct by gang members.

<If criminal street gang has already been defined.>

[A criminal street gang is defined in another instruction to which you should refer.]

<If criminal street gang has not already been defined in another instruction.>

[A *criminal street gang* is any ongoing organization, association, or group of three or more persons, whether formal or informal:

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

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

AND

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

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

<Give this paragraph only when the conduct that establishes the pattern of criminal gang activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition.>

[To decide whether the organization, association, or group has, as one of its primary activities, the commission of _____ <insert felony or felonies from Pen. Code, § 186.22(e)(1)-(25), (31)-(33)> please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

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

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

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

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

[OR]

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

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

AND

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

2. At least one of those crimes was committed after September 26, 1988;
3. The most recent crime occurred within three years of one of the earlier crimes;

AND

4. The crimes were committed on separate occasions or were personally committed by two or more persons.]

<Give this paragraph only when the conduct that establishes the pattern of criminal gang activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition.>

[To decide whether a member of the gang [or the defendant] committed _____ <insert felony or felonies from Pen. Code, § 186.22(e)(1)–(33)> please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

[The crimes, if any, that establish a pattern of criminal gang activity, need not be gang-related.]

[The People need not prove that the defendant is an active or current member of the alleged criminal street gang.]

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

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

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

New January 2006; Revised August 2006, June 2007, April 2008, December 2008,
February 2013, August 2013, February 2014 [\[insert date of council approval\]](#)

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

In element 2 of the paragraph defining a “criminal street gang,” insert one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33) that are alleged to be the primary activities of the gang. (See *People v. Sengpadychith, supra*, 26 Cal.4th at pp. 323–324.)

In element 1A of the paragraph defining a “pattern of criminal gang activity,” insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient].) if the alleged crime or crimes are listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). Give on request the bracketed phrase “any combination of” if two or more different crimes are inserted in the blank. If one or more of the alleged crimes are listed in Penal Code section 186.22(e)(26)–(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section 182.22(e)(1)–(25), (31)–(33). (See Pen. Code, § 186.22(j) [“A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone.”].)

The court should also give the appropriate instructions defining the elements of crimes inserted in the list of alleged “primary activities,” or the definition of “pattern of criminal gang activity” that have not been established by prior convictions or sustained juvenile petitions.

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

On request, give the bracketed paragraph that begins with “You may not find that there was a pattern of criminal gang activity.” (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758]; see also Related Issues section below on Unanimity.)

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

The court may bifurcate the trial on the gang enhancement, at its discretion. (*People v. Hernandez, supra*, 33 Cal.4th at p. 1048.)

Related Instructions

CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.

AUTHORITY

- Enhancement ▶ Pen. Code, § 186.22(b)(1).
- “For the Benefit of, at the Direction of, or in Association With Any Criminal Street Gang” Defined. ▶ *People v. Albillar* (2010) 51 Cal.4th 47, 59–64 [119 Cal.Rptr.3d 415, 244 P.3d 1062].
- Specific Intent Defined. ▶ *People v. Albillar* (2010) 51 Cal.4th 47, 64–68 [119 Cal.Rptr.3d 415, 244 P.3d 1062].
- Criminal Street Gang Defined ▶ Pen. Code, § 186.22(f); see *People v. Duran, supra*, 97 Cal.App.4th at pp. 1464–1465.
- Pattern of Criminal Gang Activity Defined ▶ Pen. Code, § 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236]; see *People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196] [conviction of perpetrator and aider and abettor for single crime establishes only single predicate offense].
- Active or Current Participation in Gang Not Required ▶ *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207 [66 Cal.Rptr.2d 816].
- Primary Activities Defined ▶ *People v. Sengpadychith, supra*, 26 Cal.4th at pp. 323–324.
- Defendant Need Not Act With Another Gang Member ▶ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1138 [150 Cal.Rptr.3d 533].

- Crimes Committed After Charged Offense Not Predicates ▶ *People v. Duran*, *supra*, 97 Cal.App.4th at p. 1458.
- Proof of Sufficient Connection Among Gang “Subsets” and Umbrella Gang Required ▶ *People v. Prunty* (2015) 62 Cal.4th 59, 81-85 [192 Cal.Rptr.4th 309, 355 P.3d 480].

Secondary Sources

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 25.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.43 (Matthew Bender).

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

RELATED ISSUES

Commission On or Near School Grounds

In imposing a sentence under Penal Code section 186.22(b)(1), it is a circumstance in aggravation if the defendant’s underlying felony was committed on or within 1,000 feet of specified schools. (Pen. Code, § 186.22(b)(2).)

Enhancements for Multiple Gang Crimes

Separate criminal street gang enhancements may be applied to gang crimes committed against separate victims at different times and places, with multiple criminal intents. (*People v. Akins* (1997) 56 Cal.App.4th 331, 339–340 [65 Cal.Rptr.2d 338].)

Wobblers

Specific punishments apply to any person convicted of an offense punishable as a felony or a misdemeanor that is committed for the benefit of a criminal street gang and with the intent to promote criminal conduct by gang members. (See Pen. Code, § 186.22(d); see also *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 909 [135 Cal.Rptr.2d 30, 69 P.3d 951].) However, the felony enhancement provided by Penal Code section 186.22(b)(1) cannot be applied to a misdemeanor offense made a felony pursuant to section 186.22(d). (*People v. Arroyas* (2002) 96 Cal.App.4th 1439, 1449 [118 Cal.Rptr.2d 380].)

Murder—Enhancements Under Penal Code section 186.22(b)(1) May Not Apply at Sentencing

The enhancements provided by Penal Code section 186.22(b)(1) do not apply to crimes “punishable by imprisonment in the state prison for life . . .” (Pen. Code, § 186.22(b)(5); *People v. Lopez* (2005) 34 Cal.4th 1002, 1004 [22 Cal.Rptr.3d 869, 103 P.3d 270].) Thus, the 10-year enhancement provided by Penal Code section 186.22(b)(1)(C) for a violent felony committed for the benefit of the street gang may not apply in some sentencing situations involving the crime of murder.

