Judicial Council *of* California

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 23-020
For business meeting on: March 24, 2023

Title
Jury Instructions: Criminal Jury Instructions (2023 Edition)

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

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

Agenda Item Type
Action Required

Effective Date
March 24, 2023

Date of Report
January 20, 2023

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Executive Summary

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

Recommendation

The Advisory Committee on Criminal Jury Instructions recommends that the Judicial Council, effective March 24, 2023, approve the following changes to the criminal jury instructions prepared by the committee:

1. Adoption of new CALCRIM Nos. 352, 3224, 3225, 3226, 3227, 3228, 3229, 3230, 3231, 3232, 3233, and 3234;
2. Revisions to CALCRIM Nos. 301, 335, 336, 350, 358, 375, 418, 540A, 730, 736, 761, 763, 908, 1400, 1401, 1520, 2181, 2542, 2622, and 2623; and
3. Revocation of CALCRIM No. 1156.

Relevant Previous Council Action

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

Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CALCRIM.* The council approved the last *CALCRIM* release at its September 2022 meeting.

Analysis/Rationale

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

Below is an overview of some of the proposed changes.

CALCRIM No. 301, *Single Witness's Testimony*; No. 335, *Accomplice Testimony: No Dispute Whether Witness Is Accomplice*; No. 336, *In-Custody Informant*; No. 358, *Evidence of Defendant's Statements*; No. 761, *Death Penalty: Duty of Jury;* and No. 763, *Death Penalty: Factors to Consider—Not Identified as Aggravating or Mitigating*
In *People v. Tran* (2022) 13 Cal.5th 1169 [298 Cal.Rptr.3d 150, 515 P.3d 1210], the California Supreme Court rejected a variety of challenges to several CALCRIM instructions. Specifically, the court held instructing the jury with CALCRIM Nos. 301, 335, 336, and 358 did not violate the defendant's "constitutional rights to present a defense and to proof beyond a reasonable doubt." (13 Cal.5th at pp. 1198–1201.) Later in the opinion, the court rejected challenges to CALCRIM Nos. 761 and 763, finding that "the penalty jury was properly instructed." (*Id.* at pp. 1220–1221.) The committee added *Tran* to the authority sections of the above instructions, and specifically noted in No. 763 that the instruction was upheld against a due process challenge to victim-impact factors.

Proposed new CALCRIM No. 352, *Character of Victim and of Defendant*
A trial court judge suggested that the committee draft a new instruction to address evidence admitted pursuant to Evidence Code section 1103. In her proposal, the commenter referred the committee to an instruction that the California Supreme Court approved in *People v. Fuiava* (2012) 53 Cal. 4th 622, 694–695 [137 Cal.Rptr.3d 147, 269 P.3d 568]. To draft this new instruction, the committee reviewed the *Fuiava* instruction as well as CALCRIM No. 350, *Character of Defendant*, and CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.* The committee included the preponderance standard of proof

[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."

language from No. 375 to inform the jury's consideration of the specific conduct evidence of the defendant's character for violence. The committee also made some conforming changes to Nos. 350 and 375.

CALCRIM No. 418, *Coconspirator's Statements*

A deputy attorney general alerted the committee to a potential error in the instructional duty section of the bench notes. This section stated that the court has a sua sponte duty to instruct on the use of a coconspirator's statement, as specified. However, the commenter pointed out legal authority that seemingly contradicted this assertion, including *People v. Carter* (2003) 30 Cal.4th 1166, 1198 ["as the Evidence Code makes clear, courts are required to [instruct on requisite foundational facts] only at a defendant's request"]; *People v. Lewis* (2001) 26 Cal.4th 334, 362 ["On its own terms, [Evidence Code section 403] makes it discretionary for the trial court to give an instruction regarding a preliminary fact unless the party makes a request"]; and *People v. Marshall* (1996) 13 Cal.4th 799, 833 [Evidence Code section 403(c) "clearly does not contemplate a sua sponte duty to instruct"].

The committee reviewed the authority provided by the commenter but ultimately concluded that the question has been left open by the California Supreme Court in *People v. Prieto* (2003) 30 Cal.4th 226, 251–252 [133 Cal.Rptr.2d 18, 66 P.3d 1123] and in *People v. Sully* (1991) 53 Cal.3d 1195, 1231–1232 [283 Cal.Rptr. 144, 812 P.2d 163]. The committee modified the instructional duty section accordingly and added the relevant case law.

CALCRIM No. 540A, *Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act,* and No. 730, *Special Circumstances: Murder in Commission of Felony*

During this past year, several cases considered the meaning of "actual killer" in the revised felony-murder rule of Penal Code section 189(e)(1).[2] In *People v. Lopez* (2022) 78 Cal.App.5th 1, 4 [293 Cal.Rptr.3d 272], the court concluded that this term "refers to someone who personally killed the victim and is not necessarily the same as a person who 'caused' the victim's death." Likewise, in *People v. Vang* (2022) 82 Cal.App.5th 64, 88 [297 Cal.Rptr.3d 806], the court held that the term limits liability "to the actual perpetrator of the killing, i.e., the person (or persons) who personally committed the homicidal act." Based on these holdings, the committee modified the final element of Nos. 540A and 730 to read, in part, "the defendant personally committed (an/the) act[s] that directly caused the death of another person."

People v. Garcia (2022) 82 Cal.App.5th 956 [299 Cal.Rptr.3d 131] also examined the meaning of "actual killer." In that case, the defendant—acting alone—robbed an 82-year-old man who died of a heart attack an hour later. (82 Cal.App.5th at p. 959.) In reviewing the denial of the defendant's resentencing petition, the court concluded that substantial evidence supported the trial court's finding that the defendant qualified as an "actual killer." (*Id.* at pp. 969–971.) The committee added *Garcia* to the bench notes and added it, *Lopez*, and *Vang* to the authority section. Finally, the committee added a related issues note to No. 540A that had been previously

[2] Senate Bill 1437 (Stats. 2018, ch. 1015) amended Penal Code section 189 to narrow the scope of felony-murder liability.

added to No. 730. This note cites a 2020 case (*People v. Garcia* (2020) 46 Cal.App.5th 123 [259 Cal.Rptr.3d 600]) and highlights the difference between being an actual killer and an aider and abettor.

CALCRIM No. 1156, *Loitering: For Prostitution*

Senate Bill 357 (Stats. 2022, ch. 86) repealed Penal Code section 653.22. As a result, the committee agreed that this instruction is no longer necessary and proposes that it be revoked.

CALCRIM No. 736, *Special Circumstances: Killing by Street Gang Member;* No. 1400, *Active Participation in Criminal Street Gang*; No. 1401, *Felony or Misdemeanor Committed for Benefit of Criminal Street Gang*; and No. 2542, *Carrying Firearm: Active Participant in Criminal Street Gang*

Two recent cases examined the new requirement of Penal Code section 186.22(f)[3] that gang members "collectively engage" in a pattern of criminal gang activity. In *People v. Delgado* (2022) 74 Cal.App.5th 1067, 1072 [290 Cal.Rptr.3d 189], the court held that this requirement "means the People were required to prove that two or more gang members committed each predicate offense." Disagreeing with *Delgado*, the court in *People v. Clark* (2022) 81 Cal.App.5th 133, 144 [296 Cal.Rptr.3d 153], review granted October 19, 2022, S275746, concluded that "a pattern of criminal gang activity may be established by (1) two gang members who separately committed crimes on different occasions, or (2) two gang members who committed a crime together on a single occasion." The committee added a bench note in all four gang instructions that highlights this split in authority as to the meaning of "collectively" and also noted that the California Supreme Court granted review in *People v. Clark*.

Two other recent cases interpreted subdivision (b) of Penal Code section 186.22. In *People v. Renteria* (2022) 13 Cal.5th 951, 969 [297 Cal.Rptr.3d 344, 515 P.3d 77], the court held that this subdivision requires, in the case of a solo gang member committing a felony, "evidence connecting testimony about any general reputational advantage that might accrue to the gang because of its members' crimes to the defendant's commission of a crime on a particular occasion for the benefit of the gang, and with the specific intent to promote criminal activities by the gang's members." In *People v. Lopez* (2022) 12 Cal.5th 957, 975 [292 Cal.Rptr.3d 265, 507 P.3d 925], the court held that the alternative penalty provisions provided by subdivision (b)(4) apply only to completed target offenses, not to conspiracies. For CALCRIM No. 1401, the committee added *Renteria* to the authority section and added *Lopez* to the related issues section.

CALCRIM No. 2622, *Intimidating a Witness,* and No. 2623, *Intimidating a Witness: Sentencing Factors*

In *People v. Serrano* (2022) 77 Cal.App.5th 902, 912–913 [292 Cal.Rptr.3d 865], the court held that the trial court erred by failing to instruct on the malice element and by failing to define the term "malice," which "has a special definition for purposes of section 136.1." Meanwhile, in *People v. Johnson* (2022) 79 Cal.App.5th 1093, 1110 [295 Cal.Rptr.3d 353], the court held that

[3] Assembly Bill 333 (Stats. 2021, ch. 699) amended Penal Code section 186.22 in several ways, including changing the evidentiary requirements for establishing a pattern of criminal gang activity.

the reference to "third person" in Penal Code section 136.1(c)(1) means an outside party, not including the defendant. In response to *Serrano*, the committee added a bench note in both No. 2622 and No. 2623 to require defining the term "malice." In response to *Johnson*, the committee added instructional language to No. 2623 to clarify that the defendant is excluded from the statutory definition and added the case to the authority section.

Proposed new CALCRIM Nos. 3224–3234 (aggravating sentencing factors)

Senate Bill 567 (Stats. 2021, ch. 731) amended Penal Code sections 1170 and 1170.1 to limit the ability of the trial court to impose an upper sentencing term unless a jury finds aggravating factors beyond a reasonable doubt or the defendant admits to them.[4] Penal Code section 1170.1(d)(3) references the sentencing rules of the Judicial Council. California Rules of Court, rule 4.421 sets forth circumstances in aggravation for consideration at sentencing.

In response to this new legislation, several trial court judges and legal practitioners asked the committee to develop jury instructions for the aggravating factors listed in rule 4.421. The committee initially considered these proposals at its spring 2022 meeting but recognized the challenge presented and formed a subcommittee to draft them. In addition to four committee members, the subcommittee included Judge J. Richard Couzens (Ret.), who provided his sentencing expertise.

The subcommittee met several times over the summer months to draft 11 new instructions, based on 11 aggravating factors listed in rule 4.421.[5] Although this rule contains a total of 17 factors, the subcommittee selected factors that appeared to be the most common and/or relatively straightforward. The work group and then the full committee reviewed these drafts with painstaking attention to detail.

The minimal published case law interpreting the aggravating factors presented a challenge in developing these instructions. Further, as the California Supreme Court noted in *People v. Sandoval* (2007) 41 Cal.4th 825, 849 [62 Cal.Rptr.3d 588, 161 P.3d 1146],

[4] Excluded from this new mandate is evidence of prior convictions, which the trial court can separately determine as an aggravating factor.

[5] The 11 factors from rule 4.421 are (a)(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness; (a)(2) The defendant was armed with or used a weapon at the time of the commission of the crime; (a)(3) The victim was particularly vulnerable; (a)(4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission; (a)(5) The defendant induced a minor to commit or assist in the commission of the crime; (a)(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process; (a)(8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism; (a)(9) The crime involved an attempted or actual taking or damage of great monetary value; (a)(10) The crime involved a large quantity of contraband; (a)(11) The defendant took advantage of a position of trust or confidence to commit the offense; and (b)(1) The defendant has engaged in violent conduct that indicates a serious danger to society.

> the aggravating circumstances listed in the rules were drafted for the purpose of guiding judicial discretion and not for the purpose of requiring factual findings by a jury beyond a reasonable doubt. Many of those circumstances are not readily adaptable to the latter purpose, because they include imprecise terms that implicitly require comparison of the particular crime at issue to other violations of the same statute, a task a jury is not well-suited to perform. For example, without some basis for comparing the instant offense to others, it would be difficult for a jury to determine whether "[t]he victim was *particularly* vulnerable," or whether the crime "involved ... taking or damage of *great* monetary value" or "a large quantity of contraband." (Cal. Rules of Court, rule 4.421(a)(3), (9) & (10), italics added.)

Consistent with the Supreme Court's observation, numerous commenters argue that Penal Code section 1170.1(d)(2) and (3)'s reliance on rule 4.421 does not provide the specificity necessary for the jury's decision. They urge clarification by the Legislature. In that event, we anticipate revision of the California Rules of Court to accord with the revised statute. Should the Legislature not act, rule 4.421—which was promulgated for judges—could be revised to address the role assigned to the jury by Penal Code section 1170.1.

In light of these concerns, the committee considered waiting for further guidance. However, trial judges urged the committee to develop instructions to be used in the interim. Simply put, the enactment of SB 567 made it imperative for the committee to forge ahead in spite of the inherent difficulties. The committee believes that its studied and well-considered approach will assist trial courts and counsel.

In addition to the issues identified in *Sandoval*, commenters raised multiple constitutional challenges: separation of powers, due process, and vagueness. However, legal arguments about the validity and infirmity of the aggravating factors are outside this advisory committee's purview. Once further clarification develops, either through statutory amendments, rule revision, or case law, the committee remains ready to further refine these instructions. Until then, the committee has discharged its duty, in the words of Supreme Court Associate Justice Carol A. Corrigan, "to write instructions that are both legally accurate and understandable to the average juror." (*CALCRIM* (2022 ed.), Preface, page xi.)

A question the committee pondered and the public comments address is whether the jury must be unanimous as to the facts or conduct supporting the finding that an aggravating factor is true or need only unanimously agree on the factor. Several commenters argued that some of the aggravating factors—and therefore the applicable instruction—improperly combine multiple aggravating factors. They contend that some of the instructions fail to instruct jurors of the requirement to agree on the specific underlying act or conduct. The committee carefully considered but ultimately rejected these arguments, noting that the rule of court refers to qualitative descriptions of the defendant's conduct related to a single count of conviction and does not require a finding concerning a specific act. In support of this position, the committee relied on the reasoning in *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d

32, 493 P.3d 815]. Although in the context of a death penalty case, *McDaniel* held "that neither article I, section 16 of the California Constitution nor Penal Code section 1042 provides a basis to require unanimity in the jury's determination of factually disputed aggravating circumstances." (12 Cal.5th at pp. 147–148.)

The public comments also urged the committee to add language to inform the jury that the act or conduct must be "distinctively worse than the ordinary." (See *People v. Moreno* (1982) 128 Cal.App.3d 103, 110.) During the initial drafting process, the committee considered but did not include this language out of concern that it would be more confusing than helpful to jurors. Upon further reflection and in response to the public comments, the committee agreed that the "distinctively worse" admonition was essential and added the requirement to all the aggravating factor instructions. The committee also added a commentary to each instruction about *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem.

Other comments provided helpful suggestions to improve the wording in specific instructions. In response, the committee added and/or modified some of the language. Although the committee did not agree with all of the suggested edits, the committee considered and appreciated the robust public comments.

Policy implications

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

Comments

The proposed additions, revisions, and revocation to *CALCRIM* circulated for public comment from November 21, 2022, through January 4, 2023. The committee received responses from 16 commenters. The commenters included 2 judicial officers, 1 district attorney's office, 11 public defender's offices, 1 individual public defender, and 1 county bar association. The public defenders generally disagreed with the new aggravating factor instructions (Nos. 3224–3234). The comments disagreeing with the new aggravating factor instructions, along with the committee's responses, are described above. The text of all comments received and the committee's responses are included in a chart of comments attached at pages 9–57.

Alternatives considered

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

Fiscal and Operational Impacts

No implementation costs are associated with this proposal.

Attachments and Links

1. Chart of comments, at pages 9–57
2. Full text of revised *CALCRIM* instructions, including table of contents, at pages 58–194

Instruction No.	Commenter	Position	Comment	Committee Response
301, 335, 336, 358, 761, 763, 350, 375, 418, 540A, 730, 908, 1156, 1400, 1401, 736, 2542, 1520, 2181, 2622, 2623, 3226, 3233	Orange County Bar Association, by Daniel S. Robinson, President.	A	The Orange County Bar Association agrees with the above referenced proposals.	No response necessary.
352	Judge Mary Wiss, San Francisco Superior Court	AM	The title to proposed 352 is: 352. Character of Victim and Violent Character of Defendant I am very troubled by the title describing "Violent" Character of Defendant. The title in effect contrasts the "Character of Victim" with "Violent Character of Defendant." In my jury instructions handed out to the jury I always delete the title of an instruction but note that many judges leave in the title. As with the codes such as CCP or CC, the title is inserted by the editor (Wests or Lexis Nexis) and is not part of the statute. Thus, those publishers often times have different labels for the same statutes.	The title is technically correct because Evidence Code section 1103(b) restricts admission of evidence to the defendant's violent character. However, the committee agrees that the title could be problematic if seen by deliberating jurors. Therefore, the committee decided to change the title to "Character of Victim and of Defendant."
352	Orange County Bar Association, by Daniel S. Robinson, President.	AM	The limiting note for paragraph 2 should also be extended to paragraphs 3-5: *[#2] <Give only when specific conduct evidence of the defendant's character for violence has been admitted>* [The People presented evidence that the defendant (committed ([an]other offense[s]/the offense[s] of _____ *<insert description of alleged offense[s]>*/_____*<insert description of alleged conduct admitted under Evid. Code, § 1103(b)>*) that (was/were) not charged in this case. [#3] You may consider this evidence about the defendant only if the People have proved by a preponderance of the evidence that the	This limiting note already applies to the language that the commenter seeks to have included. There is one opening bracket in front of "The People" and one closing bracket after "character trait" in the final sentence.

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

Instruction No.	Commenter	Position	Comment	Committee Response
			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. [#4] If the People have not met this burden, you must disregard this evidence entirely. [#5] 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 the defendant (is a violent person/has a trait for violence) and acted in conformity with that character trait.]	
New 3224–3234	Assistant Presiding Judge Syda Cogliati, Santa Cruz County Superior Court	AM	With respect to the proposed new jury instructions on aggravating factors, the instructions should include an option for cases where the aggravating factors are alleged as to a conduct allegation that has a sentencing triad. For instance, the PC 12022.5 personal use of a firearm enhancement allegation has a sentencing triad, and the upper term could only be imposed with aggravating factors found as to that allegation. Thus, instead of referring only to "crimes," the instructions should also include an option for referencing "special allegations."	The committee declines to make this change. Where necessary, the trial court can modify the instructions.
New 3224–3234	San Francisco District Attorney's Office, by Allison Garbutt Macbeth, Assistant District Attorney.	AM	Non-Unanimity in Instructions: In general, the proposed CALCRIM instructions for aggravating factors include a "non-unanimity" clause, meaning that the jury need not agree on which facts show the particular aggravating factor. We respectfully request that the Judicial Council include the authority in the bench notes for all instructions that include that clause.	The committee has added *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 to the authority section of each instruction, with the following description: **Unanimity Not Required Regarding Facts Underlying the Aggravating Factor.**
New 3224–3234	Judith Gweon, Assistant Public Defender, County of Riverside	N	Please note that I disagree with the proposed CALCRIMs 3224, 3224, 3226, 3227, 3228, 3229, 3230, 3231, 3232, 3233, and 3234 on vagueness grounds. These proposed instructions fail to include as an element that for every alleged aggravating circumstance, the evidence	The committee considered *Moreno* and added the following language to all of these instructions: **You may not find**

Instruction No.	Commenter	Position	Comment	Committee Response
			must show beyond a reasonable doubt that the facts of the case are "distinctly worse" than the "ordinary case" (*People v. Moreno* (1982) 128 Cal.App.3d 103, 110 ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].) Excluding such element renders these proposals vague and tips the scale in favor of the jury, finding that the circumstances are aggravating against the defendant. The CA Rules of Court 4.421 was intended to be used by judges, not jurors. As judges, they could compare the facts of the current case to other cases using 4.421's language as a guidepost and decide if the current charge was "distinctly worse" than the "ordinary" offense of that type. To make these CALCRIMs more balanced and not biased against the defendants, it is essential to add the language from *Moreno* that to find the aggravating circumstance true, the jury has to find that the facts alleged are "distinctly worse" than the "ordinary case." Thank you for your consideration.	**the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.** The committee modified this sentence for CALCRIM No. 3234 because the aggravating factor of "serious danger to society" includes consideration of additional conduct beyond the underlying offense.[1]
New 3224–3234	Orange County Public Defender's Office, by Adam Vining, Assistant Public Defender.	N	The Office of the Orange County Public Defender DISAGREES with many of the proposed jury instructions 3224-3234 [Aggravating Factors]. The proposed instructions suffer from defects implicating issues regarding jury unanimity and impermissible vagueness. Most of the instructions improperly combine multiple aggravating factors as if they are one aggravating factor. The defect is a result of simply transferring each subdivision found in Rule 4.421 to a single instruction.	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. The committee also does not agree

[1] The added sentence for CALCRIM No. 3234 states: **You may not find the allegation true unless all of you agree that the People have proved that the defendant's violent conduct was distinctively worse than that posed by an ordinary commission of the underlying crime and that the violent conduct, considered in light of all the evidence presented[and the defendant's background], shows that the defendant is a serious danger to society.**

Instruction No.	Commenter	Position	Comment	Committee Response
			Under California's determinate sentencing laws, before a court may rely upon an aggravating fact in sentencing, such fact must be proved at trial beyond a reasonable doubt to a jury pursuant to Penal Code §1170(b)(2) and the Sixth and Fourteenth Amendments to the U.S. Constitution. (*Cunningham v. California* (2007) 549 U.S. 270.) In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." When the prosecution presents evidence of more than one act to prove an allegation, the court has a sua sponte duty to give a unanimity instruction. (CALCRIM 3500.) "You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed." (*Ibid.*) The bench notes to CALCRIM 3500 on Unanimity cite to the rule as dictated by the U.S. Supreme Court: "[W]hen the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) "'The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done something sufficient to convict on one count.' [Citation.]" (*People v. Russo, supra,* 25 Cal. 4th at p. 1132.) The court has no sua sponte duty to instruct on	that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

Instruction No.	Commenter	Position	Comment	Committee Response
			unanimity if the offense constitutes a "continuous course of conduct." (*People v. Maury* (2003) 30 Cal.4th 342, 423.) The court in *Russo* explains that, "[i]n deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*People v. Russo, supra,* 25 Cal. 4th at pp. 1134-35.) Unanimity is required as to the act[s] constituting the violation. Unanimity is not required as the what legal theory places the act within the meaning of the statute. Unanimity is not required as to every underlying fact that provides circumstantial evidence of the violation. But, unanimity is required as to the "fact" that is sought to be proven. Most of the proposed new instructions on aggravating factors contain language to the effect of "unanimity is not required," that render the instructions Constitutionally impermissible. In order to highlight the unanimity defect, consider the appropriateness of simply combining all aggravating factors into one jury instruction and telling the jury that no unanimity is required, as long as they each find any factor to be true. It should be clear that such an instruction would not pass muster.	
			Moreover, as a matter of Due Process the Defendant must be on notice of what alleged act[s] he is defendant himself against. Due Process "requires 'a reasonable degree of certainty in legislation, especially in the criminal law….' [Citation.]" (*People v. Maciel* (2003) 113 Cal.App.4th 670, 683.) "To withstand a facial vagueness challenge, a penal statute must satisfy two basic requirements. First, the statute must be definite enough to provide adequate notice of the conduct proscribed. (Citations.) […] Second, the statute must provide sufficiently definite guidelines…. (Citations.)" (*People v. Ellison* (1998) 68 Cal.App.3d 692, 698-699.) "If a criminal statute is not	The role of the CALCRIM committee is to review case law and new legislation affecting jury instructions to determine whether changes to the criminal jury instructions are required and—if so—to draft jury instructions that accurately and understandably state the law. Addressing the certainty or vagueness of the

Instruction No.	Commenter	Position	Comment	Committee Response
			sufficiently certain and definite, it is unconstitutionally vague and therefore void." (*People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1116.) Several of the proposed instructions suffer from impermissible vagueness on their face. Others suffer from impermissible vagueness by not combining multiple aggravating factors into one instruction allowing each juror to choose any factor from the list while explicitly discounting any requirement of unanimity. If the Council prefers to place each subdivision of Rule 4.421 into a single instruction, perhaps the Rule itself should be revised to break up the subdivisions that contain multiple aggravators. Or perhaps the factor in aggravation should be reconsidered in entirety.	aggravating factors is not within its purview. Furthermore, vagueness concerns may be raised by counsel in individual cases. We forwarded this suggestion to the Criminal Law Advisory Committee which can propose revisions to the applicable rule.
New 3224–3234	Los Angeles Public Defender's Office, by Nick Stewart-Oaten, Deputy Public Defender.	N	This memo is intended as a response to the CALCRIM ITC2022-02 on behalf of the Los Angeles Public Defender's Office. As discussed below, the Public Defender has significant concerns about the proposed instructions for Penal Code section 1170(b) "aggravating circumstance" enhancements (NEW 3224 through NEW 3234) because the proposed instructions: (i) omit required elements; (ii) reduce the evidentiary requirements for conviction; and (iii) fail to define necessary elements. We recognize that rule 4.421, the rule on which these instructions are based, was never intended for use by a jury, and that any Committee tasked with translating its language into jury instructions has been handed a difficult if not impossible task. The solution cannot, however, be to rewrite that language or omit long-standing evidentiary requirements to make it easier for juries to convict defendants of an "aggravating circumstance." Our concerns regarding these proposed instructions are described in detail below. Please do not hesitate to contact our office with questions or requests for clarification.	

