JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on September 24, 2019

Title
Jury Instructions: Revisions to Criminal Jury Instructions

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

Recommended by
Advisory Committee on Criminal Jury Instructions
Hon. Peter J. Siggins, Chair

Agenda Item Type
Action Required

Effective Date
September 24, 2019

Date of Report
July 19, 2019

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Executive Summary

The Advisory Committee on Criminal Jury Instructions recommends approving the revised and revoked 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 September 2019 Supplement of the *Judicial Council of California Criminal Jury Instructions (CALCRIM)*.

Recommendation

The Advisory Committee on Criminal Jury Instructions recommends that the Judicial Council, effective September 24, 2019, approve the following changes to the criminal jury instructions prepared by the committee:

1. Revisions to CALCRIM Nos. 101, 200, 362, 376, 402, 403, 511, 520, 524, 540A, 540B, 540C, 548, 561, 600, 703, 732, 860, 862, 863, 875, 970, 982, 983, 1128, 1191A, 1502, 2100, 2101, 2102, 2503, 2572, 2651, 2652, 2720, 2721, 2900, 2902, 3130, and 3145;

2. Technical changes to CALCRIM Nos. 123, 208, 590, 810, 890, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1070, 1080, 1081, 1082, 1090, 1091, 1101, 1123, 1203, 2306, and 3406;
3. Revocation of CALCRIM Nos. 541A, 541B, and 541C; and
4. Updates to the Introduction to Felony-Murder Series.

A table of contents and the full text of the revised instructions are attached at pages 26–306.

Relevant Previous Council Action

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

Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CALCRIM.* The council approved the last *CALCRIM* release at its March 2019 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.

Felony Murder (CALCRIM Nos. 540A–540C and 541A–541C)

Senate Bill 1437 (Stats. 2018, ch. 1015) substantially changed accomplice liability for felony murder. As a result of these legislative changes, the instructions for felony murder need to be revised. CALCRIM No. 540A is the instruction for felony murder when the defendant is charged as the actual killer. This instruction required the least revision because felony murder liability for the actual killer did not change. CALCRIM Nos. 540B and 540C required more revisions and now contain the added elements for intent to kill (Pen. Code, § 189(e)(2)), major participant (Pen. Code, § 189(e)(3)), and the peace officer exception (Pen. Code, § 189(f)). The committee also proposes revoking CALCRIM Nos. 541A, 541B, and 541C. These instructions relate to second degree felony murder, which the new legislation effectively eliminated by adding subdivision (a)(3) to Penal Code section 188. The committee has proposed updates to the Introduction to Felony-Murder Series to explain these changes.

[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."

Natural and Probable Consequences (CALCRIM Nos. 402 and 403) and *Attempted Murder* (CALCRIM No. 600)

Senate Bill 1437 added subdivision (a)(3) to Penal Code section 188. This subdivision contains the following statement: "Malice shall not be imputed to a person based solely on his or her participation in a crime." The committee added a bench note to these three instructions to alert users that, as a result of this amendment, the natural and probable consequences doctrine might no longer apply to attempted murder.

Murder: Alternative Theories (CALCRIM No. 548)

Senate Bill 1437 added two theories of felony murder accomplice liability: aider and abettor with intent to kill and major participant with reckless indifference. The legislation also carved out an exception when the victim was a peace officer. The committee inserted new language in this instruction to account for murder prosecutions where the evidence supports more than one theory of felony murder liability.

Homicide: Provocative Act by Accomplice (CALCRIM No. 561)

The addition of subdivision (a)(3) to Penal Code section 188 also has potential consequences for provocative act liability when an accomplice commits the provocative act. The committee added a bench note about this possible impact.

Cautionary Admonitions and Duties of Judge and Jury (CALCRIM Nos. 101 and 200)

Addressing the potential for bias among jurors during deliberations is an important issue. Based on requests from several trial court judges, the committee added additional language about bias to highlight to jurors the importance of not allowing bias to affect their deliberations.

Engaging in Oral Copulation or Sexual Penetration (CALCRIM No. 1128)

In *People v. Saavedra* (2018) 24 Cal.App.5th 605 *(Saavedra)*, the trial court erred in instructing the jury with the general intent language of CALCRIM No. 252 in a prosecution for Penal Code section 288.7(b) because the underlying act was sexual penetration and not oral copulation. The court found the error to be harmless because CALCRIM No. 1128 "correctly defined sexual penetration and informed jurors of the requisite purpose." *Id.* at p. 615. The committee added a bench note to instruct on specific intent when the underlying act is sexual penetration. The committee also added *Saavedra* to the authority section.

Consciousness of Guilt: False Statements (CALCRIM No. 362)

In *People v. Burton* (2018) 29 Cal.App.5th 917, the court upheld CALCRIM No. 362 over a challenge that the instruction's reference to "the charged crime" improperly undermined the defendant's claim that her false statement to the police reflected consciousness of guilt of a lesser offense. In response to this case, the committee added a bench note that suggests modifying the instruction when the evidence supports an inference that the defendant was aware of his or her guilt generally but not of the charged crime.

***Instructions that involve deadly or dangerous weapon* (CALCRIM Nos. 511, 524, 860, 862, 863, 875, 982, 983, 2503, 2720, 2721, 3130, and 3145)**

In *People v. Stutelberg* (2018) 29 Cal.App.5th 314, the defendant was convicted of assault for waiving around a box cutter. The court reversed this conviction because CALCRIM Nos. 875 and 3145 did not provide the definition for inherently deadly or dangerous weapons. As a result, the court concluded that jurors could have erroneously classified the box cutter as inherently dangerous. In response to this holding, the committee added the definition of inherently deadly or dangerous weapon to these instructions and included bench notes about when trial courts should include the phrase "inherently deadly." The committee also added case citations to the authority section.

***Arson: Inhabited Structure or Property* (CALCRIM No. 1502)**

A user noted that the definition of an inhabited structure in the burglary instruction (CALCRIM No. 1701) contains different wording from the definition of that term in the arson instruction. The committee decided to conform the arson instruction with the burglary definition of "inhabited." The committee also added punctuation to make "inhabited structure" and "inhabited property" optional.

Policy implications

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

Comments

The proposed additions and revisions to *CALCRIM* circulated for public comment from May 29 through July 5, 2019. The committee received responses from nine commenters. The text of all comments received and the committee's responses are included in a comments chart attached at pages 6–25.

Alternatives considered

The proposed revisions 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. To the contrary, under the publication agreement, the official publisher, LexisNexis, will print a new edition and pay royalties to the Judicial Council. The council's contract with West Publishing provides additional royalty revenue.

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

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

Attachments and Links

1. Chart of comments, at pages 6–25
2. Full text of revised *CALCRIM* instructions, including table of contents, at pages 26–306.

CALCRIM-2019-01 Invitation to Comment
Revised CALCRIM Instructions
The longer comments have been lightly edited

Instruction	Commentator	Comment	Response
101 & 200	Hon. Kelvin Filer, Los Angeles Superior Court	I definitely agree with the proposed additions to the Cautionary Instructions - CalCrim 101 and 200!! It is important to remind our jurors that, as human beings, we ALL have implied biases and that part of their job is going to be to set aside those biases to be fair to all the parties in the case. I have been using this language as additions to my regular instructions and I think it helps the jurors to relax a little in carrying out their duties - it "humanizes" the process!	No response necessary.
101 & 200	Hon. Christopher Hite, San Francisco Superior Court	I had one suggested edit to the instructions: You must not let bias, prejudice, or public opinion influence your assessment of the evidence or your decision in this case. Many people have conscious and/or unconscious biases about other people. You must not be biased in favor of or against any party, witness, attorney, defendant[s], or alleged victim because of his or her disability, gender, nationality, national origin, race or ethnicity, religion, gender identity, sexual orientation, age, [or] socioeconomic status(./,) [or _____<insert any other impermissible form of bias>.] I am sure there was a lot of time and effort put into this change, but it seems to read a bit challenging to me. I'm not sure this fixes it all that much but if not, I think the original needs to be more clear.	The committee agrees with the suggestion to add "your" before "decision." The committee disagrees with the suggestions to add "in this case" and "conscious and/or unconscious biases about other people." To make the instruction clearer, the committee changed the second sentence to read: "Many people have assumptions and biases about or stereotypes of other people and may be unaware of them."
101 & 200	Hon. Bobbi Tillmon, Los Angeles Superior Court	Please accept my comments only for CALCRIM #101 and #200. The proposed language is similar to part of the California Civil Instruction #113 which is a very important instruction to remind jurors of their responsibility to avoid biased thinking in their decision making.	No response necessary.
101 & 200	Judge Lee Tsao, Chair Judge Brenda Penny, Vice-Chair Los Angeles Superior Court Access and Fairness Committee	The Los Angeles Superior Court's Access and Fairness Committee lodges its support for the proposed changes to CALCRIM 101 and 200 which caution jurors in a criminal case against the effects of implicit bias upon their decision making. Our committee has been actively engaged in educating judicial officers in our court about implicit bias. During the last several years, we presented four judicial trainings on the subject, two of which were presented jointly with the Access to Justice Committee of the Los Angeles County Bar Association. While implicit bias has been the subject of scholarly research for many years, in the past decade have we seen an increased awareness of the harmful effects of implicit bias in the legal system. Articles published by the American Judges	No response necessary.

Instruction	Commentator	Comment	Response
		Association, Judge Mark Bennett of the Northern District of Iowa, and Professor Jerry Kang of the UCLA School of Law, to name a few, reveal how implicit bias can be manifested by just about anyone in a courtroom, including jurors, witnesses, attorneys, judges and court staff. Each time a bias is left uncorrected, we undermine our ability to achieve justice for all. The research teaches us that in order to combat the effects of implicit bias upon our decision making, we must first become aware of them. This appears to be the primary purpose behind CACI 113, introduced in 2010 for jurors in civil cases. Because of the lack of any corresponding implicit bias instruction for criminal cases, some judges hearing criminal cases have been adding CACI 113 to their standard CALCIM instructions. One such person is Judge Kelvin Filer, a member of our committee who has been instructing on CACI 113 for years in his criminal cases. On behalf of our committee, Judge Filer submitted proposed changes to CALCRIM 101 to the Advisory Committee on Criminal Jury Instructions. Judge Filer's efforts were the impetus for the proposed changes to CALCRIM 101 and 200 now under consideration. When discussing these changes to CALCRIM as a committee and during our trainings on implicit bias to judges of our court, it became apparent that many judges presiding over criminal cases were unaware of the existence of an implicit bias instruction in CACI. Our committee believes that the real question is not whether courts should instruct upon implicit bias, but rather how we should do so. In this regard, we believe that judges need just as much guidance as jurors and that a standardized approach, which balances the need for education about implicit bias with demands for efficiency, is the best approach. That a standard jury instruction addressing implicit bias has been in place in civil cases for nearly a decade points to an even greater need in criminal cases where life and liberty are at stake. The proposed changes to CALCRIM 101 and 200 effectively and efficiently address that need and they are long overdue.	
402 & 403	Erin Loback, Deputy District Attorney from Alameda County	Because of the changes to Penal Code section 188, consider adding a sentence such as this: "If the non-target offense is murder, you must also determine whether the defendant had the required mental state of malice aforethought as	The committee disagrees with the assertion that a defendant who harbors malice can be guilty under natural and probable

Instruction	Commentator	Comment	Response
		defined elsewhere in these instructions." (This suggestion is based on my review of many cases through the lens of 1170.95.) I disagree with the comment that a verdict of murder can no longer be based on the doctrine of natural and probable consequences. It can (and per ***Chiu*** it is second degree), with an individualized showing of malice aforethought.	consequences of murder as a nontarget offense. Although a codefendant's target offense might not be murder, a defendant's target offense would be murder if the defendant acts with malice.
402 & 403	Kate Chatfield, on behalf of The Justice Collaborative	Comment – add to Bench Notes: **Do not give this instruction if the non-target crime committed by the coparticipant is murder. Penal Code section 188(a)(3), as amended by Statutes 2018, ch.1015 (S.B. 1437), became effective January 1, 2019. The amendment added "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." Section 1 of S.B. 1437 stated, "(g) Except as stated in subdivision (e) of Section 189 of the Penal Code, a conviction for murder requires that a person act with malice aforethought. A person's culpability for murder must be premised upon that person's own actions and subjective mens rea."** **There is no more liability for murder for a non-killer based on the natural and probable consequences doctrine. (See also Senate Concurrent Resolution 48, (Resolution Chapter 175, 2017–18 Regular Session)** **The question whether this amendment abolished the natural and probable consequences doctrine as to attempted murder is unresolved.**	The committee disagrees with this suggestion. The committee has already added language about Pen. Code, § 188(a)(3) in the Related Issues section. The commenter's proposed statement to include in the instructional duty section is unnecessary.
417	Robert Mestman, Sr. Deputy District Attorney, on behalf of the Orange County District Attorney's Office	[The] paragraph under the heading "Conspiracy Liability – Natural and Probable Consequences" [in CALCRIM No. 540B] should be added to instruction No. 417.	The committee does not currently have a proposed modification for this instruction and will consider this comment at its next meeting.

CALCRIM-2019-01 Invitation to Comment
Revised CALCRIM Instructions
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Instruction	Commentator	Comment	Response
417	Kate Chatfield, on behalf of The Justice Collaborative	Add to the bench notes under Instructional Duty: **Do not give this instruction if the non-target crime committed by the coconspirator is murder and the defendant did not act with express or implied malice.** **Penal Code section 188(a)(3), as amended by Statutes 2018, ch.1015 (S.B. 1437), became effective January 1, 2019. The amendment added "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." Section 1 of S.B. 1437 stated, "(g) Except as stated in subdivision (e) of Section 189 of the Penal Code, a conviction for murder requires that a person act with malice aforethought. A person's culpability for murder must be premised upon that person's own actions and subjective *mens rea*." (See also Senate Concurrent Resolution 48, (Resolution Chapter 175, 2017–18 Regular Session).** **There is no more liability for murder for a non-killer based on the natural and probable consequences doctrine. The question whether this amendment abolished the natural and probable consequences doctrine as to attempted murder is unresolved.**	The committee does not currently have a proposed modification for this instruction and will consider this comment at its next meeting.
540A	Kate Chatfield, on behalf of The Justice Collaborative	The note [on imperfect self-defense] states that "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) However, after SB 1437, malice now is an element of felony murder for non-perpetrators of the killing. For the non-killer accomplice, that person either has to have the mental state of an intention to kill or act with the mental state of reckless indifference to human life in the killing. (See *People v. Clark* (2016) 63 Cal. 4th 522, 617.). One can conceive of a situation in which a defendant could raise a defense of imperfect self-defense or defense of others. Accordingly, although this Note on Imperfect Self Defense appears in 540A (and appropriately not in 540B) to avoid confusion, it should state:	The committee disagrees with this suggestion. Intent to kill is not the same as express malice and reckless indifference is not the same as implied malice. Although malice can be mitigated by heat of passion or imperfect self-defense, intent to kill and conscious disregard are not themselves mitigated by heat of passion or imperfect self-defense. Section 189(e) continues to allow for imputed malice under certain

Instruction	Commentator	Comment	Response
		Malice aforethought is not an element of felony murder when the prosecution has proved beyond a reasonable doubt that the defendant was the actual killer.	circumstances and that imputed malice is not negated by heat of passion or imperfect self-defense.
540A	The Offices of the Los Angeles County Public Defender and Alternate Public Defender	**Escape Rule in CALCRIM 540A.** The Introduction to the Proposed Changes states: [T]he committee has deleted [CALCRIM no. 549] and replaced it with appropriate bench note references. If the defendant committed the homicidal act and fled, that killing did not occur in the commission of the felony if the fleeing felon has reached a place of temporary safety. (*People v. Wilkins, supra*, at p. 345.) However, the language in CALCRIM 540A itself does not comport with this language and is legally insufficient. Proposed CALCRIM 540A contains a bracketed portion that states: *<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.] The instruction should contain the following statement: If the defendant committed the homicidal act and fled, that killing did not occur in the commission of the felony if the fleeing felon has reached a place of temporary safety. This language is consistent with the Supreme Court's holding in *Wilkins*: When the killing occurs during flight, however, the escape rule establishes the outer limits of the continuous-transaction theory. Flight following a felony is considered part of the same transaction as long as the felon has not reached a place of temporary safety. (*People v. Wilkins* (2013) 56 Cal.4th 333, 345, internal citations omitted.)	This comment raises issues outside the scope of the current invitation to comment. The committee will consider this comment at its next meeting.
540B & 540C	Robert Mestman, Sr. Deputy District Attorney, on behalf of the Orange County	**AGREE WITH THE PROPOSAL IF IT IS MODIFIED** Felony murder of a police officer should be its own instruction. For instance, CALCRIM 540B should be split into 2 instructions: 1) dealing with felony murder with the major participant language (PC § 189(e)(3)); and 2) felony	The committee previously considered whether to create a separate peace officer exception instruction. Ultimately the

Instruction	Commentator	Comment	Response
	District Attorney's Office	murder dealing with death of law enforcement officer (PC § 189(f)). The logic behind this recommendation is that PC 189(f) states that the circumstance that are required in 189(e) [the factors that are subsequently "organized" in 540A, 540B, 540C] do not apply to felony murder of police officers. Further, 189(f) has additional factors that a jury must consider (e.g. officer in lawful performance of his duties, defendant knew or should have known victim was officer, etc.) that do not apply to felony murder under 189(e)(3). Thus, it is much cleaner to have separate instructions. Additionally, it is foreseeable where a prosecutor may proceed under both theories – a) felony murder where officer was in lawful performance of his duties and b) felony murder where defendant was a major participant. Thus, the court would have to instruct twice using 540B, but just using the different theories. [NOTE: we understand that 540B and C deal with co-participant caused murder and other acts caused murder and therefore, for uniformity, the committee may want two instructions for felony murder of a police officer to mirror 540B and C, but ultimately that makes little sense given that felony murder of a police officer is now its own subset of the felony murder rule.]	committee decided to include the peace officer exception in these two instructions because it is preferable to have all accomplice liability theories in one instruction and unnecessary to create a separate instruction. However, in response to this comment, the committee added an "[OR]" before alternative 189(f) and additional punctuation so that a trial court would only need to instruct once using 540B (or 540C) regardless of how many theories of liability the evidence supported.
540B & 540C	Robert Mestman, Sr. Deputy District Attorney, on behalf of the Orange County District Attorney's Office	These instructions contain the following sentence: "[It is not required that the defendant be present when the act causing the death occurs.]" While this is a correct statement of law, we are concerned that it potentially runs afoul of the *Banks* factors which are considered when deciding whether the defendant was a major participant (e.g., "4. Was the defendant in a position to facilitate or to prevent the death?") As was noted in *Banks*, the defendant's absence from the scene was a major factor contributing to the conclusion that he was not a major participant. So the inclusion of this bracketed language could undercut *Banks*. My concern, therefore, is that we may find the court overturning a conviction where this bracketed language was included in a jury instruction. Perhaps a cautionary note would be helpful.	The committee does not agree that a cautionary note is warranted. The statement about presence is not inconsistent with the identified *Banks* factor: the statement tells the jury not to acquit merely because the defendant is not present; whereas, the *Banks* factor tells the jury to consider the defendant's position to facilitate or to prevent the death among many factors when deciding whether to convict or to acquit.
540B & 540C	Erin Loback, Deputy District Attorney from Alameda County	Text is great. Consider also citing ***People v. Clark*****,** 63 Cal.4th 522 (2016), along with ***Tison*** and ***Estrada*** with respect to "reckless indifference to human life."	The committee agrees with this suggestion and has added *People v. Clark* to the Authority section.

CALCRIM-2019-01 Invitation to Comment
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540B & 540C	Barry P. Helft, Chief Deputy State Public Defender, on behalf of the Office of the State Public Defender ("OSPD")	***Clarification of the Reckless Indifference Standard*** These two proposed instructions reflect revisions undertaken in response to the amendments to the murder statutes made effective on January 1, 2019 by the passage of Senate Bill No. 1437 (2017-2018 Reg. Sess.). Specifically, both address the potential felony-murder liability of defendants who aided and abetted the underlying felony but did so without intending the resulting murder. As the instructions accurately state, such defendants can be found liable for the murder only if, as "major participant[s]" in the underlying felony they acted "with reckless indifference to human life." (Pen. Code, § 189, subd. (e) (3).) The instructions provide the following guidance regarding the mental component of that standard: A person acts with reckless indifference to human life when he or she knowingly engages in criminal activity that he or she knows involves a grave risk of death. OSPD's concern stems from the fact that the "major participant /reckless indifference" standard has long been applied in the context of the felony-murder special circumstance set forth in Penal Code section 190.2 and – although juries have been instructed accordingly – they have clearly misunderstood what the standard requires, for there have been (and continue to be) an exceptional number of appellate reversals of such findings based on the constitutional insufficiency of the evidence to support them. (E.g., *People v. Clark* (2016) 63 Cal.4th 522; *People v. Banks* (2015) 61 Cal.4th 788; *In re Taylor* (2019) 34 Cal.App.5th 543; *In re Ramirez* (2019) 32 Cal.App.5th 384; *In re Bennett* (2018) 26 Cal.App.5th 1002; *In re Miller* (2017) 14 Cal.App.5th 960.) In its opinions in these cases, the appellate courts have pointed to a ready source of confusion for jurors – namely, the notion that by merely participating in a felony that has the clear potential of resulting in violence (typically, an armed robbery) the aider and abettor has necessarily evinced "a reckless indifference to human life." The Supreme Court has emphasized – in terms that speak directly to the proposed instruction – that "participation in an armed robbery, without more, does *not* involve 'engaging in criminal activities known to carry a grave	When revising CALCRIM Nos. 540B and 540C pursuant to SB 1437, the committee incorporated the existing reckless indifference standard from CALCRIM No. 703 (*Special Circumstances – Felony Murder*) but did not evaluate whether this standard should be expanded or clarified. This suggestion is therefore outside the scope of the current invitation to comment. The committee will consider it at its next meeting.

Instruction	Commentator	Comment	Response
		risk of death.'" (*People v. Banks*, *supra*, 61 Cal.4th at p. 805 [emphasis supplied; citation omitted]; accord, *People v. Clark*, *supra*, 63 Cal.4th at pp. 617-618.) Rather, to suffer liability, "[t]he defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed, demonstrating reckless indifference to the significant risk of death his or her actions create." (*Banks*, *supra*, 61 Cal.4th at p. 801.) Thus the defendant's conduct must demonstrate "a willingness to kill (or to assist another in killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his actions." (*Clark*, *supra*, 63 Cal.4th at p. 617.) OSPD suggests that, to avoid the confusion and improper, unjust results that have repeatedly arisen in the special circumstance context, the instructions incorporate the clarifying language found in the Supreme Court's opinions. Thus OSPD proposes that the portions of CALCRIM Nos. 540B and 540C discussing "reckless indifference to human life" be modified to read substantially as follows: A person acts with reckless indifference to human life when that person knowingly engages in criminal activity that he or she knows involves a grave risk of death. However, the defendant's participation in [insert underlying felony] does not, in itself, constitute engaging in a criminal activity known to carry a grave risk of death. Rather, to find that the defendant acted with reckless disregard of human life you must determine that the defendant was aware of and willingly involved in the violent manner in which the crime was committed, demonstrating reckless indifference to the significant risk of death his or her actions created. Put another way, to find the defendant guilty under this theory you must find that his or her conduct demonstrated a willingness to kill (or to assist another in killing) to achieve a distinct aim, even if the defendant did not specifically desire that death as the outcome of his or her actions.	
540B & 540C	Barry P. Helft, Chief Deputy State Public Defender, on behalf of	***Incorporation of "Related Issues" Commentary from CALCRIM NO. 540A*** In the "Related Issues" section of both CALCRIM No. 540B and CALCRIM No. 540C, the Council has kept the paragraph incorporating the Related Issues	The committee disagrees with this suggestion. Intent to kill is not the same as express malice and

Instruction	Commentator	Comment	Response
	the Office of the State Public Defender ("OSPD")	section of CALCRIM No. 540A ("Felony Murder: First Degree – Defendant Allegedly Committed Fatal Act.") However, the amendment of Penal Code sections 188 and 189 by Senate Bill No. 1437 makes wholesale incorporation improper. Specifically, the Related Issues section of CALCRIM No. 540A provides, in pertinent part, that "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." While that remains true for perpetrators after Senate Bill No. 1437, and thus is properly included in CALCRIM No. 540A, it is now an incorrect statement of the law for accomplices who did not commit the fatal act. The language thus should not be incorporated by reference into CALCRIM Nos. 540B and 540C. Malice is now required for accomplices who did not commit the fatal act. (See Pen. Code, §§ 188, 189, as amended by Sen. Bill No. 1437.) To be guilty of first degree murder, the jury must find that a non-killer accomplice either directly aided and abetted the murder or was a major participant in a felony listed in Penal Code section 189 and acted with reckless indifference to human life. Reckless indifference to human life is a state of malice aforethought. It "requires subjective awareness of a higher degree of risk than the 'conscious disregard for human life' required for conviction of second degree murder based on implied malice." (*People v. Johnson* (2016) 243 Cal.App.4th 1247, 1285.) Because malice is now required, imperfect self-defense and other malice-negating theories are now applicable. OSPD suggests revising the Related Issues sections of CALCRIM Nos. 540B and 540C, so that they read as follows: See the Related Issues section of CALCRIM No. 540A, Felony Murder: First Degree – Defendant Allegedly Committed Fatal Act. However, malice-negating theories, including imperfect self-defense, remain available to defendants who did not commit the fatal act and the jury must be instructed that the prosecutor	reckless indifference is not the same as implied malice. Although malice can be mitigated by heat of passion or imperfect self-defense, intent to kill and conscious disregard are not themselves mitigated by heat of passion or imperfect self-defense. Section 189(e) continues to allow for imputed malice under certain circumstances and that imputed malice is not negated by heat of passion or imperfect self-defense.