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

**2542. Carrying Firearm: Active Participant in Criminal Street Gang
(Pen. Code, §§ 25400(c)(3), 25850(c)(3))**

If you find the defendant guilty of unlawfully (carrying a concealed firearm (on (his/her) person/within a vehicle)[,]/ causing a firearm to be carried concealed within a vehicle[,]/ [or] carrying a loaded firearm) [under Count[s] ___], you must then decide whether the People have proved the additional allegation that the defendant was an active participant in a criminal street gang.

To prove this allegation, the People must prove that:

- 1. When the defendant (carried the firearm/ [or] caused the firearm to be carried concealed in a vehicle), the defendant was an active participant in a criminal street gang;**
- 2. When the defendant participated in the gang, (he/she) knew that members of the gang engage in or have engaged in a pattern of criminal gang activity;**

AND

- 3. The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by:**
 - a. Directly and actively committing a felony offense;**

OR

- b. aiding and abetting a felony offense.**

At least two members of that same gang must have participated in committing the felony offense. The defendant may count as one of those members if you find that the defendant was a member of the gang.

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

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

A *criminal street gang* is any ongoing organization, association, or group of three or more persons, whether formal or informal:

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

AND

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

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

<Give this paragraph only when the conduct that establishes the primary activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition.>

[To decide whether the organization, association, or group has, as one of its primary activities, the commission of _____ <insert felony or felonies from Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

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

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

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

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

[OR]

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

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

AND

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

- 2. At least one of those crimes was committed after September 26, 1988;**
- 3. The most recent crime occurred within three years of one of the earlier crimes;**

AND

- 4. The crimes were committed on separate occasions or were personally committed by two or more persons.**

<Give this paragraph only when the conduct that establishes the pattern of criminal gang activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition.>

[To decide whether a member of the gang [or the defendant] committed _____ <insert felony or felonies from Pen. Code, § 186.22(e)(1)–(33)>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

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

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

As the term is used here, a *willful act* is one done willingly or on purpose.

Felonious criminal conduct means committing or attempting to commit [any of] the following crime[s]: _____ <insert felony or felonies by gang members that the defendant is alleged to have furthered, assisted, or promoted>.

To decide whether a member of the gang [or the defendant] committed _____ <insert felony or felonies listed immediately above and crimes from Pen. Code, § 186.22(e)(1)–(33) inserted in definition of pattern of criminal gang activity>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

To prove that the defendant aided and abetted felonious criminal conduct by a member of the gang, the People must prove that:

1. A member of the gang committed the crime;
2. The defendant knew that the gang member intended to commit the crime;
3. Before or during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime;

AND

4. The defendant's words or conduct did in fact aid and abet the commission of the crime.

Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

[If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor.]

[If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.]

[A person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed. To withdraw, a person must do two things:

- 1. He or she must notify everyone else he or she knows is involved in the commission of the crime that he or she is no longer participating. The notification must be made early enough to prevent the commission of the crime;**

AND

- 2. He or she must do everything reasonably within his or her power to prevent the crime from being committed. He or she does not have to actually prevent the crime.**

The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you may not find the defendant guilty under an aiding and abetting theory.]

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

New January 2006; Revised August 2006, June 2007, December 2008, February 2012, August 2013, February 2014 *insert date of council approval*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *People v. Robles* (2000) 23 Cal.4th 1106, 1115 [99 Cal.Rptr.2d 120, 5 P.3d 176] [now-repealed Pen. Code, § 12031(a)(2)(C) incorporates entire substantive gang offense defined in section 186.22(a)]; see *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give this instruction if the defendant is charged under Penal Code section 25400(c)(3) or 25850(c)(3) and the defendant does not stipulate to being an active gang participant. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].) This instruction **must** be given with the appropriate instruction defining the elements of carrying a concealed firearm, CALCRIM No. 2520, 2521, or 2522, carrying a loaded firearm, CALCRIM No. 2530. The court must provide the jury

with a verdict form on which the jury will indicate if the sentencing factor has been proved.

If the defendant does stipulate that he or she is an active gang participant, this instruction should not be given and that information should not be disclosed to the jury. (See *People v. Hall*, *supra*, 67 Cal.App.4th at p. 135.)

In element 2 of the paragraph defining a “criminal street gang,” insert one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33) that are alleged to be the primary activities of the gang. (See *People v. Sengpadychith*, *supra*, 26 Cal.4th at pp. 316, 323–324.)

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

In the definition of “felonious criminal conduct,” insert the felony or felonies the defendant allegedly aided and abetted. (See *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].)

The court should also give the appropriate instructions defining the elements of all crimes inserted in the definition of “criminal street gang,” “pattern of criminal gang activity,” or “felonious criminal conduct.”

Note that a defendant’s misdemeanor conduct in the charged case, which is elevated to a felony by operation of Penal Code section 186.22(a), is not sufficient to satisfy the felonious criminal conduct requirement of an active gang participation offense charged under subdivision (a) of section 186.22 or of active gang participation charged as an element of felony firearm charges under sections 25400(c)(3) or 25850(c)(3). *People v. Lamas* (2007) 42 Cal.4th 516, 524 [67 Cal.Rptr.3d 179, 169 P.3d 102].

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

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

On request, give the bracketed paragraph that begins with “You may not find that there was a pattern of criminal gang activity.” (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758]; see also Related Issues section to CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.)

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

Defenses—Instructional Duty

If there is evidence that the defendant was merely present at the scene or only had knowledge that a crime was being committed, the court has a **sua sponte** duty to give the bracketed paragraph that begins with “If you conclude that defendant was present.” (*People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].)

If there is sufficient evidence that the defendant withdrew, the court has a **sua sponte** duty to give the final bracketed section on the defense of withdrawal.

Related Instructions

CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.

CALCRIM No. 1401, *Felony or Misdemeanor Committed for Benefit of Criminal Street Gang* (*Pen. Code, § 186.22(b)(1) (Felony) and § 186.22(d) (Felony or Misdemeanor)*).

For additional instructions relating to liability as an aider and abettor, see series 400, Aiding and Abetting.