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			Objections That Apply to All of the Proposed Instructions: ***Each Proposed Instruction Fails to Include the Legal Requirement that the Prosecution Prove Beyond a Reasonable Doubt That the Purported "Aggravating Circumstance" Is Not an "Ordinary" Part of the Charged Offense*** In the context of aggravating factors, "the essence of aggravation relates to the effect of a particular fact in making the offense distinctively worse than the ordinary." (*People v. Moreno* (1982) 128 Cal.App.3d 103, 110; *People v. Fernandez* (1990) 226 Cal.App.3d 669, 682-683 [error to find an aggravating factor true unless the evidence establishes that the facts of the case are "distinctly worse" than those in the "ordinary" case of that type].) A fact-finder must therefore compare the facts of the defendant's case with those of involved in an *ordinary* offense of that type to determine if they are "aggravating" or merely an ordinary occurrence within the context of the charged offense. (*Fernandez* at p. 682; *People v. Sandoval* (2007) 41 Cal.4th 825, 840 ["Many of the aggravating circumstances set forth in [rule 4.421] require an imprecise quantitative *or comparative evaluation of the facts*"] emphasis added; *People v. Superior Court* (*Brooks*) 159 Cal.App.4th 1, 7 [jury trial on rule 4.421 aggravators requires a "comparative evaluation" of the facts of the case to other cases]; *Butler v. Curry* (2008) 528 F.3d 624, 649 [a determination as to whether an alleged fact is truly an aggravator requires the fact-finder to consider "other cases."].) As a result, an aggravating circumstance cannot be based on a fact that is an "ordinary" part of the charged offense, even if that fact is not an *element* of the charged offense. (*People v. Piceno* (1987) 195 Cal.App.3d 1353, 1358 [a crime cannot be aggravated by circumstances that are an ordinary part of the offense]; *Fernandez* at p. 680 [error to find defendant guilty of "planning and sophistication" aggravator in a child-molestation case, absent evidence that the planning and	The committee considered *Moreno* and added the following language to all of the aggravating factor instructions: **You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.**

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			sophistication in defendant's case was "distinctly worse" than in the "ordinary" child molestation case].) In *Piceno*, for example, the defendant was charged with vehicular manslaughter after striking and killing a pedestrian while drunk driving. The trial court sentenced the defendant to high term, asserting that the offense was "aggravated" because, as a pedestrian, the victim was "particularly vulnerable," an aggravating factor listed in rule 4.421. The Court of Appeal reversed. The Court pointed out that every vehicular manslaughter case involves a person who was vulnerable to being killed if struck by a vehicle, and that a victim's "vulnerability" to that harm is therefore not an aggravator, but a routine part of the crime. (*Piceno* at p. 394 ["All victims of drunk drivers are 'vulnerable victims,' but it is precisely because they are all vulnerable that [the decedent] cannot be considered to be vulnerable 'in a special or unusual degree, to an extent greater than in other cases."].) Respectfully, none of the proposed jury instructions capture the requirement that an alleged aggravating circumstance can only be based on facts or circumstances that are not "ordinary" parts of the crime – *even if they are not per se "elements" of the crime*. As written, the proposed CALCRIM 3226 ("particularly vulnerable victim"), for example, would have permitted the prosecutor in *Piceno* to argue that the pedestrian-victim was "particularly vulnerable" solely because they were a pedestrian…because being a pedestrian is not an *element* of vehicular manslaughter. The same is true in the context of the other proposed instructions. In Calcrim 3224 ("great violence" enhancement), for example, the proposed instruction only requires proof that the defendant's conduct "was distinctively worse than what was *necessary* to commit the crime." While it is true that proof that an alleged aggravating fact cannot be based on an event that was a "necessary" part of the crime,	

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			this instruction fails to capture the requirement that the defendant must also have done something distinctly worse than *ordinary*, or that the jury make that determination by comparing the facts of the case with those in other cases involving the same offense. (*Moreno* at p. 110, *Fernandez* at p. 680; *Sandoval* at p. 840; *Brooks* at p. 7.) Assault, for example, does not *require* the defendant to actually *strike* the victim, but routinely involves a defendant who has done so – a fact that certainly does not render an assault defendant's conduct "distinctly worse than ordinary." Under the currently proposed instruction, however, a prosecutor is free to charge (and a jury is free to convict) the defendant of this enhancement if he struck the victim…simply because striking the victim wasn't "necessary" to complete the offense. The same is true of proposed CALCRIM 3230 ("planning, sophistication" enhancement). Almost every crime, for example, involves *some* level of "planning" (e.g., the defendant will "plan" to drive his car even though he is drunk, carry the illegal weapon, hit the victim, steal the purse, deposit the fake check, use the drugs, sell the drugs, etc.) but the proposed instruction does not require any proof whatsoever that the "planning" involved in the defendant's offense be something that renders his offense "distinctly worse than the ordinary" offense of that type. (*Moreno* at p. 110; see also *Fernandez* at p. 680 [error to claim that a child-molestation case was aggravated by "planning" because this would render every child molestation case an aggravated offense].) The same is true of proposed CALCRIM 3229 ("dissuading a witness" enhancement), particularly in the context of an alleged violation of section 136.2 (dissuading a witness). As written, the proposed instruction permits a prosecutor to charge (and a jury to convict) a defendant of this enhancement not just when the defendant has engaged in conduct that is "distinctly worse" than ordinary" for the charged offense, but when he has simply committed a violation of section 136.2 – the same offense with which he is charged. The practical result is that	

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			this instruction turns *every* violation of section 136.2 into an "aggravated" violation of 136.2. The same is true of proposed CALCRIM 3232 ("large amount of contraband" enhancement) and CALCRIM 3231 ("great monetary value" enhancement) because the currently proposed instructions would allow a jury to convict the defendant of this enhancement based on facts that are a necessary or ordinary part of the offense (e.g., when the underlying offense alleges that the defendant is charged with possessing a specific "large" amount of drugs, or with stealing or damaging a "great" amount of property).	
			Instructions Fail to Preclude Dual Use of Facts to Support Different Aggravators A fact-finder cannot use the same facts to find the defendant guilty of multiple aggravators. (*Fernandez* at p. 680 [error to use defendant's identity as victim's father to find true both the aggravating factor of "vulnerability" and the aggravating factor of "took advantage of a position of trust or confidence."].) None of the current instructions, however, require the prosecutor to identify the allegedly aggravating fact or facts that allegedly justify the aggravator, or inform the jury that the same facts cannot be dual-used to justify multiple aggravators.	*Fernandez* is about the improper use of aggravating factors at sentencing and does not prohibit the jury from finding multiple aggravators based on the same conduct. The committee added a related issues note about *Fernandez* to each aggravating factor instruction with the heading: ***Prohibition Against Dual Use of Facts at Sentencing.***
			Instructions Improperly Allow Jurors to Convict on an Aggravator Without Unanimity Particularly because of the barrier to dual-use of facts to justify multiple aggravators, the proposed instructions are also flawed because, as currently drafted, the instructions allow jurors to convict the defendant of an aggravator *without* requiring that the jurors specify and agree on the factual basis for that aggravator (e.g., in CALCRIM 3224, the instructions says: "you need not all agree on the act[s] or conduct which constitute[s] the [aggravating circumstance]".)	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. The

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			Such an instruction is not justified by the language of rule 4.421 or SB 567. First, as discussed in *Fernandez*, a fact-finder cannot use the same fact to find multiple aggravators. (*Fernandez* at p. 680.) The current instructions, however, would permit a defendant to be convicted of multiple aggravators on the same fact, because the instructions do not inform the jury that the same fact cannot be used to justify multiple aggravators. Under SB 567, jurors are stepping into a role previously held by a judge – who were not (and are not) permitted to find true an aggravating factor when they disagree with themselves about whether a specific fact justifies the use of that aggravating factor. In short, absent the overruling of *Fernandez* and clear guidance from the legislature or court of appeal on this issue, it is erroneous to assert that juries may find true an aggravating factor without agreeing on the facts that justify the use of that aggravating factor.	committee also does not agree that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
New 3224–3234	Santa Cruz County Office of the Public Defender, by Jonathan Cruz, Chief Deputy Public Defender.	N	The Santa Cruz County Office of the Public Defender joins the Los Angeles County Public Defender in their concern for the drafted jury instructions regarding aggravating circumstances post SB 567. Attached you will find our memo outlining our concerns and objections. If the Advisory Committee would like to discuss anything in the memo further, please provide my contact information below. Thank you for your attention this matter. This memo is intended as a response to the CALCRIM ITC2022-02 on behalf of the Santa Cruz County Office of the Public Defender. As discussed below, the Public Defender has significant concerns about the proposed instructions for Penal Code section 1170(b) "aggravating circumstance" enhancements (NEW 3224 through NEW 3234) because the proposed instructions: (i) omit required elements; (ii) reduce the evidentiary requirements for conviction; and (iii) fail to define necessary elements.	With the exception of the introductory paragraph, this comment is identical to the above comment from the Los Angeles Public Defender's Office. Please see the above responses.

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			We recognize that rule 4.421, the rule on which these instructions are based, was never intended for use by a jury, and that any Committee tasked with translating its language into jury instructions has been handed a difficult if not impossible task. The solution cannot, however, be to rewrite that language or omit long-standing evidentiary requirements to make it easier for juries to convict defendants of an "aggravating circumstance." Our concerns regarding these proposed instructions are described in detail below. Please do not hesitate to contact our office with questions or requests for clarification. **Objections That Apply to All of the Proposed Instructions:** ***Each Proposed Instruction Fails to Include the Legal Requirement that the Prosecution Prove Beyond a Reasonable Doubt That the Purported "Aggravating Circumstance" Is Not an "Ordinary" Part of the Charged Offense*** In the context of aggravating factors, "the essence of aggravation relates to the effect of a particular fact in making the offense distinctively worse than the ordinary." (*People v. Moreno* (1982) 128 Cal.App.3d 103, 110; *People v. Fernandez* (1990) 226 Cal.App.3d 669, 682-683 [error to find an aggravating factor true unless the evidence establishes that the facts of the case are "distinctly worse" than those in the "ordinary" case of that type].) A fact-finder must therefore compare the facts of the defendant's case with those of involved in an *ordinary* offense of that type to determine if they are "aggravating" or merely an ordinary occurrence within the context of the charged offense. (*Fernandez* at p. 682; *People v. Sandoval* (2007) 41 Cal.4th 825, 840 ["Many of the aggravating circumstances set forth in [rule 4.421] require an imprecise quantitative *or comparative evaluation of the facts*"] emphasis added; *People v. Superior Court (Brooks)* 159 Cal.App.4th 1, 7 [jury trial on rule 4.421	

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			aggravators requires a "comparative evaluation" of the facts of the case to other cases]; *Butler v. Curry* (2008) 528 F.3d 624, 649 [a determination as to whether an alleged fact is truly an aggravator requires the fact-finder to consider "other cases."].) As a result, an aggravating circumstance cannot be based on a fact that is an "ordinary" part of the charged offense, even if that fact is not an *element* of the charged offense. (*People v. Piceno* (1987) 195 Cal.App.3d 1353, 1358 [a crime cannot be aggravated by circumstances that are an ordinary part of the offense]; *Fernandez* at p. 680 [error to find defendant guilty of "planning and sophistication" aggravator in a child-molestation case, absent evidence that the planning and sophistication in defendant's case was "distinctly worse" than in the "ordinary" child molestation case].) In *Piceno*, for example, the defendant was charged with vehicular manslaughter after striking and killing a pedestrian while drunk driving. The trial court sentenced the defendant to high term, asserting that the offense was "aggravated" because, as a pedestrian, the victim was "particularly vulnerable," an aggravating factor listed in rule 4.421. The Court of Appeal reversed. The Court pointed out that every vehicular manslaughter case involves a person who was vulnerable to being killed if struck by a vehicle, and that a victim's "vulnerability" to that harm is therefore not an aggravator, but a routine part of the crime. (*Piceno* at p. 394 ["All victims of drunk drivers are 'vulnerable victims,' but it is precisely because they are all vulnerable that [the decedent] cannot be considered to be vulnerable 'in a special or unusual degree, to an extent greater than in other cases."].) Respectfully, none of the proposed jury instructions capture the requirement that an alleged aggravating circumstance can only be based on facts or circumstances that are not "ordinary" parts of the crime –	

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			even if they are not per se "elements" of the crime. As written, the proposed CALCRIM 3226 ("particularly vulnerable victim"), for example, would have permitted the prosecutor in *Piceno* to argue that the pedestrian-victim was "particularly vulnerable" solely because they were a pedestrian…because being a pedestrian is not an element of vehicular manslaughter. The same is true in the context of the other proposed instructions. In Calcrim 3224 ("great violence" enhancement), for example, the proposed instruction only requires proof that the defendant's conduct "was distinctively worse than what was necessary to commit the crime." While it is true that proof that an alleged aggravating fact cannot be based on an event that was a "necessary" part of the crime, this instruction fails to capture the requirement that the defendant must also have done something distinctly worse than ordinary, or that the jury make that determination by comparing the facts of the case with those in other cases involving the same offense. (*Moreno* at p. 110, *Fernandez* at p. 680; *Sandoval* at p. 840; *Brooks* at p. 7.) Assault, for example, does not *require* the defendant to actually *strike* the victim, but routinely involves a defendant who has done so – a fact that certainly does not render an assault defendant's conduct "distinctly worse than ordinary." Under the currently proposed instruction, however, a prosecutor is free to charge (and a jury is free to convict) the defendant of this enhancement if he struck the victim…simply because striking the victim wasn't "necessary" to complete the offense. The same is true of proposed CALCRIM 3230 ("planning, sophistication" enhancement). Almost every crime, for example, involves some level of "planning" (e.g., the defendant will "plan" to drive his car even though he is drunk, carry the illegal weapon, hit the victim, steal the purse, deposit the fake check, use the drugs, sell the drugs, etc.) but the proposed instruction does not require any proof	

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			whatsoever that the "planning" involved in the defendant's offense be something that renders his offense "distinctly worse than the ordinary" offense of that type. (*Moreno* at p. 110; see also *Fernandez* at p. 680 [error to claim that a child-molestation case was aggravated by "planning" because this would render every child molestation case an aggravated offense].) The same is true of proposed CALCRIM 3229 ("dissuading a witness" enhancement), particularly in the context of an alleged violation of section 136.2 (dissuading a witness). As written, the proposed instruction permits a prosecutor to charge (and a jury to convict) a defendant of this enhancement not just when the defendant has engaged in conduct that is "distinctly worse" than ordinary" for the charged offense, but when he has simply committed a violation of section 136.2 – the same offense with which he is charged. The practical result is that this instruction turns every violation of section 136.2 into an "aggravated" violation of 136.2. The same is true of proposed CALCRIM 3232 ("large amount of contraband" enhancement) and CALCRIM 3231 ("great monetary value" enhancement) because the currently proposed instructions would allow a jury to convict the defendant of this enhancement based on facts that are a necessary or ordinary part of the offense (e.g., when the underlying offense alleges that the defendant is charged with possessing a specific "large" amount of drugs, or with stealing or damaging a "great" amount of property). ***Instructions Fail to Preclude Dual Use of Facts to Support Different Aggravators*** A fact-finder cannot use the same facts to find the defendant guilty of multiple aggravators. (*Fernandez* at p. 680 [error to use defendant's identity as victim's father to find true both the aggravating factor of "vulnerability" and the aggravating factor of "took advantage of a position of trust or confidence."].)	

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			None of the current instructions, however, require the prosecutor to identify the allegedly aggravating fact or facts that allegedly justify the aggravator, or inform the jury that the same facts cannot be dual-used to justify multiple aggravators. ***Instructions Improperly Allow Jurors to Convict on an Aggravator Without Unanimity*** Particularly because of the barrier to dual-use of facts to justify multiple aggravators, the proposed instructions are also flawed because, as currently drafted, the instructions allow jurors to convict the defendant of an aggravator without requiring that the jurors specify and agree on the factual basis for that aggravator (e.g., in CALCRIM 3224, the instructions says: "you need not all agree on the act[s] or conduct which constitute[s] the [aggravating circumstance]".) Such an instruction is not justified by the language of rule 4.421 or SB 567. First, as discussed in *Fernandez*, a fact-finder cannot use the same fact to find multiple aggravators. (*Fernandez* at p. 680.) The current instructions, however, would permit a defendant to be convicted of multiple aggravators on the same fact, because the instructions do not inform the jury that the same fact cannot be used to justify multiple aggravators. Under SB 567, jurors are stepping into a role previously held by a judge – who were not (and are not) permitted to find true an aggravating factor when they disagree with themselves about whether a specific fact justifies the use of that aggravating factor. In short, absent the overruling of *Fernandez* and clear guidance from the legislature or court of appeal on this issue, it is erroneous to assert that juries may find true an aggravating factor without agreeing on the facts that justify the use of that aggravating factor.	
New 3224–3234	San Diego Primary Public Defender's Office, by Troy Britt,	N	<u>Proposed Objection</u> The proposed instructions fail on several grounds, including separation of powers, vagueness, and due process. As the Supreme Court pointed	Senate Bill 567, which amended Penal Code section 1170 to

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	Deputy Public Defender		out "[t]he sentencing rules that set forth aggravating circumstances were not drafted with a jury in mind. Rather, they were intended to "provid[e] criteria for the consideration of the trial judge." (*People v. Sandoval* (2007) 41 Cal.4th 825, 840.) Using this Rule of Court "would pose difficult jury questions and potentially raise constitutional concerns." (*People v. Superior Court* (*Brooks*) (2007) 159 Cal.App.4th 1, 5 citing *People v. Sandoval* (2007) 41 Cal.4th 825, 840.) The Rules of Court were not meant to be used as jury instructions. "[B]ecause the rules provide criteria intended to be applied to a broad spectrum of offenses, they are 'framed more broadly than' criminal statutes and necessarily 'partake of a certain amount of vagueness which would be impermissible if those standards were attempting to define specific criminal offenses.'" (Citation omitted.) "Many of the aggravating circumstances described in the rules require an imprecise quantitative or comparative evaluation of the facts. For example, aggravating circumstances set forth in the sentencing rules call for a determination as to whether '[t]he victim was particularly vulnerable,' whether the crime 'involved a[] … taking or damage of great monetary value,' whether the 'quantity of contraband' involved was 'large.'" (Citation omitted.) "Many of those circumstances are not readily adaptable … because they include imprecise terms that implicitly require comparison of the particular crime at issue to other violations of the same statute, a task a jury is not well suited to perform. For example, without some basis for comparison "it would be difficult for a jury to determine whether '[t]he victim was particularly vulnerable,' or whether the crime 'involved … taking or damage of great monetary value' or 'a large quantity of contraband.' " (*People v. Superior Court* (*Brooks*) (2007) 159 Cal.App.4th 1, 5-6.) Additionally, "[s]ome aggravating factors may not be identifiable until after the trial, such as whether the defendant 'unlawfully prevented or dissuaded witnesses from testifying … or in any other way illegally interfered with the judicial process.' " (*People v. Superior Court* (*Brooks*) (2007) 159 Cal.App.4th 1, 5-6.)	require that aggravating factors be proved beyond a reasonable doubt to a jury, implicitly encompassed the California Rules of Court governing aggravating sentencing factors. (See, e.g., *People v. Black* (2007) 41 Cal..4th 799, 817 ["Aggravating circumstances include those listed in the sentencing rules, as well as any facts "statutorily declared to be circumstances in aggravation" (Cal. Rules of Court, rule 4.421(c)) and any other facts that are "reasonably related to the decision being made." (Cal. Rules of Court, rule 4.408(a).)]

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			The use of the Rules of Court as jury instructions has been discouraged since 2007 before the change in the law.	
			Separation of Powers The Legislature may direct the Judicial Council to adopt rules of court to implement statutes that do not "'defeat' or 'materially impair' a court's exercise of its constitutional power or the fulfillment of its constitutional function." (*Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837, 855; citing *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 58–59.).) Here, these proposed instructions violate the Separation of Powers. Specifically: 1. The Legislature did not authorize the Judicial Council to adopt jury instructions and elements of the law to implement section 1170(b). 2. The Legislature created aggravating circumstances and included them in the Penal Code. (See Penal Code section 1170.7 – 1170.89.) Proposed CALCRIM 3224–3234 are not anchored in any aggravating factor set forth by the Legislature in Penal Code sections 1170.7 to 1170.89. Allowing the Judiciary's own body of work – the Rules of Court – to be used for selecting terms within a statutory scheme for what were intended to be judicial guidelines nullifies the Legislature's decision. 3. Rule 4.421's language is so expansive and, in turn, problematic because it can apply every defendant in every case. This effectively nullifies section 1170(b).	As stated above, Senate Bill 567 implicitly encompassed the California Rules of Court governing aggravating sentencing factors.
			Vagueness Violates Due Process *The language used in the proposed jury instructions is based on Rule 4.421 which was only intended to guide a judge's use of discretion at sentencing. The language is "broad, imprecise, and vague" and does not	As stated previously, addressing the certainty or vagueness of the aggravating factors is not within the purview of the CALCRIM

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			give "advance warning" about the nature of the prohibited conduct. (*People v. Sandoval* (2007) 41 Cal.4th 825, 840 [rule 4.421 language is "broad, imprecise, and vague" and an attempt to use it to describe a specific offense at jury trial is therefore "impermissible"]; *People v. Superior Court* 159 Cal.App.4th 1, 7 ["a jury trial on the aggravated circumstances [listed in rule 4.421] would introduce to the jury imprecise standards and ones requiring comparative evaluation"]; *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108 [an allegation is unconstitutionally vague when it fails to give "fair warning as to what is prohibited"]; *People v. Thomas* (1979) 87 Cal.App.3d 1014, 1023 [this language "obviously" does not "give people advance warning of prohibited activities."].) The language in the proposed jury instructions is similar to language that has previously been found to violate the Eighth Amendment's vagueness standard. The United States Supreme Court has found words like "heinous, atrocious, or cruel" and "outrageously or wantonly vile, horrible or inhuman" are vague and do not inform or guide jurors sufficiently. (See *Maynard v. Cartwright* (1988) 486 U.S. 356 and *Godfrey v. Georgia* (1980) 446 U.S. 420.) Following the enactment of section 1170(b), defendants are supposed to be eligible for an enhanced sentence only when the prosecution has proven that their offense is "distinctly worse" than an "ordinary" offense of that type. (*People v. Moreno* (1982) 128 Cal.App.3d 103, 110 ["the essence of aggravation relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].) Rule 4.421's language is so vague, however, that California prosecutors are now claiming that 1170(b) enhancements apply to every defendant in every case. Additionally, the use of these vague standards deprives defendants of due process. "The Government violates the Due Process Clause when it takes away someone's life, liberty, or property under a criminal law so	committee. Furthermore, vagueness concerns may be raised by counsel in individual cases.

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			vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." (*Johnson v. U.S.* (2015) 576 U.S. 591, 596 [vagueness prohibitions "apply not only to statutes defining elements of crimes, but also to statutes fixing sentences."].) "A vague law not only fails to provide adequate notice to those who must observe its strictures, but also impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (Sheena K.).) This instruction fails to define its key terms, fails to provide ordinary people with "advance warning of prohibited activities," and asks juries to make abstract value judgments untethered from "real-world facts or statutory elements," it "fails to provide adequate notice to those who must observe its strictures," and "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." (*Sheena K.* at p. 890; Johnson at p. 597; *Thomas* at p. 1023.) These failures make this allegation impermissibly vague. (*Sandoval* at p. 840; *Brooks* at p. 7.)	
			*The allegations are also constitutionally infirm because they require jurors to compare petitioner's offense with a hypothetical "ordinary" offense, in violation of the Supreme Court's holding in *Johnson*. (*Sandoval* at p. 840 [rule 4.421 language requires "a comparison of the particular crime at issue to other violations of the same statute"]; *Brooks* at p. 7 [the use of rule 4.421 at jury trial would require jurors to engage in "comparative evaluation"]; *Johnson* at p. 597 [an enhancement that requires a comparison between the charged offense and a hypothetical "ordinary" offense is unconstitutional].) Here, the case law cited as authority for the proposed jury instruction requires a comparative analysis to determine whether there is "an extent greater than in other cases." This is exactly what has been found to be constitutionally infirm and dates back to a time when a sentencing	In response to the argument about *Johnson*, the committee has added the following commentary to the instructions: "The committee is aware *of Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of

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			judge, who could compare different circumstances, not a jury was making the comparison. In *Johnson*, the defendant was charged with an enhancement that required the factfinder to decide what facts or circumstances an "ordinary" crime might involve, and to then decide if those facts or circumstances included "a serious potential risk of physical injury to another." (*Johnson* at p. 596.) On appeal, the Supreme Court found that an allegation that requires a factfinder to "picture the kind of conduct that the crime involves in the ordinary case" is constitutionally infirm because, absent clear standards for making such a determination, each fact-finder's definition of "ordinary" will vary. (*Johnson* at p. 597 ["How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?"].) Here, because the allegations require jurors to compare the alleged crime with a hypothetical "ordinary" crime to determine if the crime is "aggravated," the same issue arises. To paraphrase *Johnson*, how are jurors supposed to decide whether petitioner's violation of the law was "distinctly worse" than the "ordinary" violation of the law? A survey? Expert evidence? Google? Gut instinct? Because these questions are simply unanswered, the allegations are impermissibly vague. (*Sandoval* at p. 840; *Brooks* at p. 7.)	California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* at p. 110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime."
New 3224–3234	Santa Barbara Public Defender's Office, by Tracy Macuga, Public Defender Alameda County Public Defender's Office, by Brendon Woods, Public Defender.	N	The Public Defenders for the Counties of Santa Barbara, Alameda, Sacramento, San Francisco, Santa Clara, Santa Cruz, Contra Costa, and Yolo respectfully submit the following comments regarding ITC CALCRIM-2022-02. Recognizing that the legislation which amended Penal Code section 1170 to require that aggravating factors be proved beyond a reasonable doubt to a jury implicitly encompassed the California Rules of Court governing DSL Sentencing, and that those rules were drafted for an entirely different purpose (to add sentencing judges in electing the	The committee previously considered waiting for further development of statutory and/or case law authority but ultimately determined that delay would be a disservice to trial judges who need more immediate guidance. The committee hopes that its studied and well-considered approach will be of assistance.

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Instruction No.	Commenter	Position	Comment	Committee Response
	Yolo County Public Defender's Office, by Tracie Olson, Public Defender. San Francisco Public Defender's Office, by Mano Raju, Public Defender. Contra Costa Public Defender's Office, by Ellen McDonnell, Public Defender. Sacramento Public Defender's Office, by Amanda Benson, Public Defender. Santa Clara Public Defender's Office, by Molly O'Neal, Public Defender. Santa Cruz Public Defender's Office, by Heather Rogers, Public Defender.[2]		appropriate term of a triad for a substantive offense or an enhancement after an adjudication of guilt), we have concerns about the vagueness of the language sought to be interpreted in the proposed instructions. Some of the rules and proposed instructions simply cannot provide the clarity needed for jurors to make beyond-a-reasonable doubt findings as to the truth or existence of a fact. Other instructions, by the very nature of the language of the rules of court, require that the factfinder compare the proven fact in the case at hand with other cases involving similar charges, and that is simply impossible. Additionally, it is inconceivable that a jury could make a finding as to whether a defendant poses a "serious danger to society," without the competent opinion of a qualified expert. Generally, we also have concern about the committee recommending that the Judicial Council promulgate jury instructions in a legal vacuum. There is a dearth of decision law regarding the aggravating factors in the Rules of Court, and they are treated superficially, and even in dicta, in the opinions cited in the Committee's comments. Finally, we have concerns about the Judicial Council promulgating these instructions at a time when their constitutional validity is being challenged by parties to criminal cases in appellate court proceedings. (see, e.g. Docket No. A166159 (First Appellate District).) Recognizing that these concerns cannot be addressed by this Committee, our comments are confined to suggestions regarding specific language which, we believe, should be modified. The suggestions are attached hereto, with changes tracked and comments inserted. We did not include the entirety of each instruction in each comment, believing that placement of the suggested modifications within each respective instructions was self-evident.	Further, the arguments raised by the commenters here can be argued by counsel in individual cases.

[2] Subsequent comments by this group of commenters are collectively referred to as "Santa Barbara Public Defender's Office, et. al."