Instruction	Commentator	Comment	Response
		bears the burden to disprove all malice-negating theories beyond a reasonable doubt.	
540B, 540C & 703	Kate Chatfield, on behalf of The Justice Collaborative	In *People v. Estrada*, (1995) 11 Cal. 4th 568, 578, the Supreme Court stated that the court does not have a sua sponte duty to define "reckless indifference to human life" because this phrase has a "common understanding." However, as *People v. Banks*, *People v. Clark* (2016) 63 Cal. 4th 522 and its progeny[1] have made clear, this phrase is *not* commonly understood by juries. It has been improperly argued and applied, leading to overbroad application against defendants who did not act with reckless indifference to human life under the case law. Moreover, in its current proposed form, the limited definition that is offered as a suggestion does not adequately focus the jury on the fact that the defendant must act with reckless indifference to human life *in the actual murder*; participating in a dangerous felony *alone* is insufficient to show the requisite recklessness. The proposed definition, even should the court give it, will allow the jury to improperly conflate the mere participation in the dangerous felony with a finding of reckless indifference to human life. This will result in defendants being improperly convicted of first-degree murder, as they have of special circumstances under Penal Code § 190.2 (d). To highlight this point, instructions very similar to the proposed suggested instructions were given in *In re Ramirez*, 32 Cal. App. 5th at 395, fn. 5. Although the California Supreme Court determined in *Estrada* that trial courts have no sua sponte duty to explain the phrase "reckless indifference to human life" to the jury (*Estrada, supra*, 11 Cal.4th at p. 581, 46 Cal.Rptr.2d 586, 904 P.2d 1197), the written form of CALJIC No. 8.80.1 (1996 rev.) (5th ed. 1988) instructed petitioner's jury that '[a] defendant acts with reckless indifference to human life when that defendant knows or is	The committee disagrees with the comment that SB 1437 created a sua sponte duty to instruct on reckless indifference. *Estrada* held there was no duty to instruct on the meaning of reckless indifference for the felony-murder special circumstance. The passage of SB 1437, by making reckless indifference and major participant elements of accomplice liability for felony murder, does not change this holding. Regarding the comment that the reckless indifference standard is inadequate: the committee incorporated this standard from CALCRIM No. 703 (*Special Circumstances – Felony Murder*) but did not evaluate whether it should be expanded or clarified. This suggestion is therefore outside the scope of the current invitation to comment and the committee will consider it at its next meeting.

[1] See *In re Bennett* (2018) 26 Cal.App.5th 1002; *People v. Taylor* (2019) 34 Cal.App.5th 543; *In re Ramirez* (2019) 32 Cal.App.5th 384; *In re Miller* (2017) 14 Cal.App.5th 960

Instruction	Commentator	Comment	Response
		aware that his acts involve a grave risk of death to an innocent human being.' Thus, despite the fact that the jury was given this limited instruction on reckless indifference to human life the *Ramirez* court held: "no reasonable juror could have found defendant aided and abetted the attempted robbery 'with reckless indifference to human life and as a major participant' (§ 190.2, subd. (d)), as those terms are set out in *Tison* and explicated by *Banks* and *Clark*." (*Ramirez, supra,* at 406.) As courts have noted, in order to determine whether someone acted with reckless indifference to human life, a court or jury must assess a person's "**individual responsibility for the loss of life**, not just his or her vicarious responsibility for the underlying crime." (*In re Bennett* (2018) 26 Cal.App.5th 1002, emphasis added.) A trier of fact must focus on whether the defendant's *own* actions in the killing exhibited the state of mind of reckless indifference. (See *People v. Banks* (2015) 61 Cal. 4th 788, 807 [as nothing at trial supported a conclusion that defendant's own actions were recklessly indifferent, or involved a grave risk of death, special circumstance finding reversed].) A defendant's own actions must evince a willingness to kill or to assist another in killing (*People v. Clark* (2016) 63 Cal. 4th 522, 617.); mere participation in a dangerous felony is insufficient. (See *Banks*, *Clark*, *Tison*, *Enmunds*) Accordingly, as a result of SB 1437, the court must not only give an instruction on reckless indifference and major participation in the felony for accomplices under Penal Code § 189(e)(3) when the facts require it, as these are now elements of the offense for certain accomplices to a felony murder, but the court must also properly define what it means to act with reckless indifference to human life. **COMMENTER'S PROPOSED INSTRUCTIONS REGARDING RECKLESS INDIFFERENCE TO HUMAN LIFE**	

Instruction	Commentator	Comment	Response
		<The following instructions must[2] be given when reckless indifference and major participant under Pen. Code § 189(e)(3) applies> **[A person *acts with reckless indifference to human life* when he or she personally engages in criminal activity that he or she knows involves a grave risk of death.** **Recklessness to human life is a standard of behavior in which one's own actions shows a willingness to kill or to assist another in killing.** **The fact that defendant or another accomplice was armed during the felony and therefore there was a foreseeable risk of death is insufficient on its own to find that defendant acted with reckless indifference to human life.** **In determining whether defendant acted with reckless indifference to human life, you must assess the defendant's own actions and individual responsibility for the loss of life not just [his/her] responsibility for the underlying crime. In order to decide whether the defendant acted with reckless indifference to human life, you may consider the following factors:** **1) The defendant's knowledge of weapons, and the use and number of weapons** **2) The defendant's proximity to the killing** **3) The defendant's opportunity to stop the killing or aid the victim.** **4) The duration of the restraint of the victims before the murder.** **5) The defendant's knowledge (either before or during the commission of the felony) that another participant was likely to kill. Awareness that another participant was armed is insufficient on its own to show that the defendant knew that participant was likely to kill.** **6) The defendant's efforts to minimize the possibility of violence during the felony.** **7) [*any other relevant factor*]** **No one of these factors is necessary, nor is any one of them necessarily enough, to determine whether the defendant acted with reckless indifference to human life.]**	

[2] As noted above, as a result of SB 1437, it must now be proven beyond a reasonable doubt that a person was the actual killer; intended to kill; or acted as a major participant in the felony and with reckless indifference to human life. Accordingly, when there is an issue as to whether a defendant acted with reckless indifference to human life, these instructions must be given.

Instruction	Commentator	Comment	Response
		COMMENTER'S SUGGESTED BENCH NOTES Instructional Duty **As "reckless indifference to human life" and acting as a "major participant" in the felony are necessary elements to be found liable for first degree murder under a theory of felony murder, the court has a sua sponte duty to define these elements for the jury.** ~~The court does not have a sua sponte duty to define "reckless indifference to human life." (People v. Estrada (1995) 11 Cal.4th 568, 578 [46 Cal.Rptr.2d 586, 904 P.2d 1197].) However, this "holding should not be understood to discourage trial courts from amplifying the statutory language for the jury." (Id. at p. 579.) The court may give the bracketed definition of reckless indifference if requested.~~ ~~In People v. Banks (2015) 61 Cal.4th 788, 803-808 [189 Cal.Rptr.3d 208, 351 P.3d 330], the court identified certain factors to guide the jury in its determination of whether the defendant was a major participant but stopped short of holding that the court has a sua sponte duty to instruct on those factors. The trial court should determine whether the Banks factors need be given.~~ *Alternatively, even if it is decided that there is no sua sponte duty to define the terms, the word "must" can be replaced with "may" with the expanded definition added.* AUTHORITY *** Reckless Indifference To Human Life (*People v. Banks* (2015) 61 Cal. 4th 788, 799-804, 807-812; *People v. Clark* (2016) 63 Cal. 4th 522, 614-624; *In re Bennett* (2018) 26 Cal. App.5th 1002, 1021-1027; *People v. Taylor* (2019) 34 Cal. App. 5th 543; *In re Ramirez* (2019) 32 Cal. App. 5th 384; *In re Miller* (2017) 14 Cal.App.5th 960, 967-977)**	
540B, 540C, & 703	The Offices of the Los Angeles County Public Defender and Alternate Public Defender	**CALCRIMS 540B, 540C, and 703 Inadequately Define Reckless Indifference.** CALCRIMs 540B, 540C, and 703 instruct in a bracketed portion: [A person acts with reckless indifference to human life when he or she knowingly engages in criminal activity that he or she knows involves a grave risk	When revising CALCRIM Nos. 540B and 540C pursuant to SB 1437, the committee incorporated the existing reckless indifference standard from CALCRIM No.

Instruction	Commentator	Comment	Response
		of death.] This statement is misleading and will give jurors the misimpression that engaging in a dangerous felony is sufficient to find the defendant acted with reckless indifference: [A]lthough the felonies listed in section 189 are those that the Legislature views as "inherently dangerous," this did not collapse the differences between an analysis involving felony murder, on the one hand, and an analysis of reckless indifference to human life, on the other. [*People v. Banks*, supra, 61 Cal.4th at p. 810.] As we concluded, "[w]hether a category of crimes is sufficiently dangerous to warrant felony-murder treatment, and whether an individual participant has acted with reckless indifference to human life, are different inquiries." (*Ibid.*) (*People v. Clark* (2016) 63 Cal.4th 522, 616.) The jury must be informed that reckless indifference requires that the defendant "knowingly created a serious risk of death," which is a higher standard than that proposed in these instructions. [T]he governing standard as explained in *People v. Banks* (2015) 61 Cal.4th 788 and *People v. Clark* (2016) 63 Cal.4th 522, is not satisfied with evidence of a general indifference to human life, but instead with evidence of a reckless indifference, which is shown when the defendant knowingly creates a serious risk of death. *(Banks, supra*, 61 Cal.4th at pp. 808- 809.) (*In re Taylor* (2019) 34 Cal.App.5th 543, 560, emphasis added.) The proposed instructions' failure to properly define "reckless indifference" is compounded by the failure to include the case-specific factors expressly delineated in *People v. Clark* (2016) 63 Cal.4th 522; the Supreme Court considered these factors in upholding a determination of reckless indifference to human life: (1) Knowledge of Weapons, and Use and Number of Weapons (2) Physical Presence at the Crime and Opportunities to Restrain the Crime and/or Aid the Victim	703 (*Special Circumstances – Felony Murder*) but did not evaluate whether this standard should be expanded or clarified. This suggestion is therefore outside the scope of the current invitation to comment. The committee will consider it at its next meeting.

Instruction	Commentator	Comment	Response
		(3) Duration of the Felony (4) Defendant's Knowledge of Cohort's Likelihood of Killing (5) Defendant's Efforts to Minimize the Risks of the Violence During the Felony The definition of "reckless indifference to human life" should be modified to instruct that the "person acts with reckless indifference to human life when he or she knowingly engages in criminal activity that he or she knows creates a serious risk of death," as well as include the five case-specific factors listed in *Clark*.	
540C	The Offices of the Los Angeles County Public Defender and Alternate Public Defender	**CALCRIM 540C Should Eliminate Reference to Natural and Probable Consequences.** The proposed instruction states: An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence. This instruction creates confusion by using the term "natural and probable consequence" to describe causation in relation to murder. SB 1437's amendments to Penal Code section 188 eliminated the natural and probable consequences doctrine as it relates to murder. Use of the term "natural and probable consequences" in this instruction will invite unnecessary confusion. Under California law there is no strict requirement of "causation" between a "killing" and the commission of a felony under the felony-murder rule, however Penal Code section 189 does require a "killing" in the perpetration of one of the designated felonies. A simultaneous or coincidental "death" is not a "killing." It has been held in California that death from a heart attack during the course of a robbery is murder if " ... but for the robbery the victim would not have experienced the fright which brought on the fatal heart attack." (*People v. Stamp* (1969) 2 Ca1.App.3d 203, 209.) Conversely, if death would have occurred despite the robbery, the death is not a "killing" which would constitute "murder." (*People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378.) CALCRIM 540C should be redrafted to state:	This comment raises issues outside the scope of the current invitation to comment. The committee will consider this comment at its next meeting.

Instruction	Commentator	Comment	Response
		An act causes death if the death would not have happened without the act. If the death would have occurred despite commission of the act, the death is not a killing that constitutes murder.	
548	Erin Loback, Deputy District Attorney from Alameda County	"Whether" is a better choice than "that" in the last paragraph.	The committee agrees with this suggestion and has changed the word back to "whether."
548	Barry P. Helft, Chief Deputy State Public Defender, on behalf of the Office of the State Public Defender ("OSPD")	***Potentially Ambiguous Language Regarding Unanimity Requirement*** The final sentence of the proposed instruction ("you must unanimously agree that the murder is in the first or second degree") is open to an erroneous interpretation. The jurors could understand it to mean that they could "unanimously agree that the murder is in the first or second degree" if some of them believe the murder is in the first degree, and some of them believe the murder is in the second degree. Even with that split in their opinions, they would be "unanimously agree[ing]" that the murder is either "in the first or second degree." This interpretation would be legally improper. The jury must unanimously determine whether murder is in the first or second degree. (*People v. Jones* (2014) 230 Cal.App.4th 373, 376.) And when two alternative theories of murder support different degrees of murder, juror unanimity is required as to the theory of guilt. (*People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1018, 1026; see also *People v. Johnson* (2016) 243 Cal.App.4th 1247, 1279-1280.) To address this problem, OSPD suggests that the final sentence of the proposed instruction be replaced with the following language: You do not all need to agree on the same theory, but in order to convict the defendant of murder you must be unanimous in finding the defendant guilty of first degree murder, or unanimous in finding the defendant guilty of second degree murder. If different theories of murder support different degrees of murder, you must be unanimous as to the theory of guilt.	The committee disagrees with the assertion that this instruction could be erroneously interpreted by jurors. Jurors are told not to return a verdict on second degree murder without first acquitting on first degree murder. Therefore, in the event of a split among jurors about degree, the jurors would understand not to return a verdict for either degree. Further, there is no requirement of unanimity as to the theory of guilt. However, the committee agrees that the instruction could possibly be improved with different or additional language. Therefore, the committee will reconsider this comment at its next meeting.

CALCRIM-2019-01 Invitation to Comment
Revised CALCRIM Instructions
The longer comments have been lightly edited

Instruction	Commentator	Comment	Response
548	Barry P. Helft, Chief Deputy State Public Defender, on behalf of the Office of the State Public Defender ("OSPD")	***Revision of Bench Note to Reflect New Mens Rea Requirement*** As noted, the proposed instruction informs jurors that, when the defendant is prosecuted for murder on two or more theories "You do not all need to agree on the same theory . . . ." There is some cautionary language in the proposed Bench Notes to CALCRIM No. 548 based on *People v. Dellinger* (1984) 163 Cal.App.3d 284, 300-302, stating: "If there is evidence of multiple acts from which the jury might conclude that the defendant killed the decedent, the court may be required to give CALCRIM No. 3500, Unanimity." Senate Bill No. 1437 (2017-2018 Reg. Sess.) compelled statutory changes to the mens rea element of felony murder in cases where the defendant was not the actual perpetrator of the killing. Accordingly, OSPD suggests adding the following language to the Bench Note: > When the theories of murder include felony murder where the defendant allegedly committed the fatal act, and felony murder where the defendant did not commit the fatal act, a unanimity instruction must be given. The additional language is necessary because the theories of felony murder as an actual perpetrator, and felony murder as an aider and abettor, rely on different acts or factual scenarios and, following the passage of Senate Bill No. 1437, there are separate defenses to each. Malice is now an element of the latter but not the former. A unanimity instruction is warranted in such a case for the same reasons one was required in *People v. Dellinger*, *supra*, 163 Cal.App.3d 284.	The committee disagrees with this proposal. *Dellinger* says that unanimity might be required for a multiple-acts case; it does not say that unanimity is required when there are multiple theories of felony-murder liability that differ based on who committed the single fatal act. The presence of different defenses might mean that a theory has not been proven beyond a reasonable doubt. It does not mean that there has to be unanimity as to the theory.
561	Kate Chatfield, on behalf of The Justice Collaborative	As the proposed Bench Notes state, as a result of changes to Penal Code section 188, there can no longer be murder liability when a participant in a crime does not act with malice aforethought. ("Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." Penal Code section 188(a)(3)) As provocative act murder by an accomplice does not require malice aforethought on the part of the non-provocateur defendant, this theory of murder liability has been legislatively repealed.	The committee previously considered whether to revoke this instruction but decided instead to add the proposed cautionary bench note. To revoke this instruction in the absence of case law would be premature.

Instruction	Commentator	Comment	Response
		Further, in addition to the changes Penal Code § 188 noted by Judicial Council, Section 1, subd.(g) of Senate Bill 1437 states: > Except as stated in subdivision (e) of Section 189 of the Penal Code, a conviction for murder requires that a person act with malice aforethought. A person's culpability for murder must be premised upon that person's own actions and subjective *mens rea*. As provocative act murder by an accomplice is not premised on the defendant's own actions, nor is the defendant's subjective state of mind at issue, there can be no more murder liability under this doctrine for a non-killer. This instruction should be revoked.	
703	Erin Loback, Deputy District Attorney from Alameda County	These are good changes.	No response necessary.
1045-1051	Robert Mestman, Sr. Deputy District Attorney, on behalf of the Orange County District Attorney's Office	The same issue addressed by this revision [in No. 1128] regarding specific intent required for sexual penetration of a minor 10 years or younger [288.7(b)] also applies to other sexual penetrations in violation of PC § 289. (See *People v. McCoy* (2013) 215 Cal.App.4th 1510, 1539-40). A similar note with citation to *McCoy* and *Saavedra* should be included in instruction Nos. 1045 through 1051. While No. 1045 does contain a brief mention to "intent" under AUTHORITY, more clarification in a note or commentary would be appropriate. Here is proposed language: > If the defendant is charged with sexual penetration in violation of Penal Code § 289, instruct that the defendant must have specific intent. (*People v. McCoy* (2013) 215 Cal.App.4th 1510, 1539-1540; *People v. Saavedra* (2018) 24 Cal.App.5th 605, 613- 615.)	The committee does not currently have proposed modifications for these instructions and will consider this comment at its next meeting.
1128 & 252	Robert Mestman, Sr. Deputy District Attorney, on behalf of the Orange County	**AGREE WITH THE PROPOSAL IF IT IS MODIFIED** While it is a good idea to clarify that specific intent is required for a violation of PC § 288.7(b) [sexual penetration of a minor 10 or younger], we are not sure the appropriate place to include this note is in No. 252, as opposed to the instruction for the underlying crime. Such a note is included in No. 1128. Including this note	The committee agrees with this comment and has removed the proposed addition for CALCRIM No. 252.

Instruction	Commentator	Comment	Response
	District Attorney's Office	in No. 252 may set a bad precedent. Should all mental states/intents for every crime now be listed in instructions Nos. 250-252? We believe that the appropriate place to include a note about mental state/intent for a particular crime is in the instruction for the underlying crime.	
511, 524, 860, 862-863, 875, 982-983, 2503, 2720, 2721, 3130, 3145	The Offices of the Los Angeles County Public Defender and Alternate Public Defender	The modification to these instructions (dealing with deadly or dangerous weapons) is misleading and incomplete and should be reconsidered. The instructions have been modified to add this language: [An object is inherently deadly if it is deadly or dangerous in the ordinary use for which it is designed.] This is only a partial statement of the law and, therefore, is incorrect as stated. The drafters claim to have taken this modification from *People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318. The problem is that the drafters omitted the trailing portion of the definition. The Court of Appeal in *Stutelberg* said, "An 'inherently deadly or dangerous' weapon is a term of art describing objects that are deadly or dangerous in "the ordinary use for which they are designed," that is, weapons that have no practical nondeadly purpose." (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 318-319.) The correct definition, pursuant to *Stutelberg* is: An object is inherently deadly if it is deadly or dangerous in the ordinary use for which it is designed, that is, the object has no practical nondeadly purpose. The proposed instruction is incorrect as a matter of law because it leaves out the final clause, which specifies what makes the item deadly. The Supreme Court, in *In re B.M.* (2018) 6 Cal.5th 528, explains that whether an item is a deadly or dangerous weapon is nuanced. First, the object alleged to be a deadly weapon must be used in a manner that is not only capable of producing but also "likely to produce death or great bodily injury." (*B.M.* at p. 533, emphasis in original.) The use of an object in a manner likely to produce death or great bodily injury requires more than a mere possibility that serious injury could have resulted from	The committee disagrees with the suggestion to add the clause "that is, weapons that have no practical nondeadly purpose" to the definition of inherently deadly. This clause states an alternate and equivalent phrasing of the definition; it is not a limitation of the definition. And reliance on *In re B.M.* is misplaced because that case dealt with a noninherently deadly weapon.

Instruction	Commentator	Comment	Response
		the way the object was used. (*B.M.* at p. 534.) Second, the law does not permit conjecture as to how the object could have been used. Rather, the determination of whether an object is a deadly weapon must rest on evidence of how the defendant actually used the object. (*B.M.* at p. 534.) Third, although it is appropriate to consider the injury that could have resulted from the way the object was used, the extent of actual injury or lack of injury is also relevant. A conviction for assault with a deadly weapon does not require proof of an injury or even physical contact, but limited injury or lack of injury may suggest that the nature of the object or the way it was used was not capable of producing or likely to produce death or serious harm. (*B.M.* at p. 535.) These CALCRIMs, if they are to be modified, must be modified to correctly state the definition found in *In re B.M.*	
511, 524, 860, 862-863, 875, 982-983, 2503, 2720, 2721, 3130, 3145	The Offices of the Los Angeles County Public Defender and Alternate Public Defender	There is a modification to the Bench Note which is confusing. As modified, the Bench Note states: If there is substantial evidence whether the object is a deadly weapon as a matter of law, give both bracketed portions. This modification is poorly worded and its meaning uncertain. The intent of the drafters is unclear; it is possible, however, that the drafters meant that when it cannot be said that the object is a deadly weapon as a matter of law, then both bracketed portions should be given. If that was the intent, then the sentence should be rewritten thusly: If there is no substantial evidence that the object is a deadly weapon as a matter of law, give both bracketed portions.	The committee agrees that the proposed bench note could be improved. In response, the committee has changed the sentence to: "If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions."

CALCRIM Proposed Changes
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*technical change only

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732	Special Circumstances: Murder in Commission of Felony – Arson
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970	Shooting Firearm in Grossly Negligent Manner
982 & 983	Brandishing Firearm or Deadly Weapon
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1203*	Kidnapping: For Robbery, Rape, other Sex Offenses
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2306*	Possession of Controlled Substance with Intent to Commit Sexual Assault
2503	Possession of Deadly Weapon With Intent to Assault
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2651 & 2652	Trying to Prevent an Executive Officer From Performing Duty; Resisting an Executive Officer
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3406*	Mistake of Fact

*technical change only

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

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

During the trial, do not talk about the case or about any of the people or any subject involved in the case with anyone, not even your family, friends, spiritual advisors, or therapists. Do not share information about the case in writing, by email, by telephone, on the Internet, or by any other means of communication. You must not talk about these things with other jurors either, until you begin deliberating.