AUTHORITY

- Factors ▶ Pen. Code, §§ 25400(c)(3), 25850(c)(3) Sentencing Factors, Not Elements ▶ *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].
- Elements of Gang Factor ▶ Pen. Code, § 186.22(a); *People v. Robles* (2000) 23 Cal.4th 1106, 1115 [99 Cal.Rptr.2d 120, 5 P.3d 176].
- Active Participation Defined ▶ Pen. Code, § 186.22(i); *People v. Salcido* (2007) 149 Cal.App.4th 356 [56 Cal.Rptr.3d 912]; *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined ▶ Pen. Code, § 186.22(f); see *People v. Duran, supra*, 97 Cal.App.4th at pp. 1464–1465.
- Pattern of Criminal Gang Activity Defined ▶ Pen. Code, §§ 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236].
- Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct ▶ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132–1138 [150 Cal.Rptr.3d 533, 290 P.3d 1143].
- Crimes Committed After Charged Offense Not Predicates ▶ *People v. Duran, supra*, 97 Cal.App.4th at p. 1458.
- Proof of Sufficient Connection Among Gang “Subsets” and Umbrella Gang Required ▶ *People v. Prunty* (2015) 62 Cal.4th 59, 81–85 [192 Cal.Rptr.4th 309, 355 P.3d 480].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 31–46, 203–204, 249–250.

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

RELATED ISSUES

Gang Expert Cannot Testify to Defendant’s Knowledge or Intent

In *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658 [126 Cal.Rptr.2d 876], the court held it was error to permit a gang expert to testify that the defendant knew there was a loaded firearm in the vehicle:

[The gang expert] testified to the subjective *knowledge and intent* of each occupant in each vehicle. Such testimony is much different from the *expectations* of gang members in general when confronted with a specific action.... ¶... [The gang expert] simply informed the jury of his belief of the suspects' knowledge and intent on the night in question, issues properly reserved to the trier of fact. [The expert's] beliefs were irrelevant.

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

See also the Commentary and Related Issues sections of the Bench Notes for CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.

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.

[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.]

[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 [*insert date of council approval*]

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”

If there is sufficient evidence that an alleged victim’s injuries were caused by an accident, the court has a **sua sponte** duty to instruct on accident. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 390 [88 Cal.Rptr.2d 111].) Give CALCRIM No. 3404, *Accident*.

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, 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(c); *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* (1996) 44 Cal.App.4th 1323, 1335 [52 Cal.Rptr.2d 256].

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).

LESSER INCLUDED OFFENSES

- Attempted Infliction of Corporal 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* (1985) 171 Cal.App.3d 944, 952 [217 Cal.Rptr. 616].
- Battery Against Spouse, Cohabitant, or Fellow Parent ▶ Pen. Code, § 243(e)(1); see *People v. Jackson* (2000) 77 Cal.App.4th 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].)

**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/~~former~~-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 ~~former~~ 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.]

[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 <insert date of council approval>

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 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); 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]].
- 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].
- Dating Relationship Defined ▶ Pen. Code, § 243(f)(10).
- Simultaneous Cohabitation ▶ *People v. Moore* (1996) 44 Cal.App.4th 1323, 1335 [52 Cal.Rptr.2d 256].

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, § 19.

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

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*.

842–849. Reserved for Future Use

935. Sexual Battery: Felony (Pen. Code, §§ 242, 243.4(a) & (d))

The defendant is charged [in Count ___] with sexual battery [in violation of Penal Code section 243.4].

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

1. The defendant [or an accomplice] unlawfully restrained _____
<insert name of complaining witness>;

<Alternative 2A—defendant touched>

- [2. While _____ <insert name of complaining witness> was restrained, the defendant touched an intimate part of _____
<insert name of complaining witness>;]

<Alternative 2B—caused complaining witness to touch>

- [2. While _____ <insert name of complaining witness> was restrained, the defendant (caused _____ <insert name of complaining witness> to touch (his/her) own intimate part/ [or] caused _____ <insert name of complaining witness> to touch the intimate part of defendant [or someone else]);]

3. The touching was done against _____'s <insert name of complaining witness> will;

AND

4. The touching was done for the specific purpose of sexual arousal, sexual gratification, or sexual abuse.

An *intimate part* is a female's breast or the anus, groin, sexual organ or buttocks of anyone.

Contact must have been made with _____'s <insert name of complaining witness> bare skin. This means that:

1. The defendant must have touched the bare skin of _____'s
<insert name of complaining witness> intimate part;

OR

2. _____'s <insert name of complaining witness> **bare skin must have touched the defendant's [or _____'s <insert name or description of third person>] intimate part either directly or through (his/her) clothing.**

Someone is *unlawfully restrained* when his or her liberty is controlled by words, acts, or authority of another and the restraint is against his or her will. Unlawful restraint requires more than just the physical force necessary to accomplish the sexual touching. [A person does not unlawfully restrain someone if he or she only uses lawful authority for a lawful purpose.]

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

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

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

AND

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

<Defense: Reasonable Belief in Consent>

[The defendant is not guilty of sexual battery if (he/she) actually and reasonably, even if mistakenly, believed that the other person consented to the touching [and actually and reasonably believed that (he/she) consented throughout the act of touching]. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the other person consented. If the People have not met this burden, you must find the defendant not guilty.]

New January 2006 *[insert date of council approval]*

BENCH NOTES

Instructional Duty

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

The court has a **sua sponte** duty to instruct on the defense of mistaken but honest and reasonable belief in consent if there is substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not. (See *People v. Andrews* (2015) 234 Cal.App.4th 590, 602 [184 Cal.Rptr.3d 183]; following *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337].)

Give either alternative 2A or 2B depending on the evidence in the case. The committee has concluded that the direct touching requirement for felony sexual battery is satisfied when (1) the defendant forces the alleged victim to touch the defendant’s intimate parts through the defendant’s clothing with the alleged victim’s bare skin; (2) the defendant forces the alleged victim to touch any part of the defendant with the victim’s unclothed intimate part, whether the defendant’s body is clothed or not; or (3) the defendant touches the alleged victim’s bare intimate part either directly or through clothing. If a defendant is only charged under Penal Code section 243.4(a), the defendant must touch the victim’s intimate part, not the other way around. (*People v. Elam* (2001) 91 Cal.App.4th 298, 309–310 [110 Cal.Rptr.2d 185].)