Instruction No.	Commenter	Position	Comment	Committee Response
New 3224	San Francisco District Attorney's Office, by Allison Garbutt Macbeth, Assistant District Attorney.	AM	Thank you for the opportunity to provide comments on the Proposed CALCRIM Jury Instructions. Our office reviewed the proposed jury instructions for the aggravating factors and respectfully suggest the following: CALCRIM 3224: Aggravating Factor: Great Violence, Great Bodily Harm, or High Degree of Cruelty, Viciousness, or Callousness: Although the instruction includes a statement that "[v]iciousness is not the same as violence[,]" which is followed by examples, the instruction does not affirmatively define viciousness as it does for "cruelty" and "callousness." And in stating viciousness is not the same as violence, the instruction suggests that the term itself has a technical, legal meaning that differs from its nonlegal meaning, particularly when viciousness can be commonly understood as "dangerously aggressive" or "marked by violence or ferocity." (Merriam-Webster Dictionary http://www.merriam-webster.com/dictionary/viciousness [as of Jan. 3, 2023].) It is therefore suggested that CALCRIM 3224 include an affirmative definition of viciousness.	The committee agrees with this suggestion and has added the following definition of viciousness: ***Viciousness* means dangerously aggressive or marked by violence or ferocity.** The committee also changed "**many acts**" to "**some acts**" in the explanatory paragraph about viciousness.
New 3224	Santa Barbara Public Defender's Office, et. al.	AM	For the crime to have been committed with (great violence[,]/ [or]cruelty[,]/ [or]viciousness[,]/ [or]callousness), the People need not prove beyond a reasonable doubt that a person was actually injured by the defendant's act.no one needs to actually have been injured by the defendant's act. ~~But if~~ If you do find that someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed the crime with (great violence[,]/ [or]cruelty[,]/ [or]viciousness[,]/ [or]callousness).] Conversely, if you find that no one was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed the crime with great violence. Conversely, if you find that no one was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed the crime with great violence. *P v. Duran* (1982) 130 Cal.App.3d 987, 990.	The committee believes that the proposed draft adequately instructs the jury. The committee considered but rejected these suggested changes.

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			Viciousness is not the same as violence. For example, many acts which may be described as vicious do not involve violence at all, but rather involve acts such as deceit and slander. On the other hand, many violent acts do not indicate viciousness, but instead show fear, frustration, anger, or other emotional states. ~~justifiable rage, or self-defense.]~~ *P v. Reed* (1984) 157 Cal.App.3d 489, 492 – dicta, citing 1971 version of Webster's Third New International Dictionary. Not a statement of law. In the context of the rule, the reasonable meaning is dangerously aggressive: savage; marked by extreme violence or ferocity.) Why must rage be justifiable to not be vicious? And what is justifiable rage? Why would self-defense be included here? Why would we limit this to rage, rather than "anger"? An act discloses cruelty when it demonstrates the deliberate infliction of physical or mental suffering, unrelieved by leniency, and devoid of humane feelings.] https://www.merriam-webster.com/dictionary/cruel [An act discloses callousness when it demonstrates an utter lack of sympathy for the suffering of~~, or harm to~~ another human being, which cannot reasonably be accounted for by the circumstances.~~the victim~~[s].] In determining the truth of the allegation, you are required to consider the totality of the circumstances surrounding the offense, including, but not limited to any of the following, if proved true beyond a reasonable doubt: (1) That the victim was, or was not, particularly vulnerable to the degree of violence employed by the defendant in the commission of the crime; i.e. particularly fragile, youthful, infirm, or aged;	The committee considered but rejected this suggested change. Instead, the committee added the following definition of viciousness: ***Viciousness* means dangerously aggressive or marked by violence or ferocity.** The committee also changed "**many acts**" to "**some acts**" in the explanatory paragraph about viciousness. The committee declined to add the language suggested here. The committee declined to modify the language suggested here. The committee declined to add these suggested six factors. Although these factors may be the proper subject of argument by counsel, including them in the instruction itself would unduly single them out.

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Instruction No.	Commenter	Position	Comment	Committee Response
			(2) That the victim was, or was not, attacked under circumstances in which he had no opportunity to defend himself; (3) That the victim was, or was not, attacked without provocation; (4) That the victim was, or was not intentionally made to suffer over a substantial period of time; (5) That the degree of violence used by the defendant did or did not exceed the degree of violence necessary to commit the intended act or acts; and (6) That the manner in which the victim was treated during the commission of the crime does or does not reflect a high degree of cruelty, viciousness or callousness. (*People v. Curry* (2007) 158 Cal.App.4th 766 [woman in advanced stages of pregnancy kicked with both feet and left bruised and bleeding on the side of the road]; *People v. Nevill* (1985) 167 Cal.App. 3d 198 [shooting of unarmed and unsuspecting wife while toddle was standing beside her]; *People v. Harvey* (1984) 163 Cal.App.3d 90 [victim was unsuspecting, unarmed, and shooting was unprovoked and inexplicable]; *People v. Wilson* (1982) 135 Cal.App.3d 343 [defendant's beating of victim on buttocks with shoe while she was engaging in forcible intercourse with codefendant]; *People v. Duran* (1982) 130 Cal.App.3d 987 [repeated stabbing of defenseless victim in the chest, while victim was kicked by several other people]; *People v. Collins* (1981) 123 Cal.App.3d 535 [continual holding of cocked gun to victim's head])	
New 3224	Orange County Bar Association, by Daniel S. Robinson, President.	N	As will be explained, the proposed instruction has two legal errors which render it as drafted unconstitutional; namely, (1) it improperly combines multiple aggravating factors and, (2) fails to instruct the jury that unanimity is required. Under California's DSL, before a court may rely upon an aggravating factor in sentencing, such factor must be proved at trial beyond a	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does

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			reasonable doubt to either the court or a jury pursuant to Penal Code §1170(b)(2) and the Sixth and Fourteenth Amendments to the U.S. Constitution. This new instruction improperly combines six possible aggravating factors found in CA Rule of Court, rule 4.421(a)(1): "*The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness*". Clearly, subd. (a)(1) contains **six** separate and distinct aggravating factors. For instance, a "crime which involved great violence" is not tantamount to a "crime which involved the threat of great bodily harm". These are **not** synonymous factors as each has a different definition for the jury to consider. However, for aggravation under this subdivision, the jury need only find one of the six. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." As presently drafted, this instruction is unconstitutional. For example, it seemingly permits some members of the jury to find one factor such as "great violence" while allowing a few jurors to find "great bodily harm" and still others to conclude that " a high degree of cruelty" was involved. The bracketed optional language, "*You may not find the allegation proven unless all of you agree that the People have proved at least one of the following…*" is of limited usefulness. It provides the judge no guidance as to when it must be given and if the full paragraph is given it will undoubtedly confuse the jury. Consistent with *Apprendi, supra*., and *Cunningham v. California* (2007) 549 U.S. 270, this instruction must be redrafted to unambiguously require jury unanimity as to only one of the six listed aggravating factors per instruction. Should the prosecution seek to present more than one aggravating factor to the jury for a single offense then a separate instruction for each aggravating factor should be required.	not improperly combine multiple aggravating factors. The committee also does not agree that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

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Instruction No.	Commenter	Position	Comment	Committee Response
New 3224	Orange County Public Defender Office, by Adam Vining, Assistant Public Defender.	N	This instruction improperly combines multiple aggravating circumstances. Each circumstance is reasonably likely to be based on different acts. For example, 6 jurors may find the defendant inflicted great bodily harm while the other 6 may find there was no great bodily harm but that the acts were callous. It should be split into four different instructions to avoid amalgamating. 1) Great Violence 2) Great Bodily Harm 3) Threat of Great bodily harm, or 4) Acts disclosing a high degree of cruelty, viciousness, or callousness. 1, 2, 3, and 4 require different acts. In contrast, 4 requires the same act[s] but proof of the act fact can be arrived at based on three different theories (cruelty, viciousness, or callousness.) Unanimity – This instruction is contrary to the law. The instruction states "you need not all agree on the act[s] or conduct which constitute…." However, unanimity is in fact required as to the act or course of conduct that would prove each. The proposed instruction is erroneous because of the risk that the jury will divide on the discrete acts that constitute the aggravating factor(s) and not agree on any particular factor(s). This would result in the jury amalgamating evidence of multiple acts—none of which have been proven beyond a reasonable doubt—to conclude that the defendant must have done something sufficient to find true the aggravating factor.	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. Further, the committee does not agree that a unanimity requirement exists for each qualitative description within the aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
New 3224	San Diego Primary Public Defender's Office, by Troy Britt, Deputy Public Defender	N	While the jury instruction attempts to define several terms, those definitions remain vague. For example, violence is defined as "the use of physical force so as to injure, abuse, damage, or destroy." (See *United States v. Davis* (2019) 139 S.Ct. 2324 [the term "crime of violence" may be unconstitutionally vague]; *Johnson* at p. 596 [same].) Great violence? Viciousness? Callousness? High degree of cruelty (to be distinguished from low or moderate degree of cruelty)? What guidance is provided to the jurors who are not required to agree on the acts or conduct which constitute the use of great violence, infliction of	As stated previously, addressing the certainty or vagueness of the aggravating factors is not within the CALCRIM committee's purview. Furthermore, arguments based on vagueness concerns may be raised by counsel in individual cases.

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			bodily harm, threat to inflict bodily harm, or other acts showing a high degree of cruelty, viciousness, or callousness?	
New 3225	Orange County Bar Association, by Daniel S. Robinson, President.	N	As will be explained, the proposed instruction has two legal errors which render it as drafted unconstitutional; namely, (1) it improperly combines multiple aggravating factors and, (2) fails to instruct the jury that unanimity is required. Under California's DSL, before a court may rely upon an aggravating factor in sentencing, such factor must be proved at trial beyond a reasonable doubt to either the court or a jury pursuant to Penal Code §1170(b)(2) and the Sixth and Fourteenth Amendments to the U.S. Constitution. This new instruction improperly combines two possible aggravating factors found in CA Rule of Court, rule 4.421(a)(2): "*The defendant was armed with **or** used a weapon at the time of the commission of the crime*". (Emphasis supplied.) Clearly, subd. (a)(2) contains two separate and distinct aggravating factors. Decisional and statutory law differentiate being "armed" from "use" of a weapon during the commission of a crime. These are not synonymous factors as each has a different definition for the jury to consider. However, for aggravation under this subdivision, the jury need only find one of the two. While the paragraph containing the bracketed alternative proof language is helpful, a jury may be confused when instructed in combination by one of the two introductory paragraphs. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." As presently drafted, this instruction is unconstitutional. For example, it seemingly permits some members of the jury to find one factor such as "armed" while allowing others to conclude that defendant "used a weapon". The bracketed optional language, "*You may not find the allegation proven unless all of you agree that the People have proved at least one*	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. Further, the committee does not agree that a unanimity requirement exists for each qualitative description within the aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

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			of the following…" is of limited usefulness. It provides the judge no guidance as to when it must be given and if the full paragraph is given it will undoubtedly confuse the jury. Consistent with *Apprendi, supra*., and *Cunningham v. California* (2007) 549 U.S. 270, this instruction must be redrafted to unambiguously require jury unamimity as to only one of the two listed aggravating factors per instruction. Should the prosecution seek to present more than one aggravating factor to the jury for a single offense then a separate instruction for each aggravating factor should be required.	
New 3225	Orange County Public Defender Office, by Adam Vining, Assistant Public Defender.	N	This instruction improperly combines multiple aggravating circumstances. Each circumstance is reasonably likely to be based on different acts. For example, 6 jurors may find that the defendant was armed with a firearm while the other 6 find the defendant used a knife to stab the victim. It should be split into two different instructions to avoid amalgamating. 1) Armed or 2) Used Weapon Unanimity - The instruction states "you need not all agree on the act[s] or conduct which constitute…." However, unanimity is required as to the act or course of conduct that would prove each. The proposed instruction is erroneous because of the risk that the jury will divide on the discrete acts that constitute the aggravating factor(s) and not agree on any particular factor(s). This would result in the jury amalgamating evidence of multiple acts—none of which have been proven beyond a reasonable doubt—to conclude that the defendant must have done something sufficient to find true the aggravating factor.	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. The committee also does not agree that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
			The definition of weapon must be modified. As written, an aggravating factor is proven if a person knowingly carries an object that is capable of being used to inflict injury or death. If a person had a pen in their front pocket the aggravating factor would be proven. See CALCRIM	In response to this comment, the committee has modified the definition of "weapon": **[A device, instrument, or object**

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			875 re weapons. An object is a weapon if it is deadly or dangerous in the ordinary use for which it was designed. (A gun, a sword, a mace.) An object is also a weapon if it is capable of causing injury or death AND is used in a manner that is capable of causing and likely to cause injury.	**that is capable of being used to inflict injury or death may be a *weapon*. [In determining whether** _____ <*insert description*> **was a *weapon*, you may consider the totality of circumstances, including the manner in which it was used or possessed.]**
New 3225	San Diego Primary Public Defender's Office, by Troy Britt, Deputy Public Defender	N	The proposed jury instruction would allow an aggravated sentence and the imposition of the upper term when a defendant "knowingly carried" or "knowingly had a weapon available for use" even if not used. A defendant could be given the upper term for carrying car keys or wearing steel-toed boots. (See *People v. Koback* (2019) 36 Cal.App.5th 912 and *People v. Crites* (2006) 135 Cal.App.4th 1251.) A defendant could receive the upper term for carrying or having available for use a screwdriver while committing a non-violent offense. (*People v. Simons* (1996) 42 Cal.App.4th 1100.) Even after providing vague guidance, the proposed jury instruction allows more ambiguity by failing to require the jurors to agree on which acts or conduct constitutes the arming or use of a weapon.	The committee modified the definition of weapon (please see the above response) to address some of the concerns raised here. Further, as previously noted, the jury is not required to agree on which acts or conduct constitute the aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
			Moreover, section 1170(b) does not allow an aggravating factor that is an element of the offense, but it is unclear based on the proposed instructions whether a defendant could violate a gun enhancement allegation (e.g. Penal Code 12022.5) and have the same weapon used to apply the upper term on the underlying offense. Finally, it is unclear from the Commentary of the proposed jury instruction whether a defendant could be found guilty of section 12022(a)(1) "whether or not the person is personally armed with a weapon" and receive the upper term if the defendant was not personally armed with a weapon was available for use.	The instruction contains the following bench note: Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).) The committee awaits the development of case law to determine the resolution of this issue.

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New 3226	Orange County Public Defender Office, by Adam Vining, Assistant Public Defender	A	Unanimity – This instruction is a correct statement of the law because it does not allow a risk of conviction without unanimity on the factor. There is no risk of amalgamation. "[Y]ou do not have to agree on which facts show that the victim was particularly vulnerable" is a correct statement of the law of circumstantial evidence. "You may not find the allegation proven unless all of you agree that the People have proved that the victim was particularly vulnerable" is a correct statement of the law of unanimity.	No response necessary.
New 3226	Santa Barbara Public Defender's Office, et al.	AM	Particularly vulnerable means ~~includes~~ being defenseless, unguarded, unprotected, or otherwise susceptible to the defendant's criminal act to a higher degree than is usual or average ~~special or unusual degree~~.	The committee believes the definition in the draft is correct and does not agree with modifying it as proposed.
New 3226	Los Angeles Public Defender's Office, by Nick Stewart-Oaten, Deputy Public Defender.	N	***Objection to CALCRIM 3226 (Particularly Vulnerable Victim)*** Along with the omissions described above, the current proposed CALCRIM 3226 instruction is flawed because it omits the requirement that the prosecutor prove beyond a reasonable doubt that the defendant *know of the alleged vulnerability and targeted the victim because of that vulnerability*. (*Piceno* at p. 1358 [reversing court's use of "particularly vulnerable" aggravator because the evidence did not establish that the defendant sought to "take deliberate advantage of the vulnerability of victim."].)	Although knowledge and targeting may be relevant in some cases, they are not general requirements for this factor to apply. The committee added *Piceno* to the authority section with the following description: **Factor Did Not Apply in Vehicular Manslaughter.**
New 3226	Santa Cruz County Office of the Public Defender, by Jonathan Cruz, Chief Deputy Public Defender.	N	***Objection to CALCRIM 3226 (Particularly Vulnerable Victim)*** Along with the omissions described above, the current proposed CALCRIM 3226 instruction is flawed because it omits the requirement that the prosecutor prove beyond a reasonable doubt that the defendant *know of the alleged vulnerability and targeted the victim because of that vulnerability*. (*Piceno* at p. 1358 [reversing court's use of "particularly vulnerable" aggravator because the evidence did not establish that the defendant sought to "take deliberate advantage of the vulnerability of victim."].)	Please see above response to the comment from Los Angeles County Public Defender.
New 3226	San Diego Primary Public Defender's Office, by Troy Britt,	N	Penal Code 1170.85 (b) already defines a vulnerable victim as someone who is "particularly vulnerable, or unable to defend himself or herself, due to age or significant disability." Despite the existence of a	The committee is not aware of any case law that supports the commenter's argument that the

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	Deputy Public Defender.		legislatively created aggravating factor, allowing the Judiciary's own body of work – the Rules of Court – to be used for selecting terms within a statutory scheme for what were intended to be judicial guidelines nullifies the Legislature's decision. Because the Legislature created a similar aggravating factor, the Judicial Counsel exceeds its function by suggesting that a judicially created aggravating factor, if found true beyond a reasonable doubt, can be used by a court to exceed the statutory maximum sentence set by the Legislature. As the Supreme Court pointed out, without some basis for comparison "it would be difficult for a jury to determine whether '[t]he victim was particularly vulnerable.'" (*People v. Superior Court* (*Brooks*) (2007) 159 Cal.App.4th 1, 5-6.) Moreover, what does particularly vulnerable mean? The definition provided is much less clear than the word being defined—"defenseless, unguarded, unprotected, or otherwise susceptible to the defendant's criminal act to a special or unusual degree." Does this mean that any victim without a weapon meets the definition of being defenseless? Does this mean that any victim who does not employ a personal security guard is unguarded? The vagueness of the definition is further exacerbated by the fact that the jurors do not have to agree on which facts show that the victim was particularly vulnerable.	statutory definition is the only permissible definition for aggravating a sentence. As stated previously, the committee has added a Commentary about *Johnson v. United States*. The committee believes that the proposed definition adequately informs the jury.
New 3227	Orange County Bar Association, by Daniel S. Robinson, President.	N	As will be explained, the proposed instruction has two legal errors which render it as drafted unconstitutional; namely, (1) it improperly combines multiple aggravating factors and, (2) fails to instruct the jury that unanimity is required. Under California's DSL, before a court may rely upon an aggravating factor in sentencing, such factor must be proved at trial beyond a reasonable doubt to either the court or a jury pursuant to Penal Code §1170(b)(2) and the Sixth and Fourteenth Amendments to the U.S. Constitution. This new instruction improperly combines three possible aggravating factors found in CA Rule of Court, rule 4.421(a)(4): "*The*	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. The committee also does not agree that a unanimity requirement

Instruction No.	Commenter	Position	Comment	Committee Response
			defendant induced others to participate in the commission of the crime ***or*** *occupied a position of leadership* ***or*** *dominance of other participant in its commission*". (Emphasis supplied.) Clearly, subd. (a)(4) contains three separate and distinct aggravating factors. These are not synonymous factors as each has a different definition for the jury to consider. However, for aggravation under this subdivision, the jury need only find one of the three. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." As presently drafted, this instruction is unconstitutional. For example, it seemingly permits some members of the jury to find one factor such as "defendant induced others to participate in the commission of the crime" while allowing other jurors to conclude that defendant "occupied a position of leadership". The bracketed optional language, "*You may not find the allegation proven unless all of you agree that the People have proved at least one of the following…*" is of limited usefulness. It provides the judge no guidance as to when it must be given and if the full paragraph is given it will undoubtedly confuse the jury. Consistent with *Apprendi, supra.*, and *Cunningham v. California* (2007) 549 U.S. 270, this instruction must be redrafted to unambiguously require jury unamimity as to only one of the three listed aggravating factors per instruction. Should the prosecution seek to present more than one aggravating factor to the jury for a single offense then a separate instruction for each aggravating factor should be required.	exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
New 3227	Orange County Public Defender Office, by	N	This instruction improperly combines multiple aggravating circumstances. Each circumstance is reasonably likely to be based on different acts. For example, 6 jurors may find that the defendant	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to

Instruction No.	Commenter	Position	Comment	Committee Response
	Adam Vining, Assistant Public Defender		induced a minor co-defendant while the other 6 find the defendant was in a position of leadership within an organization to an adult victim. It should be split into two different instructions to avoid amalgamating. 1) Induced Others to Participate 2) Occupied Position of Leadership or Dominance Unanimity - The instruction states "you need not all agree on the act[s] or conduct which constitute…." However, unanimity is required as to the act or course of conduct that would prove each. The proposed instruction is erroneous because of the risk that the jury will divide on the discrete acts that constitute the aggravating factor(s) and not agree on any particular factor(s). This would result in the jury amalgamating evidence of multiple acts—none of which have been proven beyond a reasonable doubt—to conclude that the defendant must have done something sufficient to find true the aggravating factor. The proposed instruction is erroneous because of the risk that the jury will divide on the discrete acts that constitute the aggravating factor(s) and not agree on any particular factor(s). This would result in the jury amalgamating evidence of multiple acts—none of which have been proven beyond a reasonable doubt—to conclude that the defendant must have done something sufficient to find true the aggravating factor.	qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. The committee also does not agree that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
New 3227	San Diego Primary Public Defender's Office, by Troy Britt, Deputy Public Defender.	N	First, the Legislature did not authorize the Judicial Council to adopt jury instructions and elements of the law to implement section 1170(b). Second, a legislatively created aggravating circumstance exists in the Penal Code. (See Penal Code section 1170.7 – 1170.89.) Finally, the Legislature did not add a similar aggravated factor to the Penal Code. Moreover, how are jurors supposed to understand what "induced" means when the definition is overly broad and just includes synonyms for the word being defined? How much guidance is provided when the jurors are not required to agree on which acts or conduct constitutes inducing others to participate or occupying a position of leadership or trust?	The committee believes that the proposed definitions adequately inform the jury. As stated previously, addressing the certainty or vagueness of the aggravating factors is not within the purview of the CALCRIM committee. Furthermore, arguments about vagueness concerns may be raised by counsel in individual cases.

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

Instruction No.	Commenter	Position	Comment	Committee Response
New 3228	Orange County Bar Association, by Daniel S. Robinson, President.	N	As will be explained, the proposed instruction has two legal errors which render it as drafted unconstitutional; namely, (1) it improperly combines multiple aggravating factors and, (2) fails to instruct the jury that unanimity is required. Under California's DSL, before a court may rely upon an aggravating factor in sentencing, such factor must be proved at trial beyond a reasonable doubt to either the court or a jury pursuant to Penal Code §1170(b)(2) and the Sixth and Fourteenth Amendments to the U.S. Constitution. This new instruction improperly combines two possible aggravating factors in the language found in CA Rule of Court, rule 4.421(a)(5): "*The defendant induced a minor to commit **or** assist in the commission of the crime*". (Emphasis supplied.) Clearly, subd. (a)(5) contains two separate and distinct aggravating factors. These are not synonymous factors as each has a different definition for the jury to consider. However, for aggravation under this subdivision, the jury need only find one of the two. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." As presently drafted, this instruction is unconstitutional. For example, it seemingly permits some members of the jury to find one factor such as "inducing the minor to commit the crime" while allowing others to conclude that defendant "induced the minor to assist in the commission of the crime". The bracketed optional language, "*You may not find the allegation proven unless all of you agree that the People have proved at least one of the following…*" is of limited usefulness. It provides the judge no guidance as to when it must be given and if the full paragraph is given it will undoubtedly confuse the jury.	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the committee does not agree that the instruction improperly combines multiple aggravating factors. The committee also does not agree that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

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			Consistent with *Apprendi, supra*., and *Cunningham v. California* (2007) 549 U.S. 270, this instruction must be redrafted to unambiguously require jury unanimity as to only one of the two listed aggravating factors per instruction. Should the prosecution seek to present more than one aggravating factor to the jury for a single offense then a separate instruction for each aggravating factor should be required.	
New 3228	Orange County Public Defender Office, by Adam Vining, Assistant Public Defender.	N	This instruction improperly combines multiple aggravating circumstances. Each circumstance is reasonably likely to be based on different acts. It should be split into four different instructions to avoid amalgamating. 1) Induced a minor to commit 2) Induced a minor to assist Unanimity - The instruction states "you need not all agree on the act[s] or conduct which constitute…." However, unanimity is required as to the act or course of conduct that would prove each. The proposed instruction is erroneous because of the risk that the jury will divide on the discrete acts that constitute the aggravating factor(s) and not agree on any particular factor(s). This would result in the jury amalgamating evidence of multiple acts—none of which have been proven beyond a reasonable doubt—to conclude that the defendant must have done something sufficient to find true the aggravating factor.	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. The committee also does not agree that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
New 3228	San Diego Primary Public Defender's Office, by Troy Britt, Deputy Public Defender	N	The Legislature, in Penal Code sections 1170.71 and 1170.72, provided for circumstances where a minor was used to commit or assisted in committing a crime. Allowing the Judiciary's own body of work – the Rules of Court – to be used for selecting terms within a statutory scheme for what were intended to be judicial guidelines nullifies the Legislature's decision. Because the Legislature created a similar aggravating factor, the Judicial Counsel exceeds its function by suggesting that a judicially created aggravating factor, if found true	The committee is not aware of any case law that supports the commenter's argument that the statutory definition is the only permissible definition for aggravating a sentence.

Instruction No.	Commenter	Position	Comment	Committee Response
			beyond a reasonable doubt, can be used by a court to exceed the statutory maximum sentence set by the Legislature.	
			The word "induced" is not currently defined in the jury instructions. The proposed jury instruction, however, attempts to define "Induced" as "persuaded, convinced, influenced, or instructed." The word and definition are vague and do not provide adequate notice or guidance. And even if there was marginal guidance, nothing constrains the jurors when they do not need to agree on which acts or conduct constitute the inducement.	The committee believes that the proposed definitions adequately inform the jury.
New 3229	Santa Barbara Public Defender's Office, et al.	AM	[A threat is an expression of a person's intention to inflict evil, injury, or damage. To threaten a person is to convey a threat, specifically intending that the threat be received by the person who is the subject of the threat, and that the person take it seriously.] [A threat may be oral or written and may be implied by a pattern of conduct or a combination of statements and conduct.]	The proposed definition is too narrow. The factor relates to the common understanding of a threat, not the definition encompassed in Penal Code section 422.
			~~[The defendant does not have to communicate the threat directly to the intended victim, but may do so through someone else.]~~ [Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act [or intend to have someone else do so].]	The committee disagrees with the suggestion to delete.
			[Dissuade means to turn a person toward or against doing something by the use of persuasive communication. To dissuade a person is to intentionally communicate information, through words or actions, to that person, with the intent that the person turn toward or against a particular course of action as a result.	The committee prefers the draft's current definition of "dissuade" which is clearer than the proposed replacement.
			[Suborned perjury means encouraged, induced, or assisted witnesses to willfully make [a]false statement[s] under oath. In order to find that the defendant suborned perjury, the People must prove, beyond a	The committee agrees with this suggested language and has added it to the instruction.