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

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

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

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

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

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

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

~~**Do not let bias, sympathy, prejudice, or public opinion influence your decision.**~~ **You must not let bias, prejudice, or public opinion influence your assessment of the evidence or your decision. Many people have assumptions and biases about or stereotypes of other people and may be unaware of them. You must not be biased in favor of or against any party, witness, attorney, defendant[s], or alleged victim because of his or her disability, gender, nationality, national origin, race or ethnicity, religion, gender identity, sexual orientation, age, [or] socioeconomic status(./,) [or** *<insert any other impermissible form of bias>.*]

You must reach your verdict without any consideration of punishment.

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

AUTHORITY

- Statutory Admonitions. ▸ Pen. Code, § 1122.
- Avoid Discussing the Case. ▸ *People v. Pierce* (1979) 24 Cal.3d 199 [155 Cal.Rptr. 657, 595 P.2d 91]; *In re Hitchings* (1993) 6 Cal.4th 97 [24 Cal.Rptr.2d 74, 860 P.2d 466]; *In re Carpenter* (1995) 9 Cal.4th 634, 646–658 [38 Cal.Rptr.2d 665, 889 P.2d 985].
- Avoid News Reports. ▸ *People v. Holloway* (1990) 50 Cal.3d 1098, 1108–1111 [269 Cal.Rptr. 530, 790 P.2d 1327], disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830 [38 Cal.Rptr.2d. 394, 889 P.2d 588].
- Judge's Conduct as Indication of Verdict. ▸ *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].
- No Bias, Sympathy, or Prejudice. ▸ *People v. Hawthorne* (1992) 4 Cal.4th 43, 73 [14 Cal.Rptr.2d 133, 841 P.2d 118].
- No Independent Research. ▸ *People v. Karis* (1988) 46 Cal.3d 612, 642 [250 Cal.Rptr. 659, 758 P.2d 1189]; *People v. Castro* (1986) 184 Cal.App.3d 849, 853 [229 Cal.Rptr. 280]; *People v. Sutter* (1982) 134 Cal.App.3d 806, 820 [184 Cal.Rptr. 829].
- Prior Version of This Instruction Upheld. ▸ *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1182–1183 [67 Cal.Rptr.3d 871].

- Court's Contempt Power for Violations of Admonitions. ▸ Pen. Code, § 1122(a)(1); Code Civ. Proc. § 1209(a)(6) (effective 1/1/12).

RELATED ISSUES

Admonition Not to Discuss Case With Anyone

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

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

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

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

Jury Misconduct

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

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (3d ed. 2000), Criminal Trial § 643.

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

123 Witness Identified as John or Jane Doe

In this case, a person is called ((John/Jane) Doe/ _____<*insert other name used*>**). This name is used only to protect (his/her) privacy, as required by law. [The fact that the person is identified in this way is not evidence. Do not consider this fact for any purpose.]**

New January 2006

BENCH NOTES

Instructional Duty

If an alleged victim will be identified as John or Jane Doe, the court has a **sua sponte** duty to give this instruction at the beginning and at the end of the trial. (Pen. Code, § 293.5(b); *People v. Ramirez* (1997) 55 Cal.App.4th 47, 58 [64 Cal.Rptr.2d 9].)

Penal Code section 293.5 provides that the alleged victim of certain offenses may be identified as John or Jane Doe if the court finds it is "reasonably necessary to protect the privacy of the person and will not unduly prejudice the prosecution or the defense." (*Id.,* § 293.5(a).) This applies only to alleged victims of offenses under the following Penal Code sections: 261 (rape), 261.5 (unlawful sexual intercourse), 262 (rape of spouse), 264.1 (aiding and abetting rape), 286 (sodomy), 288 (lewd or lascivious act), 287~~8a~~ (oral copulation), and 289 (penetration by force). Note that the full name must still be provided in discovery. (*Id.,* § 293.5(a); *People v. Bohannon* (2000) 82 Cal.App.4th 798, 803, fn. 7 [98 Cal.Rptr.2d 488]; *Reid v. Superior Court* (1997) 55 Cal.App.4th 1326, 1338 [64 Cal.Rptr.2d 714].)

Give the last two bracketed sentences on request. (*People v. Ramirez, supra,* 55 Cal.App.4th at p. 58.)

AUTHORITY

- Identification as John or Jane Doe. ▸ Pen. Code, § 293.5(a).
- Instructional Requirements. ▸ Pen. Code, § 293.5(b); *People v. Ramirez* (1997) 55 Cal.App.4th 47, 58 [64 Cal.Rptr.2d 9].
- Statute Constitutional. ▸ *People v. Ramirez* (1997) 55 Cal.App.4th 47, 54–59 [64 Cal.Rptr.2d 9].

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 553.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 70, *Discovery and Investigation*, § 70.05 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.24[3] (Matthew Bender).

200 Duties of Judge and Jury

Members of the jury, I will now instruct you on the law that applies to this 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.] [The instructions that you receive may be printed, typed, or written by hand. Certain sections may have been crossed-out or added. Disregard any deleted sections and do not try to guess what they might have been. Only consider the final version of the instructions in your deliberations.]

You must decide what the facts are. It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in this trial.

~~Do not let bias, sympathy, prejudice, or public opinion influence your decision.~~ You must not let bias, prejudice, or public opinion influence your assessment of the evidence or your decision. Many people have assumptions and biases about or stereotypes of other people and may be unaware of them. You must not be biased in favor of or against any party, witness, attorney, defendant[s], or alleged victim because of his or her disability, gender, nationality, national origin, race or ethnicity, religion, gender identity, sexual orientation, age, [or] socioeconomic status (,/,) [or *<insert any other impermissible form of bias>.* **~~Bias includes, but is not limited to, bias for or against the witnesses, attorneys, defendant[s] or alleged victim[s], based on disability, gender, nationality, national origin, race or ethnicity, religion, gender identity, sexual orientation, age, [or] socioeconomic status (,/,) [or _____ <insert any other impermissible basis for bias as appropriate>.]~~**

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 do apply to the facts as you find them.

New January 2006; Revised June 2007, April 2008, December 2008, September 2019

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct that the jurors are the exclusive judges of the facts and that they are entitled to a copy of the written instructions when they deliberate. (Pen. Code, §§ 1093(f), 1137.) Although there is no sua sponte duty to instruct on the other topics described in this instruction, there is authority approving instruction on these topics.

In the first paragraph, select the appropriate bracketed alternative on written instructions. Penal Code section 1093(f) requires the court to give the jury a written copy of the instructions on request. The committee believes that the better practice is to always provide the jury with written instructions. If the court, in the absence of a jury request, elects not to provide jurors with written instructions, the court must modify the first paragraph to inform the jurors that they may request a written copy of the instructions.

Do not instruct a jury in the penalty phase of a capital case that they cannot consider sympathy. (*People v. Easley* (1982) 34 Cal.3d 858, 875–880 [196 Cal.Rptr. 309, 671 P.2d 813].) Instead of this instruction, CALCRIM 761 is the proper introductory instruction for the penalty phase of a capital case.

Do not give the bracketed sentence in the final paragraph if the court will be commenting on the evidence pursuant to Penal Code section 1127.

AUTHORITY

- Copies of Instructions. ▸ Pen. Code, §§ 1093(f), 1137.

- Judge Determines Law. ‣ Pen. Code, §§ 1124, 1126; *People v. Como* (2002) 95 Cal.App.4th 1088, 1091 [115 Cal.Rptr.2d 922]; see *People v. Williams* (2001) 25 Cal.4th 441, 455 [106 Cal.Rptr.2d 295, 21 P.3d 1209].
- Jury to Decide the Facts. ‣ Pen. Code, § 1127.
- Attorney's Comments Are Not Evidence. ‣ *People v. Stuart* (1959) 168 Cal.App.2d 57, 60–61 [335 P.2d 189].
- Consider All Instructions Together. ‣ *People v. Osband* (1996) 13 Cal.4th 622, 679 [55 Cal.Rptr.2d 26, 919 P.2d 640]; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [25 Cal.Rptr.2d 602]; *People v. Shaw* (1965) 237 Cal.App.2d 606, 623 [47 Cal.Rptr. 96].
- Follow Applicable Instructions ‣ *People v. Palmer* (1946) 76 Cal.App.2d 679, 686–687 [173 P.2d 680].
- No Bias, Sympathy, or Prejudice ‣ Pen. Code, § 1127h; *People v. Hawthorne* (1992) 4 Cal.4th 43, 73 [14 Cal.Rptr.2d 133, 841 P.2d 118].
- This Instruction Upheld ‣ *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1185 [67 Cal.Rptr.3d 871].

RELATED ISSUES

Jury Misconduct

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

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 643, 644.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 80, *Defendant's Trial Rights*, § 80.05[1], Ch. 83, *Evidence*, § 83.02, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[1], [2][c], 85.03[1], 85.05[2], [4] (Matthew Bender).

208 Witness Identified as John or Jane Doe

In this case, a person is called ((John/Jane) Doe/ _____<*insert other name used*>**). This name is used only to protect (his/her) privacy, as required by law. [The fact that the person is identified in this way is not evidence. Do not consider this fact for any purpose.]**

New August 2009

BENCH NOTES

Instructional Duty

If an alleged victim will be identified as John or Jane Doe, the court has a **sua sponte** duty to give this instruction at the beginning and at the end of the trial. (Pen. Code, § 293.5(b); *People v. Ramirez* (1997) 55 Cal.App.4th 47, 58 [64 Cal.Rptr.2d 9].)

Penal Code section 293.5 provides that the alleged victim of certain offenses may be identified as John or Jane Doe if the court finds it is "reasonably necessary to protect the privacy of the person and will not unduly prejudice the prosecution or the defense." (*Id.,* § 293.5(a).) This applies only to alleged victims of offenses under the following Penal Code sections: 261 (rape), 261.5 (unlawful sexual intercourse), 262 (rape of spouse), 264.1 (aiding and abetting rape), 286 (sodomy), 288 (lewd or lascivious act), 287~~8a~~ (oral copulation), and 289 (penetration by force). Note that the full name must still be provided in discovery. (*Id.,* § 293.5(a); *Reid v. Superior Court* (1997) 55 Cal.App.4th 1326, 1338 [64 Cal.Rptr.2d 714].)

Give the last two bracketed sentences on request. (*People v. Ramirez, supra,* 55 Cal.App.4th at p. 58.)

AUTHORITY

- Identification as John or Jane Doe. ▸ Pen. Code, § 293.5(a).
- Instructional Requirements. ▸ Pen. Code, § 293.5(b); *People v. Ramirez* (1997) 55 Cal.App.4th 47, 58 [64 Cal.Rptr.2d 9].
- Statute Constitutional. ▸ *People v. Ramirez* (1997) 55 Cal.App.4th 47, 54–59 [64 Cal.Rptr.2d 9].

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 553.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 70, *Discovery and Investigation*, § 70.05 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.24[3] (Matthew Bender).

362. Consciousness of Guilt: False Statements

If [the] defendant [_____ <*insert name of defendant when multiple defendants on trial*>] made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show (he/she) was aware of (his/her) guilt of the crime and you may consider it in determining (his/her) guilt. [You may not consider the statement in deciding any other defendant's guilt.]

If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself.

New January 2006, Revised August 2009, April 2010, September 2019

BENCH NOTES

Instructional Duty

This instruction should not be given unless it can be inferred that the defendant made the false statement for self-protection rather than to protect someone else. (*People v. Rankin* (1992) 9 Cal.App.4th 430, 436 [11 Cal.Rptr.2d 735] [error to instruct on false statements and consciousness of guilt where defendant lied to protect an accomplice]; see also *People v. Blakeslee* (1969) 2 Cal.App.3d 831, 839 [82 Cal.Rptr. 839].)

Consider modifying this instruction when the evidence supports an inference that the defendant was aware of his or her guilt generally, but not of the charged crime. *People v. Burton* (2018) 29 Cal.App.5th 917, 926, fn.2 [241 Cal.Rptr.3d 35].

AUTHORITY

- Instructional Requirements ▸ *People v. Najera* (2008) 43 Cal.4th 1132, 1139 [77 Cal.Rptr.3d 605, 184 P.3d 732] [in context of adoptive admissions]; *People v. Atwood* (1963) 223 Cal.App.2d 316, 333 [35 Cal.Rptr. 831]; but see *People v. Carter* (2003) 30 Cal.4th 1166, 1197-1198 [135 Cal.Rptr.2d 553, 70 P.3d 981]; see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 102–103 [17 Cal.Rptr.3d 710, 96 P.3d 30].
- This Instruction Upheld ▸ *People v. McGowan* (2008) 160 Cal.App.4th 1099, 1104 [74 Cal.Rptr.3d 57].

COMMENTARY

The word "willfully" was not included in the description of the making of the false statement. Although one court suggested that the jury be explicitly instructed that the defendant must "willfully" make the false statement (*People v. Louis* (1984) 159 Cal.App.3d 156, 161–162 [205 Cal.Rptr. 306]), the California Supreme Court subsequently held that such language is not required. (*People v. Mickey* (1991) 54 Cal.3d 612, 672, fn. 9 [286 Cal.Rptr. 801, 818 P.2d 84].)

RELATED ISSUES

Evidence

The false nature of the defendant's statement may be shown by inconsistencies in the defendant's own testimony, his or her pretrial statements, or by any other prosecution evidence. (*People v. Kimble* (1988) 44 Cal.3d 480, 498 [244 Cal.Rptr. 148, 749 P.2d 803] [overruling line of cases that required falsity to be demonstrated only by defendant's own testimony or statements]; accord *People v. Edwards* (1992) 8 Cal.App.4th 1092, 1103 [10 Cal.Rptr.2d 821]; *People v. Williams* (1995) 33 Cal.App.4th 467, 478–479 [39 Cal.Rptr.2d 358].)

Un-Mirandized Voluntary Statement

The *Miranda* rule (*Miranda v. Arizona* (1966) 384 U.S. 436, 444, 479 [86 S.Ct. 1602, 16 L.Ed.2d 694]) does not prohibit instructing the jury that it may draw an inference of guilt from a willfully false or deliberately misleading un-*Mirandized* statement that the defendant voluntarily introduces into evidence on direct examination. (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1166–1169 [94 Cal.Rptr.2d 727].)

SECONDARY SOURCES

1 Witkin, California Evidence (4th Ed. 2000) Hearsay, § 110.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 641.
4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.13[1], Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][c] (Matthew Bender).

363–369. Reserved for Future Use

376. Possession of Recently Stolen Property as Evidence of a Crime

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If you conclude that the defendant knew (he/she) possessed property and you conclude that the property had in fact been recently (stolen/extorted), you may not convict the defendant of _____ <*insert crime*> based on those facts alone. However, if you also find that supporting evidence tends to prove (his/her) guilt, then you may conclude that the evidence is sufficient to prove (he/she) committed _____ <*insert crime*>.

The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove (his/her) guilt of _____ <*insert crime*>.

[You may also consider whether _____ <*insert other appropriate factors for consideration*>.]

Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt.

New January 2006, September 2019

BENCH NOTES

Instructional Duty

In *People v. Najera* (2008) 43 Cal.4th 1132, 1141 [77 Cal.Rptr.3d 605, 184 P.3d 732], the Supreme Court abrogated *People v. Clark* (1953) 122 Cal.App.2d 342, 346 [265 P.2d 43] [failure to instruct that unexplained possession alone does not support finding of guilt was error]. Accordingly, there is no longer a sua sponte duty to give this instruction.

The instruction may be given when the charged crime is robbery, burglary, theft, or receiving stolen property. (See *People v. McFarland* (1962) 58 Cal.2d 748, 755 [26 Cal.Rptr. 473, 376 P.2d 449] [burglary and theft]; *People v. Johnson* (1993) 6 Cal.4th 1, 36–37 [23 Cal.Rptr.2d 593, 859 P.2d 673] [burglary]; *People v. Gamble* (1994) 22 Cal.App.4th 446, 453 [27 Cal.Rptr.2d 451] [robbery]; *People v. Anderson* (1989) 210 Cal.App.3d 414, 424 [258 Cal.Rptr. 482] [receiving stolen property].) The crime of receiving stolen property includes receiving property that was obtained by extortion (Pen. Code, § 496). Thus, the instruction also includes optional language for recently extorted property.

Use of this instruction should be limited to theft and theft-related crimes. (*People v. Prieto* (2003) 30 Cal.4th 226, 248-249 [66 P.3d 1123; 133 Cal.Rptr.2d 18] [trial court's failure to do so was error.]; *People v. Barker* (2001) 91 Cal.App.4th 1166, 1176 [111 Cal.Rptr.2d 403] [disapproving use of instruction to infer guilt of murder]; but see *People v. Harden* (2003) 110 Cal.App.4th 848, 856 [2 Cal.Rptr.3d 105] [court did not err in giving modified instruction on possession of recently stolen property in relation to special circumstance of murder committed during robbery]; *People v. Smithey* (1999) 20 Cal.4th 936, 975–978 [86 Cal.Rptr.2d 243, 978 P.2d 1171] [in a case involving both premeditated and felony murder, no error in instructing on underlying crimes of robbery and burglary]; *People v. Mendoza* (2000) 24 Cal.4th 130, 176–177 [99 Cal.Rptr.2d 485, 6 P.3d 150].)

Corroborating Evidence

The bracketed paragraph that begins with "You may also consider" may be used if the court grants a request for instruction on specific examples of corroboration supported by the evidence. (See *People v. Russell* (1932) 120 Cal.App. 622, 625–626 [8 P.2d 209] [list of examples]; see also *People v. Peters* (1982) 128 Cal.App.3d 75, 85–86 [180 Cal.Rptr. 76] [reference to false or contradictory statement improper when no such evidence was introduced]). Examples include the following:

a. False, contradictory, or inconsistent statements. (*People v. Anderson* (1989) 210 Cal.App.3d 414, 424 [258 Cal.Rptr. 482]; see, e.g., *People v. Peete* (1921) 54 Cal.App. 333, 345–346 [202 P. 51] [false statement showing consciousness of guilt]; *People v. Lang* (1989) 49 Cal.3d 991, 1024–1025 [264 Cal.Rptr. 386, 782 P.2d 627] [false explanation for possession of property]; *People v. Farrell* (1924) 67 Cal.App. 128, 133–134 [227 P. 210] [same].)

b. The attributes of possession, e.g., the time, place, and manner of possession that tend to show guilt. (*People v. Anderson, supra,* 210 Cal.App.3d at p. 424; *People v. Hallman* (1973) 35 Cal.App.3d 638, 641 [110 Cal.Rptr. 891]; see, e.g., *People v. Gamble* (1994) 22 Cal.App.4th 446, 453–454 [27 Cal.Rptr.2d 451].)

c. The opportunity to commit the crime. (*People v. Anderson, supra,* 210 Cal.App.3d at p. 425; *People v. Mosqueira* (1970) 12 Cal.App.3d 1173, 1176 [91 Cal.Rptr. 370].)

d. The defendant's conduct or statements tending to show guilt, or the failure to explain possession of the property under circumstances that

indicate a "consciousness of guilt." (*People v. Citrino* (1956) 46 Cal.2d 284, 288–289 [294 P.2d 32]; *People v. Wells* (1960) 187 Cal.App.2d 324, 328–329, 331–332 [9 Cal.Rptr. 384]; *People v. Mendoza* (2000) 24 Cal.4th 130, 175–176 [99 Cal.Rptr.2d 485, 6 P.3d 150]; *People v. Champion* (1968) 265 Cal.App.2d 29, 32 [71 Cal.Rptr. 113].)

e. Flight after arrest. (*People v. Scott* (1924) 66 Cal.App. 200, 203 [225 P. 767]; *People v. Wells, supra,* 187 Cal.App.2d at p.329.)

f. Assuming a false name and being unable to find the person from whom the defendant claimed to have received the property. (*People v. Cox* (1916) 29 Cal.App. 419, 422 [155 P. 1010].)

g. Sale of property under a false name and at an inadequate price. (*People v. Majors* (1920) 47 Cal.App. 374, 375 [190 P. 636].)

h. Sale of property with identity marks removed (*People v. Miller* (1920) 45 Cal.App. 494, 496–497 [188 P. 52]) or removal of serial numbers (*People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1401 [34 Cal.Rptr.2d 324]).

i. Modification of the property. (*People v. Esquivel, supra,* 28 Cal.App.4th at p. 1401 [shortening barrels of shotguns].)

j. Attempting to throw away the property. (*People v. Crotty* (1925) 70 Cal.App. 515, 518–519 [233 P. 395].)

AUTHORITY

- Instructional Requirements ▸ *People v. Williams* (2000) 79 Cal.App.4th 1157, 1172 [94 Cal.Rptr.2d 727]; see *People v. McFarland* (1962) 58 Cal.2d 748, 755 [26 Cal.Rptr. 473, 376 P.2d 449].
- This Instruction Upheld ▸ *People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1577 [64 Cal.Rptr.3d 116]; *People v. Solorzano* (2007) 153 Cal.App.4th 1026, 1036 [63 Cal.Rptr.3d 659].
- Corroboration Defined ▸ See Pen. Code, § 1111; *People v. McFarland* (1962) 58 Cal.2d 748, 754–755 [26 Cal.Rptr. 473, 376 P.2d 449].
- Due Process Requirements for Permissive Inferences ▸ *Ulster County Court v. Allen* (1979) 442 U.S. 140, 157, 165 [99 S.Ct. 2213, 60 L.Ed.2d 777]; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1172; *People v. Gamble* (1994) 22 Cal.App.4th 446, 454–455 [27 Cal.Rptr.2d 451].

- Examples of Corroborative Evidence ▸ *People v. Russell* (1932) 120 Cal.App. 622, 625–626 [8 P.2d 209].
- Recently Stolen ▸ *People v. Anderson* (1989) 210 Cal.App.3d 414, 421–422 [258 Cal.Rptr. 482]; *People v. Lopez* (1954) 126 Cal.App.2d 274, 278 [271 P.2d 874].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 13 [in context of larceny]; § 82 [in context of receiving stolen property]; § 86 [in context of robbery]; § 135 [in context of burglary].

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 526 [presumptions].

1 Witkin, California Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 62.

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, § 129.

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

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

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

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

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

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

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

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

AND

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

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

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

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

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

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

Related Instructions

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

This instruction should be used when the prosecution relies on the natural and probable consequences doctrine and charges both target and non-target crimes. If only non-target crimes are charged, give CALCRIM No. 403, *Natural and Probable Consequences Doctrine (Only Non-Target Offense Charged)*.

AUTHORITY

- Aiding and Abetting Defined. ▸ *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].
- Natural and Probable Consequences, Reasonable Person Standard. ▸ *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [26 Cal.Rptr.2d 323].
- ~~A Verdict of First Degree Murder May Not Be Based on the Natural and Probable Consequences Doctrine; Murder Under That Doctrine is Second Degree Murder.~~ ▸ ~~*People v. Chiu* (2014) 59 Cal.4th 155, 166 [172 Cal.Rptr.3d 438, 325 P.3d 972].~~
- Reasonably Foreseeable Crime Need Not Be Committed for Reason Within Common Plan ▸ *People v. Smith* (2014) 60 Cal.4th 603, 616–617 [180 Cal.Rptr.3d 100, 337 P.3d 1159].

COMMENTARY

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

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

RELATED ISSUES

Murder

A verdict of murder may not be based on the natural and probable consequences doctrine. Pen. Code, § 188(a)(3). Penal Code section 188, as amended by Statutes 2018, ch. 1015 (S.B. 1437), became effective January 1, 2019. The amendment added "malice shall not be imputed to a person based solely on his or her participation in a crime." The question whether this amendment abolished the natural and probable consequences doctrine as to

attempted murder is unresolved.

Lesser Included Offenses

The court has a duty to instruct on lesser included offenses that could be the natural and probable consequence of the intended offense when the evidence raises a question whether the greater offense is a natural and probable consequence of the original, intended criminal act. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1586-1588 [11 Cal.Rptr.2d 231] [aider and abettor may be found guilty of second degree murder under doctrine of natural and probable consequences although the principal was convicted of first degree murder].)

Specific Intent—Non-Target Crimes

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

Target and Non-Target Offense May Consist of Same Act

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

Target Offense Not Committed

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

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Introduction to Crimes, §§ 82, 84, 88.