The committee omitted the word “masturbate” from the elements because the plain language of Penal Code section 243.4(d) requires only that the victim be compelled to touch him- or herself, and a further finding of whether that act of touching was actually masturbation is unnecessary.

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

If the court gives the bracketed phrase “or an accomplice” in element 1, the court must also give the bracketed definition of “accomplice.” (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of “accomplice” are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

AUTHORITY

- Elements ▶ Pen. Code, §§ 242, 243.4(a) & (d).

- Intimate Part ▶ Pen. Code, § 243.4(g)(1).
- Touches Defined ▶ Pen. Code, § 243.4(f).
- Otherwise Lawful Restraint for Unlawful Purpose ▶ *People v. Alford* (1991) 235 Cal.App.3d 799, 803–804 [286 Cal.Rptr. 762].
- Sexual Abuse Defined ▶ *People v. White* (1986) 179 Cal.App.3d 193, 205 [224 Cal.Rptr. 467] [discussing Pen. Code, § 289].
- Specific Intent Crime ▶ *People v. Chavez* (2000) 84 Cal.App.4th 25, 29 [100 Cal.Rptr.2d 680].
- Caused to Masturbate ▶ *People v. Reeves* (2001) 91 Cal.App.4th 14, 50 [109 Cal.Rptr.2d 728].
- Accomplice Defined ▶ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 26, 74–76.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.22[1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault ▶ Pen. Code, § 240.
- Misdemeanor Sexual Battery ▶ Pen. Code, § 243.4(e)(1).

COMMENTARY

In a case addressing the meaning of “for the purpose of . . . sexual abuse” in the context of Penal Code section 289, one court stated, “when a penetration is accomplished for the purpose of causing pain, injury or discomfort, it becomes sexual abuse, even though the perpetrator may not necessarily achieve any sexual arousal or gratification whatsoever.” (*People v. White* (1986) 179 Cal.App.3d 193, 205 [224 Cal.Rptr. 467].) If the court concludes it this reasoning applies to the crime sexual battery and a party requests a definition of “sexual abuse,” the following language can be used:

Sexual abuse means any touching of a person's intimate parts in order to cause pain, injury, or discomfort. The perpetrator does not need to achieve any sexual arousal or sexual gratification.

938. Sexual Battery: Misdemeanor (Pen. Code, § 243.4(e)(1))

The defendant is charged [in Count ___] with sexual battery [in violation of Penal Code section 243.4(e)(1)].

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

1. The defendant touched an intimate part of _____ <insert name of complaining witness>;
2. The touching was done against _____'s <insert name of complaining witness> will;

AND

3. The touching was done for the specific purpose of sexual arousal, sexual gratification, or sexual abuse.

An *intimate part* is a female's breast or the anus, groin, sexual organ, or buttocks of anyone.

Touching, as used here, means making physical contact with another person. *Touching* includes contact made through the clothing.

[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.]

<Defense: Reasonable Belief in Consent>

[The defendant is not guilty of sexual battery if (he/she) actually and reasonably believed that the other person consented to the touching [and actually and reasonably believed that (he/she) consented throughout the act of touching]. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the other person consented. If the People have not met this burden, you must find the defendant not guilty.]

New January 2006 *[insert date of council approval]*

BENCH NOTES

Instructional Duty

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

The court has a **sua sponte** duty to instruct on the defense of mistaken but honest and reasonable belief in consent if there is substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not. (See *People v. Andrews* (2015) 234 Cal.App.4th 590, 602 [184 Cal.Rptr.3d 183]; following *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337].)

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

AUTHORITY

- Elements ▶ Pen. Code, § 243.4(e)(1).
- Touches Defined ▶ Pen. Code, § 243.4(e)(2).
- Intimate Part Defined ▶ Pen. Code, § 243.4(g)(1).
- Consent Defined ▶ Pen. Code, §§ 261.6, 261.7.
- Specific-Intent Crime ▶ *People v. Chavez* (2000) 84 Cal.App.4th 25, 29 [100 Cal.Rptr.2d 680].
- Defendant Must Touch Intimate Part of Victim ▶ *People v. Elam* (2001) 91 Cal.App.4th 298, 309–310 [110 Cal.Rptr.2d 185].

Defendant Need Not Touch Skin ▶ *People v. Dayan* (1995) 34 Cal.App.4th 707, 716 [40 Cal.Rptr.2d 391].

LESSER INCLUDED OFFENSES

Neither sexual battery nor attempted sexual battery are lesser included offenses of sexual battery by fraudulent representation. *People v. Babaali* (2009) 171 Cal.App.4th 982.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 26.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.22[2] (Matthew Bender).

COMMENTARY

In a case addressing the meaning of for the “purpose of . . . sexual abuse” in the context of Penal Code section 289, one court has stated that “when a penetration is accomplished for the purpose of causing pain, injury or discomfort, it becomes sexual abuse, even though the perpetrator may not necessarily achieve any sexual arousal or gratification whatsoever.” (*People v. White* (1986) 179 Cal.App.3d 193, 205 [224 Cal.Rptr. 467].) If the court concludes that this reasoning applies to the crime of sexual battery and a party requests a definition of “sexual abuse,” the following language may be used:

Sexual abuse means any touching of a person’s intimate parts in order to cause pain, injury, or discomfort. The perpetrator does not need to achieve any sexual arousal or sexual gratification.

939–944. Reserved for Future Use

985. Brandishing Imitation Firearm (Pen. Code, § 417.4)

The defendant is charged [in Count __] with brandishing an imitation firearm [in violation of Penal Code section 417.4].

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

1. The defendant drew or exhibited an imitation firearm in a threatening manner against another person;
2. The defendant's act caused someone to fear bodily harm to himself or herself or someone else;

[AND]

3. That fear of harm was reasonable(;/.)

<Give element 4 when instructing on self-defense or defense of another.>

[AND]

4. When the defendant drew or exhibited the imitation firearm, (he/she) was not acting (in self-defense/ [or] in defense of someone else).]