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Instruction No.	Commenter	Position	Comment	Committee Response
			reasonable doubt, not only that the sworn statement was actually false, but also that the defendant, at the time he encouraged, induced, or assisted the witness(es) to make the statement, knew that it was false. Induced means persuaded, convinced, influenced, or instructed.]	
New 3229	Orange County Bar Association, by Daniel S. Robinson, President.	N	As will be explained, the proposed instruction has two legal errors which render it as drafted unconstitutional; namely, (1) it improperly combines multiple aggravating factors and, (2) fails to instruct the jury that unanimity is required. Under California's DSL, before a court may rely upon an aggravating factor in sentencing, such factor must be proved at trial beyond a reasonable doubt to either the court or a jury pursuant to Penal Code §1170(b)(2) and the Sixth and Fourteenth Amendments to the U.S. Constitution. This new instruction improperly combines multiple possible aggravating factors found in CA Rule of Court, rule 4.421(a)(6): "*The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process*". (Emphasis supplied.) Clearly, subd. (a)(6) contains several separate and distinct aggravating factors. These are not synonymous factors as each has a different definition for the jury to consider. However, for aggravation under this subdivision, the jury need only find one. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." As presently drafted, this instruction is unconstitutional. For example, it seemingly permits some members of the jury to find that "*defendant threatened a witness*" while allowing other jurors to find "*defendant prevented a witness from testifying*". The bracketed optional language, "*You may not find the allegation proven unless all of you agree that the People have proved at least one*	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. The committee also does not agree that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

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Instruction No.	Commenter	Position	Comment	Committee Response
			of the following…" is of limited usefulness. It provides the judge no guidance as to when it must be given and if the full paragraph is given it will undoubtedly confuse the jury as it suggests that they do not have to be unanimous. Similarly, the paragraph which instructs the jury as to proof of the allegation is equally confusing and suggests unanimity is not required. Consistent with *Apprendi, supra*., and *Cunningham v. California* (2007) 549 U.S. 270, this instruction must be redrafted to unambiguously require jury unamimity as to only one of the listed aggravating factors per instruction. Should the prosecution seek to present more than one aggravating factor to the jury for a single offense then a separate instruction for each aggravating factor should be required.	
New 3229	Orange County Public Defender Office, by Adam Vining, Assistant Public Defender.	N	This instruction improperly combines multiple aggravating circumstances. Each circumstance is reasonably likely to be based on different acts. For example, 6 jurors may find the defendant threatened his mother on the date of arrest while the other 6 may find the defendant dissuaded his girlfriend from testifying through a phone call made from jail. It should be split into three different instructions to avoid amalgamating. 1) Threatened 2) Prevented 3) Dissuaded Unanimity - The instruction states "you need not all agree on the act[s] or conduct which constitute…." However, unanimity is required as to the act or course of conduct that would prove each. The proposed instruction is erroneous because of the risk that the jury will divide on the discrete acts that constitute the aggravating factor(s) and not agree on any particular factor(s). This would result in the jury amalgamating evidence of multiple acts—none of which have been proven beyond a reasonable doubt—to conclude that the defendant must have done something sufficient to find true the aggravating factor.	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. The committee also does not agree that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

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Instruction No.	Commenter	Position	Comment	Committee Response
New 3229	San Diego Primary Public Defender's Office, by Troy Britt, Deputy Public Defender	N	The Legislature, in Penal Code sections 1170.85 (enhancement for threatening, preventing, or dissuading witnesses) and 136.1 (crime of preventing or dissuading witness or victim from testifying or doing other acts) addressed this issue. Allowing the Judiciary's own body of work – the Rules of Court – to be used for selecting terms within a statutory scheme for what were intended to be judicial guidelines nullifies the Legislature's decision. Because the Legislature created a similar aggravating factor, the Judicial Counsel exceeds its function by suggesting that a judicially created aggravating factor, if found true beyond a reasonable doubt, can be used by a court to exceed the statutory maximum sentence set by the Legislature.	The committee is not aware of any case law that supports the commenter's argument that the statutory definition is the only permissible definition for aggravating a sentence.
			The proposed instruction proclaims to provide guidance to jurors and then fails to define in a meaningful way the terms used, including "other legal activity that interfered with the judicial process." Moreover, the proposed instruction does not require the jurors to agree on the acts or conduct that constitutes the aggravating factor. The proposed instruction is incapable of providing guidance. Like the description in *Brooks*, "whether the defendant 'unlawfully prevented or dissuaded witnesses from testifying … or in any other way illegally interfered with the judicial process' " whether a person threatened, prevented, dissuaded, or any other illegal activity that interfered with the judicial process in the current proposed jury instruction cannot be ascertained until after the trial. (*People v. Superior Court* (*Brooks*) (2007) 159 Cal.App.4th 1, 5-6.)	The committee believes that the proposed definitions adequately inform the jury. As stated previously, addressing the certainty or vagueness of the aggravating factors is not within the purview of the CALCRIM committee. Furthermore, arguments about vagueness concerns may be raised by counsel in individual cases.
New 3230	Santa Barbara Public Defender's Office, et. al.	AM	Planning refers to conduct before the crime preparing for its commission. Sophistication refers to conduct demonstrating knowledge ~~or awareness~~ of the complexities ~~or details~~ and subtleties involved in the cultivation and commission of ~~committing the~~ crime and can include conduct occurring before or after its commission. Professionalism refers to conduct demonstrating unusual experience or expertise in an activity or field or endeavor	The committee considered these proposed edits and added the word "particular" to modify the word "experience." The committee rejected the other suggested changes.

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Instruction No.	Commenter	Position	Comment	Committee Response
New 3230	Orange County Bar Association, by Daniel S. Robinson, President.	N	As will be explained, the proposed instruction has two legal errors which render it as drafted unconstitutional; namely, (1) it improperly combines multiple aggravating factors and, (2) fails to instruct the jury that unanimity is required. Under California's DSL, before a court may rely upon an aggravating factor in sentencing, such factor must be proved at trial beyond a reasonable doubt to either the court or a jury pursuant to Penal Code §1170(b)(2) and the Sixth and Fourteenth Amendments to the U.S. Constitution. This new instruction improperly combines three possible aggravating factors found in CA Rule of Court, rule 4.421(a)(8): "*The manner in which the crime was carried out indicates planning, sophistication, **or** professionalism*". (Emphasis supplied.) Clearly, subd. (a)(8) contains three separate and distinct aggravating factors. These are not synonymous factors as each has a different definition for the jury to consider. However, for aggravation under this subdivision, the jury need only find one of the three. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." As presently drafted, this instruction is unconstitutional. For example, it seemingly permits some members of the jury to find that "*the manner in which the crime was carried out showed planning*" while allowing to find "*sophistication*" and still others to conclude that the manner demonstrated "professionalism". The bracketed optional language, "*You may not find the allegation proven unless all of you agree that the People have proved at least one of the following…*" is of limited usefulness. It provides the judge no guidance as to when it must be given and if the full paragraph is given it will undoubtedly confuse the jury as it suggests that they do not have to be unanimous.	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. The committee also does not agree that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

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Instruction No.	Commenter	Position	Comment	Committee Response
			Consistent with *Apprendi, supra*., and *Cunningham v. California* (2007) 549 U.S. 270, this instruction must be redrafted to unambiguously require jury unamimity as to only one of the three listed aggravating factors per instruction. Should the prosecution seek to present more than one aggravating factor to the jury for a single offense then a separate instruction for each aggravating factor should be required.	
New 3230	Orange County Public Defender Office, by Adam Vining, Assistant Public Defender.	N	This instruction improperly combines multiple aggravating circumstances. Each circumstance is reasonably likely to be based on different acts. For example, 6 jurors may find the defendant planned to rob the bank while the other 6 may find the defendant exhibited professionalism because he took the manager into the safe. It should be split into three different instructions to avoid amalgamating. 1) Planning 2) Sophistication 3) Professionalism Unanimity - The instruction states "you need not all agree on the act[s] or conduct which constitute…." However, unanimity is required as to the act or course of conduct that would prove each. The proposed instruction is erroneous because of the risk that the jury will divide on the discrete acts that constitute the aggravating factor(s) and not agree on any particular factor(s). This would result in the jury amalgamating evidence of multiple acts—none of which have been proven beyond a reasonable doubt—to conclude that the defendant must have done something sufficient to find true the aggravating factor.	The rule of court does not require a finding concerning a specific act; instead, the rule only refers to qualitative descriptions of the defendant's conduct related to a single count of conviction. Therefore, the instruction does not improperly combine multiple aggravating factors. The committee also does not agree that a unanimity requirement exists for each qualitative description within an aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
New 3230	San Diego Primary Public Defender's Office, by Troy Britt, Deputy Public Defender.	N	The proposed definitions do little more than restate the word being defined—planning is defined as preparing, sophistication is defined as knowledge or awareness of the complexities or details involved, and professionalism is defined as conduct demonstrating experience or expertise. Under the proposed instructions, someone who picked up a rock, broke a car window, and drove a car away could conceivably receive an upper term for planning the crime by picking up the rock,	The committee believes that the proposed definitions adequately inform the jury.

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			exercising sophistication for knowing to break the car window, and exhibiting professionalism for demonstrating experience driving the car away. The proposed instruction is overly broad. Nearly every crime where a person thinks about committing the crime, rather than spontaneously acting, could be sentenced to the upper term. To ensure that no one is left out, the proposed instruction does not require unanimity about which acts or conduct demonstrate that the manner of committing the crime involves planning, sophistication, or professionalism.	As stated previously, addressing the certainty or vagueness of the aggravating factors is not within the purview of the CALCRIM committee. Furthermore, arguments about vagueness concerns may be raised by counsel in individual cases.
New 3231	Santa Barbara Public Defender's Office, et. al.	AM	An item is of "great" monetary value if, based on its fair market value, its worth is remarkable, when compared to the threshold amount required for the offense and/or other evidence of the value of items taken in average or typical cases.	The committee considered this additional language but believes that the current draft adequately informs the jury.
New 3231	Orange County Bar Association, by Daniel S. Robinson, President.	N	1. In the Bench Notes, the subsections of the Rules of Court should be listed in order to make it clear which Aggravating Factor the instruction applies to. Many of the Aggravating Factors have similar names and it gets confusing. This would be listed as rule 4.421(a)(9) instead of 4.421. 2. In the Authority section, the cite to *People v. Wright* inaccurately states the law. The black letter of the holding was that the trial court "made no error" in considering the losses of $2300 and $3250. a. The portion stating "It would APPEAR out of line to impose the upper term on the basis of monetary losses [alone]..." is dicta. b. Furthermore, the Cal. Supreme Court vacated the holding, ruling only that "We agree with the [DCA's] resolution of these issues." c. Thus, there is no legal authority holding that losses of $2300 and $3250 do not qualify as "Great Monetary Value."	The specific applicable subsection is listed in the authority section for each instruction. It is unnecessary to list it twice. The committee has changed the description in the citation to state: "losses of $2,300 and $3,250 qualified."
New 3231	Orange County Public Defender Office, by	N	This instruction is vague as written, and it would violate due process protections to give this instruction. The instruction requires that everyone agree the amount was "great," but not that everyone agrees	The committee believes that the draft's proposed definition adequately informs the jury. The

Instruction No.	Commenter	Position	Comment	Committee Response
	Adam Vining, Assistant Public Defender.		what "great" means. Here, the word "great" is not defined. Where there is no technical definition, the jury is instructed to use the common, everyday definition. However, "great," as defined by Merriam Webster is not a helpful guideline, as it simply says "notably large in size." "Great" essentially has a subjective definition, because a great amount for one juror might not be a great amount for another juror. The jury needs clear direction. The instruction should at least include—within the instruction, not the bench notes—that courts have rejected amounts as high as $3200 as being great, and have even suggested that "great" might be at least $25,000. (*People v. Bejarano* (1981) 114 Cal.App.3d 693, 705-706.) In addition to failing to provide the jury with useful guidelines, this does not adequately state what the proscribed conduct is. The subjective, vague nature of the word "great" means a reasonable person would not know whether their conduct would result in a lengthier prison term or not.	committee disagrees with the suggestion to add the specific facts of these case holdings into the instruction itself.
New 3231	San Diego Primary Public Defender's Office, by Troy Britt, Deputy Public Defender.	N	The proposed instruction is overly broad and does not have a set definition. The California Supreme Court specifically addressed the problem created by using the vague term "great monetary value" in *Sandoval*. What guidance does "great monetary value" provide to jurors? Particularly when the jurors do not have to agree on the specific monetary value? This is the epitome of creating a vague or subjective standard, requires imprecise quantitative or comparative evaluation, and would be difficult to determine how the jury would resolve the issue. (*Sandoval, supra,* 41 Cal.4th at pp. 839-841.)	The committee believes that the draft's proposed definition adequately informs the jury. As stated previously, addressing the certainty or vagueness of the aggravating factors is not within the purview of the CALCRIM committee. Furthermore, vagueness concerns may be raised by counsel in individual cases.
New 3232	Santa Barbara Public Defender's Office, et. al.	AM	[A Quantity is "Large" if it exceeds most other things of like kind. In determining whether the quantity was large, you may consider all evidence presented on the issue of amount, including evidence comparing the quantity of contraband in the instant case to the statutory threshold or to quantities seized in similar cases.] https://www.merriam-webster.com/dictionary/large	The committee considered adding this suggested language but believes that the instructional draft adequately informs the jury.

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Instruction No.	Commenter	Position	Comment	Committee Response
New 3232	Orange County Bar Association, by Daniel S. Robinson, President.	N	In the Authority section, a cite to *People v. Maese*, 105 CA3d 710, would be appropriate ("Aggravation of defendant's sentence for possession of heroin and narcotics paraphernalia was proper based on a showing that he was in possession of almost one-half ounce of heroin.")	The committee previously considered including this case but decided against it because the opinion relies on a now repealed statutory prohibition.
New 3232	Orange County Public Defender Office, by Adam Vining, Assistant Public Defender.	N	This instruction is vague as written, as there is no technical definition of "large" provided, and any common definition of "large" would be too subjective to be helpful to fact finders. The instruction requires that everyone agree the amount was "large," but does not provide an objective standard for what is large, and does not require that everyone agree what the threshold for "large" is. This fails to provide useful instruction to the jury, and fails to adequately state what the proscribed conduct is.	The committee believes that the draft's proposed definition adequately informs the jury.
New 3232	San Diego Primary Public Defender's Office, by Troy Britt, Deputy Public Defender.	N	*The Legislature, in Penal Code section 1170.73 (quantity of controlled substance as aggravating circumstance) and Health and Safety Code section 11370.4 (Enhancement of punishment upon conviction related to unlawful possession or sale of controlled substances based on amount involved) addressed this issue. Allowing the Judiciary's own body of work – the Rules of Court – to be used for selecting terms within a statutory scheme for what were intended to be judicial guidelines nullifies the Legislature's decision. Because the Legislature created a similar aggravating factor, the Judicial Counsel exceeds its function by suggesting that a judicially created aggravating factor, if found true beyond a reasonable doubt, can be used by a court to exceed the statutory maximum sentence set by the Legislature. The proposed instruction is overly broad and does not have a set definition. The California Supreme Court specifically addressed the problem created by using the vague term "large quantity of contraband" in *Sandoval*. What guidance does "large quantity of contraband" provide to jurors? Particularly when the jurors do not have to agree on the specific	The committee is not aware of any case law that supports the commenter's argument that the statutory definition is the only permissible definition for aggravating a sentence. The committee believes that the draft's proposed definition adequately informs the jury. As stated previously, addressing the certainty or vagueness of the aggravating factors is not within

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			quantity? This is the epitome of creating a vague or subjective standard, requires imprecise quantitative or comparative evaluation, and would be difficult to determine how the jury would resolve the issue. (*Sandoval, supra,* 41 Cal.4th at pp. 839-841.)	the purview of the CALCRIM committee. Furthermore, vagueness concerns may be raised by counsel in individual cases.
New 3233	Orange County Public Defender Office, by Adam Vining, Assistant Public Defender.	N	Unanimity - This instruction allows jurors to disagree as to which conduct constitutes "taking advantage" of the trust. The instruction states "you need not all agree on the act[s] or conduct which constitute…." However, unanimity is required as to the act or course of conduct that would prove each. The proposed instruction is erroneous because of the risk that the jury will divide on the discrete acts that constitute the aggravating factor(s) and not agree on any particular factor(s). This would result in the jury amalgamating evidence of multiple acts—none of which have been proven beyond a reasonable doubt—to conclude that the defendant must have done *something* sufficient to find true the aggravating factor.	The committee believes that unanimity is not required regarding facts underlying the aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
New 3233	San Diego Primary Public Defender's Office, by Troy Britt, Deputy Public Defender.	N	The Legislature did not enact an enhancement or allegation for taking advantage of a position of trust or confidence. Allowing the Judiciary's own body of work – the Rules of Court – to be used for selecting terms within a statutory scheme for what were intended to be judicial guidelines nullifies the Legislature's decision. The proposed instruction is overly broad and does not have a set definition. The California Supreme Court specifically addressed the problem created by using the vague term "large quantity of contraband" in *Sandoval*. What guidance does "took advantage of a position of trust or confidence" provide to jurors? Particularly when the jurors do not need to agree on which acts or conduct constitutes the taking advantage of a position of trust or confidence to commit the crime? Despite the title of the proposed jury instruction, "Position of Trust or Confidence," more is required. The defendant must take advantage of that position of trust or confidence. None of the terms are defined. This is the epitome of creating a vague or subjective standard, requires imprecise quantitative	As previously stated, Senate Bill 567 implicitly encompassed the California Rules of Court governing aggravating sentencing factors. See also *People v. Black* (2007) 41 Cal..4th 799, 817. The committee believes that the draft's proposed definition adequately informs the jury. Addressing the certainty or vagueness of the aggravating factors is not within the purview of the CALCRIM committee. Furthermore, arguments based on vagueness concerns may be raised by counsel in individual cases.

Instruction No.	Commenter	Position	Comment	Committee Response
			or comparative evaluation, and would be difficult to determine how the jury would resolve the issue. (*Sandoval, supra,* 41 Cal.4th at pp. 839-841.)	
New 3234	Orange County Bar Association, by Daniel S. Robinson, President.	N	The first element should say "The defendant has engaged in A PATTERN of violent conduct," which is consistent with Rule of Court 4.421(b)(1).	The current version of rule 4.421(b)(1) does not use the word "pattern." It states: "The defendant has engaged in violent conduct that indicates a serious danger to society."
New 3234	Orange County Public Defender Office, by Adam Vining, Assistant Public Defender.	N	This instruction is impermissibly vague. It invites the jury to find every defendant found guilty of any crime a serious danger to society by providing no guidance. Unanimity - The instruction states "you do not need to agree on which violent conduct shows that the defendant is a serious danger to society." However, unanimity is required as to the act or course of conduct that would prove each. The proposed instruction is erroneous because of the risk that the jury will divide on the discrete acts that constitute the aggravating factor(s) and not agree on any particular factor(s). This would result in the jury amalgamating evidence of multiple acts—none of which have been proven beyond a reasonable doubt—to conclude that the defendant must have done *something* sufficient to find true the aggravating factor.	The committee believes that the proposed draft adequately instructs the jury. The committee believes that unanimity is not required regarding facts underlying the aggravating factor. See *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
New 3234	San Diego Primary Public Defender's Office, by Troy Britt, Deputy Public Defender.	N	*The Legislature wisely chose to forego including an aggravating factor or enhancement for being a serious danger to society. Allowing the Judiciary's own body of work – the Rules of Court – to be used for selecting terms within a statutory scheme for what were intended to be judicial guidelines nullifies the Legislature's decision. The proposed instruction is overly broad and does not have a set definition. What guidance does "serious danger to society" provide to jurors? Particularly when the jurors do not need to agree on which violent conduct shows that the defendant is a serious danger to society? Another attempt at defining "Society" results in additional vagueness.	As stated previously, Senate Bill 567 implicitly encompassed the California Rules of Court governing aggravating sentencing factors. See also *People v. Black* (2007) 41 Cal..4th 799, 817. The committee believes that the proposed draft adequately instructs the jury.

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

Instruction No.	Commenter	Position	Comment	Committee Response
			"Society" is defined as "a large group of people who live together in an organized way, making decisions about how to do things and sharing the work that needs to be done." Given this definition, to prove that the defendant's future conduct will pose a "serious danger to society," must the prosecutor prove beyond a reasonable doubt that the defendant's future actions will threaten a "large group of people?" Is "society" in "serious danger" if the defendant's future actions will threaten only one or two individuals? How is a jury supposed to decide what the defendant's conduct "indicates" about his future actions, or how many people the defendant's likely future actions will threaten? (See, e.g., *Johnson* at p. 597 [an allegation that requires abstract value judgements untethered from "real world facts or statutory elements" is unconstitutional].) Similarly, does "danger to society" refer to a physical threat? A financial threat? Or does "danger to society" require proof of an existential threat "to society?" Does a defendant actually pose a "danger to society" if one or two individuals may face future economic loss because of the defendant? What if the defendant is likely to start bar fights in the future, but any harm is unlikely to mean that the victims will lose their ability to contribute "to society?" Alternatively, given the plain language of the allegation, must the prosecution prove beyond a reasonable doubt that the defendant's future conduct will cause significant harm to a "large group of people" that will "seriously" threaten their ability to "live together in an organized way" or their ability to "mak[e] decisions about how to do things and shar[e] the work that needs to be done?" What establishes that the future danger to society is "serious?" Is the danger "serious" if there is a 1% chance that the defendant will pose a "danger to society?" 20%? 50%? (See, *Johnson* at p. 597 [an allegation requiring a finder-of-fact to make abstract value judgments is	Addressing the certainty or vagueness of the aggravating factors is not within the purview of the CALCRIM committee. Furthermore, arguments based on vagueness concerns may be raised by counsel in individual cases.

Instruction No.	Commenter	Position	Comment	Committee Response
			unconstitutionally vague, because the verdict is not tied to "real-world facts or statutory elements."].) Similarly, is the danger to society "serious" if the defendant is likely to commit a crime against one or two people but society as a whole will be unaffected? Is the danger "serious" if the defendant is likely to steal cars in the future? To get in fights? To sell drugs? Is a prosecutor required to present expert testimony establishing the likelihood that the defendant will reoffend and the nature of those future crimes? Is the defendant permitted to present expert testimony establishing that, given his age, prospects, support system, and probable prison sentence without this enhancement, he is statistically unlikely to reoffend? (See, *Johnson* at p. 597 [enhancement was unconstitutional, in part, because it was unclear if a necessary element required expert testimony].) This is the epitome of creating a vague or subjective standard, requires imprecise quantitative or comparative evaluation, and would be difficult to determine how the jury would resolve the issue. (*Sandoval, supra,* 41 Cal.4th at pp. 839-841.)	

CALCRIM Proposed Changes: Table of Contents

Instruction Number	Instruction Title
NEW 3224	Aggravating Factor: Great Violence, Great Bodily Harm, Threat of Great Bodily Harm, or Other Acts
NEW 3225	Aggravating Factor: Armed With or Used a Weapon
NEW 3226	Aggravating Factor: Particularly Vulnerable Victim
NEW 3227	Aggravating Factor: Induced Others or Occupied Leadership Position
NEW 3228	Aggravating Factor: Induced Minor
NEW 3229	Aggravating Factor: Threatened, Prevented, Dissuaded, Etc. Witnesses
NEW 3230	Aggravating Factor: Planning, Sophistication, or Professionalism
NEW 3231	Aggravating Factor: Taking or Damage of Great Monetary Value
NEW 3232	Aggravating Factor: Large Quantity of Contraband
NEW 3233	Aggravating Factor: Position of Trust or Confidence
NEW 3234	Aggravating Factor: Serious Danger to Society

301. Single Witness's Testimony

[Unless I instruct you otherwise,] (The/the) testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.

New January 2006; Revised April 2010, February 2012, February 2014, September 2017, March 2019, March 2023

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction on this issue in every case. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884–885 [123 Cal.Rptr. 119, 538 P.2d 247].)

Give the bracketed phrase if any testimony requires corroboration. See: Cal. Const., art. I, § 18 [treason]; Pen. Code, §§ 1111 [accomplice testimony]; 1111.5 [in-custody informant]; 653f [solicitation of felony]; 118 [perjury]; 1108 [abortion and seduction of minor]; 532 [obtaining property by false pretenses].

AUTHORITY

- Instructional Requirements. ▸ Evid. Code, § 411; *People v. Rincon-Pineda, supra,* ~~(1975)~~ 14 Cal.3d at p.~~864,~~ 885 ~~[123 Cal.Rptr. 119, 538 P.2d 247]~~.
- Corroboration Required. ▸ *People v. Chavez* (1985) 39 Cal.3d 823, 831–832 [218 Cal.Rptr. 49, 705 P.2d 372].
- No Corroboration Requirement for Exculpatory Accomplice Testimony. ▸ *People v. Smith* (2017) 12 Cal.App.5th 766, 778-780 [218 Cal.Rptr.3d 892].
- This Instruction Upheld. ▸ *People v. Tran* (2022) 13 Cal.5th 1169, 1198–1201 [298 Cal.Rptr.3d 150, 515 P.3d 1210].

RELATED ISSUES

Uncorroborated Testimony of Defendant

The cautionary admonition regarding a single witness's testimony applies with equal force to uncorroborated testimony by a defendant. (*People v. Turner* (1990) 50 Cal.3d 668, 696, fn. 14 [268 Cal.Rptr. 706, 789 P.2d 887].)

Uncorroborated Testimony in Sex Offense Cases
In a prosecution for forcible rape, an instruction that the testimony of a single witness is sufficient may be given in conjunction with an instruction that there is no legal corroboration requirement in a sex offense case. Both instructions correctly state the law and because each focuses on a different legal point, there is no implication that the victim's testimony is more credible than the defendant's testimony. (*People v. Gammage* (1992) 2 Cal.4th 693, 700–702 [7 Cal.Rptr.2d 541, 828 P.2d 682] [resolving split of authority on whether the two instructions can be given together].)

SECONDARY SOURCES

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, § 125.

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

335. Accomplice Testimony: No Dispute Whether Witness Is Accomplice

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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 (a statement/ [or] testimony) of an accomplice that tends to incriminate the defendant to convict the defendant only if:

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

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

AND

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

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, 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.

New January 2006; Revised June 2007, April 2010, August 2012, February 2016, March 2019, March 2023

BENCH NOTES

Instructional Duty

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

"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 p. 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, supra,* ~~(2004)~~ 34 Cal.4th at p.~~1,~~ 105 ~~[17 Cal.Rptr.3d 710, 96 P.3d 30]~~.)

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

If the court concludes that the corroboration requirement applies to an out-of-court statement, use the word "statement" throughout the instruction. (See discussion in Related Issues section 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, supra,* ~~(1998)~~ 18 Cal.4th at p.~~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, supra,* ~~(1997)~~ 16 Cal.4th at p.~~635,~~ 679 ~~-~~[66 Cal.Rptr.2d 573, 941 P.2d 752].
- This Instruction Upheld. ▸ *People v. Tran* (2022) 13 Cal.5th 1169, 1198–1201 [298 Cal.Rptr.3d 150, 515 P.3d 1210]; *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].
- No Corroboration Requirement for Exculpatory Accomplice Testimony. ▸ *People v. Smith, supra,* ~~(2017)~~ 12 Cal.App.5th at pp.~~766,~~ 778-780 ~~[218 Cal.Rptr.3d 892]~~.