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

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

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

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

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

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

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

   AND

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

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

A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.
[Do not consider evidence of defendant's intoxication in deciding whether _____ <*insert non-target offense*> **was a natural and probable consequence of _____** <*insert target offense*>**.]**

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

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

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

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

Related Instructions

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

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

AUTHORITY

- Aiding and Abetting Defined ▸ *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].
- Natural and Probable Consequences, Reasonable Person Standard ▸ *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [26 Cal.Rptr.2d 323].
- No Unanimity Required ▸ *People v. Prettyman* (1996) 14 Cal.4th 248, 267–268 [58 Cal.Rptr.2d 827, 926 P.2d 1013].
- Presence or Knowledge Insufficient ▸ *People v. Boyd* (1990) 222 Cal.App.3d 541, 557 fn.14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87, 926 P.2d 1013].
- Withdrawal ▸ *People v. Norton* (1958) 161 Cal.App.2d 399, 403 [327 P.2d 87]; *People v. Ross* (1979) 92 Cal.App.3d 391, 404–405 [154 Cal.Rptr. 783].
- ~~Verdict of First Degree Murder May Not Be Based on the Natural and Probable Consequences Doctrine; Murder Under That Doctrine is Second Degree Murder ▸ *People v. Chiu* (2014) 59 Cal.4th 155, 167–168 [172 Cal.Rptr.3d 438, 325 P.3d 972].~~
- Reasonably Foreseeable Crime Need Not Be Committed for Reason Within Common Plan ▸ *People v. Smith* (2014) 60 Cal.4th 603, 616–617 [180 Cal.Rptr.3d 100, 337 P.3d 1159].

COMMENTARY

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

Although no published case to date gives a clear definition of the terms "natural" and "probable," nor holds that there is a sua sponte duty to define them, we have included a suggested definition. (See *People v. Prettyman, supra,* 14 Cal.4th at p. 291 (conc. & dis. opn. of Brown, J.); see also *People v. Coffman and Marlow*

(2004) 34 Cal.4th 1, 107–109 [17 Cal.Rptr.3d 710, 96 P.3d 30] [court did not err in failing to define "natural and probable."])

RELATED ISSUES

Murder

A verdict of murder may not be based on the natural and probable consequences doctrine. Pen. Code, § 188(a)(3). Penal Code section 188, as amended by Statutes 2018, ch. 1015 (S.B. 1437), became effective January 1, 2019. This amendment added "malice shall not be imputed to a person based solely on his or her participation in a crime." The question whether this legislation abolished the natural and probable consequences doctrine as to attempted murder is unresolved.

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Introduction to Crimes, §§ 82, 84, 88.

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

511 Excusable Homicide: Accident in the Heat of Passion

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

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

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

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

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

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

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

AND

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

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

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

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

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

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

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

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

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

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

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

AND

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

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

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

New January 2006; Revised April 2011, September 2019

BENCH NOTES

Instructional Duty

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

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

Related Instructions

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

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

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

AUTHORITY

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

RELATED ISSUES

Distinguished From Voluntary Manslaughter

Under Penal Code section 195, subd. 2, a homicide is "excusable," "in the heat of passion" if done "by accident," or on "sudden . . . provocation . . . or . . . combat." (Pen. Code, § 195, subd. 2.) Thus, unlike voluntary manslaughter, the killing must have been committed without criminal intent, that is, accidentally. (See *People v. Cooley* (1962) 211 Cal.App.2d 173, 204 [27 Cal.Rptr. 543], disapproved on other

grounds in *People v. Lew* (1968) 68 Cal.2d 774, 778, fn. 1 [69 Cal.Rptr. 102, 441 P.2d 942]; Pen. Code, § 195, subd. 1 [act must be without criminal intent]; Pen. Code, § 26, subd. 5 [accident requires absence of "evil design [or] intent"].) The killing must also be on "sudden" provocation, eliminating the possibility of provocation over time, which may be considered in cases of voluntary manslaughter. (See Bench Notes to CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion–Lesser Included Offense*.)

Distinguished From Involuntary Manslaughter

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 242.

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 212.

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

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

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

520. First or Second Degree Murder With Malice Aforethought (Pen. Code, § 187)

The defendant is charged [in Count __] with murder [in violation of Penal Code section 187].

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

[1A. The defendant committed an act that caused the death of (another person/ [or] a fetus);]

[OR]

[1B. The defendant had a legal duty to (help/care for/rescue/warn/maintain the property of/ _____ *<insert other required action[s]>***) _____***<insert description of decedent/person to whom duty is owed>* and the defendant failed to perform that duty and that failure caused the death of (another person/ [or] a fetus);]**

[AND]

2. When the defendant (acted/[or] failed to act), (he/she) had a state of mind called malice aforethought(;/.)

<Give element 3 when instructing on justifiable or excusable homicide.>
[AND

3. (He/She) killed without lawful (excuse/[or] justification).]

There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.

The defendant had *express malice* if (he/she) unlawfully intended to kill.

The defendant had *implied malice* if:

1. (He/She) intentionally (committed the act/[or] failed to act);

2. **The natural and probable consequences of the (act/[or] failure to act) were dangerous to human life;**

3. **At the time (he/she) (acted/[or] failed to act), (he/she) knew (his/her) (act/[or] failure to act) was dangerous to human life;**

AND

4. **(He/She) deliberately (acted/[or] failed to act) with conscious disregard for (human/ [or] fetal) life.**

Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time.

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

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

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

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

[(A/An) _____<*insert description of person owing duty*> **has a legal duty to (help/care for/rescue/warn/maintain the property of/** _____ <*insert other required action[s]*>**)** _____<*insert description of decedent/person to whom duty is owed*>**.]**

<Give the following bracketed paragraph if the second degree is the only possible degree of the crime for which the jury may return a verdict>

[If you find the defendant guilty of murder, it is murder of the second degree.]

<Give the following bracketed paragraph if there is substantial evidence of first degree murder>

[If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM No. ___ *<insert number of appropriate first degree murder instruction>*.**]**

New January 2006; Revised August 2009, October 2010, February 2013, August 2013, September 2017, March 2019, September 2019

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the first two elements of the crime. If there is sufficient evidence of excuse or justification, the court has a **sua sponte** duty to include the third, bracketed element in the instruction. (*People v. Frye* (1992) 7 Cal.App.4th 1148, 1155–1156 [10 Cal.Rptr.2d 217].) The court also has a **sua sponte** duty to give any other appropriate defense instructions. (See CALCRIM Nos. 505–627, and CALCRIM Nos. 3470–3477.)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the "substantial factor" instruction and definition in the second bracketed causation paragraph. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].) If there is an issue regarding a superseding or intervening cause, give the appropriate portion of CALCRIM No. 620, *Causation: Special Issues*.

If the prosecution's theory of the case is that the defendant committed murder based on his or her failure to perform a legal duty, the court may give element 1B.

Review the Bench Notes to CALCRIM No. 582, *Involuntary Manslaughter: Failure to Perform Legal Duty—Murder Not Charged*.

If the defendant is charged with first degree murder, give this instruction and CALCRIM No. 521, *First Degree Murder*. If the defendant is charged with second degree murder, no other instruction need be given.

If the defendant is also charged with first ~~or second~~ degree felony murder, instruct on th<u>at</u>~~ese~~ crime~~s~~ and give CALCRIM No. 548, *Murder: Alternative Theories*.

AUTHORITY

- Elements ▸ Pen. Code, § 187.
- Malice ▸ Pen. Code, § 188; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1217–1222 [264 Cal.Rptr. 841, 783 P.2d 200]; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103–105 [13 Cal.Rptr.2d 864, 840 P.2d 969]; *People v. Blakeley* (2000) 23 Cal.4th 82, 87 [96 Cal.Rptr.2d 451, 999 P.2d 675].
- Causation ▸ *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274].
- Fetus Defined ▸ *People v. Davis* (1994) 7 Cal.4th 797, 814–815 [30 Cal.Rptr.2d 50, 872 P.2d 591]; *People v. Taylor* (2004) 32 Cal.4th 863, 867 [11 Cal.Rptr.3d 510, 86 P.3d 881].
- Ill Will Not Required for Malice ▸ *People v. Sedeno* (1974) 10 Cal.3d 703, 722 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Breverman* (1998) 19 Cal.4th 142, 163 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- Prior Version of This Instruction Upheld ▸ *People v. Genovese* (2008) 168 Cal.App.4th 817, 831 [85 Cal.Rptr.3d 664].

LESSER INCLUDED OFFENSES

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

Gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5(a)) is not a lesser included offense of murder. (*People v. Sanchez* (2001) 24 Cal.4th 983, 988–992 [103 Cal.Rptr.2d 698, 16 P.3d 118].) Similarly, child abuse homicide (Pen. Code, § 273ab) is not a necessarily included offense of murder. (*People v. Malfavon* (2002) 102 Cal.App.4th 727, 744 [125 Cal.Rptr.2d 618].)

RELATED ISSUES

Causation—Foreseeability

Authority is divided on whether a causation instruction should include the concept of foreseeability. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 362–363 [43 Cal.Rptr.2d 135]; *People v. Temple* (1993) 19 Cal.App.4th 1750, 1756 [24 Cal.Rptr.2d 228] [refusing defense-requested instruction on foreseeability in favor of standard causation instruction]; but see *People v. Gardner* (1995) 37 Cal.App.4th 473, 483 [43 Cal.Rptr.2d 603] [suggesting the following language be used in a causation instruction: "[t]he death of another person must be foreseeable in order to be the natural and probable consequence of the defendant's act"].) It is clear, however, that it is error to instruct a jury that foreseeability is immaterial to causation. (*People v. Roberts* (1992) 2 Cal.4th 271, 315 [6 Cal.Rptr.2d 276, 826 P.2d 274] [error to instruct a jury that when deciding causation it "[w]as immaterial that the defendant could not reasonably have foreseen the harmful result"].)

Second Degree Murder of a Fetus

The defendant does not need to know a woman is pregnant to be convicted of second degree murder of her fetus. (*People v. Taylor* (2004) 32 Cal.4th 863, 868 [11 Cal.Rptr.3d 510, 86 P.3d 881] ["[t]here is no requirement that the defendant specifically know of the existence of each victim."]) "[B]y engaging in the conduct he did, the defendant demonstrated a conscious disregard for all life, fetal or otherwise, and hence is liable for all deaths caused by his conduct." (*Id.* at p. 870.)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 96-101, 112-113.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04, Ch. 142, *Crimes Against the Person,* § 142.01 (Matthew Bender).

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

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

To prove this allegation the People must prove that:

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

[AND]

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

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

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

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

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

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

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

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

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

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

OR

3. **Fires the weapon.]**

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

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

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

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

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>
[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

New January 2006; Revised August 2009, February 2013, September 2019

BENCH NOTES

Instructional Duty

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

186, 193–195 [99 Cal.Rptr.2d 441]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

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

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

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

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

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

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

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

AUTHORITY

- Second Degree Murder of a Peace Officer. ▸ Pen. Code, § 190(b) & (c).
- Personally Used Deadly or Dangerous Weapon. ▸ Pen. Code, § 12022.
- Personally Used Firearm. ▸ Pen. Code, § 12022.5.
- Personal Use. ▸ Pen. Code, § 1203.06(b)(2).
- Inherently Deadly Defined ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 164.

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

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

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

D. FELONY MURDER

Introduction to Felony-Murder Series

~~The Supreme Court recently clarified the temporal component necessary for liability for a death under the felony-murder rule. (*People v. Wilkins* (2013) 56 Cal.4th 333, 344.) In that case, the Supreme Court noted the limited usefulness of former CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*, which was based on the facts of *People v. Cavitt* (2004) 33 Cal.4th 187, 208, in which a non-killer fled, leaving behind an accomplice who killed. (*People v. Wilkins, supra,* at p. 342.) To avoid any potential confusion, the committee has deleted that instruction and replaced it appropriate bench note references. If the defendant committed the homicidal act and fled, that killing did not occur in the commission of the felony if the fleeing felon has reached a place of temporary safety. (*People v. Wilkins, supra,* at p. 345.)~~

Senate Bill No. 1437 (2017-2018 Reg. Sess.) substantially changed accomplice liability for felony murder. Malice may no longer be imputed simply from participation in a designated crime. (Pen. Code, § 188(a)(3).) If a defendant participated in the commission or attempted commission of a designated felony when a person was killed, the defendant is now liable under the felony-murder rule only if: (1) the defendant was the actual killer; (2) the defendant was not the actual killer but, *with intent to kill*, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in committing murder in the first degree; or (3) the defendant was a major participant in the underlying designated felony *and* acted with reckless indifference to human life. (Pen. Code, § 189(e).) These restrictions do not apply when the victim was a peace officer and the defendant knew or reasonably should have known that the victim was a peace officer acting within the performance of his or her duties. (Pen. Code, § 189(f).)

As a result of these changes, the committee has modified CALCRIM Nos. 540B and 540C to incorporate the additional statutory elements for accomplice liability. The committee has also removed CALCRIM Nos. 541A, 541B, and 541C which addressed second degree felony murder. These instructions are included in an appendix, along with the former versions of Nos. 540A, 540B, and 540C.

The ~~committee has provided~~ three separate instructions for ~~both first and second degree~~ felony murder ~~. These instructions~~ present the following options:

A. Defendant Allegedly Committed Fatal Act

B. Coparticipant Allegedly Committed Fatal Act

C. Other Acts Allegedly Caused Death

For a simple case in which the defendant allegedly personally caused the death by committing a direct act of force or violence against the victim, the court may use ~~an option A~~ CALCRIM No. 540A~~instruction~~. This ~~option~~ instruction contains the least amount of bracketed material and requires the least amount of modification by the court.

In a case where the prosecution alleges that a participant in the felony other than the defendant caused the death~~is a "nonkiller cofelon" liable under the felony-murder rule for a death caused by another participant in the felony, ,then~~ the court must use CALCRIM No. 540B~~an option B instruction~~. This ~~option~~ instruction allows the court to instruct that the defendant may have committed the underlying felony or may have aided and abetted or conspired to commit an underlying felony that actually was committed by a coparticipant.

If the evidence indicates that either the defendant or a coparticipant may have committed the fatal act, the court should give both CALCRIM No. 540A~~option A~~ and CALCRIM No. 540B~~option B instructions~~.

In addition, the committee has provided CALCRIM No. 540C ~~option C instructions~~ to account for the unusual factual situations where a victim dies during the course of a 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. (See *People v. Billa* (2003) 31 Cal.4th 1064, 1072.) ~~Option C~~ This instruction is the most complicated of the three ~~options~~ instructions~~provided~~. Thus, although ~~option C~~ CALCRIM No. 540C is broad enough to cover most felony-murder scenarios, the committee recommends using ~~an option A or B instruction~~ CALCRIM Nos. 540A or 540B whenever appropriate to avoid providing the jury with unnecessarily complicated instructions.

In *People v. Wilkins* (2013) 56 Cal.4th 333, 344, the Supreme Court clarified the temporal component necessary for liability for a death under the felony-murder rule and noted the limited usefulness of former CALCRIM No. 549, *Felony Murder, One Continuous Transaction—Defined*. To avoid any potential confusion, the committee has deleted that instruction and replaced it with appropriate bench note references. If the defendant committed the homicidal act and fled, that killing did not occur in the commission of the felony if the fleeing felon has reached a place of temporary safety. (*People v. Wilkins, supra,* at p. 345.)

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 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 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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give ~~this~~ 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* (1995) 10 Cal.4th 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.)*

~~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* (1995) 10 Cal.4th 1, 35–37 [40 Cal.Rptr.2d 481, 892 P.2d 1224] [error to instruct on malice when felony murder only theory].)~~

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. 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].

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* (2001) 25 Cal.4th 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].)

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).

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

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

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

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

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

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

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

~~**AND**~~

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

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

AND

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

[OR]

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

AND

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

[OR]

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

AND

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

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

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

~~*<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] aid and abet[,]/ [or] been a member of a conspiracy to commit) the (felony/felonies) of _____ *<insert felony or felonies from Pen. Code, § 189>* **before or at the time ~~that (he/she) caused~~ of the death.]**

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

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

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

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

<The following instructions can be given when reckless indifference and major participant under Pen. Code § 189(e)(3) applies>

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

[When you decide whether the defendant was a *major participant*, consider all the evidence. Among the factors you may consider are:

1. **What was the defendant's role in planning the crime that led to the death[s]?**
2. **What was the defendant's role in supplying or using lethal weapons?**
3. **What did the defendant know about dangers posed by the crime, any weapons used, or past experience or conduct of the other participant[s]?**
4. **Was the defendant in a position to facilitate or to prevent the death?**
5. **Did the defendant's action or inaction play a role in the death?**
6. **What did the defendant do after lethal force was used?**

[7. _____ *<insert any other relevant factors.>***]**

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

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

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

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

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

BENCH NOTES

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

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

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

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

If the prosecution's theory is that the defendant, as well as the perpetrator, committed or attempted to commit the underlying felony or felonies, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in

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

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

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

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

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

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

bracketed sentence that begins with "It is not required that the person killed be" on request.

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

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

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

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

People v. Cavitt (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].

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

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

Related Instructions—Other Causes of Death

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

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

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

Related Instructions

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

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

AUTHORITY

- Felony Murder: First Degree. ▸ Pen. Code, § 189.
- Specific Intent to Commit Felony Required. ▸ *People v. Gutierrez (*2002) 28 Cal.4th 1083, 1140 [124 Cal.Rptr.2d 373, 52 P.3d 572].
- Infliction of Fatal Injury. ▸ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Defendant Must Join Felonious Enterprise Before or During Killing of Victim. ▸ *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].
- Logical Nexus Between Felony and Killing. ▸ *People v. Dominguez* (2006) 39 Cal.4th 1141]; *People v. Cavitt* (2004) 33 Cal.4th 187, 197–206].

- Merger Doctrine Does Not Apply to First Degree Felony Murder. ▸ *People v. Farley* (2009) 46 Cal.4th 1053, 1118-1120 [96 Cal.Rptr.3d 191, 210 P.3d 361].
- Reckless Indifference to Human Life. ▸ *People v. Clark* (2016) 63 Cal.4th 522, 614-620 [203 Cal.Rptr.3d 407, 372 P.3d 811]; *People v. Estrada* (1995) 11 Cal.4th 568, 578 [46 Cal.Rptr.2d 586, 904 P.2d 1197]; *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127].
- Major Participant. ▸ *People v. Banks* (2015) 61 Cal.4th 788, 803-808 [189 Cal.Rptr.3d 208, 351 P.3d 330].

RELATED ISSUES

Conspiracy Liability—Natural and Probable Consequences

In the context of nonhomicide crimes, a coconspirator is liable for any crime committed by a member of the conspiracy that was a natural and probable consequence of the conspiracy. (*People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 842–843 [68 Cal.Rptr.2d 388].) This is analogous to the rule in aiding and abetting that the defendant may be held liable for any unintended crime that was the natural and probable consequence of the intended crime. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [26 Cal.Rptr.2d 323].) In the context of felony murder, the Supreme Court has explicitly held that the natural and probable consequences doctrine does not apply to a defendant charged with felony murder based on aiding and abetting the underlying felony. (See *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1658 [285 Cal.Rptr. 523].) The court has not explicitly addressed whether the natural and probable consequences doctrine continues to limit liability for felony murder where the defendant's liability is based solely on being a member of a conspiracy. In *People v. Pulido* (1997) 15 Cal.4th 713, 724 [63 Cal.Rptr.2d 625, 936 P.2d 1235], the court stated in dicta, "[f]or purposes of complicity in a cofelon's homicidal act, the conspirator and the abettor stand in the same position. [Citation; quotation marks omitted.]

~~In *People v. Pulido* (1997) 15 Cal.4th 713, 724 [63 Cal.Rptr.2d 625, 936 P.2d 1235], the court stated in dicta, "[f]or purposes of complicity in a cofelon's homicidal act, the conspirator and the abettor stand in the same position. [Citation; quotation marks omitted.] In stating the rule of felony-murder complicity we have not distinguished accomplices whose responsibility for the underlying felony was pursuant to prior agreement (conspirators) from those who intentionally assisted without such agreement (aiders and abettors). [Citations]." In the court's two most recent opinions on felony-murder complicity, the court refers to the liability of "cofelons" or "accomplices" without reference to whether liability is based on directly committing the offense, aiding and abetting the offense, or conspiring to commit the offense. (*People v. Cavitt* (2004) 33 Cal.4th 187, 197–205 [14~~

~~Cal.Rptr.3d 281, 91 P.3d 222]; *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542].) On the other hand, in both of these cases, the defendants were present at the scene of the felony and directly committed the felonious acts. (*People v. Cavitt, supra,* 33 Cal.4th at p. 194; *People v. Billa, supra,* 31 Cal.4th at p. 1067.) Thus, the court has not had occasion recently to address a situation in which the defendant was convicted of felony murder based solely on a theory of coconspirator liability.~~

~~The requirement for a logical nexus between the felony and the act causing the death, articulated in *People v. Cavitt, supra,* 33 Cal.4th at p. 193, may be sufficient to hold a conspiring defendant liable for the resulting death under the felony-murder rule. However, *Cavitt* did not clearly answer this question. Nor has any case explicitly held that the natural and probable consequences doctrine does not apply in the context of felony murder based on conspiracy.~~

~~Thus, if the trial court is faced with a factual situation in which the defendant's liability is premised solely on being a member of a conspiracy in which another coparticipant killed an individual, the committee recommends that the court do the following: (1) give optional element on logical connection provided above; (2) request briefing and review the current law on conspiracy liability and felony murder; and (3) at the court's discretion, add as an additional element: "The act causing the death was a natural and probable consequence of the plan to commit _____ <*insert felony or felonies from Pen. Code, § 189*>."~~

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

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

SECONDARY SOURCES

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

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

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

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

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

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

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

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

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

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

[3. A perpetrator, (whom the defendant was aiding and abetting/ [or] with whom the defendant conspired), personally committed [or attempted to commit] _____ *<insert felony or felonies from Pen. Code, § 189>***;]**

~~**AND**~~

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

<Alternative for Pen. Code § 189(e)(2) and (e)(3) liability>

[(4A/5A). The defendant intended to kill;

AND

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

[OR]

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

AND

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

[OR]

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

AND

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

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

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

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

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

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

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

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

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

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

<The following instructions can be given when reckless indifference and major participant under Pen. Code § 189(e)(3) applies>

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

[When you decide whether the defendant was a *major participant*, consider all the evidence. Among the factors you may consider are:

1. **What was the defendant's role in planning the crime that led to the death[s]?**
2. **What was the defendant's role in supplying or using lethal weapons?**
3. **What did the defendant know about dangers posed by the crime, any weapons used, or past experience or conduct of the other participant[s]?**

4. Was the defendant in a position to facilitate or to prevent the death?
5. Did the defendant's action or inaction play a role in the death?
6. What did the defendant do after lethal force was used?
[7. _____ <insert any other relevant factors.>]

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

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

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

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

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

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

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

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

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Related Instructions—Other Causes of Death

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

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

AUTHORITY

- Felony Murder: First Degree. ▸ Pen. Code, § 189.
- Specific Intent to Commit Felony Required. ▸ *People v. Gutierrez (2*002) 28 Cal.4th 1083, 1140 [124 Cal.Rptr.2d 373, 52 P.3d 572].
- Infliction of Fatal Injury. ▸ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Defendant Must Join Felonious Enterprise Before or During Killing of Victim. ▸ *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].
- Death Caused by Felony but Not by Act of Force or Violence Against Victim. ▸ *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79

P.3d 542] [arson causing death of accomplice]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598] [heart attack caused by robbery]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166] [same]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [simultaneous or coincidental death is not killing].

- Logical Nexus Between Felony and Killing. ▸ *People v. Dominguez* (2006) 39 Cal.4th 1141 [47 Cal.Rptr.3d 575, 140 P.3d 866]; *People v. Cavitt* (2004) 33 Cal.4th 187, 197–206 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Merger Doctrine Does Not Apply to First Degree Felony Murder. ▸ *People v. Farley* (2009) 46 Cal.4th 1053, 1118-1120 [96 Cal.Rptr.3d 191, 210 P.3d 361].
- Reckless Indifference to Human Life. ▸ *People v. Clark* (2016) 63 Cal.4th 522, 614-620 [203 Cal.Rptr.3d 407, 372 P.3d 811]; *People v. Estrada* (1995) 11 Cal.4th 568, 578 [46 Cal.Rptr.2d 586, 904 P.2d 1197]; *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127].
- Major Participant. ▸ *People v. Banks* (2015) 61 Cal.4th 788, 803-808 [189 Cal.Rptr.3d 208, 351 P.3d 330].