An *imitation firearm* is a device[, or a toy gun, replica of a firearm, or BB device,] that is so substantially similar to a real firearm in color and overall appearance that a reasonable person would believe that it is a real firearm. [A *BB device* is an instrument that expels a projectile, such as a BB or other pellet, ~~not exceeding 6 mm caliber~~either 6 millimeters or 8 millimeters in caliber, through the force of air pressure, gas pressure, or spring action, or any spot marker gun that expels a projectile 10 millimeters or less in caliber.]

New January 2006; Revised February 2012 [*insert date of council approval*]

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.)

AUTHORITY

- Elements ▶ Pen. Code, § 417.4.
- Imitation Firearm ▶ Pen. Code, § 16700.
- BB Device Defined ▶ Pen. Code, § 16250.
- Reasonable Person Must Be Placed in Fear ▶ *In re Michael D.* (2002) 100 Cal.App.4th 115, 124 [121 Cal.Rptr.2d 909].
- Person Placed in Fear May Be Bystander ▶ *In re Michael D.* (2002) 100 Cal.App.4th 115, 120–123 [121 Cal.Rptr.2d 909].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, § 5.

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

RELATED ISSUES

Reasonable Person Who Fears Harm May Be Bystander

Penal Code section 417.4 requires not “only the presence of another person against whom the imitation firearm is displayed or exhibited, but also some person’s knowledge of, and a reaction to, the perpetrator’s action.” (*In re Michael D.* (2002) 100 Cal.App.4th 115, 124 [121 Cal.Rptr.2d 909].) Thus, someone must be placed in fear as a result of the defendant’s conduct; however, this does not have to be the person against whom the object is exhibited. (*Id.* at pp. 120–123.) The term “reasonable person,” as used in the statute “refers to anyone who witnesses the actions of the perpetrator, not just to the person against whom the device is drawn or exhibited.” (*Id.* at p. 123.)

986–999. Reserved for Future Use

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

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

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

1. The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to _____ <insert name of complaining witness or member[s] of complaining witness's immediate family>;
2. The defendant made the threat (orally/in writing/by electronic communication device);
3. The defendant intended that (his/her) statement be understood as a threat [and intended that it be communicated to _____ <insert name of complaining witness>];
4. The threat was so clear, immediate, unconditional, and specific that it communicated to _____ <insert name of complaining witness> a serious intention and the immediate prospect that the threat would be carried out;
5. The threat actually caused _____ <insert name of complaining witness> to be in sustained fear for (his/her) own safety [or for the safety of (his/her) immediate family];

AND

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

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

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

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

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

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

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

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

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

New January 2006; Revised August 2006, June 2007, February 2015

BENCH NOTES

Instructional Duty

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

A specific crime or the elements of any specific Penal Code violation that might be subsumed within the actual words of any threat need not be identified for the jury. (See *People v. Butler* (2000) 85 Cal.App.4th 745, 758 [102 Cal.Rptr.2d 269].) The threatened acts or crimes may be described on request depending on the nature of the threats or the need to explain the threats to the jury. (*Id.* at p. 760.)

When the threat is conveyed through a third party, give the appropriate bracketed language in element three. (*People v. Felix* (2001) 92 Cal.App.4th 905, 913 [112 Cal.Rptr.2d 311]; *In re Ryan D.* (2002) 100 Cal.App.4th 854, 861–862 [123 Cal.Rptr.2d 193] [insufficient evidence minor intended to convey threat to victim].)

Give the bracketed definition of “electronic communication” on request. (Pen. Code, § 422; 18 U.S.C., § 2510(12).)

If there is evidence that the threatened person feared for the safety of members of his or her immediate family, the bracketed phrase in element 5 and the final bracketed paragraph defining “immediate family” should be given on request. (See Pen. Code, § 422; Fam. Code, § 6205; Prob. Code, §§ 6401, 6402.)

If instructing on attempted criminal threat, give the third element in the bench notes of CALCRIM No. 460, *Attempt Other Than Attempted Murder*. (*People v. Chandler* (2014) 60 Cal.4th 508, 525 [176 Cal.Rptr.3d 548, 332 P.3d 538].

AUTHORITY

- Elements ▶ Pen. Code, § 422; *In re George T.* (2004) 33 Cal.4th 620, 630 [16 Cal.Rptr.3d 61, 93 P.3d 1007]; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536 [70 Cal.Rptr.2d 878].
- Great Bodily Injury Defined ▶ Pen. Code, § 12022.7(f).
- Sufficiency of Threat Based on All Surrounding Circumstances ▶ *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340 [69 Cal.Rptr.2d 728]; *People v. Butler* (2000) 85 Cal.App.4th 745, 752–753 [102 Cal.Rptr.2d 269]; *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1218–1221 [62 Cal.Rptr.2d 303]; *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137–1138 [105 Cal.Rptr.2d 165]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1013–1014 [109 Cal.Rptr.2d 464]; see *People v. Garrett* (1994) 30 Cal.App.4th 962, 966–967 [36 Cal.Rptr.2d 33].
- Crime that Will Result in Great Bodily Injury Judged on Objective Standard ▶ *People v. Maciel* (2003) 113 Cal.App.4th 679, 685 [6 Cal.Rptr.3d 628].
- Threat Not Required to Be Unconditional ▶ *People v. Bolin* (1998) 18 Cal.4th 297, 339–340 [75 Cal.Rptr.2d 412, 956 P.2d 374], disapproving *People v. Brown* (1993) 20 Cal.App.4th 1251, 1256 [25 Cal.Rptr.2d 76]; *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1162 [38 Cal.Rptr.2d 328].
- Conditional Threat May Be True Threat, Depending on Context ▶ *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1540 [70 Cal.Rptr.2d 878].
- Immediate Ability to Carry Out Threat Not Required ▶ *People v. Lopez* (1999) 74 Cal.App.4th 675, 679 [88 Cal.Rptr.2d 252].
- Sustained Fear ▶ *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1139–1140 [105 Cal.Rptr.2d 165]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1024 [109 Cal.Rptr.2d 464]; *People v. Allen* (1995) 33 Cal.App.4th 1149, 1155–1156 [40 Cal.Rptr.2d 7].