SECONDARY SOURCES

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, §§ 108, 109, 118, 122.

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, §§ 686, 738, 739.

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] (You/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 against the defendant 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].

This supporting evidence requirement does not apply where the testimony of an in-custody informant is offered for any purpose other than proving (guilt/ [or] a special circumstance/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 statement 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, February 2016, October 2021, March 2023

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].
- This Instruction Upheld. ▸ *People v. Tran* (2022) 13 Cal.5th 1169, 1198–1201 [298 Cal.Rptr.3d 150, 515 P.3d 1210].

SECONDARY SOURCES

2 Witkin, California Evidence (5th ed. 2012) Witnesses, § 20.

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, §§ 120, 123.

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).

350. Character of Defendant

You have heard ~~character~~ testimony that the defendant (is a _____ *<insert character trait relevant to crime[s] committed >* **person/ [or] has a good reputation for _____** *<insert character trait relevant to crime[s] committed >* **in the community where (he/she) lives or works).**

Evidence of the defendant's character for _____ *<insert character trait relevant to crime[s] committed >* **can by itself create a reasonable doubt [whether the defendant committed _____***<insert name[s] of alleged offenses[s] and count[s], e.g., battery, as charged in Count 1>*]**. However, evidence of the defendant's ~~good~~ character for _____** *<insert character trait>* **may be countered by other evidence of (his/her) ~~bad~~ character for the same trait. You must decide the meaning and importance of the character evidence.**

[If the defendant's character for certain traits has not been discussed among those who know (him/her), you may assume that (his/her) character for those traits is good.]

You may take that testimony into consideration along with all the other evidence in deciding whether the People have proved that the defendant is guilty beyond a reasonable doubt.

New January 2006; Revised August 2012, March 2023

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction on defendant's character; however, it must be given on request. (*People v. Bell* (1875) 49 Cal. 485, 489–490 [jury should be instructed that evidence of good reputation should be weighed as any other fact established and may be sufficient to create reasonable doubt of guilt]; *People v. Jones* (1954) 42 Cal.2d 219, 222 [266 P.2d 38] [character evidence may be sufficient to create reasonable doubt of guilt]; *People v. Wilson* (1913) 23 Cal.App. 513, 523–524 [138 P. 971] [court erred in failing to give requested instruction or any instruction on character evidence].)

AUTHORITY

- Instructional Requirements. ▸ *People v. Bell, supra,* ~~(1875)~~ 49 Cal. at pp.~~485,~~ 489–490; *People v. Wilson, supra,* ~~(1913)~~ 23 Cal.App. ~~513,~~at pp. 523–524 ~~[138 P. 971]~~; *People v. Jones, supra,* ~~(1954)~~ 42 Cal.2d at p.~~219,~~ 222 ~~[266 P.2d 38]~~.
- Character Evidence Must Be Relevant to Offense Charged. ▸ *People v. Taylor* (1986) 180 Cal.App.3d 622, 629 [225 Cal.Rptr. 733].
- Admissibility. ▸ Evid. Code, §§ 1100–1102.

RELATED ISSUES

No Discussion of Character Is Evidence of Good Character

The fact that the defendant's character or reputation has not been discussed or questioned among those who know him or her is evidence of the defendant's good character and reputation. (*People v. Castillo* (1935) 5 Cal.App.2d 194, 198 [42 P.2d 682].) However, the defendant must have resided in the community for a sufficient period of time and become acquainted with the community in order for his or her character to have become known and for some sort of reputation to have been established. (See Evid. Code, § 1324 [reputation may be shown in the community where defendant resides and in a group with which he or she habitually associates]; see also *People v. Pauli* (1922) 58 Cal.App. 594, 596 [209 P. 88] [witness's testimony about defendant's good reputation in community was inappropriate where defendant was a stranger in the community, working for a single employer for a few months, going about little, and forming no associations].)

Business Community

The community for purposes of reputation evidence may also be the defendant's business community and associates. (*People v. Cobb* (1955) 45 Cal.2d 158, 163 [287 P.2d 752].)

SECONDARY SOURCES

1 Witkin, California Evidence (5th ed. 2012) Circumstantial Evidence, § 55.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.22[3][d], [e][ii], Ch. 83, *Evidence*, § 83.12[1] (Matthew Bender).

352. Character of Victim and of Defendant

You have heard testimony that _____<*insert name of alleged victim*> **((is/was) a (violent/_____** <*insert character trait*>**) person/(has/had) a character trait for (violence/_____**<*insert character trait*>**))[and testimony that _____**<*insert name of alleged victim*> **(is/was) (not a violent person/does not have a character trait for violence/_____**<*insert character trait*>**)]. [You have also heard testimony that the defendant (is a violent person/has a character trait for violence)[and testimony that the defendant (is not a violent person/does not have a character trait for violence)].]**

<*Give only when specific conduct evidence of the defendant's character for violence has been admitted*>
[The People presented evidence that the defendant (committed ([an]other offense[s]/the offense[s] of _____ <*insert description of alleged offense[s]*>**)/_____**<*insert description of alleged conduct admitted under Evid. Code, § 1103(b)*>**) and was not charged with (that/those offense[s]/act[s]) in this case.**

You may consider this evidence about the defendant 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 the fact is more likely than not to be 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 the defendant (is a violent person/has a trait for violence) and acted in conformity with that character trait.]

A person's character for (violence/_____<*insert other relevant trait*>**) may be shown by evidence of reputation, opinion, or specific acts. Evidence of a person's character for (violence/_____**<*insert other relevant trait*>**) may tend to show the person acted in conformity with that character trait. You may consider such evidence only for this limited purpose[and only in deciding the charges of _____**<*insert applicable counts*>**].**

You must decide the meaning and importance of the character evidence. Whether a person had a character for (violence/_____<*insert other relevant trait*>) and whether that person acted in conformity with that character trait are matters for you to decide.

[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 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/have) been proved]. The People must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt.**

You may consider the testimony regarding character along with all the other evidence in deciding whether the People have proved that the defendant is guilty beyond a reasonable doubt.

New March 2023

BENCH NOTES

Instructional Duty

No case holds that a trial court has a sua sponte duty to instruct on the use of character evidence admitted under Evidence Code section 1103. However, the court should give an instruction on request. (See Evid. Code, § 355.)

AUTHORITY

- Admissibility. ▸ Evid. Code, § 1103.
- "Victim" Defined. ▸ *People v. Tackett* (2006) 144 Cal.App.4th 445, 455 [50 Cal.Rptr.3d 449].
- "Character Evidence" Defined. ▸ *People v. Myers* (2007) 148 Cal.App.4th 546, 552–553 [56 Cal.Rptr.3d 27].

- Statute Constitutional. ‣ *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1173 [13 Cal.Rptr.2d 176].
- Defendant's Character for Violence Must Be Relevant to Material Issue. ‣ *People v. Fuiava* (2012) 53 Cal.4th 622, 700 [137 Cal.Rptr.3d 147, 269 P.3d 568].
- Analysis Under Evidence Code Section 352 Applies. ‣ *People v. Fuiava, supra,* 53 Cal.4th at p. 700.
- Similar Instruction Upheld. ‣ *People v. Fuiava, supra,* 53 Cal.4th at pp. 694–695.
- 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], abrogated on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176 [185 Cal.Rptr.3d 431, 345 P.3d 62].

358. Evidence of Defendant's Statements

You have heard evidence that the defendant made [an] [oral] [and] [a] [written] statement[s] (before the trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in whole or in part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s].

[Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]

New January 2006; Revised June 2007, December 2008, February 2014, August 2015, September 2017, September 2020, March 2023

BENCH NOTES

Instructional Duty

There is no sua sponte duty to give this instruction. ~~-~~*People v. Diaz* (2015) 60 Cal.4th 1176, 1190 [185 Cal.Rptr.3d 431, 345 P.3d 62].

Give the bracketed cautionary instruction on request if there is evidence of an incriminating out-of-court oral statement made by the defendant. (*People v. Diaz, supra,* ~~(2015)~~ 60 Cal.4th ~~1176~~at p. 1192 ~~[185 Cal.Rptr.3d 431, 345 P.3d 62]~~.) In the penalty phase of a capital trial, the bracketed paragraph should be given only if the defense requests it. (*People v. Livaditis* (1992) 2 Cal.4th 759, 784 [9 Cal.Rptr.2d 72, 831 P.2d 297].)

The bracketed cautionary instruction is not required when the defendant's incriminating statements are written or tape-recorded. (*People v. Gardner* (1961) 195 Cal.App.2d 829, 833 [16 Cal.Rptr. 256]; *People v. Hines* (1964) 61 Cal.2d 164, 173 [37 Cal.Rptr. 622, 390 P.2d 398], disapproved on other grounds in *People v. Murtishaw* (1981) 29 Cal.3d 733, 774, fn. 40 [175 Cal.Rptr. 738, 631 P.2d 446]; *People v. Scherr* (1969) 272 Cal.App.2d 165, 172 [77 Cal.Rptr. 35]; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1200 [120 Cal.Rptr.2d 477, 47 P.3d 262] [admonition to view non-recorded statements with caution applies only to a defendant's incriminating statements].) If the jury heard both inculpatory and exculpatory, or only inculpatory, statements attributed to the defendant, give the

bracketed paragraph. If the jury heard only exculpatory statements by the defendant, do not give the bracketed paragraph.

If ~~the~~ a defendant ~~was a minor~~ suspected of murder ~~who~~ made a statement in a custodial interview that did not comply with Penal Code section 859.5, give the following additional instruction:

Consider with caution any statement tending to show defendant's guilt made by (him/her) during _____<*insert description of interview, e.g., interview with Officer Smith of October 15, 2013*.>

When a defendant's statement is a verbal act, as in conspiracy cases, this instruction applies. ~~(~~*People v. Bunyard* (1988) 45 Cal.3d 1189, 1224 [249 Cal.Rptr. 71, 756 P.2d 795]; *People v. Ramirez* (1974) 40 Cal.App.3d 347, 352 [114 Cal.Rptr. 916]; see also, e.g., *Peabody v. Phelps* (1858) 9 Cal. 213, 229 [similar, in civil cases].

When a defendant's statement is an element of the crime, as in conspiracy or criminal threats (Pen. Code, § 422), this instruction still applies. (*People v. Diaz*, *supra*, ~~(2015)~~ 60 Cal.4th at p. 1187~~1176 [185 Cal.Rptr.3d 431, 345 P.3d 62]~~, overruling *People v. Zichko* (2004) 118 Cal.App.4th 1055, 1057 [13 Cal.Rptr.3d 509].)

Related Instructions

If out-of-court oral statements made by the defendant are prominent pieces of evidence in the trial, then CALCRIM No. 359, *Corpus Delicti: Independent Evidence of a Charged Crime*, may also have to be given together with the bracketed cautionary instruction.

AUTHORITY

- Instructional Requirements. ▸ *People v. Diaz*, *supra*, ~~(2015)~~ 60 Cal.4th at pp. 1187, 1190, 1192~~1176 [185 Cal.Rptr.3d 431, 345 P.3d 62]~~; ~~*People v. Livaditis*, *supra*, (1992)~~ 2 Cal.4th at p.~~759,~~ 784~~[9 Cal.Rptr.2d 72, 831 P.2d 297]~~.
- Custodial Statements by ~~Minors~~ Defendants Suspected of Murder. ▸ Pen. Code, § 859.5(e)(3)~~, effective 1/1/2014~~.
- This Instruction Upheld. ▸ *People v. Tran* (2022) 13 Cal.5th 1169, 1198–1201 [298 Cal.Rptr.3d 150, 515 P.3d 1210].

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial §§ 683-686, 723, 724, 733.

1 Witkin, California Evidence (5th ed. 2012) Hearsay § 52.

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial § 127.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 30, *Confessions and Admissions*, § 30.57 (Matthew Bender).

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 the fact~~it~~ is more likely than not to be ~~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:

<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, February 2016, August 2016, March 2023

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], abrogated on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176 [185 Cal.Rptr.3d 431, 345 P.3d 62]; *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, supra,* ~~(1994)~~ 7 Cal.4th at pp.~~380,~~ 393–394 ~~[27 Cal.Rptr.2d 646, 867 P.2d 757]~~; *People v. Balcom, supra,* ~~(1994)~~ 7 Cal.4th at p.~~414,~~ 422 ~~[27 Cal.Rptr.2d 666, 867 P.2d 777]~~.
- Degree of Similarity Required. ▸ *People v. Ewoldt, supra,* ~~(1994)~~ 7 Cal.4th at pp.~~380,~~ 402–404 ~~[27 Cal.Rptr.2d 646, 867 P.2d 757]~~; *People v. Balcom, supra,* ~~(1994)~~ 7 Cal.4th at p.~~414,~~ 424 ~~[27 Cal.Rptr.2d 666, 867 P.2d 777]~~.

- Analysis Under Evidence Code Section 352 Required. ‣ *People v. Ewoldt, supra,* (1994) 7 Cal.4th at p.380, 404 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Balcom, supra,* (1994) 7 Cal.4th at pp.414, 426–427 [27 Cal.Rptr.2d 666, 867 P.2d 777].
- Instructional Requirements. ‣ *People v. Collie, supra,* (1981) 30 Cal.3d at pp.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, supra,* (1997) 15 Cal.4th at p.312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708].
- Two Burdens of Proof Pose No Problem fFor Properly Instructed Jury. ‣ *People v. Virgil* (2011) 51 Cal.4thth 1210, 1258-1259 [126 Cal.Rptr.3d 465, 253 P.3d 553].

RELATED ISSUES

Circumstantial Evidence—Burden of Proof

The California Supreme Court has upheld CALJIC Nos. 2.50, 2.50.1, and 2.50.2 on the burden of proof for uncharged crimes and CALJIC No. 2.01 on sufficiency of circumstantial evidence. (*People v. Virgil, supra,* (2011) 51 Cal.4th at pp.1210, 1258–1259 [126 Cal.Rptr.3d 465, 253 P.3d 553].) *Virgil* explained it was not error to permit consideration of evidence by two different evidentiary standards: "If the jury finds the facts sufficiently proven [by a preponderance of the evidence] for consideration, it must still decide whether the facts are sufficient, taken with all the other evidence, to prove the defendant's guilt beyond a reasonable doubt." (*Id.*Id. at pp. 1259–1260.) Jury instructions on the People's burden of proof and circumstantial evidence eliminate any danger that the jury might use the preponderance of evidence standard to decide elemental facts or issues because together those instructions make clear that ultimate facts must be proved beyond a reasonable doubt. (*Ibid.*)

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, supra,* (1994) 7 Cal.4th at p.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, supra,* ~~(1994)~~ 7 Cal.4th at pp.~~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, supra,* ~~(1994)~~ 7 Cal.4th at pp.~~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].)

SECONDARY SOURCES

1 Witkin, California Evidence (5th ed. 2012) Circumstantial Evidence, §§ 76–97.

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

418. Coconspirator's Statements

In deciding whether the People have proved that (the defendant[s]/Defendant[s] _____ *<insert name[s] of defendant[s] if codefendant trial and this instruction does not apply to all defendants; see Bench Notes>*) **committed [any of] the crime[s] charged, you may not consider any statement made out of court by** _____ *<insert name[s] of coconspirator[s]>* **unless the People have proved by a preponderance of the evidence that:**

1. **Some evidence other than the statement itself establishes that a conspiracy to commit a crime existed when the statement was made;**

2. _____ *<insert name[s] of coconspirator[s]>* **(was/were) [a] member[s] of and participating in the conspiracy when (he/she/they) made the statement;**

3. _____ *<insert name[s] of coconspirator[s]>* **made the statement in order to further the goal of the conspiracy;**

AND

4. **The statement was made before or during the time that (the defendant[s]/Defendant[s]** _____ *<insert name[s] of defendant[s] if codefendant trial and this instruction does not apply to all defendants>*) **(was/were) participating in the conspiracy.**

A *statement* means an oral or written expression, or nonverbal conduct intended to be a substitute for an oral or written expression.

***Proof by a preponderance of the evidence* is a different standard of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that the fact~~it~~ is more likely than not to be ~~that the fact is~~ true.**

[You may not consider statements made by a person who was not a member of the conspiracy even if the statements helped accomplish the goal of the conspiracy.]

[You may not consider statements made after the goal of the conspiracy had been accomplished.]

New January 2006; Revised August 2016, March 2023

BENCH NOTES

Instructional Duty

It is an open question whether ~~T~~the court has a **sua sponte** duty to instruct on the use of a coconspirator's statement to incriminate a defendant. (See *People v. Prieto* (2003) 30 Cal.4th 226, 251–252 [133 Cal.Rptr.2d 18, 66 P.3d 1123]; *People v. Sully* (1991) 53 Cal.3d 1195, 1231–1232 [283 Cal.Rptr. 144, 812 P.2d 163].) On request, the court must give this instruction if the statement has been admitted under Evidence Code section 1223. (See Evid. Code, § 403(c)(1); see also *People v. Carter* (2003) 30 Cal.4th 1166, 1198 [135 Cal.Rptr.2d 553, 70 P.3d 981]; *People v. Lewis* (2001) 26 Cal.4th 334, 362 [110 Cal.Rptr.2d 272, 28 P.3d 34]; *People v. Marshall* (1996) 13 Cal.4th 799, 833 [55 Cal.Rptr.2d 347, 919 P.2d 1280]~~*People v. Jeffery* (1995) 37 Cal.App.4th 209, 215 [43 Cal.Rptr.2d 526]; *People v. Herrera* (2000) 83 Cal.App.4th 46, 63 [98 Cal.Rptr.2d 911]~~.)

The court **must also** give either CALCRIM No. 415, *Conspiracy*, or CALCRIM No. 416, *Evidence of Uncharged Conspiracy*, with this instruction.

If the coconspirator statement has been admitted against all defendants on trial, then use "the defendant[s]" in the first sentence and in element 4. If the coconspirator statement has been admitted under Evidence Code section 1223 against only one or some of the defendants on trial, insert the names of the defendants to whom this instruction applies where indicated. For example, if the prosecution is relying on a statement made by a defendant in the trial, the statement may be used against that defendant as an admission. However, as to the other defendants, the statement may be used only if it qualifies under Evidence Code section 1223 or another hearsay exception. In such cases, insert the names of the other codefendants where indicated in the first sentence and in element 4.

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

AUTHORITY

- Hearsay Exception for Coconspirator's Statements. ‣ Evid. Code, § 1223; *People v. Jeffery* (1995) 37 Cal.App.4th 209, 215 [43 Cal.Rptr.2d 526]; *People v. Lipinski* (1976) 65 Cal.App.3d 566, 575 [135 Cal.Rptr. 451].
- "Statement" Defined. ‣ Evid. Code, § 225.
- Burden of Proof. ‣ *People v. Herrera* (2000) 83 Cal.App.4th 46, 63 [98 Cal.Rptr.2d 911].
- Independent Evidence Conspiracy Existed at Time of Statement. ‣ *People v. Leach* (1975) 15 Cal.3d 419, 430, fn. 10, 436 [124 Cal.Rptr. 752, 541 P.2d 296].

SECONDARY SOURCES

1 Witkin, California Evidence (5th ed. 2012) Hearsay, § 135.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, §§ 141.01[5], 141.02 (Matthew Bender).

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

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

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

1. **The defendant committed [or attempted to commit]** _____ *<insert felony or felonies from Pen. Code, § 189>***;**

2. **The defendant intended to commit** _____ *<insert felony or felonies from Pen. Code, § 189>***;**

AND

3. **While committing [or attempting to commit]** _____~~,~~*<insert felony or felonies from Pen. Code, § 189>***, the defendant personally committed (an/the) act[s] that directly caused the death of another person.**

A person [who was the actual killer] may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether the defendant committed [or attempted to commit] _____ *<insert felony or felonies from Pen. Code, § 189>***, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder.** *<Make certain that all appropriate instructions on all underlying felonies are given.>*

[The defendant must have intended to commit the (felony/felonies) of _____ *<insert felony or felonies from Pen. Code, § 189>* **before or at the time that (he/she) caused the death.]**

<If the facts raise an issue whether the commission of the felony continued while a defendant was fleeing the scene, give the following sentence instead of CALCRIM No. 3261, While Committing a Felony: Defined—Escape Rule.>

[The crime of _____ <*insert felony or felonies from Pen. Code, § 189*> continues until a defendant has reached a place of temporary safety.]

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

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

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of any underlying felonies. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].) Give all appropriate instructions on all underlying felonies with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense.

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

When giving this instruction with CALCRIM No. 540B or with CALCRIM No. 540C, give the bracketed phrase [who was the actual killer].

The felonies that support a charge of first degree felony murder are arson, rape, carjacking, robbery, burglary, kidnapping, mayhem, train wrecking, sodomy, lewd or lascivious acts on a child, oral copulation, and sexual penetration. (See Pen. Code, § 189(a).)

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127 [287 P.2d 497]; *People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769].) Give the bracketed sentence that begins with "The defendant must have intended to commit the felony." For an instruction specially tailored to

robbery-murder cases, see *People v. Turner* (1990) 50 Cal.3d 668, 691 [268 Cal.Rptr. 706, 789 P.2d 887].

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

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

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

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

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

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

Drive-By Shooting

The drive-by shooting clause in Penal Code section 189 is not an enumerated felony for purposes of the felony-murder rule. (*People v. Chavez* (2004) 118 Cal.App.4th 379, 386–387 [12 Cal.Rptr.3d 837].) A finding of a specific intent to kill is required in order to find first degree murder under this clause. (~~(~~*Ibid.*~~)~~)

Related Instructions—Other Causes of Death

This instruction should be used only when the prosecution alleges that the defendant committed the act causing the death.

If the prosecution alleges that another coparticipant in the felony committed the fatal act, give CALCRIM No. 540B, *Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act*. If the evidence indicates that either the defendant or a coparticipant may have committed the fatal act, give both instructions.

When the alleged victim dies during the course of the felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants, give CALCRIM No. 540C, *Felony Murder: First Degree—Other Acts Allegedly Caused Death*. (Cf. *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166]; but see *People v. Garcia* (2022) 82 Cal.App.5th 956, 966–971 [299 Cal.Rptr.3d 131] [defendant liable as actual killer for robbing elderly victim who died of heart attack an hour later]; *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].)

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

AUTHORITY

- Felony Murder: First Degree. ▸ Pen. Code, § 189.
- Specific Intent to Commit Felony Required. ▸ *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1140 [124 Cal.Rptr.2d 373, 52 P.3d 572].
- Infliction of Fatal Injury. ▸ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Merger Doctrine Does Not Apply to First Degree Felony Murder. ▸ *People v. Farley* (2009) 46 Cal.4th 1053, 1118-1120 [96 Cal.Rptr.3d 191, 210 P.3d 361].

- Meaning of "Actual Killer." *People v. Garcia* (2020) 46 Cal.App.5th 123, 151 [259 Cal.Rptr.3d 600]; *People v. Lopez* (2022) 78 Cal.App.5th 1, 4 [293 Cal.Rptr.3d 272]; *People v. Vang* (2022) 82 Cal.App.5th 64, 88 [297 Cal.Rptr.3d 806]; *People v. Garcia* (2022) 82 Cal.App.5th 956, 966–971 [299 Cal.Rptr.3d 131].

RELATED ISSUES

Does Not Apply Where Felony Committed Only to Facilitate Murder

If a felony, such as robbery, is committed merely to facilitate an intentional murder, then the felony-murder rule does not apply. (*People v. Green* (1980) 27 Cal.3d 1, 61 [164 Cal.Rptr. 1, 609 P.2d 468], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99] [robbery committed to facilitate murder did not satisfy felony-murder special circumstance].) If the defense requests a special instruction on this point, see CALCRIM No. 730, *Special Circumstances: Murder in Commission of Felony*.

No Duty to Instruct on Lesser Included Offenses of Uncharged Predicate Felony

"Although a trial court on its own initiative must instruct the jury on lesser included offenses of *charged* offenses, this duty does not extend to *uncharged* offenses relevant only as predicate offenses under the felony-murder doctrine." (*People v. Silva, supra,* ~~(2001)~~ 25 Cal.4th at p.~~345,~~ 371 ~~[106 Cal.Rptr.2d 93, 21 P.3d 769]~~ [original italics]; see *People v. Cash* (2002) 28 Cal.4th 703, 736–737 [122 Cal.Rptr.2d 545] [no duty to instruct on theft as lesser included offense of uncharged predicate offense of robbery].)

Auto Burglary

Auto burglary may form the basis for a first degree felony-murder conviction. (*People v. Fuller* (1978) 86 Cal.App.3d 618, 622–623, 628 [150 Cal.Rptr. 515] [noting problems of applying felony-murder rule to nondangerous daytime auto burglary].)

Duress

"[D]uress can, in effect, provide a defense to murder on a felony-murder theory by negating the underlying felony." (*People v. Anderson* (2002) 28 Cal.4th 767, 784 [122 Cal.Rptr.2d 587, 50 P.3d 368] [dictum]; see also CALCRIM No. 3402, *Duress or Threats*.)

Imperfect Self-Defense

Imperfect self-defense is not a defense to felony murder because malice aforethought, which imperfect self-defense negates, is not an element of felony

murder. (See *People v. Tabios* (1998) 67 Cal.App.4th 1, 6–9 [78 Cal.Rptr.2d 753], disapproved on another ground in *People v. Chun* (2009) 45 Cal.4th 1172, 1198-1199 [91 Cal.Rptr.3d 106, 203 P.3d 425].)

Actual Killer vs. Aider and Abettor

The meaning of *actual killer* is literal. It is not enough that the defendant's act formed part of a series of events that resulted in the death, if the act itself would not cause death. (*People v. Garcia* (2020) 46 Cal.App.5th 123, 149–155 [259 Cal.Rptr.3d 600].)

SECONDARY SOURCES

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

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

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

730. Special Circumstances: Murder in Commission of Felony (Pen. Code, § 190.2(a)(17))

The defendant is charged with the special circumstance of murder committed while engaged in the commission of _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>* **[in violation of Penal Code section 190.2(a)(17)].**

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

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit)** _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***;**

2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit)** _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***;**

<Give element 3 if defendant did not personally commit or attempt felony.>

[3. If the defendant did not personally commit [or attempt to commit] _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***, then a perpetrator, (whom the defendant was aiding and abetting before or during the killing/ [or] with whom the defendant conspired), personally committed [or attempted to commit]** _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***;]**

AND

(3/4). (The defendant/_____ *<insert name or description of person causing death if not defendant>***) personally committed~~did~~ (an/the) act[s] that directly caused the death of another person.**

To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. [To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I (will give/have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit a crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You**

must apply those instructions when you decide whether the People have proved this special circumstance.

<Make certain that all appropriate instructions on all underlying felonies, aiding and abetting, and conspiracy are given.>

[The defendant must have (intended to commit[,]/ [or] aided and abetted/ [or] been a member of a conspiracy to commit) the (felony/felonies) of _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>* **before or at the time of the act causing the death.]**

[In addition, in order for this special circumstance to be true, the People must prove that the defendant intended to commit _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>* **independent of the killing. If you find that the defendant only intended to commit murder and the commission of _____** *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>* **was merely part of or incidental to the commission of that murder, then the special circumstance has not been proved.]**

New January 2006; Revised August 2006, April 2008, August 2013, March 2021, March 2023

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [66 Cal.Rptr.2d 573, 941 P.2d 752].) The court also has a **sua sponte** duty to instruct on the elements of any felonies alleged. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].)