RELATED ISSUES

~~***Accidental Death of Accomplice During Commission of Arson***~~

~~In *People v. Ferlin* (1928) 203 Cal. 587, 596–597 [265 P. 230], the Supreme Court held that an aider and abettor is not liable for the accidental death of an accomplice to arson when (1) the defendant was neither present nor actively participating in the arson when it was committed; (2) the accomplice acted alone in actually perpetrating the arson; and (3) the accomplice killed only himself or herself and not another person. More recently, the court stated,~~

> ~~We conclude that felony-murder liability for any death in the course of arson attaches to all accomplices in the felony at least where, as here, one or more surviving accomplices were present at the scene and active participants in the crime. We need not decide here whether *Ferlin* was correct on its facts.~~

~~*(People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542].)~~

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

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

SECONDARY SOURCES

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

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

541A. Felony Murder: Second Degree—Defendant Allegedly Committed Fatal Act

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

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

1. **The defendant committed [or attempted to commit] _____** *<insert inherently dangerous felony or felonies>***;**

2. **The defendant intended to commit _____** *<insert inherently dangerous felony or felonies>***;**

AND

3. **The defendant did an act that caused the death of another person.**

A person 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 inherently dangerous felony or felonies>***, 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 second 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 inherently dangerous felony or felonies>* **before or at the time of the act causing 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 inherently dangerous felony or felonies>* **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 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 August 2009, February 2012, August 2013

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this 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.

Insert the appropriate, nonassaultive, inherently dangerous felony or felonies in the blanks provided in accordance with the Supreme Court's ruling in *People v. Chun* (2009) 45 Cal.4th 1172, 1199 [91 Cal.Rptr.3d 106, 203 P.3d 425] [when underlying felony is assaultive in nature, felony merges with homicide and cannot be basis of a felony-murder instruction].

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 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."

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 inherently dangerous felony or felonies*> **[or attempted** _____ <*insert inherently dangerous felony or felonies*>**]. The connection between the cause of death and the** _____ <*insert inherently dangerous felony or felonies*> **[or attempted** _____ <*insert inherently dangerous felony or felonies*>**] 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, 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* (1995) 10 Cal.4th 1, 35–37 [40 Cal.Rptr.2d 481, 892 P.2d 1224] [error to instruct on malice when felony murder only theory].)

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. 541B, *Felony Murder: Second 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. 541C, *Felony Murder: Second Degree—Other Acts Allegedly Caused Death*. (Cf. *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [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

- Inherently Dangerous Felonies ▸ *People v. Satchell* (1971) 6 Cal.3d 28, 33–41 [98 Cal.Rptr. 33, 489 P.2d 1361], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Henderson* (1977) 19 Cal.3d 86, 93 [137 Cal.Rptr. 1, 560 P.2d 1180], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Patterson* (1989) 49 Cal.3d 615, 622–625 [262 Cal.Rptr. 195, 778 P.2d 549].
- 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 Applies if Elements of Crime Have Assaultive Aspect ▸ *People v. Chun* (2009) 45 Cal.4th 1172, 1199 [91 Cal.Rptr.3d 106, 203 P.3d 425].

LESSER INCLUDED OFFENSES

- Voluntary Manslaughter ▸ Pen. Code, § 192(a).
- Involuntary Manslaughter ▸ Pen. Code, § 192(b).
- Attempted Murder ▸ Pen. Code, §§ 663, 189.

RELATED ISSUES

Second Degree Felony Murder: Inherently Dangerous Felonies

The second degree felony-murder doctrine is triggered when a homicide occurs during the commission of a felony that is inherently dangerous to human life. (*People v. Satchell* (1971) 6 Cal.3d 28, 33–41 [98 Cal.Rptr. 33, 489 P.2d 1361] and *People v. Henderson* (1977) 19 Cal.3d 86, 93 [137 Cal.Rptr. 1, 560 P.2d 1180], both overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470,

484 [76 Cal.Rptr.2d 180, 957 P.2d 869].) In *People v. Burroughs* (1984) 35 Cal.3d 824, 833 [201 Cal.Rptr. 319, 678 P.2d 894], the court described an inherently dangerous felony as one that cannot be committed without creating a substantial risk that someone will be killed. However, in *People v. Patterson* (1989) 49 Cal.3d 615, 618, 626–627 [262 Cal.Rptr. 195, 778 P.2d 549], the court defined an inherently dangerous felony as "an offense carrying a high probability that death will result." (See *People v. Coleman* (1992) 5 Cal.App.4th 646, 649–650 [7 Cal.Rptr.2d 40] [court explicitly adopts *Patterson* definition of inherently dangerous felony].)

Whether a felony is inherently dangerous is a legal question for the court to determine. (See *People v. Schaefer* (2004) 118 Cal.App.4th 893, 900–902 [13 Cal.Rptr.3d 442] [rule not changed by *Apprendi*].) In making this determination, the court should assess "the elements of the felony in the abstract, not the particular facts of the case," and consider the statutory definition of the felony in its entirety. (*People v. Satchell, supra,* 6 Cal.3d at p. 36; *People v. Henderson, supra,* 19 Cal.3d at pp. 93–94.) If the statute at issue prohibits a diverse range of conduct, the court must analyze whether the entire statute or only the part relating to the specific conduct at issue is applicable. (See *People v. Patterson, supra,* 49 Cal.3d at pp. 622–625 [analyzing Health & Saf. Code, § 11352, which prohibits range of drug-related behavior, and holding that only conduct at issue should be considered when determining dangerousness].)

The following felonies have been found inherently dangerous for purposes of second degree felony murder (but note that since Proposition 115 amended Penal Code section 189 in 1990, that code section includes kidnapping in its list of first degree felony murder felonies):

- Attempted Escape From Prison by Force or Violence ‣ Pen. Code, § 4530; *People v. Lynn* (1971) 16 Cal.App.3d 259, 272 [94 Cal.Rptr. 16]; *People v. Snyder* (1989) 208 Cal.App.3d 1141, 1143–1146 [256 Cal.Rptr. 601].
- Furnishing Poisonous Substance ‣ Pen. Code, § 347; *People v. Mattison* (1971) 4 Cal.3d 177, 182–184 [93 Cal.Rptr. 185, 481 P.2d 193].
- Kidnapping for Ransom, Extortion, or Reward ‣ Pen. Code, § 209(a); *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1227–1228 [277 Cal.Rptr. 382].
- Manufacturing Methamphetamine ‣ Health & Saf. Code, § 11379.6(a); *People v. James* (1998) 62 Cal.App.4th 244, 270–271 [74 Cal.Rptr.2d 7].
- Reckless Possession of Destructive or Explosive Device ‣ Pen. Code, § 18715; *People v. Morse* (1992) 2 Cal.App.4th 620, 646, 655 [3 Cal.Rptr.2d 343].
- Shooting Firearm in Grossly Negligent Manner ‣ Pen. Code, § 246.3; *People v. Clem* (2000) 78 Cal.App.4th 346, 351 [92 Cal.Rptr.2d 727];

People v. Robertson (2004) 34 Cal.4th 156, 173 [17 Cal.Rptr.3d 604, 95 P.3d 872] [merger doctrine does not apply].

- Shooting at Inhabited Dwelling ‣ Pen. Code, § 246; *People v. Tabios* (1998) 67 Cal.App.4th 1, 9–10 [78 Cal.Rptr.2d 753].
- Shooting at Occupied Vehicle ‣ Pen. Code, § 246; *People v. Tabios* (1998) 67 Cal.App.4th 1, 10–11 [78 Cal.Rptr.2d 753].
- Shooting From Vehicle at Inhabited Dwelling ‣ *People v. Hansen* (1994) 9 Cal.4th 300, 311 [36 Cal.Rptr.2d 609, 885 P.2d 1022].

The following felonies have been found to be *not* inherently dangerous for purposes of second degree felony murder:

- Conspiracy to Possess Methedrine ‣ *People v. Williams* (1965) 63 Cal.2d 452, 458 [47 Cal.Rptr. 7, 406 P.2d 647].
- Driving With Willful or Wanton Disregard for Safety While Fleeing a Pursuing Officer ‣ *People v. Howard* (2005) 34 Cal.4th 1129, 1138 [23 Cal.Rptr.3d 306].
- Extortion ‣ Pen. Code, §§ 518, 519; *People v. Smith* (1998) 62 Cal.App.4th 1233, 1237–1238 [72 Cal.Rptr.2d 918].
- False Imprisonment ‣ Pen. Code, § 236; *People v. Henderson* (1977) 19 Cal.3d 86, 92–96 [137 Cal.Rptr. 1, 560 P.2d 1180], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].
- Felon in Possession of Firearm ‣ Pen. Code, § 29800; *People v. Satchell* (1971) 6 Cal.3d 28, 39–41 [98 Cal.Rptr. 33, 489 P.2d 1361], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].
- Felonious Practice of Medicine Without License ‣ *People v. Burroughs* (1984) 35 Cal.3d 824, 830–833 [201 Cal.Rptr. 319, 678 P.2d 894].
- Felony Child Abuse ‣ Pen. Code, § 273a; *People v. Lee* (1991) 234 Cal.App.3d 1214, 1228 [286 Cal.Rptr. 117].
- Felony Escape From Prison Without Force or Violence ‣ Pen. Code, § 4530(b); *People v. Lopez* (1971) 6 Cal.3d 45, 51–52 [98 Cal.Rptr. 44, 489 P.2d 1372].
- Felony Evasion of Peace Officer Causing Injury or Death ‣ Veh. Code, § 2800.3; *People v. Sanchez* (2001) 86 Cal.App.4th 970, 979–980 [103 Cal.Rptr.2d 809].
- Furnishing PCP ‣ Health & Saf. Code, § 11379.5; *People v. Taylor* (1992) 6 Cal.App.4th 1084, 1100–1101 [8 Cal.Rptr.2d 439].
- Grand Theft Under False Pretenses ‣ *People v. Phillips* (1966) 64 Cal.2d 574 [51 Cal.Rptr. 225, 414 P.2d 353], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].

- Grand Theft From the Person ▸ Pen. Code, § 487(c); *People v. Morales* (1975) 49 Cal.App.3d 134, 142–143 [122 Cal.Rptr. 157].

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

SECONDARY SOURCES

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

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

541B. Felony Murder: Second Degree—Coparticipant Allegedly Committed Fatal Act

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<Give the following introductory sentence when not giving CALCRIM No. 541A.>
[The defendant is charged [in Count __] with murder, under a theory of felony murder.]

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

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

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

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 inherently dangerous felony or felonies>***;**

3. **The perpetrator committed [or attempted to commit] _____** *<insert inherently dangerous felony or felonies>***;**

AND

4. **The perpetrator did an act that caused the death of another person.**

A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] _____ *<insert inherently dangerous felony or felonies>***, 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 second degree murder under a theory of felony murder.
<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] aid and abet[,]/ [or] been a member of a conspiracy to commit) the (felony/felonies) of _____ *<insert inherently dangerous felony or felonies>* **before or at the time of the act causing the death.]**

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

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

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

New January 2006; Revised August 2009, August 2013

BENCH NOTES

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

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

Insert the appropriate, nonassaultive, inherently dangerous felony or felonies in the blanks provided in accordance with the Supreme Court's ruling in *People v. Chun* (2009) 45 Cal.4th 1172 [203 P.3d 425, 91 Cal.Rptr.3d 106] [when underlying felony is assaultive in nature, felony merges with homicide and cannot be basis of a felony-murder instruction].

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

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

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

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, or did not join the conspiracy or aid and abet the felony until after the homicide, the defendant is entitled on request to an instruction

pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127 [287 P.2d 497]; *People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769].) Give the bracketed sentence that begins with "The defendant must have (intended to commit." For an instruction specially tailored to robbery-murder cases, see *People v. Turner* (1990) 50 Cal.3d 668, 691 [268 Cal.Rptr. 706, 789 P.2d 887].

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

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

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

If the prosecutor is proceeding under both malice and felony-murder theories, 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* (1995) 10 Cal.4th 1, 35–37 [40 Cal.Rptr.2d 481, 892 P.2d 1224] [error to instruct on malice when felony murder only theory].)

Related Instructions—Other Causes of Death

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

If the prosecution alleges that the defendant committed the fatal act, give CALCRIM No. 541A, *Felony Murder: Second Degree—Defendant 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. 541C, *Felony Murder: Second Degree—Other Acts Allegedly Caused Death*. (Cf. *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166]; but see

People v. Gunnerson (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [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*.)

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

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

AUTHORITY

- Inherently Dangerous Felonies ▸ *People v. Satchell* (1971) 6 Cal.3d 28, 33–41 [98 Cal.Rptr. 33, 489 P.2d 1361], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Henderson* (1977) 19 Cal.3d 86, 93 [137 Cal.Rptr. 1, 560 P.2d 1180], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Patterson* (1989) 49 Cal.3d 615, 622–625 [262 Cal.Rptr. 195, 778 P.2d 549].
- Specific Intent to Commit Felony Required ▸ *People v. Gutierrez (2*002) 28 Cal.4th 1083, 1140 [124 Cal.Rptr.2d 373, 52 P.3d 572].
- Infliction of Fatal Injury ▸ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Defendant Must Join Felonious Enterprise Before or During Killing of Victim ▸ *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].Merger Doctrine Applies if Elements of Crime Have Assaultive Aspect ▸ *People v. Chun* (2009) 45 Cal.4th 1172 [203 P.3d 425, 91 Cal.Rptr.3d 106].

LESSER INCLUDED OFFENSES

- Second Degree Murder ▸ Pen. Code, § 187.
- Voluntary Manslaughter ▸ Pen. Code, § 192(a).

- Involuntary Manslaughter ▸ Pen. Code, § 192(b).
- Attempted Murder ▸ Pen. Code, §§ 663, 189.

RELATED ISSUES

See the Related Issues section of CALCRIM No. 540B, Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act and CALCRIM No. 541A, Felony Murder: Second Degree—Defendant Allegedly Committed Fatal Act.

SECONDARY SOURCES

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

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 174.

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

541C. Felony Murder: Second Degree—Other Acts Allegedly Caused Death

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

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

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

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

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 inherently dangerous felony or felonies>***;**

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

[3. The perpetrator committed [or attempted to commit] _____ *<insert inherently dangerous felony or felonies>***;]**

[AND]

(3/4). The commission [or attempted commission of] the _____ *<insert inherently dangerous felony or felonies>* **caused the death of another person.**

A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] _____ *<insert inherently dangerous felony or felonies>***, 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 second degree murder under a theory of felony murder.

<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 inherently dangerous felony or felonies>* **before or at the time of the act causing the death.]**

[It is not required that the person die immediately, as long as the act causing death occurred while the defendant was committing the (felony/felonies).] An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.

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

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

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

New January 2006; Revised August 2009, August 2013

BENCH NOTES

Instructional Duty

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

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr.

401]; *People v. Cervantes* (2001) 26 Cal.4th 860, 865–874 [111 Cal.Rptr.2d 148, 29 P.3d 225].) Because causation is likely to be an issue in any case where this instruction is given, the committee has included the paragraph that begins with "An act causes death if." If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with "There may be more than one cause of death." (*People v. Sanchez* (2001) 26 Cal.4th 834, 845–849 [111 Cal.Rptr.2d 129, 29 P.3d 209]; *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135].)

Insert the appropriate, nonassaultive, inherently dangerous felony or felonies in the blanks provided in accordance with the Supreme Court's ruling in *People v. Chun* (2009) 45 Cal.4th 1172 [203 P.3d 425, 91 Cal.Rptr.3d 106] [when underlying felony is assaultive in nature, felony merges with homicide and cannot be basis of a felony-murder instruction].

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

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

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, or did not join the conspiracy or aid and abet the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127 [287 P.2d 497]; *People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21

P.3d 769].) Give the bracketed sentence that begins with "The defendant must have (intended to commit."

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

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

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

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 inherently dangerous felony or felonies*> **[or attempted** _____ <*insert inherently dangerous felony or felonies*>**]. The connection between the cause of death and the** _____ <*insert inherently dangerous felony or felonies*> **[or attempted** _____ <*insert inherently dangerous felony or felonies*>**] 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, 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* (1995) 10 Cal.4th 1, 35–37 [40 Cal.Rptr.2d 481, 892 P.2d 1224] [error to instruct on malice when felony murder only theory].)

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

See the Bench Notes to CALCRIM No. 541B, *Felony Murder: Second Degree—Defendant Allegedly Committed Fatal Act* for a discussion of other instructions to use if the evidence indicates a person committed an act of force or violence causing the death.

AUTHORITY

- Inherently Dangerous Felonies ‣ *People v. Satchell* (1971) 6 Cal.3d 28, 33–41 [98 Cal.Rptr. 33, 489 P.2d 1361], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Henderson* (1977) 19 Cal.3d 86, 93 [137 Cal.Rptr.1], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Patterson* (1989) 49 Cal.3d 615, 622–625 [262 Cal.Rptr. 195, 778 P.2d 549].
- Specific Intent to Commit Felony Required ‣ *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1140 [124 Cal.Rptr.2d 373, 52 P.3d 572]..
- Infliction of Fatal Injury ‣ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Defendant Must Join Felonious Enterprise Before or During Killing of Victim ‣ *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].
- Death Caused by Felony but Not by Act of Force or Violence Against Victim ‣ *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542] [arson causing death of accomplice]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598] [heart attack caused by robbery]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166] [same]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].Merger Doctrine Applies if Elements of Crime Have Assaultive Aspect ‣ *People v. Chun (2009)* 45 Cal.4th 1172 [203 P.3d 425, 91 Cal.Rptr.3d 106].

LESSER INCLUDED OFFENSES

- Voluntary Manslaughter ▸ Pen. Code, § 192(a).
- Involuntary Manslaughter ▸ Pen. Code, § 192(b).
- Attempted Murder ▸ Pen. Code, §§ 663, 189.

RELATED ISSUES

Accidental Death of Accomplice During Commission of Arson

In *People v. Ferlin* (1928) 203 Cal. 587, 596–597 [265 P. 230], the Supreme Court held that an aider and abettor is not liable for the accidental death of an accomplice to arson when (1) the defendant was neither present nor actively participating in the arson when it was committed; (2) the accomplice acted alone in actually perpetrating the arson; and (3) the accomplice killed only himself or herself and not another person. More recently, the court stated,

> We conclude that felony-murder liability for any death in the course of arson attaches to all accomplices in the felony at least where, as here, one or more surviving accomplices were present at the scene and active participants in the crime. We need not decide here whether *Ferlin* was correct on its facts.

(*People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542].)

See the Related Issues section of CALCRIM No. 540A, *Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act*; CALCRIM No. 540B, *Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act*; and 541A, *Felony Murder: Second Degree—Defendant Allegedly Committed Fatal Act*.

SECONDARY SOURCES

1 Witkin & Epstein, Calif*ornia Criminal L*aw (4th ed. 2012) Crimes Against the Person, § 190.

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

542–547.Reserved for Future Use

548. Murder: Alternative Theories

[The defendant has been prosecuted for murder under two theories: (1) malice aforethought, and (2) felony murder.] [[In addition,] (T/t)he defendant has been prosecuted for murder under multiple theories of felony murder.]

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

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

New January 2006; Revised August 2014, February 2016, September 2019

BENCH NOTES

Instructional Duty

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

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

AUTHORITY

- Unanimity on Degrees of Crime and Lesser Included Offenses. ▸ Pen. Code § 1157; *People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1025 [164 Cal.Rptr.3d. 880]; *People v. Aikin* (1971) 19 Cal.App.3d 685, 704 [97 Cal.Rptr. 251],

disapproved on other grounds in *People v. Lines* (1975) 13 Cal.3d 500, 512 [119 Cal.Rptr. 225].

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

561 Homicide: Provocative Act by Accomplice

[The defendant is charged [in Count __] with _____ *<insert underlying crime>***.] The defendant is [also] charged [in Count __] with murder. A person can be guilty of murder under the provocative act doctrine even if someone else did the actual killing.**

To prove that the defendant is guilty of murder under the provocative act doctrine, the People must prove that:

1. **The defendant was an accomplice of _____** *<insert name[s] or description[s] of alleged provocateur[s]>* **in (committing/ [or] attempting to commit) _____** *<insert underlying crime>*

2. **In (committing/ [or] attempting to commit) _____** *<insert underlying crime>***, _____** *<insert name[s] or description[s] of alleged provocateur[s]>* **intentionally did a provocative act;**

3. **_____** *<insert name[s] or description[s] of alleged provocateur[s]>* **knew that the natural and probable consequences of the provocative act were dangerous to human life and then acted with conscious disregard for life;**

4. **In response to _____'s** *<insert name[s] or description[s] of alleged provocateur[s]>* **provocative act, _____** *<insert name or description of third party>* **killed _____** *<insert name of decedent>***;**

AND

5. **_____'s** *<insert name of decedent>* **death was the natural and probable consequence of _____'s** *<insert name[s] or description[s] of alleged provocateur[s]>* **provocative act.**

A *provocative act* is an act:

1. [That goes beyond what is necessary to accomplish the _____ *<insert underlying crime>***;]**

[AND

2.] Whose natural and probable consequences are dangerous to human life, because there is a high probability that the act will provoke a deadly response.

The defendant is an *accomplice* of _____ *<insert name[s] or description[s] of alleged provocateur[s]>* **if the defendant is subject to prosecution for the identical offense that you conclude** _____ *<insert name[s] or description[s] of alleged provocateur[s]>* **(committed/ [or] attempted to commit). The defendant is subject to prosecution if (he/she) (committed/ [or] attempted to commit) the crime or if:**

1. **(He/She) knew of** _____**'s** *<insert name[s] or description[s] of alleged provocateur[s]>* **criminal purpose to commit** _____ **<***insert underlying crime*>**;**

AND

2. **The defendant intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of** _____ *<insert underlying crime>*/ **[or] participate in a criminal conspiracy to commit** _____ *<insert underlying crime>*).

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

In order to prove that _____**'s** *<insert name of decedent>* **death was the *natural and probable consequence* of** _____**'s** *<insert name[s] or description[s] of alleged provocateur[s]>* **provocative act, the People must prove that:**

1. **A reasonable person in** _____**'s** *<insert name[s] or description[s] of alleged provocateur[s]>* **position would have foreseen that there was a high probability that (his/her/their) act could begin a chain of events resulting in someone's death;**

2. _____**'s** *<insert name[s] or description[s] of alleged provocateur[s]>* **act was a direct and substantial factor in causing** _____**'s** *<insert name of decedent>* **death;**

AND

3. **_____'s** *<insert name or description of decedent>* **death would not have happened if** _____ *<insert name[s] or description[s] of alleged provocateur[s]>* **had not committed the provocative act.**

A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that caused the death.

<Multiple Provocative Acts>
[The People alleged the following provocative acts: _____ *<insert acts alleged>***. You may not find the defendant guilty unless you all agree that the People have proved that:**

1. _____ *<insert name[s] or description[s] of alleged provocateur[s]>* **committed at least one provocative act;**

AND

2. **At least one of the provocative acts committed by** _____ *<insert name[s] or description[s] of alleged provocateur[s]>* **was a direct and substantial factor that caused the killing.**

However, you do not all need to agree on which provocative act has been proved.]

<Accomplice Deceased>
[If you decide that the only provocative act that caused _____'s *<insert name of deceased accomplice>* **death was committed by** _____ *<insert name of deceased accomplice>***, then the defendant is not guilty of _____'s** *<insert name of deceased accomplice>* **murder.]**

<Independent Criminal Act>
[A defendant is not guilty of murder if the killing of _____ *<insert name or description of decedent>* **was caused solely by the independent criminal act of someone other than the defendant or** _____ *<insert name[s] or description[s] of all alleged accomplice[s]>***. An *independent criminal act* is a free, deliberate, and informed criminal act by a person who is not acting with the defendant.]**

<Degree of Murder>
[If you decide that the defendant is guilty of murder, you must decide whether the murder is first or second degree.

To prove that the defendant is guilty of first degree murder, the People must

prove that:

1. **As a result of _____'s** *<insert name[s] or description[s] of alleged provocateur[s]>* **provocative act, _____** *<insert name of decedent>* **was killed while _____** *<insert name[s] or description[s] of alleged provocateur[s]>* **(was/were) committing _____** *<insert Pen. Code, § 189 felony>***;**

AND

2. **_____** *<insert name[s] or description[s] of alleged provocateur[s]>* **specifically intended to commit _____** *<insert Pen. Code, § 189 felony>* **when (he/she/they) did the provocative act.**

In deciding whether _____ *<insert name[s] or description[s] of alleged provocateur[s]>* **intended to commit _____** *<insert Pen. Code, § 189 felony>* **and whether the death occurred during the commission of _____** *<insert Pen. Code, § 189 felony>***, you should refer to the instructions I have given you on _____** *<insert Pen. Code, § 189 felony>*.