- Verbal Statement, Not Mere Conduct, Is Required ▶ *People v. Franz* (2001) 88 Cal.App.4th 1426, 1441–1442 [106 Cal.Rptr.2d 773].
- Statute Not Unconstitutionally Vague ▶ *People v. Maciel* (2003) 113 Cal.App.4th 679, 684–686 [6 Cal.Rptr.3d 628].
- Attempted Criminal Threats ▶ *People v. Chandler* (2014) 60 Cal.4th 508, 525 [176 Cal.Rptr.3d 548, 332 P.3d 538]-.
- Statute Authorizes Only One Conviction and One Punishment Per Victim, Per Threatening Encounter ▶ *People v. Wilson* (2015) 234 Cal.App.4th 193, 202 [183 Cal.Rptr.3d 541].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 24–30.

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

COMMENTARY

This instruction uses the current nomenclature “criminal threat,” as recommended by the Supreme Court in *People v. Toledo* (2001) 26 Cal.4th 221, 224, fn. 1 [109 Cal.Rptr.2d 315, 26 P.3d 1051] [previously called “terrorist threat”]. (See also Stats. 2000, ch. 1001, § 4.)

LESSER INCLUDED OFFENSES

- Attempted Criminal Threat ▶ See Pen. Code, § 422; *People v. Toledo* (2001) 26 Cal.4th 221, 230–231 [109 Cal.Rptr.2d 315, 26 P.3d 1051].
- Threatening a public officer of an educational institution in violation of Penal Code section 71 may be a lesser included offense of a section 422 criminal threat under the accusatory pleadings test. (*In re Marcus T.* (2001) 89 Cal.App.4th 468, 472–473 [107 Cal.Rptr.2d 451].) But see *People v. Chaney* (2005) 131 Cal.App.4th 253, 257–258 [31 Cal.Rptr.3d 714], finding that a violation of section 71 is not a lesser included offense of section 422 under the accusatory pleading test when the pleading does not specifically allege the intent to cause (or attempt to cause) a public officer to do (or refrain from doing) an act in the performance of official duty.

RELATED ISSUES

Ambiguous and Equivocal Poem Insufficient to Establish Criminal Threat

In *In re George T.* (2004) 33 Cal.4th 620, 628–629 [16 Cal.Rptr.3d 61, 93 P.3d 1007], a minor gave two classmates a poem containing language that referenced school shootings. The court held that “the text of the poem, understood in light of the surrounding circumstances, was not ‘as unequivocal, unconditional, immediate, and specific as to convey to [the two students] a gravity of purpose and an immediate prospect of execution of the threat.’ ” (*Id.* at p. 638.)

Related Statutes

Other statutes prohibit similar threatening conduct against specified individuals. (See, e.g., Pen. Code, §§ 76 [threatening elected public official, judge, etc., or staff or immediate family], 95.1 [threatening jurors after verdict], 139 [threatening witness or victim after conviction of violent offense], 140 [threatening witness, victim, or informant].)

Unanimity Instruction

If the evidence discloses a greater number of threats than those charged, the prosecutor must make an election of the events relied on in the charges. When no election is made, the jury must be given a unanimity instruction. (*People v. Butler* (2000) 85 Cal.App.4th 745, 755, fn. 4 [102 Cal.Rptr.2d 269]; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534, 1539 [70 Cal.Rptr.2d 878].)

Whether Threat Actually Received

If a threat is intended to and does induce a sustained fear, the person making the threat need not know whether the threat was actually received. (*People v. Teal* (1998) 61 Cal.App.4th 277, 281 [71 Cal.Rptr.2d 644].)

1863. Defense to Theft or Robbery: Claim of Right (Pen. Code, § 511)

If the defendant obtained property under a claim of right, (he/she) did not have the intent required for the crime of (theft/ [or] robbery).

The defendant obtained property under a claim of right if (he/she) believed in good faith that (he/she) had a right to the specific property or a specific amount of money, and (he/she) openly took it.

In deciding whether the defendant believed that (he/she) had a right to the property and whether (he/she) held that belief in good faith, consider all the facts known to (him/her) at the time (he/she) obtained the property, along with all the other evidence in the case. The defendant may hold a belief in good faith even if the belief is mistaken or unreasonable. But if the defendant was aware of facts that made that belief completely unreasonable, you may conclude that the belief was not held in good faith.

[The claim-of-right defense does not apply if the defendant attempted to conceal the taking at the time it occurred or after the taking was discovered.]

[The claim-of-right defense does not apply to offset or pay claims against the property owner of an undetermined or disputed amount.]

[The claim-of-right defense does not apply if the claim arose from an activity commonly known to be illegal or known by the defendant to be illegal.]

If you have a reasonable doubt about whether the defendant had the intent required for (theft/ [or] robbery), you must find (him/her) not guilty of _____ <insert specific theft crime>.

New January 2006; Revised October 2010, August 2015

BENCH NOTES

Instructional Duty

There is a split in authority about whether the trial court must instruct **sua sponte** on the defense of claim of right. (See *People v. Russell* (2006) 144 Cal.App.4th 1415, 1429 [51 Cal.Rptr.3d 263] [**sua sponte** duty when claim of right supported]; but see *People v. Hussain* (2014) 231 Cal.App.4th 261, 268-269 [179

Cal.Rptr.3d 679] [no **sua sponte** duty to instruct on claim of right], following *People v. Anderson* (2011) 51 Cal.4th 989, 998 [125 Cal.Rptr.3d 408, 252 P.3d 968] [no **sua sponte** duty to instruct on accident].)

AUTHORITY

- Defense. ▶ Pen. Code, § 511; *People v. Tufunga* (1999) 21 Cal.4th 935, 952, fn. 4 [90 Cal.Rptr.2d 143, 987 P.2d 168]; [*People v. Anderson* \(2015\) 235 Cal.App.4th 93, 102 \[185 Cal.Rptr.3d 128\]\[third parties\]](#). *People v. Romo* (1990) 220 Cal.App.3d 514, 517, 518 [269 Cal.Rptr. 440].
- Good Faith Belief. ▶ *People v. Stewart* (1976) 16 Cal.3d 133, 139–140 [127 Cal.Rptr. 117, 544 P.2d 1317]; *People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, 4, 10–11 [160 Cal.Rptr. 692].
- No Concealment of Taking. ▶ *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1848–1849 [52 Cal.Rptr.2d 765].
- Not Available to Recover Unliquidated Claims. ▶ *People v. Holmes* (1970) 5 Cal.App.3d 21, 24–25 [84 Cal.Rptr. 889].
- Not Available to Recover From Notoriously or Known Illegal Activity. ▶ *People v. Gates* (1987) 43 Cal.3d 1168, 1181–1182 [240 Cal.Rptr. 666, 743 P.2d 301].
- Claim of Right Defense Available to Aiders and Abettors ▶ *People v. Williams* (2009) 176 Cal.App.4th 1521, 1529 [98 Cal.Rptr.3d 770].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Property §§ 36, 38.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.10[1][b], Ch. 143, *Crimes Against Property*, § 143.01[1][d] (Matthew Bender).