If the evidence raises the potential for accomplice liability, the court has a **sua sponte** duty to instruct on that issue. Give CALCRIM No. 703, *Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17)*. If the homicide occurred on or before June 5, 1990, give CALCRIM No. 701, *Special Circumstances: Intent Requirement for Accomplice Before June 6, 1990*.

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

If the prosecution's theory is that the defendant committed or attempted to commit the underlying felony, then select "committed [or attempted to commit]" in

element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select "the defendant" in the first sentence. Give all appropriate instructions on any underlying felonies.

If the prosecution's theory is that the defendant aided and abetted or conspired to commit the felony, select one or both of these options in element 1 and the corresponding intent requirement in element 2. Give bracketed element 3. In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on any underlying felonies and on aiding and abetting and/or conspiracy with this instruction.

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

In addition, the court must give the final bracketed paragraph stating that the felony must be independent of the murder if the evidence supports a reasonable inference that the felony was committed merely to facilitate the murder. (*People v. Green* (1980) 27 Cal.3d 1, 61 [164 Cal.Rptr. 1, 609 P.2d 468], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834 fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99]; *People v. Clark* (1990) 50 Cal.3d 583, 609 [268 Cal.Rptr. 399, 789 P.2d 127]; *People v. Kimble* (1988) 44 Cal.3d 480]; *People v. Navarette* (2003) 30 Cal.4th 458, 505 [133 Cal.Rptr.2d 89, 66 P.3d 1182].)

Proposition 115 added Penal Code section 190.41, eliminating the corpus delicti rule for the felony-murder special circumstance. (Pen. Code, § 190.41; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298 [279 Cal.Rptr. 592, 807 P.2d 434].) If, however, the alleged homicide predates the effective date of the statute (June 6, 1990), then the court must modify this instruction to require proof of the corpus delicti of the underlying felony independent of the defendant's extrajudicial statements. (*Tapia v. Superior Court, supra,* 53 Cal.3d at p. 298.)

If the alleged homicide occurred between 1983 and 1987 (the window of time between *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 135 [197 Cal.Rptr. 79, 672 P.2d 862] and *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [240 Cal.Rptr. 585, 742 P.2d 1306]), then the prosecution must also prove intent to kill on the part of the actual killer. (*People v. Bolden* (2002) 29 Cal.4th 515, 560 [127

Cal.Rptr.2d 802, 58 P.3d 931]; *People v. Mendoza* (2000) 24 Cal.4th 130, 182 [99 Cal.Rptr.2d 485, 6 P.3d 150].) The court should then modify this instruction to specify intent to kill as an element.

AUTHORITY

- Special Circumstance. ▸ Pen. Code, § 190.2(a)(17).
- Specific Intent to Commit Felony Required. ▸ *People v. Valdez* (2004) 32 Cal.4th 73, 105 [8 Cal.Rptr.3d 271, 82 P.3d 296].
- Provocative Act Murder. ▸ *People v. Briscoe* (2001) 92 Cal.App.4th 568, 596 [112 Cal.Rptr.2d 401] [citing *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1081 [53 Cal.Rptr.2d 207]].
- Concurrent Intent. ▸ *People v. Mendoza, supra,* ~~(2000)~~ 24 Cal.4th at p.~~130,~~ 183 ~~[99 Cal.Rptr.2d 485, 6 P.3d 150]~~; *People v. Clark, supra,* ~~(1990)~~ 50 Cal.3d at pp.~~583,~~ 608–609 ~~[268 Cal.Rptr. 399, 789 P.2d 127]~~.
- Felony Cannot Be Incidental to Murder. ▸ *People v. Green, supra,* ~~(1980)~~ 27 Cal.3d at p.~~1,~~ 61 ~~[164 Cal.Rptr. 1, 609 P.2d 468], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834 fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99]~~; *People v. Mendoza, supra,* ~~(2000)~~ 24 Cal.4th at p.~~130,~~ 182 ~~[99 Cal.Rptr.2d 485, 6 P.3d 150]~~.
- Instruction on Felony as Incidental to Murder. ▸ *People v. Kimble, supra,* ~~(1988)~~ 44 Cal.3d at p.~~480,~~ 501 ~~[244 Cal.Rptr. 148, 749 P.2d 803]~~; *People v. Clark, supra,* ~~(1990)~~ 50 Cal.3d at p.~~583,~~ 609 ~~[268 Cal.Rptr. 399, 789 P.2d 127]~~; *People v. Navarette, supra,* ~~(2003)~~ 30 Cal.4th at p.~~458,~~ 505 ~~[133 Cal.Rptr.2d 89, 66 P.3d 1182]~~.
- Proposition 115 Amendments to Special Circumstance. ▸ *Tapia v. Superior Court, supra,* ~~(1991)~~ 53 Cal.3d at p.~~282,~~ 298 ~~[279 Cal.Rptr. 592, 807 P.2d 434]~~.
- Meaning of "Actual Killer." ▸ *People v. Garcia* (2020) 46 Cal.App.5th 123, 149–155 [259 Cal.Rptr.3d 600]; *People v. Lopez* (2022) 78 Cal.App.5th 1, 4 [293 Cal.Rptr.3d 272]; *People v. Vang* (2022) 82 Cal.App.5th 64, 88 [297 Cal.Rptr.3d 806]; *People v. Garcia* (2022) 82 Cal.App.5th 956, 966–971 [299 Cal.Rptr.3d 131].

RELATED ISSUES

Applies to Felony Murder and Provocative Act Murder

"The fact that the defendant is convicted of murder under the application of the provocative act murder doctrine rather than pursuant to the felony-murder doctrine

is irrelevant to the question of whether the murder qualified as a special-circumstances murder under former section 190.2, subdivision (a)(17). The statute requires only that the murder be committed while the defendant was engaged in the commission of an enumerated felony." (*People v. Briscoe, supra,* ~~(2001)~~ 92 Cal.App.4th at p.~~568,~~ 596 ~~[112 Cal.Rptr.2d 401]~~ [citing *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1081 [53 Cal.Rptr.2d 207]].)

Concurrent Intent to Kill and Commit Felony

"Concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance." (*People v. Mendoza, supra,* ~~(2000)~~ 24 Cal.4th at p.~~130,~~ 183 ~~[99 Cal.Rptr.2d 485, 6 P.3d 150]~~; *People v. Clark, supra,* ~~(1990)~~ 50 Cal.3d at pp.~~583,~~ 608–609 ~~[268 Cal.Rptr. 399, 789 P.2d 127]~~.)

Multiple Special Circumstances May Be Alleged

The defendant may be charged with multiple felony-related special circumstances based on multiple felonies committed against one victim or multiple victims of one felony. (*People v. Holt* (1997) 15 Cal.4th 619, 682 [63 Cal.Rptr.2d 782, 937 P.2d 213]; *People v. Andrews* (1989) 49 Cal.3d 200, 225–226 [260 Cal.Rptr. 583, 776 P.2d 285].)

Actual Killer vs. Aider and Abettor

The meaning of *actual killer*~~actual killer~~ is literal. It is not enough that the defendant's act formed part of a series of events that resulted in the death, if the act itself would not cause death. (*People v. Garcia* (2020) 46 Cal.App.5th 123, 149–155 [259 Cal.Rptr.3d 600].)

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 532–534, 536.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* § 87.13[17] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[2][b] (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 an ongoing organized 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)*>;**

AND

3. **Whose members collectively engage in or have engaged in a pattern of criminal gang activity.**

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

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

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

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

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

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

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

AND

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

Examples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant.

[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.]

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

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

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

New January 2006; Revised August 2006, June 2007, February 2014, February 2016, March 2022, March 2023

BENCH NOTES

Instructional Duty

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

There is a split in authority over the meaning of "collectively." (Compare *People v. Delgado* (2022) 74 Cal.App.5th 1067 [290 Cal.Rptr.3d 189] [two or more gang members must have committed each predicate offense]; *People v. Clark* (2022) 81 Cal.App.5th 133 [296 Cal.Rptr.3d 153] [pattern of criminal gang activity may be established either by (1) two gang members who separately committed crimes on different occasions, or (2) two gang members who committed a crime together on a single occasion], review granted October 19, 2022, S275746.)

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

On request, give the bracketed paragraph that begins with "If you find the defendant guilty of a crime in this case." (*People v. Sengpadychith* (2001) 26

Cal.4th 316, -322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].)

On request, give the bracketed paragraph that begins with "You may not find that there was a pattern of criminal gang activity." (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758]; see also Related Issues section 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. ▸ *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).
- Transferred Intent Under Penal Code Section 190.2(a)(22). ▸ *People v. Shabazz* (2006) 38 Cal.4th 55 [40 Cal.Rptr.3d 750, 130 P.3d 519].
- "Pattern of Criminal Gang Activity" Defined. ▸ Pen. Code, § 186.22(e), (g).
- Examples of Common Benefit. ▸ Pen. Code, § 186.22(g).
- "Felonious Criminal Conduct" Defined. ▸ *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140] [abrogated on other grounds by *People v. Castenada* (2000) 23 Cal.4th 743, 747–748 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Separate Intent From Underlying Felony. ▸ *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].
- Crimes Committed After Charged Offense Not Predicates. ▸ *People v. Duran, supra,* 97 Cal.App.4th at p. 1458.
- Proof of Sufficient Connection Among Gang "Subsets" and Umbrella Gang Required. ▸ *People v. Prunty* (2015) 62 Cal.4th 59, 81-85 [192 Cal.Rptr.3d 309, 355 P.3d 480].

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*, *supra,* ~~(2006)~~ 38 Cal.4th ~~55,~~at p. 66 ~~[40 Cal.Rptr.3d 750, 130 P.3d 519]~~; see CALCRIM No. 562, *Transferred Intent*.

SECONDARY SOURCES

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

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

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

761. Death Penalty: Duty of Jury

I will now instruct you on the law that applies to this [phase of the] case. [I will give you a copy of the instructions to use in the jury room.] [Each of you has a copy of these instructions to use in the jury room.]

[You must disregard all of the instructions I gave you earlier. I will give you a set of instructions that apply only to this phase of the trial. Some of these instructions will be the same or similar to instructions you have heard before. However, you must follow only this new set of instructions in this phase of the trial.]

You must decide whether (the/each) defendant will be sentenced to death or life in prison without the possibility of parole. It is up to you and you alone to decide what the penalty will be. [In reaching your decision, consider all of the evidence from the entire trial [unless I specifically instruct you not to consider something from an earlier phase].] Do not allow bias, prejudice, or public opinion to influence your opinion in any way.

You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions.

Pay careful attention to all of these instructions and consider them together. If I repeat any instruction or idea, do not conclude that it is more important than any other instruction or idea just because I repeated it.

Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in these instructions. Please be sure to listen carefully and follow the definitions that I give you. Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings.

Some of these instructions may not apply, depending on your findings about the facts of the case. [Do not assume just because I give a particular instruction that I am suggesting anything about the facts.] After you have decided what the facts are, follow the instructions that apply to the facts as you find them.

New January 2006; Revised March 2023

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on general concepts of law. (*People v. Babbitt* (1988) 45 Cal.3d 660, 718 [248 Cal.Rptr. 69, 755 P.2d 253].) Because the introductory instructions for the guilt phase contain concepts that do not apply to the penalty phase, the court must clarify for the jury which instructions apply to the penalty phase. (*People v. Babbitt, supra,* ~~(1988)~~ 45 Cal.3d at p.~~660,~~ 718, fn. 26 ~~[248 Cal.Rptr. 69, 755 P.2d 253]~~; *People v. Weaver* (2001) 26 Cal.4th 876, 982 [111 Cal.Rptr.2d 2, 29 P.3d 103], cert. den. sub nom. *Weaver v. California* (2002) 535 U.S. 1058 [122 S.Ct. 1920, 152 L.Ed.2d 828].) The Supreme Court has stated that, in order to avoid confusion, the trial court should provide the jury with a completely new set of instructions for the penalty phase. (*People v. Weaver, supra,* 26 Cal.4th at p. 982.)

The court has a **sua sponte** duty to give the bracketed paragraph instructing the jury to disregard all previous instructions unless the current jury did not hear the guilt phase of the case. (See *People v. Arias* (1996) 13 Cal.4th 92, 171 [51 Cal.Rptr.2d 770, 913 P.2d 980], cert. den. sub nom. *Arias v. California* (1997) 520 U.S. 1251 [117 S.Ct. 2408, 138 L.Ed.2d 175].)

The court should give the bracketed portion of the last paragraph that begins with "Do not assume just because," unless the court will be commenting on the evidence pursuant to Penal Code section 1127. The committee recommends against any comment on the evidence in the penalty phase of a capital case.

This instruction should be followed by any other general instructions on evidence or principles of law the court deems appropriate based on the facts of the case. Specifically:

- The court has a **sua sponte** duty to give CALCRIM No. 222, *Evidence* and CALCRIM No. 226, *Witnesses*. (See *People v. Miranda* (1987) 44 Cal.3d 57, 107-108 [241 Cal.Rptr. 594, 744 P.2d 1127].)

- The court has a **sua sponte** duty to give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*, if the prosecution offers aggravating evidence of other criminal conduct or other felony convictions. However, the reasonable doubt standard does not apply to the question of whether the jury should impose the death penalty or to proof of other aggravating factors. (*People v. Miranda, supra,* 44 Cal.3d

at p. 107; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777–779 [230 Cal.Rptr. 667, 726 P.2d 113].)

- If the prosecution relies on circumstantial evidence to prove other criminal conduct, the court has a **sua sponte** duty to instruct on circumstantial evidence in the penalty phase. (See *People v. Brown* (2003) 31 Cal.4th 518, 564 [3 Cal.Rptr.3d 145, 73 P.3d 1137] [no error where prosecution relied exclusively on direct evidence].)

- When requested, the court must give instructions admonishing the jury not to consider the defendant's failure to testify during the penalty phase. (*People v. Melton* (1988) 44 Cal.3d 713, 757–758 [244 Cal.Rptr. 867, 750 P.2d 741].)

AUTHORITY

- Death Penalty Statute. ▸ Pen. Code, § 190.3.
- Must Tell Jury Which Instructions Apply. ▸ *People v. Babbitt, supra,* ~~(1988)~~ 45 Cal.3d at p.~~660,~~ 718, fn. 26 ~~[248 Cal.Rptr. 69, 755 P.2d 253]~~.
- Should Give Jury New Set of Instructions. ▸ *People v. Weaver, supra,* ~~(2001)~~ 26 Cal.4th at p.~~876,~~ 982 ~~[111 Cal.Rptr.2d 2, 29 P.3d 103], cert. den. sub nom. *Weaver v. California* (2002) 535 U.S. 1058 [122 S.Ct. 1920, 152 L.Ed.2d 828]~~.
- Error to Instruct Not to Consider Sympathy. ▸ *People v. Lanphear* (1984) 36 Cal.3d 163, 165 [203 Cal.Rptr. 122, 680 P.2d 1081]; *California v. Brown* (1987) 479 U.S. 538, 542 [107 S.Ct. 837, 93 L.Ed.2d 934].
- Reasonable Doubt. ▸ *People v. Miranda, supra,* ~~(1987)~~ 44 Cal.3d at p.~~57,~~ 107 ~~[241 Cal.Rptr. 594, 744 P.2d 1127]~~; *People v. Rodriguez, supra,* ~~(1986)~~ 42 Cal.3d at pp.~~730,~~ 777–779 ~~[230 Cal.Rptr. 667, 726 P.2d 113]~~.
- Circumstantial Evidence. ▸ *People v. Brown, supra,* ~~(2003)~~ 31 Cal.4th at p.~~518,~~ 564 ~~[3 Cal.Rptr.3d 145, 73 P.3d 1137]~~.
- Defendant's Failure to Testify. ▸ *People v. Melton, supra,* ~~(1988)~~ 44 Cal.3d ~~713,~~at pp. 757–758 ~~[244 Cal.Rptr. 867, 750 P.2d 741]~~.
- This Instruction Upheld. ▸ *People v. Tran* (2022) 13 Cal.5th 1169, 1220–1221 [298 Cal.Rptr.3d 150, 515 P.3d 1210].

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 549.

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

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

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

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

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

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

The factors are:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

BENCH NOTES

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

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

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

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

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

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

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

AUTHORITY

- Death Penalty Statute. ▸ Pen. Code, § 190.3.
- Jury Must Be Instructed to Consider Any Mitigating Evidence and Sympathy. ▸ *Lockett v. Ohio, supra,* ~~(1978)~~ 438 U.S. at pp.~~586,~~ 604–605 ~~[98 S.Ct. 2954, 57 L.Ed.2d 973]~~; *People v. Benson, supra,* ~~(1990)~~ 52 Cal.3d at p.~~754,~~ 799 ~~[276 Cal.Rptr. 827, 802 P.2d 330]~~; *People v. Easley* (1983) 34 Cal.3d 858, 876 [196 Cal.Rptr. 309, 671 P.2d 813].
- Should Instruct on All Factors. ▸ *People v. Marshall, supra,* ~~(1990)~~ 50 Cal.3d at p.~~907,~~ 932 ~~[269 Cal.Rptr. 269, 790 P.2d 676], cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110 [111 S.Ct. 1023, 112 L.Ed.2d 1105]~~.
- Must Instruct to Consider Only "Applicable Factors."~~.~~ ▸ *Williams v. Calderon, supra,* ~~(1998)~~ 48 F.Supp.2d at p.~~979,~~ 1023; *People v. Marshall, supra,* ~~(1990)~~ 50 Cal.3d at p.~~907,~~ 932 ~~[269 Cal.Rptr. 269, 790 P.2d 676], cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110 [111 S.Ct. 1023, 112 L.Ed.2d 1105]~~.
- Mitigating Factor Must Be Supported by Evidence. ▸ *Delo v. Lashley* (1993) 507 U.S. 272, 275, 277 [113 S.Ct. 1222, 122 L.Ed.2d 620].

- "Aggravating and Mitigating" Defined. ‣ *People v. Dyer* (1988) 45 Cal.3d 26, 77–78 [246 Cal.Rptr. 209, 753 P.2d 1]; *People v. Adcox* (1988) 47 Cal.3d 207, 269–270 [253 Cal.Rptr. 55, 763 P.2d 906].
- On Request Must Instruct to Consider Only Statutory Aggravating Factors. ‣ *People v. Hillhouse* (2002) 27 Cal.4th 469, 509 [117 Cal.Rptr. 2d 45, 40 P.3d 754], cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114 [123 S.Ct. 869, 154 L.Ed.2d 789]; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, fn. 14 [270 Cal.Rptr. 451, 792 P.2d 251].
- Mitigating Factors Are Examples. ‣ *People v. Melton*, *supra,* ~~(1988)~~ 44 Cal.3d at p.~~713,~~ 760 ~~[244 Cal.Rptr. 867, 750 P.2d 741]~~; *Belmontes v. Woodford* (2003) 350 F.3d 861, 897].
- Must Instruct to Not Double-Count. ‣ *People v. Melton*, *supra,* ~~(1988)~~ 44 Cal.3d at p.~~713,~~ 768 ~~[244 Cal.Rptr. 867, 750 P.2d 741]~~.
- Threats of Violence Must Be Directed at Persons. ‣ *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1016 [30 Cal.Rptr.2d 818, 874 P.2d 248].
- This Instruction Upheld Against Due Process Challenge to Victim-Impact Factors. ‣ *People v. Tran* (2022) 13 Cal.5th 1169, 1220–1221 [298 Cal.Rptr.3d 150, 515 P.3d 1210].

COMMENTARY

Aggravating and Mitigating Factors—Need Not Specify

The court is not required to identify for the jury which factors may be aggravating and which may be mitigating. (*People v. Hillhouse*, *supra,* ~~(2002)~~ 27 Cal.4th at p.~~469,~~ 509 ~~[117 Cal.Rptr.2d 45, 40 P.3d 754], cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114 [123 S.Ct. 869, 154 L.Ed.2d 789]~~.) "The aggravating or mitigating nature of the factors is self-evident within the context of each case." *(Ibid.)* However, the court is required on request to instruct the jury to consider only the aggravating factors listed. (*Ibid.*; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, fn. 14 [270 Cal.Rptr. 451, 792 P.2d 251].) In *People v. Hillhouse,* the California Supreme Court stated, "we suggest that, on request, the court merely tell the jury it may not consider in aggravation anything other than the aggravating statutory factors." The committee has rephrased this for clarity and included in the text of this instruction, "You may not consider as an aggravating factor anything other than the factors contained in this list that you conclude are aggravating in this case." (*People v. Hillhouse*~~People v. Hillhouse~~, *supra,* ~~(2002)~~ 27 Cal.4th at p.~~469,~~ 509, fn. 6 ~~[117 Cal.Rptr.2d 45, 40 P.3d 754], cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114 [123 S.Ct. 869, 154 L.Ed.2d 789]~~.)

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

SECONDARY SOURCES

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

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

908. Assault Under Color of Authority (Pen. Code, § 149)

The defendant is charged [in Count __] with (assaulting/ [or] beating) a person under color of authority and without lawful necessity [in violation of Penal Code section 149].

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

1. **The defendant was a *public officer*;**

2. **The defendant willfully [and unlawfully] (did an act that by its nature would directly and probably result in the application of force to _____**<*insert name of alleged victim*>**/touched _____**<*insert name of alleged victim*> **in a harmful or offensive manner);**

<*instruct with elements 3 and 4 for assault*>

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

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

(3/5). When the defendant (did the act/touched _____ <*insert name of alleged victim*> **in a harmful or offensive manner), the defendant was performing or purporting to perform (his/her) duties as a *public officer*;**

[AND]

(4/6). When the defendant (did the act/touched _____ <*insert name of alleged victim*>**), (he/she) acted *without lawful necessity*(;/.)**

[AND]

[(5/7). When the defendant (did the act/touched _____ <*insert name of alleged victim*>**), (he/she) did not act in (self-defense/ [or]defense of someone else).]**

[An officer of _____ *<insert name of state or local government agency that employs public officer>* **is a *public officer*.]**

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

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

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

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

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

~~**[The 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.]

***Without lawful necessity* means more force than was reasonably necessary under the circumstances.**

***Under color of authority* means clothed in the authority of law or when acting under pretense of law.**

[Special rules control the use of force by a peace officer.]

[A peace officer may use reasonable non-deadly force to arrest or detain someone, to prevent escape, to overcome resistance, or in self-defense.]

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

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

   OR

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

   a. _____<*insert name of fleeing felon*> **was fleeing;**

   b. The force was necessary to arrest or detain _____<*insert name of fleeing felon* > **for the crime of _____**<*insert name of felony* >;

   c. The commission of the crime of _____ <*insert name of felony*> **created a risk of or resulted in death or serious bodily injury to another person;**

   AND

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

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

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

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

harm, but is one that, from appearances, must be instantly confronted and addressed.]

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

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

New September 2022; Revised March 2023

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 5/7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

The court may instruct the jury on the appropriate definition of "public officer" from the statute. However, the court may not instruct the jury that the defendant was a public officer as a matter of law.

The court may give the bracketed sentence that begins "The duties of a _____ <*insert title . . .* > include" on request.

AUTHORITY

- Elements. ▸ Pen. Code, § 149.
- Objectively Reasonable Force to Effect Arrest. ▸ Pen. Code, § 835a(b).
- Violation of Statute Does Not Include Detention Without Lawful Authority. ▸ *People v. Lewelling* (2017) 16 Cal.App.5th 276, 298 [224 Cal.Rptr.3d 255].
- "Willful" Defined. ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

- Least Touching. ‣ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Public Officer. ‣ See, e.g., Pen. Code, §§ 831(a) [custodial officer], 831.4 [sheriff's or police security officer], 831.5 [custodial officer], 831.6 [transportation officer], 3089 [county parole officer]; *In re Frederick B.* (1987) 192 Cal.App.3d 79, 89–90 [237 Cal.Rptr. 338], disapproved on other grounds in *In re Randy G.* (2001) 26 Cal.4th 556, 567, fn. 2 [110 Cal.Rptr.2d 516, 28 P.3d 239] ["public officers" is broader category than "peace officers"]; *In re Eddie D.* (1991) 235 Cal.App.3d 417, 421–422 [286 Cal.Rptr. 684]; *In re M.M.* (2012) 54 Cal.4th 530, 536–539 [142 Cal.Rptr.3d 869, 278 P.3d 1221]; see also Pen. Code, § 836.5(a) [authority to arrest without warrant].
- Public Officer Includes De Facto Officer. ‣ *People v. Cradlebaugh* (1914) 24 Cal.App. 489, 491–492.
- "Peace Officer" Defined. ‣ Pen. Code, § 830 et seq.
- Without Lawful Necessity. ‣ *People v. Dukes* (1928) 90 Cal.App. 657, 661–662; *People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1140 & fn.20 [142 Cal.Rptr.3d 423]; *People v. Lewelling, supra,* 16 Cal.App.5th at pp. 298–299; *People v. Perry* (2019) 36 Cal.App.5th 444 [248 Cal.Rptr.3d 522].
- Color of Authority. ‣ *People v. Plesniarski* (1971) 22 Cal.App.3d 108, 114 [99 Cal.Rptr. 196].

COMMENTARY

Graham Factors

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

RELATED ISSUES

Sexual Battery

Officer convicted of sexually assaulting an arrestee was properly convicted of both sexual battery and assault under color of authority because the latter offense is not a necessarily included offense in the former. (See *People v. Alford* (1991) 235 Cal.App.3d 799, 804–805 [286 Cal.Rptr. 762].)

1156. Loitering: For Prostitution (Pen. Code, § 653.22(a))

The defendant is charged [in Count __] with loitering with the intent to commit prostitution [in violation of Penal Code section 653.22(a)].

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

1. **The defendant delayed or lingered in a public place;**

2. **When the defendant did so, (he/she) did not have a lawful purpose for being there;**

AND

3. **When the defendant did so, (he/she) intended to commit prostitution.**

As used here, a *public place* is (a/an/the) (area open to the public[(,/;)]/[or] alley[(,/;)]/ [or] plaza [(,/;)]/ [or] park[(,/;)]/ [or] driveway[(,/;)]/ [or] parking lot[(,/;)]/ [or] automobile[(,/;)]/ [or] building open to the general public[, including one that serves food or drink or provides entertainment][(,/;)]/ [or] doorway or entrance to a building or dwelling[(,/;)]/ [or] grounds enclosing a building or dwelling).

A person *intends to commit prostitution* if he or she intends to engage in sexual conduct with someone else in exchange for money [or other compensation]. *Sexual conduct* means sexual intercourse or touching the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification. [*Prostitution* does not include sexual conduct engaged in as a part of any stage performance, play, or other entertainment open to the public.]