Any murder that does not meet these requirements for first degree murder is second degree murder.]

[If you decide that the defendant committed murder, that crime is murder in the second degree.]

New January 2006; Revised August 2014, September 2019

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if the provocative act doctrine is one of the general principles of law relevant to the issues raised by the evidence. (*People v. Hood* (1969) 1 Cal.3d 444, 449 [82 Cal.Rptr. 618, 462 P.2d 370].) If the prosecution relies on a first degree murder theory based on a Penal Code section 189 felony, the court has a **sua sponte** duty to give instructions relating to the underlying felony, whether or not it is separately charged.

Penal Code section 188, as amended by Statutes 2018, ch. 1015 (S.B. 1437), became effective January 1, 2019. The amendment added "malice shall not be imputed to a person based solely on his or her participation in a crime." The continued legality of provocative act murder liability when an accomplice committed the provocative act may be affected by this statutory change.

The first bracketed sentence of this instruction should only be given if the underlying felony is separately charged.

In the definition of "provocative act," the court should always give the bracketed phrase that begins, "that goes beyond what is necessary," unless the court determines that this element is not required because the underlying felony includes malice as an element. (*In re Aurelio R.* (1985) 167 Cal.App.3d 52, 59–60 [212 Cal.Rptr. 868].) See discussion in the Related Issues section to CALCRIM No. 560, *Homicide: Provocative Act by Defendant*.

In the paragraph that begins with "An accomplice does not need to be present," use the bracketed phrase "will be committed or" if appropriate under the facts of the case.

If a deceased accomplice participated in provocative acts leading to his or her own death, give the bracketed sentence that begins, "If you decide that the only provocative act that caused . . . ." (See *People v. Garcia* (1999) 69 Cal.App.4th 1324, 1330 [82 Cal.Rptr.2d 254]; *People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 846 [68 Cal.Rptr.2d 388]; *Taylor v. Superior Court* (1970) 3 Cal.3d 578, 583–584 [91 Cal.Rptr. 275, 477 P.2d 131]; *People v. Antick* (1975) 15 Cal.3d 79, 90 [123 Cal.Rptr. 475, 539 P.2d 43], disapproved on other grounds in *People v. McCoy* (20010 25 Cal.4th 1111, 1123 [108 Cal.Rptr.2d 188, 24 P.3d 1210].)

If there is evidence that the actual perpetrator may have committed an *independent criminal act*, give on request the bracketed paragraph that begins, "A defendant is not guilty of murder if . . . ." (See *People v. Cervantes* (2001) 26 Cal.4th 860, 874 [111 Cal.Rptr.2d 148, 29 P.3d 225].)

If the evidence suggests that there is more than one provocative act, give the bracketed section on "Multiple Provocative Acts." (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 591 [112 Cal.Rptr.2d 401].)

If the prosecution is not seeking a first degree murder conviction, omit those bracketed paragraphs relating to first degree murder and simply give the last bracketed sentence of the instruction. As an alternative, the court may omit all instructions relating to the degree and secure a stipulation that if a murder verdict is returned, the degree of murder is set at second degree. If the prosecution is seeking a first degree murder conviction, give the bracketed section on "degree of murder."

AUTHORITY

- Provocative Act Doctrine. ▸ *People v. Gallegos* (1997) 54 Cal.App.4th 453, 461 [63 Cal.Rptr.2d 382].
- Felony-Murder Rule Invoked to Determine Degree. ▸ *People v. Gilbert* (1965) 63 Cal.2d 690, 705 [47 Cal.Rptr. 909, 408 P.2d 365]; *Pizano v. Superior Court* (1978) 21 Cal.3d 128, 139, fn. 4 [145 Cal.Rptr. 524, 577 P.2d 659]; see *People v. Caldwell* (1984) 36 Cal.3d 210, 216–217, fn. 2 [203 Cal.Rptr. 433, 681 P.2d 274].
- Independent Intervening Act by Third Person. ▸ *People v. Cervantes* (2001) 26 Cal.4th 860, 874 [111 Cal.Rptr.2d 148, 29 P.3d 225].
- Natural and Probable Consequences Doctrine. ▸ *People v. Gardner* (1995) 37 Cal.App.4th 473, 479 [43 Cal.Rptr.2d 603].
- Response of Third Party Need Not Be Reasonable. ▸ *People v. Gardner* (1995) 37 Cal.App.4th 473, 482 [43 Cal.Rptr.2d 603].
- Unanimity on Which Act Constitutes Provocative Act Is Not Required. ▸ *People v. Briscoe* (2001) 92 Cal.App.4th 568, 591 [112 Cal.Rptr.2d 401] [multiple provocative acts].
- Implied Malice May Be Imputed to Absent Mastermind. ▸ *People v. Johnson* (2013) 221 Cal.App.4th 623, 633 [164 Cal.Rptr.3d 505].

RELATED ISSUES

See the Related Issues section to CALCRIM No. 560, *Homicide: Provocative Act by Defendant*.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 147–155.

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

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

590 Gross Vehicular Manslaughter While Intoxicated (Pen. Code, § 191.5(a))

The defendant is charged [in Count __] with gross vehicular manslaughter while intoxicated [in violation of Penal Code section 191.5(a)].

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

1. **The defendant (drove under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug]/drove while having a blood alcohol level of 0.08 or higher/drove under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug] when under the age of 21/drove while having a blood alcohol level of 0.05 or higher when under the age of 21);**

2. **While driving that vehicle under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug], the defendant also committed (a/an) (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death);**

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

AND

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

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

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

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

Instruction[s] __ tell[s] you what the People must prove in order to prove that the defendant (drove under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug]/drove while having a blood alcohol level of 0.08 or higher/drove under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug] when under the age of 21).

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

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

AND

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

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

The combination of driving a vehicle while under the influence of (an alcoholic beverage/ [and/or] a drug) and violating a traffic law is not enough by itself to establish gross negligence. In evaluating whether the defendant acted with gross negligence, consider the level of the defendant's intoxication, if any; the way the defendant drove; and any other relevant aspects of the defendant's conduct.

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

[A person facing a sudden and unexpected emergency situation not caused by that person's own negligence is required only to use the same care and judgment that an ordinarily careful person would use in the same situation,

even if it appears later that a different course of action would have been safer.]

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

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

[The People allege that the defendant committed the following (misdemeanor[s][,]/ [and] infraction[s][,]/ [and] otherwise lawful act[s] that might cause death): _____ *<insert alleged predicate acts when multiple acts alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant committed at least one of these alleged (misdemeanors[,]/ [or] infractions[,]/ [or] otherwise lawful acts that might cause death) and you all agree on which (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) the defendant committed.]**

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

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

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

The court has a **sua sponte** duty to specify the predicate misdemeanor(s) or infraction(s) alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688]; *People v.*

Ellis (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].) In element 1, instruct on the particular "under the influence" offense charged. In element 2, instruct on either theory of vehicular manslaughter (misdemeanor/infraction or lawful act committed with negligence) as appropriate. The court **must** also give the appropriate instruction on the elements of the driving under the influence offense and the predicate misdemeanor or infraction.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

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

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

If the defendant is charged with one or more prior conviction (see Pen. Code, § 191.5(d)), the court should also give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the defendant has stipulated to the prior conviction or the court has granted a bifurcated trial. (See Bench Notes to CALCRIM No. 3100.)

AUTHORITY

- Gross Vehicular Manslaughter While Intoxicated. ▸ Pen. Code, § 191.5(a).

- Unlawful Act Dangerous Under the Circumstances of Its Commission. ▸ *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374].
- Specifying Predicate Unlawful Act. ▸ *People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688].
- Elements of the Predicate Unlawful Act. ▸ *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Unanimity Instruction. ▸ *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481[76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587[249 Cal.Rptr. 906].
- Gross Negligence. ▸ *People v. Penny*, (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Gross Negligence—Overall Circumstances. ▸ *People v. Bennett* (1992) 54 Cal.3d 1032, 1039 [2 Cal.Rptr.2d 8, 819 P.2d 849].
- Causation. ▸ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Imminent Peril/Sudden Emergency Doctrine. ▸ *People v. Boulware* (1940) 41 Cal.App.2d 268, 269 [106 P.2d 436].
- This Instruction Upheld. ▸ *People v. Hovda* (2009) 176 Cal.App.4th 1355, 1358 [98 Cal.Rptr.3d 499].

LESSER INCLUDED OFFENSES

- Vehicular Manslaughter With Gross Negligence Without Intoxication. ▸ Pen. Code, § 192(c)(1); *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1466–1467 [26 Cal.Rptr.2d 610].
- Vehicular Manslaughter With Ordinary Negligence While Intoxicated. ▸ Pen. Code, § 191.5(b)~~2(c)(3)~~; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1165–1166 [123 Cal.Rptr.2d 322].
- Vehicular Manslaughter With Ordinary Negligence Without Intoxication. ▸ Pen. Code, § 192(c)(2); *People v. Rodgers* (1949) 94 Cal.App.2d 166, 166 [210 P.2d 71].
- Injury to Someone While Driving Under the Influence of Alcohol or

Drugs. ▸ Veh. Code, § 23153; *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1466–1467 [26 Cal.Rptr.2d 610].

Gross vehicular manslaughter while intoxicated is *not* a lesser included offense of murder. (*People v. Sanchez* (2001) 24 Cal.4th 983, 992 [103 Cal.Rptr.2d 698, 16 P.3d 118].)

RELATED ISSUES

DUI Cannot Serve as Predicate Unlawful Act

The Vehicle Code driving-under-the-influence offense of the first element cannot do double duty as the predicate unlawful act for the second element. (*People v. Soledad* (1987) 190 Cal.App.3d 74, 81 [235 Cal.Rptr. 208].) "[T]he trial court erroneously omitted the 'unlawful act' element of vehicular manslaughter when instructing in . . . [the elements] by referring to Vehicle Code section 23152 rather than another 'unlawful act' as required by the statute." (*Id.* at p. 82.)

Predicate Act Need Not Be Inherently Dangerous

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

Lawful Act in an Unlawful Manner: Negligence

The statute uses the phrase "lawful act which might produce death, in an unlawful manner." (Pen. Code, § 191.5.) "[C]ommitting a lawful act in an unlawful manner simply means to commit a lawful act with negligence, that is, without reasonable caution and care." (*People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].) Because the instruction lists the negligence requirement as element 3, the phrase "in an unlawful manner" is omitted from element 2 as repetitive.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 238–245.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04, Ch. 142, *Crimes Against the Person,* § 142.02[2][c], [4], Ch. 145, *Narcotics and Alcohol Offenses,* §§ 145.02[4][c], 145.03[1][a] (Matthew Bender).

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

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

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

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

AND

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

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

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

[A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or "kill zone." In order to convict the defendant of the attempted murder of _____ *<insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>***, the People must prove that the defendant not only intended to kill _____** *<insert name of primary target alleged>* **but also either intended to kill _____** *<insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>***, or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill _____** *<insert name or description of victim charged in*

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

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

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

Penal Code section 188, as amended by Statutes 2018, ch. 1015 (S.B. 1437), became effective January 1, 2019. The amendment added "malice shall not be imputed to a person based solely on his or her participation in a crime." The natural and probable consequences doctrine as the basis for attempted murder may be affected by this statutory change.

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

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

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

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

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

AUTHORITY

- Attempt Defined. ▸ Pen. Code, §§ 21a, 663, 664.
- Murder Defined. ▸ Pen. Code, § 187.
- Specific Intent to Kill Required. ▸ *People v. Guerra* (1985) 40 Cal.3d 377, 386 [220 Cal.Rptr. 374, 708 P.2d 1252].
- Fetus Defined. ▸ *People v. Davis* (1994) 7 Cal.4th 797, 814–815 [30 Cal.Rptr.2d 50, 872 P.2d 591]; *People v. Taylor* (2004) 32 Cal.4th 863, 867 [11 Cal.Rptr.3d 510, 86 P.3d 881].
- Kill Zone Explained. ▸ *People v. Stone* (2009) 46 Cal.4th 131, 137–138 [92 Cal.Rptr.3d 362, 205 P.3d 272].
- Killer Need Not Be Aware of Other Victims in Kill Zone. ▸ *People v. Adams* (2008) 169 Cal.App.4th 1009, 1023 [86 Cal.Rptr.3d 915].
- This Instruction Correctly States the Law. ▸ *People v. Lawrence* (2009) 177 Cal.App.4th 547, 556-557 [99 Cal.Rptr.3d 324].

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Specific Intent Required

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

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

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

Solicitation

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

Single Bullet, Two Victims

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

No Attempted Involuntary Manslaughter

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

Transferred and Concurrent Intent

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 53–67.

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

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

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

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

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

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

   AND

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

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

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

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

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

[7._____<*insert any other relevant factors.***>]**

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

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

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

BENCH NOTES

Instructional Duty

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

Do not give this instruction when giving CALCRIM No. 731, Special Circumstances: Murder in Commission of Felony—Kidnapping With Intent to Kill After March 8, 2000 or CALCRIM No. 732, Special Circumstances: Murder

in Commission of Felony—Arson With Intent to Kill. (People v. Odom (2016) 244 Cal.App.4th 237, 256–257 [197 Cal.Rptr.3d 774].)

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

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

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

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

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

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

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

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

AUTHORITY

- Accomplice Intent Requirement, Felony Murder. ▸ Pen. Code, § 190.2(d).
- Reckless Indifference to Human Life. ▸ *People v. Clark* (2016) 63 Cal.4th 522, 614-620 [203 Cal.Rptr.3d 407, 372 P.3d 811]; *People v. Estrada* (1995) 11 Cal.4th 568, 578 [46 Cal.Rptr.2d 586, 904 P.2d 1197]; *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127].
- Constitutional Standard for Intent by Accomplice. ▸ *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127].
- Major Participant. ▸ *People v. Banks* (2015) 61 Cal.4th 788, 803-808 [189 Cal.Rptr.3d 208, 351 P.3d 330].

SECONDARY SOURCES

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

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

732 Special Circumstances: Murder in Commission of Felony—Arson With Intent to Kill (Pen. Code, § 190.2(a)(17))

The defendant is charged with the special circumstance of intentional murder while engaged in the commission of arson that burned an (inhabited structure /[or] inhabited property) [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) arson that burned an (inhabited structure/[or] inhabited property);**

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) arson that burned an (inhabited structure/[or] inhabited property);**

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

[3. If the defendant did not personally commit [or attempt to commit] arson, then another perpetrator, (whom the defendant was aiding and abetting/ [or] with whom the defendant conspired), personally committed [or attempted to commit] arson that burned an (inhabited structure/[or] inhabited property);]

(3/4). The commission [or attempted commission] of the arson was a substantial factor in causing the death of another person;

AND

(4/5). The defendant intended that the other person be killed.

To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] arson that burned an (inhabited structure /[or] inhabited property), please refer to the separate instructions that I (will give/have given) you on that crime. [To decide whether the defendant aided and abetted the 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 the 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 underlying arson, aiding and abetting, and conspiracy are given.>

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

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

[If all the listed elements are proved, you may find this special circumstance true even if the defendant intended solely to commit murder and the commission of arson was merely part of or incidental to the commission of that murder.]

New January 2006; Revised August 2013, August 2016, September 2019

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 the arson alleged. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].)

Do not give CALCRIM No. 703, *Special Circumstances: Intent requirement for Accomplice After June 5, 1990*, together with this instruction. See *People v. Odom* (2016) 244 Cal.App.4th 237, 256–257 [197 Cal.Rptr.3d 774].

Subparagraph (M) of Penal Code section 190.2(a)(17) eliminates the application of *People v. Green* (1980) 27 Cal.3d 1, 61 [164 Cal.Rptr. 1, 609 P.2d 468], to intentional murders during the commission of kidnapping or arson of an inhabited structure. The statute may only be applied to alleged homicides after the effective date, March 8, 2000. This instruction may be given alone or with CALCRIM No.

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

For the standard felony-murder special circumstance, it is not necessary for the actual killer to intend to kill. (Pen. Code, § 190.2(b).) However, an accomplice who is not the actual killer must either act with intent to kill or be a major participant and act with reckless indifference to human life. (Pen. Code, § 190.2(d).) Subparagraph (M) of Penal Code section 190.2(a)(17) does not specify whether the defendant must personally intend to kill or whether accomplice liability may be based on an actual killer who intended to kill even if the defendant did not. (See Pen. Code, § 190.2(a)(17)(M).) This instruction has been drafted to require that the defendant intend to kill, whether the defendant is an accomplice or the actual killer. If the evidence raises the potential for accomplice liability and the court concludes that the accomplice need not personally intend to kill, then the court must modify element 5 to state that the person who caused the death intended to kill. In such cases, the court also has a **sua sponte** duty give CALCRIM No. 703, *Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17)*.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401]; *People v. Cervantes* (2001) 26 Cal.4th 860, 865–874 [111 Cal.Rptr.2d 148, 29 P.3d 225].) Because causation is likely to be an issue in any case where this instruction is given, the committee has included the paragraph that begins with "An act causes death if." If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with "There may be more than one cause of death." (*People v. Sanchez* (2001) 26 Cal.4th 834, 845–849 [111 Cal.Rptr.2d 129, 29 P.3d 209]; *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135].)

If the prosecution's theory is that the defendant committed or attempted to commit arson, 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 arson.

If the prosecution's theory is that the defendant aided and abetted or conspired to commit arson, 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 arson and on aiding and abetting and/or conspiracy with this instruction.

When giving this instruction with CALCRIM No. 730, give the final bracketed paragraph.

Related Instructions
CALCRIM No. 1502, *Arson: Inhabited Structure or Property*.

AUTHORITY

- Special Circumstance. Pen. Code, § 190.2(a)(17)~~(B),~~ (H) & (M).

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 532-533.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.13[17], 87.14 (Matthew Bender).

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

810. Torture (Pen. Code, § 206)

The defendant is charged [in Count ____] with torture [in violation of Penal Code section 206].

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

1. **The defendant inflicted great bodily injury on someone else;**

AND

2. **When inflicting the injury, the defendant intended to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose.**

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

[It is not required that a victim actually suffer pain.]

[Someone acts for the purpose of *extortion* if he or she intends to (1) obtain a person's property with the person's consent and (2) obtain the person's consent through the use of force or fear.]

[Someone acts for the purpose of *extortion* if he or she (1) intends to get a public official to do an official act and (2) uses force or fear to make the official do the act. An *official act* is an act that an officer does in his or her official capacity using the authority of his or her public office.]

[Someone acts with a *sadistic purpose* if he or she intends to inflict pain on someone else in order to experience pleasure himself or herself.]

New January 2006

BENCH NOTES

Instructional Duty

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

Unlike murder by torture, the crime of torture does not require that the intent to cause pain be premeditated or that any cruel or extreme pain be prolonged. (*People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739]; *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1204–1205 [68 Cal.Rptr.2d 619]; *People v. Vital* (1996) 45 Cal.App.4th 441, 444 [52 Cal.Rptr.2d 676].) Torture as defined in section 206 of the Penal Code focuses on the mental state of the perpetrator and not the actual pain inflicted. (*People v. Hale* (1999) 75 Cal.App.4th 94, 108 [88 Cal.Rptr.2d 904].) Give the first bracketed paragraph on request if there is no proof that the alleged victim actually suffered pain. (See Pen. Code, § 206.)

"Extortion" need not be defined for purposes of torture. (*People v. Barrera* (1993) 14 Cal.App.4th 1555, 1564 [18 Cal.Rptr.2d 395]; but see *People v. Hill* (1983) 141 Cal.App.3d 661, 668 [190 Cal.Rptr. 628] [term should be defined for kidnapping under Pen. Code, § 209].) Nevertheless, either of the bracketed definitions of extortion, and the related definition of "official act," may be given on request if any of these issues are raised in the case. (See Pen. Code, § 518 [defining "extortion"]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [219 Cal.Rptr. 7, 706 P.2d 1141] [defining "official act"].) Extortion may also be committed by using "the color of official right" to make an official do an act. (Pen. Code, § 518; see *Evans v. United States* (1992) 504 U.S. 255, 258 [112 S.Ct. 1881, 119 L.Ed.2d 57]; *McCormick v. United States* (1990) 500 U.S. 257, 273 [111 S.Ct. 1807, 114 L.Ed.2d 307] [both discussing common law definition of the term].) It appears that this type of extortion would rarely occur in the context of torture, so it is excluded from this instruction.

"Sadistic purpose" may be defined on request. (See *People v. Barrera, supra,* 14 Cal.App.4th at p. 1564; *People v. Raley* (1992) 2 Cal.4th 870, 899–901 [8 Cal.Rptr.2d 678, 830 P.2d 712] [approving use of phrase in torture-murder and special circumstances torture-murder instructions].)

Related Instructions
First degree murder by torture defines torture differently for the purposes of murder. See CALCRIM No. 521, *Murder: Degrees*.

AUTHORITY

- Elements ▸ Pen. Code, § 206.
- Extortion Defined ▸ Pen. Code, § 518.
- Great Bodily Injury Defined ▸ Pen. Code, § 12022.7(f); see, e.g., *People v. Hale* (1999) 75 Cal.App.4th 94, 108 [88 Cal.Rptr.2d 904] [broken and smashed teeth, split lip, and facial cut sufficient evidence of great bodily injury].

- Cruel Pain Equivalent to Extreme or Severe Pain ▸ *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1202 [68 Cal.Rptr.2d 619].
- Intent ▸ *People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739]; *People v. Hale* (1999) 75 Cal.App.4th 94, 106–107 [88 Cal.Rptr.2d 904]; *People v. Jung* (1999) 71 Cal.App.4th 1036, 1042–1043 [84 Cal.Rptr.2d 5]; see *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1204–1206 [68 Cal.Rptr.2d 619] [neither premeditation nor intent to inflict prolonged pain are elements of torture].
- Sadistic Purpose Defined ▸ *People v. Raley* (1992) 2 Cal.4th 870, 899–901 [8 Cal.Rptr.2d 678, 830 P.2d 712]; *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1202–1204 [68 Cal.Rptr.2d 619]; see *People v. Healy* (1993) 14 Cal.App.4th 1137, 1142 [18 Cal.Rptr.2d 274] [sexual element not required].

LESSER INCLUDED OFFENSES

In *People v. Martinez* (2005) 125 Cal.App.4th 1035, 1042–1046 [23 Cal.Rptr.3d 508], the court held that none of the following offenses were lesser included offenses to torture: assault with a deadly weapon (Pen. Code, § 245(a)(1)); corporal injury on a cohabitant (Pen. Code, § 273.5); forcible rape (Pen. Code, § 261(a)(2)); forcible oral copulation (Pen. Code, § 287~~8a~~(c)); criminal threats (Pen. Code, § 422); dissuading a witness by force or threats (Pen. Code, § 136.1(c)(1)); false imprisonment by violence. (Pen. Code, § 236.)

The court did not decide whether assault with force likely to cause great bodily injury is a lesser included offense to torture. (*Id.* at p. 1043–1044.)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 88–90.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.15 (Matthew Bender).

811–819. Reserved for Future Use

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

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

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

<Alternative 1A—force with weapon>

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

<Alternative 1B—force without weapon>

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

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

2. The defendant did that act willfully;

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

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

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

[AND]

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

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

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

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

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

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

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

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

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

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

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

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

AND

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

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

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

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

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

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

New January 2006; Revised April 2011, February 2012, February 2013, September 2019

BENCH NOTES

Instructional Duty

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

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

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. In addition, give CALCRIM No. 2672, *Lawful Performance: Resisting Unlawful Arrest With Force*, if requested.

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

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

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

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

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

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

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

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

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

AUTHORITY

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

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 65.

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

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

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

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

<Alternative 1A—force with weapon>

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

<Alternative 1B—force without weapon>

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

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

2. The defendant did that act willfully;

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

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

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

[AND]

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

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

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

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

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

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

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

New January 2006; Revised April 2011, February 2013, September 2019

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

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

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

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

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

AUTHORITY

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

- Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Inherently Deadly Defined ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 67.

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

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

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

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

<Alternative 1A—force with weapon>

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

<Alternative 1B—force without weapon>

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

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

2. The defendant did that act willfully;

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

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

<Alternative 5A—transportation personnel>

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

<Alternative 5B—passenger>

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

[AND]

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

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

[AND

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

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

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

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

New January 2006; Revised February 2013, September 2019

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

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

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

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

AUTHORITY

- Elements ▸ Pen. Code, §§ 240, 245, 245.2.
- Willful Defined ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▸ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault ▸ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Inherently Deadly Defined ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].