1864–1899. Reserved for Future Use

**2300. Sale, Transportation for Sale, etc., of Controlled Substance
(Health & Saf. Code, §§ 11352, 11379)**

The defendant is charged [in Count __] with
(selling/furnishing/administering/giving away/transporting for
sale/importing) _____ <insert type of controlled substance>, a controlled
substance [in violation of _____ <insert appropriate code section[s]>].

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

1. The defendant (sold/furnished/administered/gave away/transported
for sale/imported into California) a controlled substance;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as a
controlled substance;

[AND]

<If the controlled substance is not listed in the schedules set forth in
sections 11054 through 11058 of the Health and Safety Code, give
paragraph 4B and the definition of analog substance below instead of 4A.>

4A. The controlled substance was _____ <insert type of controlled
substance>(;/.)

4B. The controlled substance was an analog of _____ <insert type
of controlled substance>(;/.)

<Give element 5 when instructing on usable amount; see Bench Notes.>

[AND]

5. The controlled substance was in a usable amount.]

[In order to prove that the defendant is guilty of this crime, the People must
prove that _____ <insert name of analog drug> is an analog of
_____ <insert type of controlled substance>. An analog of a controlled
substance:

1. Has a chemical structure substantially similar to the structure of a controlled substance;

OR

2. Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]

[*Selling* for the purpose of this instruction means exchanging a controlled substance for money, services, or anything of value.]

[A person *transports* something if he or she carries or moves it from one location to another **for sale**, even if the distance is short.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (sold/furnished/administered/gave away/transported for sale/imported).]

[A person does not have to actually hold or touch something to (sell/furnish/administer/transport it for sale/import/give it away) [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 October 2010, February 2014, August 2014 [*\[insert date of council approval\]*](#)

BENCH NOTES

Instructional Duty

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

Transportation of a controlled substance requires a “usable amount.” (*People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567].) Sale of a controlled substance does not. (See *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316].) When the prosecution alleges transportation, give bracketed element 5 and the definition of usable amount. When the prosecution alleges sales, do not use these portions. There is no case law on whether furnishing, administering, giving away, or importing require usable quantities.

If the defendant is charged with attempting to import or transport a controlled substance, give CALCRIM No. 460, *Attempt Other Than Attempted Murder*, with this instruction.

AUTHORITY

- Elements. ▶ Health & Saf. Code, §§ 11352, 11379.
- Administering. ▶ Health & Saf. Code, § 11002.
- Administering Does Not Include Self-Administering. ▶ *People v. Label* (1974) 43 Cal.App.3d 766, 770–771 [119 Cal.Rptr. 522].
- Knowledge. ▶ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling. ▶ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Transportation: Usable Amount. ▶ *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567].
- Usable Amount. ▶ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Definition of Analog Controlled Substance. ▶ *People v. Davis* (2013) 57 Cal.4th 353, 357, fn 2 [159 Cal.Rptr.3d 405; 303P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance. ▶ *People v. Davis* (2013) 57 Cal.4th 353, 362, fn 5 [159 Cal.Rptr.3d 405; 303P.3d 1179].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–102.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession Is Not a Lesser Included Offense of This Crime. (*People v. Murphy* (2007) 154 Cal.App.4th 979, 983-984 [64 Cal.Rptr.3d 926]; *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].)
- Possession for Sale Is Not a Lesser Included Offense of This Crime. (*People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].)

Note: In reviewing the appropriateness of sentencing enhancements, *Valenzuela v. Superior Court* (1995) 33 Cal.App.4th 1445, 1451 [39 Cal.Rptr.2d 781], finds that offering to sell is a lesser included offense of selling, and that therefore a lesser sentence is appropriate for offering to sell. However, the cases it cites in support of that conclusion do not address that specific issue. Because offering to sell is a specific-intent crime (see *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1]) and selling does not require specific intent, the committee does not include offering to sell as a lesser included offense.

RELATED ISSUES

Transportation

Transportation does not require personal possession by the defendant. (*People v. Rogers* (1971) 5 Cal.3d 129, 134 [95 Cal.Rptr. 601, 486 P.2d 129] [abrogated in part by statute on other grounds].) Transportation of a controlled substance includes transporting by riding a bicycle (*People v. LaCross* (2001) 91 Cal.App.4th 182, 187 [109 Cal.Rptr.2d 802]) or walking (*People v. Ormiston* (2003) 105 Cal.App.4th 676, 685 [129 Cal.Rptr.2d 567]). The controlled substance must be moved “from one location to another,” but the movement may be minimal. (*Id.* at p. 684.)

2302. Possession for Sale of Controlled Substance (Health & Saf. Code, §§ 11351, 11351.5, 11378, 11378.5)

The defendant is charged [in Count ____] with possession for sale of _____ <insert type of controlled substance>, a controlled substance [in violation of _____ <insert appropriate code section[s]>].

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

1. The defendant [unlawfully] possessed a controlled substance;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as a controlled substance;
4. When the defendant possessed the controlled substance, (he/she) intended **(to sell it/ for that someone else sell it)**;

<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 5B and the definition of analog substance below instead of paragraph 5A.>

5A. The controlled substance was _____ <insert type of controlled substance>;

5B. The controlled substance was an analog of _____ <insert type of controlled substance>;

AND

6. The controlled substance was in a usable amount.

[In order to prove that the defendant is guilty of this crime, the People must prove that _____ <insert name of analog drug> is an analog of _____ <insert type of controlled substance>. An analog of a controlled substance:

1. Has a chemical structure substantially similar to the structure of a controlled substance;

OR

2. Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]

***Selling* for the purpose of this instruction means exchanging _____
<insert type of controlled substance> for money, services, or anything of value.**

A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed.]