The intent to commit prostitution may be shown by a person acting in a manner and under circumstances that openly demonstrate the intent to induce, entice, or solicit prostitution or to procure someone else to commit prostitution. In deciding whether the defendant acted with intent to commit prostitution, you may consider whether (he/she):

REVOKED

- **[Repeatedly beckoned to, stopped, engaged in conversations with, or attempted to stop or engage in conversations with passersby in a way that indicated the solicitation of prostitution (./;)]**

- **[Repeatedly stopped or attempted to stop vehicles by hailing, waving, or gesturing, or engaged or attempted to engage drivers or passengers in conversation, in a way that indicated the solicitation of prostitution(./;)]**

- **[Circled an area in a vehicle and repeatedly beckoned to, contacted, or attempted to contact or stop pedestrians or other motorists in a way that indicated the solicitation of prostitution(./;)]**

- **[Has engaged in any behavior indicative of prostitution activity within the six months before (his/her) arrest in this case(./;)]**

- **[Has been convicted of this crime or of any other crime relating to or involving prostitution within five years of (his/her) arrest in this case.]**

You should also consider whether any of these activities occurred in an area known for prostitution.

This list of factors is not intended to be a complete list of all the factors you may consider on the question of intent. The factors are provided only as examples to assist you in deciding whether the defendant acted with the intent to commit prostitution. Consider all the evidence presented in this case for whatever bearing you conclude it has on the question of the defendant's intent. Give the evidence whatever weight you decide that it deserves.

New January 2006

BENCH NOTES

Instructional Duty

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

REVOKED

AUTHORITY

- Elements. ▸ Pen. Code, § 653.22(a).
- Factors to Consider to Prove Intent. ▸ Pen. Code, § 653.22(a), (b) & (c).
- Prostitution Defined. ▸ Pen. Code, § 653.20(a); see also Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535 [163 Cal.Rptr. 99]; *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433 [113 Cal.Rptr.2d 195]; *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Public Place Defined. ▸ Pen. Code, § 653.20(b).
- Loiter Defined. ▸ Pen. Code, § 653.20(b).
- Statute Constitutional. ▸ *People v. Pulliam* (1998) 62 Cal.App.4th 1430, 1434–1439 [73 Cal.Rptr.2d 371].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 74.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, §§ 144.11[1], 144.20 (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:16, 12:17 (The Rutter Group).

REVOKED

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 an ongoing organized 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)>***;**

AND

3. **Whose members collectively engage in or have engaged in a pattern of criminal gang activity.**

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

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

[To decide whether the ongoing organized association or group has, as one of its primary activities, the commission of _____*<insert felony or felonies from Pen. Code, § 186.22(e)(1)>***, 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) (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)>*;

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

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

4. **The crimes were committed on separate occasions or were personally committed by two or more members;**

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

AND

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

Examples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant.

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

[To decide whether a member of the gang [or the defendant] committed _____ *<insert felony or felonies from Pen. Code, § 186.22(e)(1)>*, **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.

[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.]

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

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

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

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

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

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

1. **A member of the gang committed the crime;**

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

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, February 2016, March 2022, March 2023

BENCH NOTES

Instructional Duty

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

In the definition of "felonious criminal conduct," insert the felony or felonies the defendant allegedly aided and abetted. (See *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140] [abrogated on other grounds by *People v. Castenada* (2000) 23 Cal.4th 743, 747–748 [97 Cal.Rptr.2d 906, 3 P.3d 278].) Note that a defendant's misdemeanor conduct in the charged case, which is elevated to a felony by operation of Penal Code section 186.22(a), is not sufficient to satisfy the felonious criminal conduct requirement of an active gang participation offense charged under subdivision (a) of section 186.22 or of active gang participation charged as an element of felony firearm charges under section 12025(b)(3) or 12031(a)(2)(C). *People v. Lamas* (2007) 42 Cal.4th 516, 524 [67 Cal.Rptr.3d 179, 169 P.3d 102].

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

There is a split in authority over the meaning of "collectively." (Compare *People v. Delgado* (2022) 74 Cal.App.5th 1067 [290 Cal.Rptr.3d 189] [two or more gang members must have committed each predicate offense]; *People v. Clark* (2022) 81 Cal.App.5th 133 [296 Cal.Rptr.3d 153] [pattern of criminal gang activity may be established either by (1) two gang members who separately committed crimes on different occasions, or (2) two gang members who committed a crime together on a single occasion], review granted October 19, 2022, S275746.)

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

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

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

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

If the defendant is charged with other counts that do not require gang evidence as an element, the court must try the Penal Code section 186.22(a) count separately. (Pen. Code, § 1109(b).)

Defenses—Instructional Duty

If there is evidence that the defendant was merely present at the scene or only had knowledge that a crime was being committed, the court has a **sua sponte** duty to give the bracketed paragraph that begins with "If you conclude that defendant was

present." (*People v. Boyd* (1990) 222 Cal.App.3d 541, 557 fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].)

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

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).
- "Active Participation" Defined. ▸ *People v. Castenada, supra,* ~~(2000)~~ 23 Cal.4th at p.~~743,~~ 747 ~~[97 Cal.Rptr.2d 906, 3 P.3d 278]~~.
- "Criminal Street Gang" Defined. ▸ Pen. Code, § 186.22(f).
- "Pattern of Criminal Gang Activity" Defined. ▸ Pen. Code, § 186.22(e), (g); .
- Examples of Common Benefit. ▸ Pen. Code, § 186.22(g).
- "Willful" Defined. ▸ Pen. Code, § 7(1).
- Applies to Both Perpetrator and Aider and Abettor. ▸ *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436 [105 Cal.Rptr.2d 837]; *People v. Castenada, supra,* ~~(2000)~~ 23 Cal.4th at pp.~~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, supra,* ~~(1991)~~ 227 Cal.App.3d at p.~~692,~~ 704 ~~[278 Cal.Rptr. 140] [abrogated on other grounds by *People v. Castenada* (2000) 23 Cal.4th 743, 747–748 [97 Cal.Rptr.2d 906, 3 P.3d 278]~~.
- Separate Intent From Underlying Felony. ▸ *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].

- Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct. ‣ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132-1138 [150 Cal.Rptr.3d 533, 290 P.3d 1143].
- 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*, *supra,* 97 Cal.App.4th at p. 1458.
- Conspiracy to Commit This Crime. ‣ *People v. Johnson* (2013) 57 Cal.4th 250, 255, 266-267 [159 Cal.Rptr.3d 70, 303 P.3d 379].
- Proof of Sufficient Connection Among Gang "Subsets" and Umbrella Gang Required. ‣ *People v. Prunty* (2015) 62 Cal.4th 59, 81-85 [192 Cal.Rptr.3d 309, 355 P.3d 480].

COMMENTARY

The jury may not consider the circumstances of the charged crime to establish a pattern of criminal activity. (Pen. Code, § 186.22(e)(2).) A "pattern of criminal gang activity" requires two or more "predicate offenses" during a statutory time period. Another offense committed on the same occasion by a fellow gang member may serve as a predicate offense. (*People v. Loeun* (1997) 17 Cal.4th 1, 9–10 [69 Cal.Rptr.2d 776, 947 P.2d 1313]; see also *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two incidents each with single perpetrator, or single incident with multiple participants committing one or more specified offenses, are sufficient]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484 [67 Cal.Rptr.2d 126].) However, convictions of a perpetrator and an aider and abettor for a single crime establish only one predicate offense (*People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196]), and "[c]rimes occurring *after* the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity." (*People v. Duran, supra,* ~~(2002)~~ 97 Cal.App.4th at p.~~1448,~~ 1458 ~~[119 Cal.Rptr.2d 272]~~ [original italics].) The "felonious criminal conduct" need not be gang-related. (*People v. Albillar, supra,* ~~(2010)~~ 51 Cal.4th at pp.~~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, supra,* 23 Cal.App.4th at pp. 1527–1528.)

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).

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.**

To benefit, promote, further, or assist means to provide a common benefit to members of a gang where the common benefit is more than reputational. Examples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant.

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

<If criminal street gang has not already been defined in another instruction.>
[A *criminal street gang* is an ongoing organized 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)>***;**

AND

3. **Whose members collectively engage in or have engaged in a pattern of criminal gang activity.**

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

<Give this paragraph only when the conduct that establishes the pattern of criminal gang activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition.>
[To decide whether the organized association or group has, as one of its primary activities, the commission of _____*<insert felony or felonies from Pen. Code, § 186.22(e)(1)>***, 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) (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)>;*

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

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

4. **The crimes were committed on separate occasions or were personally committed by two or more members;**

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

AND

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

<Give this paragraph only when the conduct that establishes the pattern of criminal gang activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition.>
[To decide whether a member of the gang [or the defendant] committed _____ *<insert felony or felonies from Pen. Code, § 186.22(e)(1)>*, **please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

[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.]

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

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

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

New January 2006; Revised August 2006, June 2007, April 2008, December 2008, August 2012, February 2013, August 2013, February 2014, February 2016, March 2022, March 2023

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].)

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.

There is a split in authority over the meaning of "collectively." (Compare *People v. Delgado* (2022) 74 Cal.App.5th 1067 [290 Cal.Rptr.3d 189] [two or more gang members must have committed each predicate offense]; *People v. Clark* (2022) 81 Cal.App.5th 133 [296 Cal.Rptr.3d 153] [pattern of criminal gang activity may be established either by (1) two gang members who separately committed crimes on different occasions, or (2) two gang members who committed a crime together on a single occasion], review granted October 19, 2022, S275746.)

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

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

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

The court must bifurcate the trial on the gang enhancement upon request of the defense. (Pen. Code, § 1109(a).) If the trial is bifurcated, give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

Related Instructions

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

AUTHORITY

- Enhancement. ▸ Pen. Code, § 186.22(b)(1).
- "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).
- "Pattern of Criminal Gang Activity" Defined. ▸ Pen. Code, § 186.22(e), (g); see *People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196] [conviction of perpetrator and aider and abettor for single crime establishes only single predicate offense].
- "To Benefit, Promote, Further, or Assist" Defined. ▸ Pen. Code, § 186.22(g).
- Active or Current Participation in Gang Not Required ▸ *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207 [66 Cal.Rptr.2d 816].
- "Primary Activities" Defined. ▸ *People v. Sengpadychith, supra,* 26 Cal.4th at pp. 323–324.
- Defendant Need Not Act With Another Gang Member. ▸ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1138-1139 [150 Cal.Rptr.3d 533].
- Crimes Committed After Charged Offense Not Predicates. ▸ *People v. Duran, supra,* 97 Cal.App.4th at p. 1458.
- Proof of Sufficient Connection Among Gang "Subsets" and Umbrella Gang Required. ▸ *People v. Prunty* (2015) 62 Cal.4th 59, 81-85 [192 Cal.Rptr.3d 309, 355 P.3d 480].
- Evidence Required for Gang Member Acting Alone. ▸ *People v. Renteria* (2022) 13 Cal.5th 951, 969 [297 Cal.Rptr.3d 344, 515 P.3d 77].

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 ~~s~~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.

Conspiracy—Alternate Penalty Provisions Under Penal Code Section 186.22(b)(4)

The alternate penalty provisions provided by Penal Code section 186.22(b)(4) apply only to completed target offenses, not to conspiracies. (*People v. Lopez* (2022) 12 Cal.5th 957, 975 [292 Cal.Rptr.3d 265, 507 P.3d 925].)

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

SECONDARY SOURCES

2 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 40.

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

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

1520. Attempted Arson (Pen. Code, § 455)

The defendant is charged [in Count __] with the crime of attempted arson [in violation of Penal Code section 455].

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

1. **The defendant attempted to set fire to or burn [or (counseled[,]/ [or] helped[,]/ [or] caused) the attempted burning of] (a structure/forest land/property);**

AND

2. **(He/She) acted willfully and maliciously.**

A person *attempts to set fire to or burn* (a structure/forest land/property) when he or she places any flammable, explosive, or combustible material or device in or around it with the intent to set fire to it.

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

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

[A *structure* is any (building/bridge/tunnel/power plant/commercial or public tent).]

[*Forest land* is any brush-covered land, cut-over land, forest, grasslands, or woods.]

[*Property* means personal property or land other than forest land.]

New January 2006; Revised September 2018, March 2023

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. Attempted arson is governed by Penal Code section 455, not the general attempt statute found in section 664. (*People v. Alberts* (1995) 32 Cal.App.4th 1424, 1427–1428 [37 Cal.Rptr.2d 401] [defendant was convicted under §§ 451 and 664; the higher sentence was reversed because § 455 governs attempted arson].)

AUTHORITY

- Elements. ▸ Pen. Code, § 455.
- "Structure, Forest Land, and Maliciously" Defined. ▸ Pen. Code, § 450.
- This Instruction Upheld. ▸ *People v. Rubino* (2017) 18 Cal.App.5th 407, 412-413 [227 Cal.Rptr.3d 75].

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 268–276.

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

1521–1529. Reserved for Future Use

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

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

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

1. **A peace officer driving a motor vehicle was pursuing the defendant;**

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

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

[3A. _During the pursuit, the defendant drove with willful or wanton disregard for the safety of persons or property;]

[OR]

[3B. _During the pursuit, the defendant caused damage to property while driving;]

[OR]

[3C. _During the pursuit, the defendant committed three or more violations, each of which would make the defendant eligible for a traffic violation point;]

AND

[3/4]. _All of the following were true:

(a) There was at least one lighted red lamp visible from the front of the peace officer's vehicle;

(b) The defendant either saw or reasonably should have seen the lamp;

(c) The peace officer's vehicle was sounding a siren as reasonably necessary;

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

AND

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

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

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

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

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

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

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

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

AUTHORITY

- Elements. ▸ Veh. Code, §§ 2800.1(a), 2800.2.
- Willful or Wanton Disregard. ▸ *People v. Schumacher* (1961) 194 Cal.App.2d 335, 339–340 [14 Cal.Rptr. 924].
- Three Violations or Property Damage as Wanton Disregard—Definitional. ▸ *People v. Taylor* (2018) 19 Cal.App.5th 1195, 1202-1203 [228 Cal.Rptr.3d 575]*; People v. Pinkston* (2003) 112 Cal.App.4th 387, 392–393 [5 Cal.Rptr.3d 274].
- Distinctively Marked Vehicle. ▸ *People v. Hudson* (2006) 38 Cal.4th 1002, 1010–1011 [44 Cal.Rptr.3d 632, 136 P.3d 168].
- Distinctive Uniform. ▸ *People v. Estrella* (1995) 31 Cal.App.4th 716, 724 [37 Cal.Rptr.2d 383]; *People v. Mathews* (1998) 64 Cal.App.4th 485, 491 [75 Cal.Rptr.2d 289].
- Jury Must Determine ~~-~~Status as Peace Officer. ▸ *People v. Flood, supra,* ~~(1998)~~ 18 Cal.4th at p.~~470,~~ 482~~ [76 Cal.Rptr.2d 180, 957 P.2d 869]~~.
- Red Lamp, Siren, Additional Distinctive Feature of Car, and Distinctive Uniform Must Be Proved. ▸ ~~-~~*People v. Hudson, supra,* ~~(2006)~~ 38 Cal.4th

~~1002,~~at p. 1013 ~~[44 Cal.Rptr.3d 632]~~; *People v. Acevedo* (2003) 105 Cal.App.4th 195, 199 [129 Cal.Rptr.2d 270]; *People v. Brown* (1989) 216 Cal.App.3d 596, 599–600 [264 Cal.Rptr. 908].

- Defendant Need Not Receive Violation Points for Conduct. ~~-~~ *People v. Leonard* (2017) 15 Cal.App.5th 275, 281 [222 Cal.Rptr3d 868].
- Statute Does Not Require Lawful Performance of a Duty. *People v. Fuentes* (2022) 78 Cal.App.5th 670, 679–680 [294 Cal.Rptr.3d 43].

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Inherently Dangerous Felony

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

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

SECONDARY SOURCES

7 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 306.

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

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

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 an ongoing organized 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)>***;**

AND

3. **Whose members collectively engage in or have engaged in a pattern of criminal gang activity.**

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

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

[To decide whether the organization, association, or group has, as one of its primary activities, the commission of _____*<insert felony or felonies from Pen. Code, § 186.22(e)(1)>***, 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) (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)***;**

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

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

4. **The crimes were committed on separate occasions or were personally committed by two or more members;**

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

AND

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

Examples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant.

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

[To decide whether a member of the gang [or the defendant] committed _____ *<insert felony or felonies from Pen. Code, § 186.22(e)(1)>***, 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.]

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

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

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

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

To decide whether a member of the gang [or the defendant] committed _____ *<insert felony or felonies listed immediately above and crimes from Pen. Code, § 186.22(e)(1) 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, February 2016, March 2022, March 2023

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.)

There is a split in authority over the meaning of "collectively." (Compare *People v. Delgado* (2022) 74 Cal.App.5th 1067 [290 Cal.Rptr.3d 189] [two or more gang members must have committed each predicate offense]; *People v. Clark* (2022) 81 Cal.App.5th 133 [296 Cal.Rptr.3d 153] [pattern of criminal gang activity may be established either by (1) two gang members who separately committed crimes on different occasions, or (2) two gang members who committed a crime together on a single occasion], review granted October 19, 2022, S275746.)

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

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

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

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, supra,* ~~(1998)~~ 67 Cal.App.4th ~~128,~~at p. 135 ~~[79 Cal.Rptr.2d 690]~~.
- Elements of Gang Factor. ▸ Pen. Code, § 186.22(a); *People v. Robles, supra,* ~~(2000)~~ 23 Cal.4th at p.~~1106,~~ 1115 ~~[99 Cal.Rptr.2d 120, 5 P.3d 176]~~.
- "Active Participation" Defined. ▸ *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).
- "Pattern of Criminal Gang Activity" Defined. ▸ Pen. Code, §§ 186.22(e), (g).
- Examples of Common Benefit. ▸ Pen. Code, § 186.22(g).
- Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct. ▸ *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132-1138 [150 Cal.Rptr.3d 533, 290 P.3d 1143].

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

RELATED ISSUES

Gang Expert Cannot Testify to Defendant's Knowledge or Intent
In *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658 [126 Cal.Rptr.2d 876], the court held it was error to permit a gang expert to testify that the defendant knew there was a loaded firearm in the vehicle:

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

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

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

SECONDARY SOURCES

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

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

2622. Intimidating a Witness (Pen. Code, § 136.1(a) & (b))

The defendant is charged [in Count __] with intimidating a witness [in violation of Penal Code section 136.1].

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

<Alternative 1A—attending or giving testimony>

[1. The defendant maliciously (tried to (prevent/ [or] discourage)/(prevented/ [or] discouraged)) _____ *<insert name/description of person defendant allegedly sought to influence>* **from (attending/ [or] giving testimony at) _____** *<insert type of judicial proceeding or inquiry authorized by law>***;]**

<Alternative 1B—report of victimization>

[1. The defendant (tried to (prevent/ [or] discourage)/(prevented/ [or] discouraged)) _____ *<insert name/description of person defendant allegedly sought to influence>* **from making a report that (he/she/someone else) was a victim of a crime to _____** *<insert type of official specified in Pen. Code, § 136.1(b)(1)>***;]**

<Alternative 1C—causing prosecution>

[1. The defendant (tried to (prevent/ [or] discourage)/(prevented/ [or] discouraged)) _____ *<insert name/description of person defendant allegedly sought to influence>* **from cooperating or providing information so that a (complaint/indictment/information/probation violation/parole violation) could be sought and prosecuted, and from helping to prosecute that action;]**

<Alternative 1D—causing arrest>

[1. The defendant (tried to (prevent/ [or] discourage)/(prevented/ [or] discouraged)) _____ *<insert name/description of person defendant allegedly sought to influence>* **from (arresting[,]/ [or] (causing/ [or] seeking) the arrest of [,]) someone in connection with a crime;]**

2. _____ *<insert name/description of person defendant allegedly sought to influence>* **was a (witness/ [or] crime victim);**

AND

3. **The defendant knew (he/she) was (trying to (prevent/ [or] discourage)/(preventing/ [or] discouraging)) _____** *<insert name/description of person defendant allegedly sought to influence>* **from _____** *<insert appropriate description from element 1>* **and intended to do so.**

[A person acts *maliciously* when he or she unlawfully intends to annoy, harm, or injure someone else in any way, or intends to interfere in any way with the orderly administration of justice.]

[As used here, *witness* means someone [or a person the defendant reasonably believed to be someone]:

<Give the appropriate bracketed paragraph[s].>

- **[Who knows about the existence or nonexistence of facts relating to a crime(;/.)]**

  [OR]

- **[Whose declaration under oath has been or may be received as evidence(;/.)]**

  [OR]

- **[Who has reported a crime to a (peace officer[,]/ [or] prosecutor[,]/ [or] probation or parole officer[,]/ [or] correctional officer[,]/ [or] judicial officer)(;/.)]**

  [OR

- **Who has been served with a subpoena issued under the authority of any state or federal court.]]**

[A person is a *victim* if there is reason to believe that a federal or state crime is being or has been committed or attempted against him or her.]

[It is not a defense that the defendant was not successful in preventing or discouraging the (victim/ [or] witness).]

[It is not a defense that no one was actually physically injured or otherwise intimidated.]

New January 2006; Revised September 2020, March 2023

BENCH NOTES

Instructional Duty

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

In element 1, alternative 1A applies to charges under Penal Code section 136.1(a), which prohibits "knowingly and maliciously" preventing or attempting to prevent a witness or victim from giving testimony. If the court instructs with alternative 1A, the court should also give the bracketed definition of "maliciously." (See *People v. Serrano* (2022) 77 Cal.App.5th 902, 912–913 [292 Cal.Rptr.3d 865].)

Alternatives 1B through 1D apply to charges under Penal Code section 136.1(b). Because the offense always requires specific intent, the committee has included the knowledge requirement with the specific intent requirement in element 3. (*People v. Ford* (1983) 145 Cal.App.3d 985, 990 [193 Cal.Rptr. 684]; see also *People v. Womack* (1995) 40 Cal.App.4th 926, 929–930 [47 Cal.Rptr.2d 76].)

If the defendant is charged with one of the sentencing factors in Penal Code section 136.1(c), give CALCRIM No. 2623, *Intimidating a Witness: Sentencing Factors*. If the defendant is charged with the sentencing factor based on a prior conviction, the court must give both CALCRIM No. 2623 and CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the court has granted a bifurcated trial on the prior conviction or the defendant has stipulated to the conviction.

Note that Penal Code section 136.1(a)(3) states, "For purposes of this section, evidence that the defendant was a family member who interceded in an effort to protect the witness or victim shall create a presumption that the act was without malice." It is unclear whether the court must instruct on this presumption.

AUTHORITY

- Elements. ▸ Pen. Code, § 136.1(a) & (b).
- "Malice" Defined. ▸ Pen. Code, § 136(1).
- "Witness" Defined. ▸ Pen. Code, § 136(2).

- "Victim" Defined. ▸ Pen. Code, § 136(3).
- Specific Intent Required. ▸ *People v. Ford, supra,* (1983) 145 Cal.App.3d 985, p. 990 [193 Cal.Rptr. 684]; see also *People v. Womack, supra,* (1995) 40 Cal.App.4th at pp. 926, 929–930 [47 Cal.Rptr.2d 76].
- Malice Not Required For Violations of Penal Code Section 136.1(b). ▸ *People v. Brackins* (2019) 37 Cal.App.5th 56, 66-67 [249 Cal.Rptr.3d 261].

LESSER INCLUDED OFFENSES

A violation of Penal Code section 136.1(a) or (b) is a felony-misdemeanor, punishable by a maximum of three years in state prison. If the defendant is also charged with one of the sentencing factors in Penal Code section 136.1(c), then the offense is a felony punishable by two, three, or four years. If the defendant is charged under Penal Code section 131.6(c), then the offenses under subdivisions (a) and (b) are lesser included offenses. The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has proved the sentencing factor alleged. If the jury finds that this allegation has not been proved, then the offense should be set at the level of the lesser offense.

The misdemeanor offense of knowingly inducing a false statement to a law enforcement official in violation of Penal Code section 137(c) is not a lesser included offense of Penal Code section 137(b) because the latter offense lacks the element that the defendant must actually cause a false statement to be made. (*People v. Miles* (1996) 43 Cal.App.4th 575, 580 [51 Cal.Rptr.2d 52].)

RELATED ISSUES

Penal Code Sections 137(b), 136.1, and 138

Because one cannot "influence" the testimony of a witness if the witness does not testify, a conviction under Penal Code section 137(b) is inconsistent with a conviction under Penal Code section 136.1 or 138, which requires that a defendant prevent, rather than influence, testimony. (*People v. Womack, supra,* (1995) 40 Cal.App.4th 926, at p. 931 [47 Cal.Rptr.2d 76].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, §§ 5, 6.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses,* § 82.07, Ch. 84, *Motions at Trial,* § 84.11 (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.23[6][e], 91.43 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.13[4][b]; Ch. 144, *Crimes Against Order,* § 144.03[2], [4] (Matthew Bender).

2623. Intimidating a Witness: Sentencing Factors (Pen. Code, § 136.1(c))

If you find the defendant guilty of intimidating a witness, you must then decide whether the People have proved the additional allegation[s] that the defendant [acted maliciously] [and] [(acted in furtherance of a conspiracy/ [or] used or threatened to use force/ [or] acted to obtain money or something of value)].

To prove (this/these) allegation[s], the People must prove that:

[1. The defendant acted maliciously(;/.)]

[AND]

<Alternative A—furtherance of a conspiracy>

[(2A/1). The defendant acted with the intent to assist in a conspiracy to intimidate a witness(;/.)]

<Alternative B—used or threatened force>

[(2B/2). The defendant used force or threatened, either directly or indirectly, to use force or violence on the person or property of ~~[~~a~~]~~ (witness[,]/ [or] victim[,]/ [or] ~~any other~~ person other than (him/her)self)(;/.)]

<Alternative C—financial gain>

[(2C/3). The defendant acted (in order to obtain (money/ [or] something of value)/ [or] at the request of someone else in exchange for something of value).]

[Instruction[s] __ *<insert instruction number[s]>* **explain[s] when someone is acting in a conspiracy to intimidate a witness. You must apply (that/those) instruction[s] when you decide whether the People have proved this additional allegation.** *<The court must modify and give Instruction 415, et seq., explaining the law of conspiracy as it applies to the facts of the particular case.>***]**

[A person acts *maliciously* when he or she unlawfully intends to annoy, harm, or injure someone else in any way, or intends to interfere in any way with the orderly administration of justice.]

The People have the burden of proving (this/each) allegation beyond a reasonable doubt. If the People have not met this burden [for any allegation], you must find that (this/the) allegation has not been proved.

New January 2006; Revised September 2020, March 2023

BENCH NOTES

Instructional Duty

If the defendant is charged with a felony based on Penal Code section 136.1(c), the court has a **sua sponte** duty to instruct on the alleged sentencing factor. This instruction **must** be given with CALCRIM No. 2622, *Intimidating a Witness*.

As noted in the Bench Notes to CALCRIM No. 2622, the court will instruct the jury that knowledge and malice are elements of a violation of Penal Code section 136.1(a). If the court has given the malice element in CALCRIM No. 2622, the court may delete it here. If the court has not already given this element and the defendant is charged under subdivision (c), the court must give the bracketed element requiring malice here, as well as the bracketed definition of "maliciously." (See *People v. Serrano* (2022) 77 Cal.App.5th 902, 912–913 [292 Cal.Rptr.3d 865].)