LESSER INCLUDED OFFENSES

- Assault ▸ Pen. Code, § 240.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 72.

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

864–874. Reserved for Future Use

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

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

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

<Alternative 1A—force with weapon>

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

<Alternative 1B—force without weapon>

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

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

2. The defendant did that act willfully;

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

[AND]

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

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

[AND

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

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

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

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

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

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

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

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

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

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

AND

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

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

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

If the charging document names more than one victim, modification of this instruction may be necessary to clarify that each victim must have been subject to the application of force. (*People v. Velasquez* (2012) 211 Cal.App.4th 1170, 1176–1177 [150 Cal.Rptr.3d 612].)

AUTHORITY

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

LESSER INCLUDED OFFENSES

- Assault ▸ Pen. Code, § 240.

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

A misdemeanor brandishing of a weapon or firearm under Penal Code section 417 is not a lesser and necessarily included offense of assault with a deadly weapon.

(*People v. Escarcega* (1974) 43 Cal.App.3d 391, 398 [117 Cal.Rptr. 595]; *People v. Steele* (2000) 83 Cal.App.4th 212, 218, 221 [99 Cal.Rptr.2d 458].)

SECONDARY SOURCES

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

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

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

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

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

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

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

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

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

[AND]

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

[AND

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

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

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

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

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

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

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

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

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

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

New January 2006; Revised April 2010, October 2010, August 2012

BENCH NOTES

Instructional Duty

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

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

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

The court has a **sua sponte** duty to instruct on the sex offense or offense alleged. (*People v. May* (1989) 213 Cal.App.3d 118, 129 [261 Cal.Rptr. 502].) In the blanks, specify the sex offense or offenses that the defendant is charged with intending to commit. Included sex offenses are: rape (Pen. Code, § 261); oral copulation (Pen. Code, § 287~~8a~~ [including in-concert offense]); sodomy (Pen. Code, § 286 [including in-concert offense]); sexual penetration (Pen. Code, § 289); rape, spousal rape, or sexual penetration in concert (Pen. Code, § 264.1); and lewd or lascivious acts (Pen. Code, § 288). (See Pen. Code, § 220.) Give the appropriate instructions on the offense or offenses alleged.

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

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

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

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

AUTHORITY

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

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 28–34.

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

LESSER INCLUDED OFFENSES

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

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

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

RELATED ISSUES

Abandonment

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

SECONDARY SOURCES

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

970. Shooting Firearm or BB Device in Grossly Negligent Manner (Pen. Code, § 246.3)

The defendant is charged [in Count __] with shooting a (firearm/BB Device) in a grossly negligent manner [in violation of Penal Code section 246.3].

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

1. **The defendant intentionally shot a (firearm/BB device);**

2. **The defendant did the shooting with gross negligence;**

[AND]

3. **The shooting could have resulted in the injury or death of a person(;/.)**

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

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

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

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

AND

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

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

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

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

[A *BB device* is any instrument that expels a projectile, such as a BB or a pellet, through the force of air pressure, gas pressure, or spring action.]

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

New January 2006; Revised June 2007, February 2012, September 2019

BENCH NOTES

Instructional Duty

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

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

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

AUTHORITY

- Elements ▸ Pen. Code, § 246.3.
- Discharge Must be Intentional ▸ *People v. Robertson* (2004) 34 Cal.4th 156, 167 [17 Cal.Rptr.3d 604, 95 P.3d 872]; *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438 [35 Cal.Rptr.2d 155]; *People v. Alonzo* (1993) 13 Cal.App.4th 535, 538 [16 Cal.Rptr.2d 656].
- Firearm Defined ▸ Pen. Code, § 16520.
- BB Device Defined ▸ Pen. Code, § 246.3(c).
- Willful Defined ▸ Pen. Code, § 7(1).

- Gross Negligence Defined ▸ *People v. Alonzo* (1993) 13 Cal.App.4th 535, 540 [16 Cal.Rptr.2d 656]; see *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926].
- Actual Belief Weapon Not Loaded Negates Mental State ▸ *People v. Robertson* (2004) 34 Cal.4th 156, 167 [17 Cal.Rptr.3d 604, 95 P.3d 872]; *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438–1439, 1440 [35 Cal.Rptr.2d 155].

LESSER INCLUDED OFFENSES

Unlawful possession by a minor of a firearm capable of being concealed on the person (see Pen. Code, § 29610) is not a necessarily included offense of unlawfully discharging a firearm with gross negligence. (*In re Giovani M.* (2000) 81 Cal.App.4th 1061, 1066 [97 Cal.Rptr.2d 319].)

RELATED ISSUES

~~***Second Degree Felony-Murder***~~
~~Grossly negligent discharge of a firearm is an inherently dangerous felony and may serve as the predicate offense to second degree felony-murder. (*People v. Robertson* (2004) 34 Cal.4th 156, 173 [17 Cal.Rptr.3d 604, 95 P.3d 872] [merger doctrine does not apply]; *People v. Clem* (2000) 78 Cal.App.4th 346, 351 [92 Cal.Rptr.2d 727]; see CALCRIM Nos. 541A–541C, *Felony Murder: Second Degree.*)~~

Actual Belief Weapon Not Loaded Negates Mental State
"A defendant who believed that the firearm he or she discharged was unloaded . . . would not be guilty of a violation of section 246.3." (*People v. Robertson* (2004) 34 Cal.4th 156, 167 [17 Cal.Rptr.3d 604, 95 P.3d 872] [citing *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438–1439, 1440 [35 Cal.Rptr.2d 155]].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 48.

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

971–979. Reserved for Future Use

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

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

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

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

AND

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

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

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

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

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

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

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

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

[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">***.]**

New January 2006; Revised February 2012, February 2013, September 2019

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

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

AUTHORITY

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

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

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

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 6, 7.

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

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

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

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

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

[AND]

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

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

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

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

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

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

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

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

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

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

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

New January 2006; Revised October 2010, February 2012, February 2013, September 2019

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

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

On request, give the bracketed sentence stating that the firearm need not be loaded.

AUTHORITY

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

SECONDARY SOURCES

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

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

1015 Oral Copulation by Force, Fear, or Threats (Pen. Code, § 287~~8a~~(c)(2) & (3), (k))

The defendant is charged [in Count __] with oral copulation by force [in violation of Penal Code section 287~~8a~~].

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

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

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

AND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

New January 2006; Revised August 2006

BENCH NOTES

Instructional Duty

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

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

AUTHORITY

- Elements. ▸ Pen. Code, § 287~~8a~~(c)(2) & (3), (k).
- Consent Defined. ▸ Pen. Code, §§ 261.6, 261.7.
- Duress Defined. ▸ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221].
- Menace Defined. ▸ Pen. Code, § 261(c) [in context of rape].
- Oral Copulation Defined. ▸ Pen. Code, § 287~~8a~~(a); *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].
- Threatening to Retaliate Defined. ▸ Pen. Code, § 287~~8a~~(l).
- Fear Defined. ▸ *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. ▸ *People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089]; *People v. Guido* (2005) 125 Cal.App.4th 566, 574–576 [22 Cal.Rptr.3d 826].
- Threatening to Retaliate. ▸ *People v. White* (2005) 133 Cal.App.4th 473, 484–485 [34 Cal.Rptr.3d 848]; *People v. Ward* (1986) 188 Cal.App.3d 459, 468 [233 Cal.Rptr. 477].

COMMENTARY

Penal Code section 287~~8a~~ requires that the oral copulation be "against the will" of the other person. (Pen. Code, § 287~~8a~~(c)(2) & (3), (k).) "Against the will" has been defined as "without consent." (*People v. Key* (1984) 153 Cal.App.3d 888, 895 [203 Cal.Rptr. 144]; see also *People v. Young* (1987) 190 Cal.App.3d 248, 257 [235 Cal.Rptr. 361].)

The instruction includes a definition of the sufficiency of "fear" because that term has meaning in the context of forcible oral copulation that is technical and may not be readily apparent to jurors. (See *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].)

The court is not required to instruct sua sponte on the definition of "duress" or "menace" and Penal Code section 288a does not define either term. (*People v.*

Pitmon (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress]). Optional definitions are provided for the court to use at its discretion. The definition of "duress" is based on *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071], and *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]. The definition of "menace" is based on the statutory definitions contained in Penal Code sections 261 and 262 [rape]. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416] [using rape definition in case involving forcible lewd acts].) In *People v. Leal, supra,* 33 Cal.4th at pp. 1004–1010, the court held that the statutory definition of "duress" contained in Penal Code sections 261 and 262 does not apply to the use of that term in any other statute. The court did not discuss the statutory definition of "menace." The court should consider the *Leal* opinion before giving the definition of "menace."

The term "force" as used in the forcible sex offense statutes does not have a specialized meaning and court is not required to define the term sua sponte. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024; *People v. Guido* (2005) 125 Cal.App.4th 566, 574–576 [22 Cal.Rptr.3d 826]). In *People v. Griffin, supra,* the Supreme Court further stated,

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

(*People v. Griffin, supra*, 33 Cal.4th at pp. 1023–1024 [emphasis in original]; see also *People v. Guido* (2005) 125 Cal.App.4th 566, 574–576 [22 Cal.Rptr.3d 826] [*Griffin* reasoning applies to violation of Pen. Code, § 287~~8a~~(c)(2)].)

The committee has provided a bracketed definition of "force," consistent with *People v. Griffin, supra,* that the court may give on request.

LESSER INCLUDED OFFENSES

- Assault. ▸ Pen. Code, § 240.

- Assault With Intent to Commit Oral Copulation. ▸ Pen. Code, § 220; see *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible crime is charged].
- Attempted Oral Copulation. ▸ Pen. Code, §§ 663, 287~~8a~~.
- Battery. ▸ Pen. Code, § 242.

RELATED ISSUES

Consent Obtained by Fraudulent Representation

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

Consent Withdrawn

A forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection. (*In re John Z.* (2003) 29 Cal.4th 756, 760 [128 Cal.Rptr.2d 783, 60 P.3d 183].) If there is an issue whether consent to oral copulation was withdrawn, see CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*, for language that may be adapted for use in this instruction.

Multiple Acts of Oral Copulation

An accused may be convicted for multiple, nonconsensual sex acts of an identical nature that follow one another in quick, uninterrupted succession. (*People v. Catelli* (1991) 227 Cal.App.3d 1434, 1446–1447 [278 Cal.Rptr. 452] [defendant properly convicted of multiple violations of former Pen. Code, § 288a where he interrupted the acts of copulation and forced victims to change positions].)

Sexual Organ

A man's "sexual organ" for purposes of Penal Code section 287~~8a~~ includes the penis and the scrotum. (Pen. Code, § 287~~8a~~; *People v. Catelli* (1991) 227 Cal.App.3d 1434, 1448–1449 [278 Cal.Rptr. 452].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 31–34.

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

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

1016 Oral Copulation in Concert (Pen. Code, § 287~~8a~~(d))

The defendant[s] [_____ *<insert name[s] if not all defendants in trial charged with this count>*] (is/are) charged [in Count __] with committing oral copulation by acting in concert [with _____ *<insert name[s] or description[s] of uncharged participant[s]>*] [in violation of Penal Code section 287~~8a~~(d)].

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

<Alternative A—defendant committed oral copulation>

[1.] [The defendant personally committed oral copulation and voluntarily acted with someone else who aided and abetted its commission(;/.)]

[OR]

<Alternative B—defendant aided and abetted>

[(1/2).] [The defendant voluntarily aided and abetted someone else who personally committed oral copulation.]

To decide whether the defendant[s] [or _____ *<insert name[s] or description[s] of uncharged participant[s]>*] committed oral copulation, please refer to the separate instructions that I (will give/have given) you on that crime. To decide whether the defendant[s] [or _____ *<insert name[s] or description[s] of uncharged participant[s]>*] aided and abetted oral copulation, please refer to the separate instructions that I (will give/have given) you on aiding and abetting. You must apply those instructions when you decide whether the People have proved oral copulation in concert.
<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ORAL COPULATION AND AIDING AND ABETTING ARE GIVEN.>

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

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. (See Pen. Code, § 287~~a~~(d).) The court also has a **sua sponte** duty to instruct on oral copulation. Give one or more of the following instructions defining oral copulation: CALCRIM No. 1015 or CALCRIM Nos. 1017–1022.

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

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

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

AUTHORITY

- Elements. ▸ Pen. Code, § 287~~a~~(d).
- Aiding and Abetting. ▸ *People v. Adams* (1993) 19 Cal.App.4th 412, 429, 444–446 [23 Cal.Rptr.2d 512]; *People v. Caldwell* (1984) 153 Cal.App.3d 947, 951–952 [200 Cal.Rptr. 508]; *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658] [in context of sodomy in concert].
- Consent Defined. ▸ *People v. Boggs* (1930) 107 Cal.App. 492, 495–496 [290 P. 618].

LESSER INCLUDED OFFENSES

- Assault. ▸ Pen. Code, § 240.
- Assault With Intent to Commit Oral Copulation. ▸ Pen. Code, § 220; see *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [when forcible crime is charged].
- Attempted Oral Copulation. ▸ Pen. Code, §§ 664, 287~~a~~.
- Attempted Oral Copulation in Concert. ▸ Pen. Code, §§ 663, 287~~a~~(d).
- Battery. ▸ Pen. Code, § 242.
- Oral Copulation. ▸ Pen. Code, § 287~~a~~.

RELATED ISSUES

See the Related Issues sections under CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*, and CALCRIM No. 1001, *Rape or Spousal Rape in Concert*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 31, 36.

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

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

1017 Oral Copulation of an Intoxicated Person (Pen. Code, § 287~~8a~~(a), (i))

The defendant is charged [in Count __] with oral copulation of a person while that person was intoxicated [in violation of Penal Code section 287~~8a~~(i)].

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

1. **The defendant committed an act of oral copulation with another person;**

2. **An (intoxicating/anesthetic/controlled) substance prevented the other person from resisting;**

AND

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

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

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

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

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

New January 2006; Revised August 2015

BENCH NOTES

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

A space is provided to identify controlled substances if the parties agree that there is no issue of fact.

Defenses—Instructional Duty
The court has a **sua sponte** duty to instruct on the defense of reasonable belief the person was capable of consent if there is sufficient evidence to support the defense. (See *People v. Giardino* (2000) 82 Cal.App.4th 454, 472 [98 Cal.Rptr.2d 315].)

Related Instructions
CALCRIM No. 1016, *Oral Copulation in Concert*, may be given in conjunction with this instruction, if appropriate.

AUTHORITY

- Elements ▸ Pen. Code, § 287~~&a~~(a), (i).
- Consent Defined ▸ Pen. Code, § 261.6.
- Controlled Substances ▸ Health & Safety Code, §§ 11054–11058; see *People v. Avila* (2000) 80 Cal.App.4th 791, 798, fn. 7 [95 Cal.Rptr.2d 651].
- Anesthetic Effect ▸ See *People v. Avila* (2000) 80 Cal.App.4th 791, 798–799 [95 Cal.Rptr.2d 651] [in context of sodomy].
- Oral Copulation Defined ▸ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].
- "Prevented From Resisting" Defined ▸ See *People v. Giardino* (2000) 82 Cal.App.4th 454, 465–466 [98 Cal.Rptr.2d 315] [rape of intoxicated woman].

LESSER INCLUDED OFFENSES

- Attempted Oral Copulation ▸ Pen. Code, §§ 663, 287~~&a~~.

RELATED ISSUES

See the Related Issues section to CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*.

A defendant may be convicted of both oral copulation of an intoxicated person and oral copulation of an unconscious person. (*People v. Gonzalez* (2014) 60 Cal.4th 533 [179 Cal.Rptr.3d 1, 335 P.3d 1083]; Pen. Code, §§ 287~~8a~~(f), (i).)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency §§ 35-37, 39, 178.

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

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

1018 Oral Copulation of an Unconscious Person (Pen. Code, § 287~~8a~~(a), (f))

The defendant is charged [in Count __] with oral copulation of a person who was unconscious of the nature of the act [in violation of Penal Code section 287~~8a~~(f)].

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

1. **The defendant committed an act of oral copulation with another person;**

2. **The other person was unable to resist because (he/she) was unconscious of the nature of the act;**

AND

3. **The defendant knew that the other person was unable to resist because (he/she) was unconscious of the nature of the act.**

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

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

New January 2006; Revised August 2015

BENCH NOTES

Instructional Duty

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

Related Instructions
CALCRIM No. 1016, *Oral Copulation in Concert*, may be given in conjunction with this instruction, if appropriate.

AUTHORITY

- Elements ▸ Pen. Code, § 287~~8a~~(a), (f).
- Oral Copulation Defined ▸ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].

COMMENTARY

The statutory language describing unconsciousness includes "was not aware, knowing, perceiving, or cognizant that the act occurred." (See Pen. Code, § 287~~8a~~(f)(2)–(4).) The committee did not discern any difference among the statutory terms and therefore used "aware" in the instruction. If there is an issue over a particular term, that term should be inserted in the instruction.

LESSER INCLUDED OFFENSES

- Attempted Oral Copulation ▸ Pen. Code, §§ 663, 287~~8a~~.

RELATED ISSUES

See the Related Issues Section to CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*.

A defendant may be convicted of both oral copulation of an intoxicated person and oral copulation of an unconscious person. (*People v. Gonzalez* (2014) 60 Cal.4th 533 [179 Cal.Rptr.3d 1, 335 P.3d 1083]; Pen. Code, §§ 287~~8a~~(f), (i).)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency §§ 35-37, 39, 178.

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

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

1019 Oral Copulation of a Disabled Person (Pen. Code, § 287~~8a~~(a), (g))

The defendant is charged [in Count __] with oral copulation of a mentally or physically disabled person [in violation of Penal Code section 287~~8a~~(g)].

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

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

2. **The other person had a (mental disorder/developmental or physical disability) that prevented (him/her) from legally consenting;**

AND

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

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

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

New January 2006; Revised August 2012

BENCH NOTES

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

Related Instructions
CALCRIM No. 1016, *Oral Copulation in Concert*, may be given in conjunction with this instruction, if appropriate.

AUTHORITY

- Elements. ▸ Pen. Code, § 287~~8a~~(a), (g).
- Consent Defined. ▸ Pen. Code, § 261.6; *People v. Boggs* (1930) 107 Cal.App. 492, 495–496 [290 P. 618].
- Oral Copulation Defined. ▸ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].
- This Instruction Completely Explains Inability to Give Legal Consent. ▸ *People v. Miranda* (2011) 199 Cal.App.4th 1403, 1419, fn. 13 [132 Cal.Rptr.3d 315] [in dicta].

LESSER INCLUDED OFFENSES

- Attempted Oral Copulation. ▸ Pen. Code, §§ 663, 287~~8a~~.

RELATED ISSUES

See the Related Issues Section to CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*, and CALCRIM No. 1004, *Rape of a Disabled Woman*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 31–33, 35.

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

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

1020 Oral Copulation of a Disabled Person in a Mental Hospital (Pen. Code, § 287~~8a~~(a), (h))

The defendant is charged [in Count __] with oral copulation of a mentally or physically disabled person in a mental hospital [in violation of Penal Code section 287~~8a~~(h)].

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

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

2. **The other person had a (mental disorder/developmental or physical disability) that prevented (him/her) from legally consenting;**

3. **The defendant knew or reasonably should have known that the other person had a (mental disorder/developmental or physical disability) that prevented (him/her) from legally consenting;**

AND

4. **At the time of the act, both people were confined in a state hospital or other mental health facility.**

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

A person is *incapable of giving legal consent* if he or she is unable to understand the act, its nature, and possible consequences.

[_____ *<Insert name of facility>* **is a (state hospital/mental health facility).] [A *state hospital* or *other mental health facility* includes a state hospital for the care and treatment of the mentally disordered or any other public or private facility approved by a county mental health director for the care and treatment of the mentally disordered.]**

New January 2006

BENCH NOTES

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

A space is provided to identify a facility as a state hospital or other mental health facility if the parties agree that there is no issue of fact. Alternatively, if there is a factual dispute about whether an institution is a state hospital or other mental health facility, give the final bracketed sentence. (See Pen. Code, § 287~~a~~(h).)

Related Instructions
CALCRIM No. 1016, *Oral Copulation in Concert*, may be given in conjunction with this instruction, if appropriate.

AUTHORITY

- Elements. ▸ Pen. Code, § 287~~a~~(a), (h).
- State Hospital or Mental Health Facility Defined. ▸ Pen. Code, § 287~~a~~(h); see Welf. & Inst. Code, § 7100 [county psychiatric facilities], § 7200 [state hospitals for mentally disordered], § 7500 [state hospitals for developmentally disabled].
- Legal Consent. ▸ *People v. Boggs* (1930) 107 Cal.App. 492, 495–496 [290 P. 618].
- Oral Copulation Defined. ▸ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].

LESSER INCLUDED OFFENSES

- Attempted Oral Copulation. ▸ Pen. Code, §§ 663, 287~~a~~.

RELATED ISSUES

See the Related Issues Section to CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*, and CALCRIM No. 1004, *Rape of a Disabled Woman*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 31–33, 35.

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

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

1021 Oral Copulation by Fraud (Pen. Code, § 287~~8a~~(a), (j))

The defendant is charged [in Count __] with oral copulation by fraud [in violation of Penal Code section 287~~8a~~(j)].

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

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

2. **The other person submitted to the oral copulation because (he/she) believed the defendant was someone (he/she) knew, other than the defendant;**

AND

3. **The defendant tricked, lied, [used an artifice or pretense,] or concealed information, intending to make the other person believe (he/she) was someone (he/she) knew, while intending to hide (his/her) own identity.**

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

New January 2006; Revised February 2015

BENCH NOTES

Instructional Duty

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

Former Penal Code section 288a(a) was amended effective September 9, 2013, in response to *People v. Morales* (2013) 212 Cal.App.4th 583 [150 Cal.Rptr.3d 920].

AUTHORITY

- Elements. ▸ Pen. Code, § 287~~8a~~(a), (j).

- Oral Copulation Defined. ▸ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].

LESSER INCLUDED OFFENSES

- Attempted Oral Copulation. ▸ Pen. Code, §§ 663, 287~~8a~~.

RELATED ISSUES

See the Related Issues Section to CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crime Against Decency, § 38.

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

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

1022 Oral Copulation While in Custody (Pen. Code, § 287~~8a~~(a), (e))

The defendant is charged [in Count __] with oral copulation committed while (he/she) was confined in (state prison/a local detention facility) [in violation of Penal Code section 287~~8a~~(e)].

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

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

AND

2. **At the time of the act, the defendant was confined in a (state prison/local detention facility).**

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

[_____ <*insert name of facility*> is a (state prison/local detention facility).] [A state prison is any prison or institution maintained by the Department of Corrections and Rehabilitation.] [A local detention facility includes any city, county, or regional jail or other facility used to confine adults [or both adults and minors].]

New January 2006; Revised August 2016

BENCH NOTES

Instructional Duty

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

A space is provided to identify a state prison or local detention facility if the parties agree that there is no issue of fact. Alternatively, if there is a factual dispute about whether the defendant was confined in a state prison or local detention facility, give the second or third bracketed sentences (or both, if necessary). (See Pen. Code, §§ 4504, 5003, 6031.4.)

Related Instructions
CALCRIM No. 1016, *Oral Copulation in Concert*, may be given in conjunction with this instruction, if appropriate.

AUTHORITY

- Elements. ▸ Pen. Code, § 287~~8a~~(a), (e).
- Local Detention Facility Defined. ▸ Pen. Code, § 6031.4.
- State Prison Defined. ▸ Pen. Code, §§ 4504, 5003.
- Oral Copulation Defined. ▸ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].

LESSER INCLUDED OFFENSES

- Attempted Oral Copulation. ▸ Pen. Code, §§ 663, 287~~8a~~.

RELATED ISSUES

See the Related Issues Section to CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 35, 36, 178.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][c], [4] (Matthew Bender).

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

1070 Unlawful Sexual Intercourse: Defendant 21 or Older (Pen. Code, § 261.5(a) & (d))

The defendant is charged [in Count __] with having unlawful sexual intercourse with a person who was under the age of 16 years at a time after the defendant had reached (his/her) 21st birthday [in violation of Penal Code section 261.5(d)].

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

1. **The defendant had sexual intercourse with another person;**

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

3. **The defendant was at least 21 years old at the time of the intercourse;**

AND

4. **The other person was under the age of 16 years at the time of the intercourse.**

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

[It is not a defense that the other person may have consented to the intercourse.]