[Two or more people may possess something at the same time.]

[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.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

New January 2006; Revised October 2010, February 2014* *[insert date of council approval]

BENCH NOTES

Instructional Duty

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

AUTHORITY

- Elements ▶ Health & Saf. Code, §§ 11351, 11351.5, 11378, 11378.5.

- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge ▶ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling ▶ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Usable Amount ▶ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- This Instruction Is Correct ▶ *People v. Montero* (2007) 155 Cal.App.4th 1170, 1177 [66 Cal.Rptr.3d 668].
- Definition of Analog Controlled Substance ▶ *People v. Davis* (2013) 57 Cal.4th 353, 357, fn. 2 [159 Cal.Rptr.3d 405, 303 P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance ▶ *People v. Davis, supra*, 57 Cal.4th at p. 362, fn. 5.
- Specific Intent to Sell Personally or That Another Will Sell Required ▶ *People v. Parra* (1999) 70 Cal. App. 4th 222, 226 [70 Cal.App.4th 222] and *People v. Consuegra* (1994) 26 Cal. App. 4th 1726, 1732, fn. 4 [32 Cal.Rptr.2d 288].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 81–93.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a]–[c], [e] (Matthew Bender).

LESSER INCLUDED OFFENSES

- ~~Simple Possession of a Controlled Substance ▶ *People v. Saldana* (1984) 157 Cal.App.3d 443, 453–458 [204 Cal.Rptr. 465]~~
- Possession of cocaine for sale is not necessarily included offense of selling cocaine base ▶ *People v. Murphy* (2005) 134 Cal.App.4th 1504, 1508 [36 Cal.Rptr.3d 872]).

2352. Possession for Sale of Marijuana (Health & Saf. Code, §§ 11018, 11359)

The defendant is charged [in Count ____] with [unlawfully] possessing for sale marijuana, a controlled substance [in violation of Health and Safety Code section 11359].

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

1. The defendant [unlawfully] possessed a controlled substance;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as a controlled substance;
4. When the defendant possessed the controlled substance, (he/she) intended (to sell it/ **[or] that someone else sell it**);
5. The controlled substance was marijuana;

AND

6. The controlled substance was in a usable amount.

Selling for the purpose of this instruction means exchanging the marijuana for money, services, or anything of value.

A usable amount is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

[Marijuana means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted

therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed.]

[Two or more people may possess something at the same time.]

[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.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

New January 2006; Revised December 2008, October 2010, February 2015 *insert date of council approval*

BENCH NOTES

Instructional Duty

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

When instructing on the definition of “marijuana,” the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

If a medical marijuana defense applies under the Compassionate Use Act or the Medical Marijuana Program Act (See Health & Saf. Code, §§ 11362.5, 11362.775.), the burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that the conduct was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 470 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 538-539 [148 Cal.Rptr.3d 375].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the conduct may have been lawful, the court has a **sua sponte** duty to give the relevant defense instruction: CALCRIM No. 3412, *Compassionate Use Defense*, or CALCRIM No. 3413, *Collective or Cooperative Cultivation Defense*.

If the medical marijuana instructions are given, then also give the bracketed word “unlawfully” in the first paragraph and element 1.

AUTHORITY

- Elements ▶ Health & Saf. Code, § 11359.
- “Marijuana” defined ▶ Health & Saf. Code, § 11018.
- Knowledge ▶ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Selling ▶ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Usable Amount ▶ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Compassionate Use Defense Generally ▶ *People v. Wright* (2006) 40 Cal.4th 81 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Urziceanu* (2005) 132 Cal.App.4th 747 [33 Cal.Rptr.3d 859]; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].
- Medical Marijuana Program Act Defense ▶ *People v. Jackson* (2012) 210 Cal.App.4th 525, 538–539 [148 Cal.Rptr.3d 375].
- Specific Intent to Sell Personally or That Another Will Sell Required ▶ *People v. Parra* (1999) 70 Cal. App. 4th 222, 226 [70 Cal.App.4th 222] and *People v. Consuegra* (1994) 26 Cal. App. 4th 1726, 1732, fn. 4 [32 Cal.Rptr.2d 288].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 90.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a]–[e], [3][a], [a.1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of Marijuana ▶ Health & Saf. Code, § 11357, *People v. Walker* (2015) 237 Cal.App.4th 111 [187 Cal.Rptr.3d 606] [duty to instruct extends to infraction for possessing less than 28.5 g] [reversible error not to instruct on simple possession of marijuana, an infraction, in case charged as possession of marijuana for sale].

2353–2359. Reserved for Future Use

3472. Right to Self-Defense: May Not Be Contrived

A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force.

New January 2006 *[insert date of council approval]*

BENCH NOTES

Instructional Duty

The court may give this instruction on request when supported by the evidence. (*People v. Olguin* (1995) 31 Cal.App.4th 1355, 1381 [37 Cal.Rptr.2d 596].) The California Supreme Court has held that language in CALJIC No. 5.55, which is similar to this instruction, correctly states California law on self-defense and imperfect self-defense. (*People v. Enraca* (2012) 53 Cal.4th 735, 761-762 [269 P.3d 543]; *People v. Hinshaw* (1924) 194 Cal. 1, 26[227 P. 156]). However, a Court of Appeal has held that this instruction does not accurately state California law where a defendant uses force intending only to provoke a fistfight and the victim responds with deadly force. (*People v. Ramirez* (2015) 233 Cal.App.4th 267, 276 [183 Cal.Rptr.3d 267]). The court should modify this instruction if necessary.

AUTHORITY

- Instructional Requirements ▶ *People v. Olguin* (1995) 31 Cal.App.4th 1355, 1381 [37 Cal.Rptr.2d 596]; *Fraguglia v. Sala* (1936) 17 Cal.App.2d 738, 743–744 [62 P.2d 783]; *People v. Hinshaw* (1924) 194 Cal. 1, 26 [227 P. 156].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 75.

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

3473. Reserved for Future Use