If the defendant is charged with the sentencing factor based on a prior conviction, the court must give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the court has granted a bifurcated trial on the prior conviction or the defendant has stipulated to the conviction. In such cases, the court should also give this instruction, CALCRIM No. 2623, only if the court has not already instructed the jury on malice or the defendant is also charged with another sentencing factor.

The court must provide the jury with a verdict form on which the jury will indicate if each alleged sentencing factor has or has not been proved.

If the court instructs on furtherance of a conspiracy, give the appropriate corresponding instructions on conspiracy. (See CALCRIM No. 415, *Conspiracy*.)

AUTHORITY

- Factors. ▸ Pen. Code, § 136.1(c).
- "Malice" Defined. ▸ Pen. Code, § 136(1).
- Statutory Meaning of "Third Person" Excludes Defendant. ▸ *People v. Johnson* (2022) 79 Cal.App.5th 1093, 1110 [295 Cal.Rptr.3d 353].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, § 6.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses,* § 82.07, Ch. 84, *Motions at Trial,* § 84.11 (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.23[6][e], 91.43 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.13[4][b], Ch. 144, *Crimes Against Order,* § 144.03[2], [4] (Matthew Bender).

3224. Aggravating Factor: Great Violence, Great Bodily Harm, or High Degree of Cruelty, Viciousness, or Callousness

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<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged [in Count[s] __[,]][or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ <*insert lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the crime[s][in Count[s] __] involved (great violence[,]/ [or]great bodily harm[,]/ [or]threat[s] of great bodily harm[,]/ [or][(other/an)] act[s] revealing a high degree of cruelty, viciousness, or callousness).]

<Introductory paragraph for bifurcated trial>
[The People have alleged that the crime[s][in Count[s] __] involved (great violence[,]/ [or]great bodily harm[,]/ [or]threat[s] of great bodily harm[,]/ [or][(other/an)] act[s] revealing a high degree of cruelty, viciousness, or callousness).]

To prove this allegation, the People must prove that:

1. **During the commission of the crime[s], the defendant (used great violence[,]/ [or]inflicted great bodily harm[,]/ [or]threatened to inflict great bodily harm[,]/ [or]committed (other/an) act[s] showing a high degree of cruelty, viciousness, or callousness);**

   AND

2. **The (type/level) of (violence[,]/ [or]bodily harm[,]/ [or]threat of bodily harm[,]/ [or]cruelty, viciousness, or callousness) was distinctively worse than what was necessary to commit the crime[s].**

[For the crime to have been committed with (great violence[,]/ [or]cruelty[,]/ [or]viciousness[,]/ [or]callousness), no one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed the crime with (great violence[,]/ [or]cruelty[,]/ [or]viciousness[,]/ [or]callousness).]

[*Great bodily harm* means significant or substantial physical injury, as opposed to minor or moderate harm.]

[*Threat of great bodily harm* means the threat of significant or substantial physical injury. It is a threatened injury that would result in greater than minor or moderate harm.]

[*Viciousness* means dangerously aggressive or marked by violence or ferocity. *Viciousness* is not the same as violence. For example, some acts which may be described as vicious do not involve violence at all, but rather involve acts such as deceit and slander. On the other hand, many violent acts do not indicate viciousness, but instead show frustration, justifiable rage, or self-defense.]

[An act discloses *cruelty* when it demonstrates the deliberate infliction of physical or mental suffering.]

[An act discloses *callousness* when it demonstrates a lack of sympathy for the suffering of, or harm to, the victim[s].]

You may not find the allegation true unless all of you agree that the People have proved at least one of the following: that the defendant (used great violence[,]/ [or]inflicted great bodily harm[,]/ [or]threatened to inflict great bodily harm[,]/ [or]committed[other] acts showing a high degree of cruelty, viciousness, or callousness). However, you need not all agree on the act[s] or conduct that [constitutes the (use of great violence[,]/ [or]infliction of great bodily harm[,]/ [or]threat to inflict great bodily harm)][or][show a high degree of cruelty, viciousness, or callousness.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

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

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

New March 2023

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

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

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. ▸ California Rules of Court, rule 4.421(a)(1).
- "Aggravating Fact" Defined. ▸ *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. ▸ *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Force, Violence, or Threat Beyond What is Necessary to Accomplish Criminal Purpose. ▸ *People v. Karsai* (1982) 131 Cal.App.3d 224, 239 [182 Cal.Rptr. 406]; see also *People v. Cortez* (1980) 103 Cal.App.3d 491, 496 [163 Cal.Rptr. 1]; *People v. Harvey* (1984) 163 Cal.App.3d 90, 116 [208 Cal.Rptr. 910]; *People v. Garcia* (1989) 209 Cal.App.3d 790, 793–794 [257 Cal.Rptr. 495].
- Viciousness Not Equivalent To Violence. ▸ *People v. Reed* (1984) 157 Cal.App.3d 489, 492 [203 Cal.Rptr. 659].
- Actual Bodily Harm Not Required. ▸ *People v. Duran* (1982) 130 Cal.App.3d 987, 990 [182 Cal.Rptr. 17].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3225. Aggravating Factor: Armed or Used Weapon

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged [in Count[s] __[,]][or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ *<insert lesser offense[s]>***], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the defendant was armed with or used a weapon, to wit: _____** *<insert description of weapon>***, during commission of the crime[s] in Count[s] _____.]**

<Introductory paragraph for bifurcated trial>
[The People have alleged that the defendant was armed with or used a weapon, to wit: _____ *<insert description of weapon>***, during commission of the crime[s][in Count[s] _____].]**

To prove this allegation, the People must prove that the defendant, while committing the crime[s][in Count[s] __] (knowingly carried a weapon[,]/ [or]knowingly had a weapon available for use[,]/ [or]intentionally displayed a weapon in a menacing manner[,]/ [or]intentionally (fired/ [or]attempted to fire) a weapon[,]/ [or]intentionally (struck[,]/ [or]stabbed[,]/ [or]slashed[,]/ [or]hit][,]/ [or]attempted to (strike[,]/ [or]stab[,]/ [or]slash[,]/ [or]hit) another person with a weapon).]

[A device, instrument, or object that is capable of being used to inflict injury or death may be a *weapon*. In determining whether _____*<insert description>*** was a *weapon*, you may consider the totality of circumstances, including the manner in which it was used or possessed.]**

You may not find the allegation true unless all of you agree that the People have proved that the defendant was either armed or used a weapon. However, all of you do not need to agree on which act[s] or conduct constitutes the arming or use of a weapon.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

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

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

New March 2023

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S.270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

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

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

Give the bracketed portion that defines weapon if the object is not a weapon as a matter of law and is capable of innocent uses.

AUTHORITY

- Aggravating Factor. ▸ California Rules of Court, rule 4.421(a)(2).
- "Aggravating Fact" Defined. ▸ *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. ▸ *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Arming Includes Available for Use. ▸ *People v. Garcia* (1986) 183 Cal.App.3d 335, 350 [228 Cal.Rptr. 87].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

Penal Code section 12022

Consistent with the language of rule 4.421(a)(2), the instruction has been drafted with the assumption that the defendant is personally armed. The armed enhancement contained in Penal Code section 12022(a)(1) provides: "This additional term shall apply to a person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm." Whether there is a relationship between the rule of court and Penal Code section 12022(a)(1) has not been addressed by case law.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3226. Aggravating Factor: Particularly Vulnerable Victim

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]][or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ *<insert lesser offense[s]>***], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that _____***<insert name of victim>* **was a particularly vulnerable victim.]**

<Introductory paragraph for bifurcated trial>
[The People have alleged[in Count[s] __] that _____*<insert name of victim>* **was a particularly vulnerable victim.]**

To prove this allegation, the People must prove that:

1. _____ *<insert name of victim>* **(suffered/ [or]was threatened with suffering) a loss, injury, or harm as the result of the crime[s];**

AND

2._____*<insert name of victim>* **was particularly vulnerable.**

Particularly vulnerable **includes being defenseless, unguarded, unprotected, or otherwise susceptible to the defendant's criminal act to a special or unusual degree.**

In determining whether _____ *<insert name of victim>* **was *particularly vulnerable*, you should consider all of the circumstances surrounding the commission of the crime, including the characteristics of _____** *<insert name of victim>* **and the manner and setting in which the crime was committed.**

[You may not find vulnerability based solely on _____ *<insert element of the offense>***, which is an element of _____***<insert offense>***.]**

You may not find the allegation true unless all of you agree that the People have proved that the victim was particularly vulnerable. However, you do not have to agree on which facts show that the victim was particularly vulnerable.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

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

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

New March 2023

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Pen. Code section 1170.85(b) states: "Upon conviction of any felony it shall be considered a circumstance in aggravation in imposing a term under subdivision (b) of Section 1170 if the victim of an offense is particularly vulnerable, or unable to defend himself or herself, due to age or significant disability." If this section is applicable, the instruction should be modified to reflect the victim's alleged inability to defend himself or herself based on age or significant disability.

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

The court should specify which crime and victim the aggravating factor pertains to if it applies to one or more specific counts or victims.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. ▸ California Rules of Court, rule 4.421(a)(3).
- "Aggravating Fact" Defined. ▸ *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496,

512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].

- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. ▸ *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- "Victim" Defined. ▸ *People v. Simon* (1983) 144 Cal.App.3d 761, 765 [193 Cal.Rptr. 28].
- "Particularly Vulnerable" Defined. ▸ *People v. DeHoyos* (2013) 57 Cal.4th 79, 154–155 [158 Cal.Rptr.3d 797, 303 P.3d 1]; *People v. Spencer* (1996) 51 Cal.App.4th 1208, 1223 [59 Cal.Rptr.2d 627]; *People v. Price* (1984) 151 Cal.App.3d 803, 814 [199 Cal.Rptr. 99]; *People v. Ramos* (1980) 106 Cal.App.3d 591, 607 [165 Cal.Rptr. 179]; *People v. Smith* (1979) 94 Cal.App.3d 433, 436 [156 Cal.Rptr. 502].
- Vulnerability Cannot Be Based Solely on Age if Age Is Element of Offense. *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1693–1694 [53 Cal.Rptr.2d 282], disapproved on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123 [65 Cal.Rptr.2d 1, 938 P.2d 986]; *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1159 [249 Cal.Rptr. 435], disapproved on other grounds in *People v. Soto* (2011) 51 Cal.4th 229, 244–245 [119 Cal.Rptr.3d 775, 245 P.3d 410]; *People v. Ginese* (1981) 121 Cal.App.3d 468, 476–477 [175 Cal.Rptr. 383]; *People v. Flores* (1981) 115 Cal.App.3d 924, 927 [171 Cal.Rptr. 777].
- Factor Did Not Apply in Vehicular Manslaughter. ▸ *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1358–1359 [241 Cal.Rptr. 391].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3227. Aggravating Factor: Induced Others to Participate or Occupied Position of Leadership or Dominance

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<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]] [or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant induced others to participate in committing the crime[s] or occupied a position of leadership or dominance of other participants in the commission of the crime[s].]

<Introductory paragraph for bifurcated trial>
[The People have alleged[in Count[s] ___] that the defendant induced others to participate in committing the crime[s] or occupied a position of leadership or dominance of other participants in the commission of the crime[s].]

To prove this allegation, the People must prove that:

1. **The defendant induced others to participate in the commission of the crime[s];**

   OR

2. **The defendant occupied a position of leadership or dominance over other participants during commission of the crime[s].**

***Induced* means persuaded, convinced, influenced, or instructed.**

You may not find the allegation true unless all of you agree that the People have proved that the defendant either induced others to participate or occupied a position of leadership or dominance. However, all of you do not need to agree on which act[s] or conduct constitutes inducing others to participate or occupying a position of leadership or dominance.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

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

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

New March 2023

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

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

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. ▸ California Rules of Court, rule 4.421(a)(4).
- "Aggravating Fact" Defined. ▸ *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. ▸ *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- More Than One Participant Required. ▸ *People v. Berry* (1981) 117 Cal.App.3d 184, 198 [172 Cal.Rptr. 756, 763–764].
- Leadership Not Equivalent to Dominance. ▸ *People v. Kellett* (1982) 134 Cal.App.3d 949, 961 [185 Cal.Rptr. 1].

- Factor Requires More Than Being Willing Participant. ▸ *People v. Searle* (1989) 213 Cal.App.3d 1091, 1097 [261 Cal.Rptr. 898].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3228. Aggravating Factor: Induced Minor to Commit or Assist

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged [in Count[s] __[,]][or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ <*insert lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the defendant induced a minor to commit or assist in the commission of the crime[s][in Count[s] __].]

<Introductory paragraph for bifurcated trial>
[The People have alleged[in Count[s] __] that the defendant induced a minor to commit or assist in the commission of the crime[s].]

To prove this allegation, the People must prove that:

1. **The defendant induced a minor to commit the crime[s];**

   OR

2. **The defendant induced a minor to assist in the commission of the crime[s].**

Induced **means persuaded, convinced, influenced, or instructed.**

A minor is a person under the age of 18 years.

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

You may not find the allegation true unless all of you agree that the People have proved that the defendant induced a minor either to commit the crime or to assist in the commission of the crime. However, all of you do not need to agree on which act[s] or conduct constitutes the inducement.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

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

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

New March 2023

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

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

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. ▸ California Rules of Court, rule 4.421(a)(5).
- "Aggravating Fact" Defined. ▸ *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. ▸ *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court

held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3229. Aggravating Factor: Threatened, Prevented, Dissuaded, Etc. Witnesses

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<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]] [or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ *<insert lesser offense[s]>***], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the defendant[in Count[s] __] (threatened witnesses[,]/ [or]unlawfully prevented or dissuaded witnesses from testifying[,]/ [or]suborned perjury[,]/ [or]**_____*<insert other illegal activity that interfered with the judicial process>***).]**

<Introductory paragraph for bifurcated trial>
[The People have alleged that the defendant[in Count[s] __] (threatened witnesses[,]/ [or]unlawfully prevented or dissuaded witnesses from testifying[,]/ [or]suborned perjury[,]/ [or]_____*<insert other illegal activity that interfered with the judicial process>***).]**

To prove this allegation, the People must prove that the defendant (threatened [a]witness[es]/ [or]prevented [a]witness[es] from testifying/ [or]dissuaded [a]witness[es] from testifying/ [or]suborned perjury/[or]_____*<insert other illegal activity that interfered with the judicial process>***).**

[As used here, *witness* means someone[or a person the defendant reasonably believed to be someone]:

<Give the appropriate bracketed paragraph[s].>

- **[Who knows about the existence or nonexistence of facts relating to a crime(;/.)]**

  [OR]

- **[Whose declaration under oath has been or may be received as evidence(;/.)]**

  [OR]

- **[Who has reported a crime to a (peace officer[,]/ [or] prosecutor[,]/ [or] probation or parole officer[,]/ [or] correctional officer[,]/ [or] judicial officer)(;/.)]**

  [OR

- **Who has been served with a subpoena issued under the authority of any state or federal court.]]**

[A threat may be oral or written and may be implied by a pattern of conduct or a combination of statements and conduct.]

[The defendant does not have to communicate the threat directly to the intended victim, but may do so through someone else.]

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

[*Dissuaded* means persuaded or advised not to do something.]

[*Suborned perjury* means encouraged, induced, or assisted witnesses to willfully make [a]false statement[s] under oath. In order to find that the defendant suborned perjury, the People must prove, beyond a reasonable doubt, not only that the sworn statement was actually false, but also that the defendant, at the time (he/she) encouraged, induced, or assisted the witness(es) to make the statement, knew that it was false.]

[*Induced* means persuaded, convinced, influenced, or instructed.]

You may not find the allegation true unless all of you agree that the People have proved that the defendant (threatened [a]witness[es]/ [or]prevented [a]witness[es] from testifying/ [or]dissuaded [a]witness[es] from testifying/ [or]suborned perjury/ [or]_____<*insert other illegal activity that interfered with the judicial process*>**). However, all of you do not need to agree on which act[s] or conduct constitutes (threatening [a]witness[es]/ [or]preventing [a]witness[es] from testifying/ [or]dissuading [a]witness[es] from testifying/ [or]suborning perjury/ [or]_____**<*insert other illegal activity that interfered with the judicial process*>**.**

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

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

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

New March 2023

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Penal Code section 1170.85(a) states: "Upon conviction of any felony assault or battery offense, it shall be considered a circumstance in aggravation of the crime in imposing a term under subdivision (b) of Section 1170 if the offense was committed to prevent or dissuade a person who is or may become a witness from attending upon or testifying at any trial, proceeding, or inquiry authorized by law, or if the offense was committed because the person provided assistance or information to a law enforcement officer, or to a public prosecutor in a criminal or juvenile court proceeding." If this section is applicable, the bracketed catch-all provision of the instruction related to other illegal activity should be modified to reflect the defendant's alleged conduct.

If it is alleged the defendant interfered with the judicial process by committing perjury, the bracketed catch-all provision for other illegal activity should be modified and the trial court should also instruct with CALCRIM No. 2640, *Perjury*. (See *People v. Howard* (1993) 17 Cal.App.4th 999, 1002–1004 [21 Cal.Rptr.2d 676].)

The catch-all provision of other illegal activity can include attempts to dissuade or prevent a witness from testifying. (See *People v. Lewis* (1991) 229 Cal.App.3d 259, 266–267 [280 Cal.Rptr. 128].)

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

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. ▸ California Rules of Court, rule 4.421(a)(6); see also
- "Aggravating Fact" Defined. ▸ *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. ▸ *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- "Witness" Defined. ▸ Pen. Code, § 136(2).
- "Threat" Defined. ▸ Pen. Code, § 76(5).
- Attempted Subornation of Perjury. ▸ *People v. Lewis* (1991) 229 Cal.App.3d 259, 266–267 [280 Cal.Rptr. 128].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

Perjury

Perjury committed by the defendant can constitute "an illegal activity that interfered with the judicial process." (See *People v. Howard* (1993) 17 Cal.App.4th 999, 1002 [21 Cal.Rptr.2d 676].) If it is alleged that the defendant committed perjury, the jury must find all the elements of a perjury violation. *Id.* at

p. 1004 [holding that the court is constitutionally required to make findings encompassing the elements of perjury: "a willful statement, under oath, of any material matter which the witness knows to be false."]; see also *United States v. Dunnigan* (1993) 507 U.S. 87, 96 [113 S.Ct. 1111, 122 L.Ed.2d 445].) The concern, essentially, is that a sentence may be aggravated if the defendant actually committed perjury by being untruthful, but not if the defendant merely gave inaccurate testimony because of confusion, mistake, faulty memory, or some other reason besides a willful attempt to impede justice. (*Howard*, *supra*, 17 Cal.App.4th at p.1005; *Dunnigan*, *supra*, 507 U.S. at pp. 95–96.)

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3230. Aggravating Factor: Planning, Sophistication, or Professionalism

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<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]] [or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the offense was carried out with planning, sophistication, or professionalism.]

<Introductory paragraph for bifurcated trial>
[The People have alleged[in Count[s] __] that the offense was carried out with planning, sophistication, or professionalism.]

To prove this allegation, the People must prove that the defendant's manner of committing the crime involved planning, sophistication, or professionalism.

Whether the manner of committing the crime involves *planning, sophistication, or professionalism* depends on the totality of the circumstances surrounding the offense.

***Planning* refers to conduct before the crime, preparing for its commission.**

***Sophistication* refers to conduct demonstrating knowledge or awareness of the complexities or details involved in committing the crime.**

***Professionalism* refers to conduct demonstrating particular experience or expertise.**

You may not find the allegation true unless all of you agree that the People have proved that the defendant's manner of committing the crime involved planning, sophistication, or professionalism. However, all of you do not need to agree on which act[s] or conduct demonstrates that the manner of committing the crime involves planning, sophistication, or professionalism.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved (this/these) allegation[s] for each crime and return a separate finding for each crime.]

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

New March 2023

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

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

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factors. ▸ California Rules of Court, rule 4.421(a)(8).
- "Aggravating Fact" Defined. ▸ *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. ▸ *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- "Planning, Sophistication, Professionalism" Defined. ▸ *People v. Mathews* (1980) 102 Cal.App.3d 704, 710 [162 Cal.Rptr. 615]; *People v. Stewart* (1983) 140 Cal.App.3d 11, 17 [189 Cal.Rptr. 141]; *People v. Charron* (1987) 193 Cal.App.3d 981, 994–995 [238 Cal.Rptr. 660]; *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1695 [53 Cal.Rptr.2d 282], disapproved on other grounds in

People v. Hammon (1997) 15 Cal.4th 1117, 1123 [65 Cal.Rptr.2d 1, 938 P.2d 986].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3231. Aggravating Factor: Great Monetary Value

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]] [or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ <*insert lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the crime[s][in Count[s] __] involved [(a/an)] [attempted] [or] [actual] (taking/ [or] damage) of great monetary value.]

<Introductory paragraph for bifurcated trial>
[The People have alleged that the crime[s][in Count[s] __] involved[(a/an)][attempted][or][actual] (taking/ [or] damage) of great monetary value.]

To prove this allegation, the People must prove that:

1. **During the commission of the crime[s], the defendant (attempted to take/ [or]actually took/damaged) _____**<*insert description of item*>**;**

   AND

2. **The monetary value of the _____** <*insert description of item or damage to item*> **was great.**

[In determining whether the *monetary value* was *great*, you may consider all evidence presented on the issue of value.]

You may not find the allegation true unless all of you agree that the People have proved that the (item/damage) that the defendant (attempted to take/took / [or] caused) was of great monetary value. However, all of you do not need to agree on a specific monetary value.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

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

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

New March 2023

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

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

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. ▸ California Rules of Court, rule 4.421(a)(9).
- "Aggravating Fact" Defined. ▸ *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. ▸ *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Great Monetary Value. ▸ *People v. Wright* (1982) 30 Cal.3d 705, 707 & 714 [180 Cal.Rptr. 196, 639 P.2d 267] [losses of $2,300 and $3,250 qualified]; *People v. Berry* (1981) 117 Cal.App.3d 184, 197 [172 Cal.Rptr. 756] [damage of $450 did not qualify]; *People v. Bejarano* (1981) 114 Cal.App.3d 693, 705–706 [173 Cal.Rptr. 71] [loss of rifle, shotgun, and television did not qualify].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3232. Aggravating Factor: Large Quantity of Contraband

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]] [or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ <*insert lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the crime[s][in Count[s] __] involved a large quantity of contraband.]

<Introductory paragraph for bifurcated trial>
[The People have alleged that the crime[s][in Count[s] __] involved a large quantity of contraband.]

To prove this allegation, the People must prove that:

1. **The _____ <*insert description of contraband*> was contraband;**

AND

2. **The quantity of _____<*insert description of contraband*> was large.**

[*Contraband* means illegal or prohibited items.]

In determining whether the quantity was *large*, you may consider all evidence presented on the issue of amount.

You may not find the allegation true unless all of you agree that the People have proved that the quantity of contraband was large. However, all of you do not need to agree on the specific quantity.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

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

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

New March 2023

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

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

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. ▸ California Rules of Court, rule 4.421(a)(10).
- "Aggravating Fact" Defined. ▸ *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. ▸ *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute

may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3233. Aggravating Factor: Position of Trust or Confidence

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]][or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ <*insert lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the defendant took advantage of a position of trust or confidence to commit the crime.]

<Introductory paragraph for bifurcated trial>
[The People have alleged[in Count[s]__] that the defendant took advantage of a position of trust or confidence to commit the crime.]

To prove this allegation, the People must prove that:

> **1. (Prior to/During) the commission of the crime, the defendant (had/developed) a relationship with _____** *<insert name of victim or other person>***;**
>
> **2. This relationship allowed the defendant to occupy a position of trust or caused _____***<insert name of victim or other person>* **to have confidence in the defendant;**
>
> **AND**
>
> **3. The defendant took advantage of this position of trust or confidence to commit the crime.**

You may not find the allegation true unless all of you agree that the People have proved that the defendant took advantage of a position of trust or confidence with the victim to commit the crime. However, all of you do not need to agree on which act[s] or conduct constitutes the taking advantage of a position of trust or confidence to commit the crime.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

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

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

New March 2023

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

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

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. ▸ California Rules of Court, rule 4.421(a)(11).
- "Aggravating Fact" Defined. ▸ *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. ▸ *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Factor Focuses on Special Status to Victim. ▸ *People v. DeHoyos* (2013) 57 Cal.4th 79, 155 [158 Cal.Rptr.3d 797, 303 P.3d 1]; *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1262–1263 [131 Cal.Rptr.2d 628] [quasi-paternal relationship]; *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1694–1695 [53 Cal.Rptr.2d 282] [defendant intentionally cultivated friendship], disapproved

on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123 [65 Cal.Rptr.2d 1, 938 P.2d 986]; *People v. Franklin* (1994) 25 Cal.App.4th 328, 337–338 [30 Cal.Rptr.2d 376] [stepfather entrusted with care]; *People v. Clark* (1992) 12 Cal.App.4th 663, 666 [15 Cal.Rptr.2d 709] [stepfather entrusted with care]; *People v. Jones* (1992) 10 Cal.App.4th 1566, 1577 [14 Cal.Rptr.2d 9] [legal parent].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3234. Aggravating Factor: Serious Danger to Society

<Introductory paragraph for nonbifurcated trial>
[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]][or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ *<insert lesser offense[s]>***], you must then decide whether the People have proved the additional allegation that _____***<insert name of defendant>* **has engaged in violent conduct, to wit:_____** *<insert description of conduct>***, which indicates (he/she) is a serious danger to society.]**

<Introductory paragraph for bifurcated trial>
[The People have alleged that _____*<insert name of defendant>* **has engaged in violent conduct, to wit:_____** *<insert description of conduct>***, which indicates (he/she) is a serious danger to society.]**

To prove this allegation, the People must prove that:

1. **The defendant has engaged in violent conduct;**

   AND

2. **The violent conduct, considered in light of all the evidence presented[and the defendant's background], shows that the defendant is a serious danger to society.**

[To determine whether the defendant is a serious danger to society, you may consider the defendant's conduct before or after commission of the crime[as well as evidence about the defendant's background].]

You may not find the allegation true unless all of you agree that the People have proved that the defendant engaged in violent conduct that shows (he/she) is a serious danger to society. However, all of you do not need to agree on which violent conduct shows that the defendant is a serious danger to society.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's violent conduct was distinctively worse than that posed by an ordinary commission of the underlying crime and that the violent conduct, considered in light of all the evidence presented[and the

defendant's background], shows that the defendant is a serious danger to society.

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

New March 2023

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

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

The court should specify the crime(s) to which the aggravating factor pertains.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factors. ▸ California Rules of Court, rule 4.421(b)(1).
- "Aggravating Fact" Defined. ▸ *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. ▸ *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Danger to Society: Subsequent Conduct Can Be Considered. ▸ *People v. Gonzales* (1989) 208 Cal.App.3d 1170, 1173 [256 Cal.Rptr. 669].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an "ordinary" violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra,* 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

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