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

<Defense: Good Faith Belief 18 or Over>
[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the other person was age 18 or older. In order for reasonable and actual belief to excuse the defendant's behavior, there must be evidence tending to show that (he/she) reasonably and actually believed that the other person was age 18 or older. If you have a reasonable doubt about whether the defendant reasonably and actually believed that the other person was age 18 or older, you must find (him/her) not guilty.]

New January 2006; Revised April 2008

BENCH NOTES

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

For a discussion of the **sua sponte** duty to instruct on the defense of mistake of fact, see CALCRIM No. 3406.

Give the bracketed paragraph that begins with "It is not a defense that" on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty
If there is sufficient evidence that the defendant reasonably and actually believed that the minor was age 18 or older, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673]; *People v. Winters* (1966) 242 Cal.App.2d 711, 716 [51 Cal.Rptr. 735].)

Related Instruction
CALCRIM No. 3406, *Mistake of Fact.*

AUTHORITY

- Elements. ▸ Pen. Code, § 261.5(a) & (d).
- Minor's Consent Not a Defense. ▸ *People v. Kemp* (1934) 139 Cal.App. 48, 51.
- Penetration Defined. ▸ Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr.406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].
- Good Faith Belief in Victim's Age. ▸ *People v. Zeihm* (1974) 40 Cal.App.3d 1085, 1089 [115 Cal.Rptr. 528].

LESSER INCLUDED OFFENSES

- Attempted Unlawful Sexual Intercourse. ▸ Pen. Code, §§ 664, 261.5; see, e.g., *People v. Nicholson* (1979) 98 Cal.App.3d 617, 622–624 [159 Cal.Rptr. 766].

Contributing to the delinquency of a minor (Pen. Code, § 272) is not a lesser included offense of unlawful sexual intercourse. (*People v. Bobb* (1989) 207 Cal.App.3d 88, 93–96 [254 Cal.Rptr. 707], disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 198, fn. 7 [47 Cal.Rptr.2d 569, 906 P.2d 531].)

RELATED ISSUES

Calculating Age

The "birthday rule" of former Civil Code section 26 (now see Fam. Code, § 6500) applies. A person attains a given age as soon as the first minute of his or her birthday has begun, not on the day before the birthday. (*In re Harris* (1993) 5 Cal.4th 813, 844–845, 849 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Participant Must be Over 21

One of the two participants in the act of unlawful sexual intercourse must be over 21 and the other person must be under 16. Proof that an aider and abettor was over 21 is insufficient to sustain the aider and abettor's conviction if neither of the actual participants was over 21 years old. (See *People v. Culbertson* (1985) 171 Cal.App.3d 508, 513, 515 [217 Cal.Rptr. 347] [applying same argument to section 287~~8a~~(c), where perpetrator must be 10 years older than victim under 14].)

Mistaken Belief About Victim's Age

A defendant is not entitled to a mistake of fact instruction if he claims that he believed that the complaining witness was over 16. His belief would still constitute the *mens rea* of intending to have sex with a minor. (*People v. Scott* (2000) 83 Cal.App.4th 784, 800–801 [100 Cal.Rptr.2d 70].) However, if he claims that he believed that the complaining witness was over 18 years old, he is entitled to the mistake of fact instruction. (See *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673].)

Married Minor Victim

A defendant may be convicted of unlawful sexual intercourse even if the minor victim is married or was previously married to another person. (*People v. Courtney* (1960) 180 Cal.App.2d 61, 62 [4 Cal.Rptr. 274] [construing former statute]; *People v. Caldwell* (1967) 255 Cal.App.2d 229, 230–231 [63 Cal.Rptr. 63].)

Sterility
Sterility is not a defense to unlawful sexual intercourse. (*People v. Langdon* (1987) 192 Cal.App.3d 1419, 1421 [238 Cal.Rptr. 158].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 45–46.

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 20–24.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[3][a] (Matthew Bender).

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

1080 Oral Copulation With Person Under 14 (Pen. Code, § 287~~8a~~(c)(1))

The defendant is charged [in Count __] with oral copulation of a person who was under the age of 14 and at least 10 years younger than the defendant [in violation of Penal Code section 287~~8a~~(c)(1)].

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

1. **The defendant participated in an act of oral copulation with another person;**

AND

2. **At the time of the act, the other person was under the age of 14 and was at least 10 years younger than the defendant.**

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

[It is not a defense that the other person may have consented to the act.]

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

New January 2006

BENCH NOTES

Instructional Duty

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

Give the bracketed paragraph that begins with "It is not a defense that" on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. ▸ Pen. Code, § 287~~8a~~(c)(1).
- Oral Copulation Defined. ▸ Pen. Code, § 287~~8a~~(a); *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884] [in context of lewd acts with children].
- Minor's Consent Not a Defense. ▸ See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502] [in context of statutory rape].

LESSER INCLUDED OFFENSES

- Attempted Oral Copulation With Minor Under 14 ▸ Pen. Code, §§ 664, 287 ~~8a~~(c)(1).
- Oral Copulation With Minor Under 18 ▸ *People v. Culbertson* (1985) 171 Cal.App.3d 508, 516 [217 Cal.Rptr. 347]; *People v. Jerome* (1984) 160 Cal.App.3d 1087, 1097–1098 [207 Cal.Rptr. 199].

RELATED ISSUES

Mistake of Fact Defense Not Available
In *People v. Olsen* (1984) 36 Cal.3d 638, 649 [205 Cal.Rptr. 492, 685 P.2d 52], the court held that the defendant's mistaken belief that the victim was over 14 was no defense to a charge of lewd and lascivious acts with a child under 14.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 31–33.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][c], [3][b] (Matthew Bender).

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

1081 Oral Copulation With Minor: Defendant 21 or Older (Pen. Code, § 287~~8a~~(b)(2))

The defendant is charged [in Count __] with engaging in an act of oral copulation with a person who was under the age of 16 years at a time after the defendant had reached (his/her) 21st birthday [in violation of Penal Code section 287~~8a~~(b)(2)].

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

1. **The defendant participated in an act of oral copulation with another person;**

2. **The defendant was at least 21 years old at the time of the act;**

AND

3. **The other person was under the age of 16 years at the time of the act.**

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

[It is not a defense that the other person may have consented to the act.]

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

<Defense: Good Faith Belief 18 or Over>
[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the other person was age 18 or older. The People must prove beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person was at least 18 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]

New January 2006

BENCH NOTES

Instructional Duty

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

Give the bracketed paragraph that begins with "It is not a defense that" on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

If there is sufficient evidence that the defendant reasonably and actually believed that the minor was age 18 or older, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673]; *People v. Winters* (1966) 242 Cal.App.2d 711, 716 [51 Cal.Rptr. 735].)

AUTHORITY

- Elements. ▸ Pen. Code, § 287~~8a~~(b)(2).
- Oral Copulation Defined. ▸ Pen. Code, § 287~~8a~~(a); *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884] [in context of lewd acts with children].
- Minor's Consent Not a Defense. ▸ See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502] [in context of statutory rape].

LESSER INCLUDED OFFENSES

- Attempted Oral Copulation With Minor When Defendant Over 21. ▸ Pen. Code, §§ 664, 288a(b)(2).
- Oral Copulation With Minor Under 18. ▸ See *People v. Culbertson* (1985) 171 Cal.App.3d 508, 516 [217 Cal.Rptr. 347]; *People v. Jerome* (1984) 160 Cal.App.3d 1087, 1097–1098 [207 Cal.Rptr. 199] [both in context of section 288a(c)].

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older*

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 31–33.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][c], [3][b] (Matthew Bender).

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

1082 Oral Copulation With Person Under 18 (Pen. Code, § 287~~8a~~(b)(1))

The defendant is charged [in Count __] with oral copulation with a person who was under the age of 18 [in violation of Penal Code section 287~~8a~~(b)(1)].

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

1. **The defendant participated in an act of oral copulation with another person;**

AND

2. **The other person was under the age of 18 when the act was committed.**

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

[It is not a defense that the other person may have consented to the act.]

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

<Defense: Good Faith Belief 18 or Over>
[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the other person was age 18 or older. The People must prove beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person was at least 18 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]

New January 2006; Revised March 2017

BENCH NOTES

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

Give the bracketed paragraph that begins with "It is not a defense that" on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

Give the final bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

If there is sufficient evidence that the defendant reasonably and actually believed that the minor was age 18 or older, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673]; *People v. Winters* (1966) 242 Cal.App.2d 711, 716 [51 Cal.Rptr. 735].)

AUTHORITY

- Elements. ▸ Pen. Code, § 287~~a~~(b)(1).
- Oral Copulation Defined. ▸ Pen. Code, § 287~~a~~(a); *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884] [in context of lewd acts with children].
- Minor's Consent Not a Defense. ▸ See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502] [in context of statutory rape].
- Mistake of Fact Regarding Age. ▸ *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673] [in context of statutory rape]; *People v. Peterson* (1981) 126 Cal.App.3d 396, 397 [178 Cal.Rptr. 734].

LESSER INCLUDED OFFENSES

A violation of Penal Code section 288.3 is not a lesser included offense of attempted oral copulation, because attempt can be committed without contacting or communicating with the victim under the statutory elements test. (*People v. Medelez* (2016) 2 Cal.App.5th 659, 663, 206 Cal.Rptr.3d 402].)

RELATED ISSUES

Minor Perpetrator

A minor under age 14 may be adjudged responsible for violating Penal Code section 287~~a~~(b)(1) upon clear proof of the minor's knowledge of wrongfulness.

(Pen. Code, § 26; *In re Paul C.* (1990) 221 Cal.App.3d 43, 49 [270 Cal.Rptr. 369].)

See the Related Issues section under CALCRIM No. 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older*.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, § 54.

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 35–37, 178.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.20[1][c], [3][b], 142.23[2] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:17, 12:18 (The Rutter Group).

1090 Sodomy With Person Under 14 (Pen. Code, § 286(c)(1))

The defendant is charged [in Count __] with sodomy with a person who was under the age of 14 years and at least 10 years younger than the defendant [in violation of Penal Code section 286(c)(1)].

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

1. **The defendant participated in an act of sodomy with another person;**

AND

2. **At the time of the act, the other person was under the age of 14 years and was at least 10 years younger than the defendant.**

***Sodomy* is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.]**

[It is not a defense that the other person may have consented to the act.]

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

New January 2006

BENCH NOTES

Instructional Duty

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

Give the bracketed paragraph that begins with "It is not a defense that" on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. ▸ Pen. Code, § 286(c)(1).
- Sodomy Defined. ▸ Pen. Code, § 286(a); see *People v. Singh* (1928) 62 Cal.App. 450, 452 [217 P. 121] [ejaculation is not required].
- Minor's Consent Not a Defense. ▸ See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502] [in context of statutory rape].

LESSER INCLUDED OFFENSES

- Attempted Sodomy With Minor Under 14. ▸ Pen. Code, §§ 664, 286(c)(1).
- Sodomy With Minor Under 18. ▸ See *People v. Culbertson* (1985) 171 Cal.App.3d 508, 516 [217 Cal.Rptr. 347]; *People v. Jerome* (1984) 160 Cal.App.3d 1087, 1097–1098 [207 Cal.Rptr. 199] [both in context of Pen. Code, § 287~~sa~~(c)].

RELATED ISSUES

Mistake of Fact Defense Not Available
In *People v. Olsen* (1984) 36 Cal.3d 638 [205 Cal.Rptr. 492, 685 P.2d 52], the court held that the defendant's mistaken belief that the victim was over 14 was no defense to a charge of lewd and lascivious acts with a child under 14.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 25–27.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][b], [3][b] (Matthew Bender).

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

1091 Sodomy With Minor: Defendant 21 or Older (Pen. Code, § 286(b)(2))

The defendant is charged [in Count __] with engaging in an act of sodomy with a person who was under the age of 16 years at a time after the defendant had reached (his/her) 21st birthday [in violation of Penal Code section 286(b)(2)].

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

1. **The defendant participated in an act of sodomy with another person;**

2. **The defendant was at least 21 years old at the time of the act;**

AND

3. **The other person was under the age of 16 years at the time of the act.**

Sodomy **is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.]**

[It is not a defense that the other person may have consented to the act.]

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

<Defense: Good Faith Belief 18 or Over>
[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the other person was age 18 or older. The People must prove beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person was at least 18 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]

New January 2006

BENCH NOTES

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

Give the bracketed paragraph that begins with "It is not a defense that" on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rtpr.2d 361, 393 P.2d 673].)

Defenses—Instructional Duty
If there is sufficient evidence that the defendant reasonably and actually believed that the minor was age 18 or older, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673]; *People v. Winters* (1966) 242 Cal.App.2d 711, 716 [51 Cal.Rptr. 735].)

AUTHORITY

- Elements. ▸ Pen. Code, § 286(b)(2).
- Sodomy Defined. ▸ Pen. Code, § 286(a); see *People v. Singh* (1923) 62 Cal.App. 450, 452 [217 P. 121] [ejaculation is not required].
- Minor's Consent Not a Defense. ▸ See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502] [in context of statutory rape].

LESSER INCLUDED OFFENSES

- Attempted Sodomy With Minor When Defendant Over 21. ▸ Pen. Code, §§ 664, 286(b)(2).
- Sodomy With Minor Under 18. ▸ See *People v. Culbertson* (1985) 171 Cal.App.3d 508, 516 [217 Cal.Rptr. 347]; *People v. Jerome* (1984) 160 Cal.App.3d 1087, 1097–1098 [207 Cal.Rtpr. 199] [both in context of Pen. Code, § 287~~8a~~(c)].

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 25–27.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.20[1][b], [3][b], 142.23[2] (Matthew Bender).

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

1101 Sexual Penetration With Minor: Defendant 21 or Older (Pen. Code, § 289(i))

The defendant is charged [in Count __] with participating in an act of sexual penetration with a person who was under the age of 16 years at a time after the defendant had reached (his/her) 21st birthday [in violation of Penal Code section 289(i)].

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

1. **The defendant participated in an act of sexual penetration with another person;**

2. **The penetration was accomplished by using (a/an) (foreign object[,]/ [or] substance[,]/ [or] instrument[,]/ [or] device[,]/ [or] unknown object);**

3. **The defendant was at least 21 years old at the time of the act;**

AND

4. **The other person was under the age of 16 years at the time of the act.**

Sexual penetration **means (penetration, however slight, of the genital or anal openings of another person/ [or] causing another person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, no matter how slightly, his or her own genital or anal opening) for the purpose of sexual abuse, arousal, or gratification.**

[A *foreign object, substance, instrument, or device* includes any part of the body except a sexual organ.] [An *unknown object* includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object penetrated the opening.]

[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]

[It is not a defense that the other person may have consented to the act.]

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

<Defense: Good Faith Belief 18 or Over>
[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the other person was age 18 or older. The People must prove beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person was at least 18 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]

New January 2006

BENCH NOTES

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

Give the bracketed paragraph that begins with "It is not a defense that" on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty
If there is sufficient evidence that the defendant reasonably and actually believed that the minor was age 18 or older, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673]; *People v. Winters* (1966) 242 Cal.App.2d 711, 716 [51 Cal.Rptr. 735].)

AUTHORITY

- Elements. ▸ Pen. Code, § 289(i).
- Foreign Object, Substance, Instrument, or Device Defined. ▸ Pen. Code, § 289(k)(2); *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [a finger is a "foreign object"].

- Sexual Penetration Defined. ▸ Pen. Code, § 289(k)(1); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].
- Unknown Object Defined. ▸ Pen. Code, § 289(k)(3).
- Minor's Consent Not a Defense. ▸ See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502] [in context of statutory rape].
- Sexual Abuse Defined. ▸ *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].

LESSER INCLUDED OFFENSES

- Attempted Sexual Penetration With Minor When Defendant Over 21. ▸ Pen. Code, §§ 664, 289(i).
- Sexual Penetration With Minor Under 18. ▸ See *People v. Culbertson* (1985) 171 Cal.App.3d 508, 516 [217 Cal.Rptr. 347]; *People v. Jerome* (1984) 160 Cal.App.3d 1087, 1097–1098 [207 Cal.Rptr. 199] [both in context of Pen. Code, § 287~~8a~~(c)].

RELATED ISSUES

See the Related Issues section under CALCRIM 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 47, 48.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.20[1][d], [3][b], 142.23[2] (Matthew Bender).

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

1123 Aggravated Sexual Assault of Child Under 14 Years (Pen. Code, § 269(a))

The defendant is charged [in Count __] with aggravated sexual assault of a child who was under the age of 14 years and at least seven years younger than the defendant [in violation of Penal Code section 269(a)].

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

1. **The defendant committed _____** <*insert sex offense specified in Pen. Code, § 269(a)(1)–(5)*> **on another person;**

AND

2. **When the defendant acted, the other person was under the age of 14 years and was at least seven years younger than the defendant.**

To decide whether the defendant committed _____ <*insert sex offense specified in Pen. Code, § 269(a)(1)–(5)*>**, please refer to the separate instructions that I (will give/have given) you on that crime.**

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

New January 2006; Revised June 2007

BENCH NOTES

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

In element 1 and in the sentence following element 2, insert the sex offense specified in Penal Code section 269(a)(1)–(5) that is charged. The sex offenses specified in section 269(a)(1)–(5) and their applicable instructions are:

1. Rape (Pen. Code, § 261(a)(2); see CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*).

2. Rape or sexual penetration in concert (Pen. Code, § 264.1; see CALCRIM No. 1001, *Rape or Spousal Rape in Concert*, and CALCRIM No.1046, *Sexual Penetration in Concert*).

3. Sodomy (Pen. Code, § 286(c)(2); see CALCRIM No. 1030, *Sodomy by Force, Fear, or Threats*).

4. Oral copulation (Pen. Code, § 288a(c)(2); see CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*).

5. Sexual penetration (Pen. Code, § 289(a); see CALCRIM No. 1045, *Sexual Penetration by Force, Fear, or Threats*).

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. ▸ Pen. Code, § 269(a).

LESSER INCLUDED OFFENSES

- Simple Assault. ▸ Pen. Code, § 240.
- Underlying Sex Offense. ▸ Pen. Code, §§ 261(a)(2) [rape], 264.1 [rape or sexual penetration in concert], 286(c)(2) [sodomy], 287~~8a~~(c)(2) [oral copulation], 289(a) [sexual penetration].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, § 54.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[2][a], [c], [7][c] (Matthew Bender).

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

1128 Engaging in Oral Copulation or Sexual Penetration With Child 10 Years of Age or Younger (Pen. Code, § 288.7(b))

The defendant is charged [in Count __] with engaging in (oral copulation/ [or] sexual penetration) with a child 10 years of age or younger [in violation of Penal Code section 288.7(b)].

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

1. **The defendant engaged in an act of (oral copulation/ [or] sexual penetration) with _____** *<insert name of complaining witness>***;**

2. **When the defendant did so, _____** *<insert name of complaining witness>* **was 10 years of age or younger;**

3. **At the time of the act, the defendant was at least 18 years old.**

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

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

[*Sexual penetration* means (penetration, however slight, of the genital or anal opening of the other person/ [or] causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, however slightly, his or her own genital or anal opening) by any foreign object, substance, instrument, device, or any unknown object for the purpose of sexual abuse, arousal, or gratification.]

[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]

[An *unknown object* includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object penetrated the opening.]

[A *foreign object, substance, instrument, or device* includes any part of the body except a sexual organ.]

New August 2009; Revised April 2010, February 2013, February 2015, September 2017, September 2019

BENCH NOTES

Instructional Duty

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

When sexual penetration is charged under Penal Code 288.7(b), instruct that the defendant must have specific intent. *People v. Saavedra* (2018) 24 Cal.App.5th 605, 613-615 [234 Cal.Rptr.3d 544].

AUTHORITY

- Elements. ▸ Pen. Code, § 288.7(b).
- Sexual Penetration Defined. ▸ Pen. Code, § 289(k)(1); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not vagina].
- Unknown Object Defined. ▸ Pen. Code, § 289(k)(3).
- Foreign Object, Substance, Instrument, or Device Defined. ▸ Pen. Code, § 289(k)(2); *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [finger is "foreign object"].
- Oral Copulation Defined. ▸ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].
- Calculating Age. ▸ Fam. Code, § 6500; *People v. Cornett* (2012) 53 Cal.4th 1261, 1264, 1275 [139 Cal.Rptr.3d 837, 274 P.3d 456] ["10 years of age or younger" means "under 11 years of age"]; *In re Harris* (1993) 5 Cal.4th 813, 849-850 [21 Cal.Rptr.2d 373, 855 P.2d 391].
- Sexual Abuse Defined. ▸ *People v. White* (1986) 179 Cal.App.3d 193, 205-206 [224 Cal.Rptr. 467].
- This Instruction Upheld. ▸ *People v. Saavedra* (2018) 24 Cal.App.5th 605, 615 [234 Cal.Rptr.3d 544].

LESSER INCLUDED OFFENSE

- Attempted Sexual Penetration. *People v. Ngo* (2014) 225 Cal.App.4th 126, 158-161 [170 Cal.Rptr.3d 90].
- Attempt to commit oral copulation with a child 10 years of age or younger is **not** a lesser included offense. *People v. Mendoza* (2015) 240 Cal.App.4th 72, 83 [191 Cal.Rptr.3d 905].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 58.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[7] (Matthew Bender).

1191A Evidence of Uncharged Sex Offense

The People presented evidence that the defendant committed the crime[s] of _____ <*insert description of offense[s]*> that (was/were) not charged in this case. (This/These) crime[s] (is/are) defined for you in these instructions.

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]. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

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

If you decide that the defendant committed the uncharged offense[s], you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit [and did commit] _____ <*insert charged sex offense[s]*>, as charged here. If you conclude that the defendant committed the uncharged offense[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 charged sex offense[s]*>. The People must still prove (the/each) _____ (charge/ [and] allegation) beyond a reasonable doubt.

[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*>].]

New January 2006; Revised April 2008, February 2013, February 2014, March 2017, September 2019

BENCH NOTES

Instructional Duty

Although there is ordinarily no sua sponte duty (*People v. Cottone* (2013) 57 Cal.4th 269, 293, fn. 15 [159 Cal.Rptr.3d 385, 303 P.3d 1163]), the court must give this instruction on request when evidence of other sexual offenses has been introduced. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924 [89 Cal.Rptr.2d

847, 986 P.2d 182] [error to refuse limiting instruction on request]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1317–1318 [97 Cal.Rptr.2d 727] [in context of prior acts of domestic violence].)

Evidence Code section 1108(a) provides that "evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101." Subdivision (d)(1) defines "sexual offense" as "a crime under the law of a state or of the United States that involved any of the following[,]" listing specific sections of the Penal Code as well as specified sexual conduct. In the first sentence, the court must insert the name of the offense or offenses allegedly shown by the evidence. The court **must** also instruct the jury on elements of the offense or offenses.

In the fourth paragraph, the committee has placed the phrase "and did commit" in brackets. One appellate court has criticized instructing the jury that it may draw an inference about disposition. (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823].) The court should review the Commentary section below and give the bracketed phrase at its discretion.

Give the bracketed sentence that begins with "Do not consider" on request.

Related Instructions
CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*

CALCRIM No. 1191B, *Evidence of Charged Sex Offense*.

CALCRIM No. 852A, *Evidence of Uncharged Domestic Violence.*

CALCRIM No. 852B, *Evidence of Charged Domestic Violence.*
CALCRIM No. 853A, *Evidence of Uncharged Abuse of Elder or Dependent Person*.

CALCRIM No. 853B, *Evidence of Charged Abuse of Elder or Dependent Person.*

AUTHORITY

- Instructional Requirement. ▸ Evid. Code, § 1108(a); see *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1016 [130 Cal.Rptr.2d 254, 62 P.3d 601]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 37 [107 Cal.Rptr.2d 100]; *People v. Falsetta, supra,* 21 Cal.4th at pp. 923–924 [dictum].

- Previous Version of CALCRIM No. 1191 Upheld. ‣ *People v. Schnabel* (2007) 150 Cal.App.4th 83, 87 [57 Cal.Rptr.3d 922]; *People v. Cromp* (2007) 153 Cal.App.4th 476, 480 [62 Cal.Rptr.3d 848].
- This Instruction Upheld. ‣ *People v. Phea* (2018) 29 Cal.App.5th 583, 614 [240 Cal.Rptr.3d 526].
- Sexual Offense Defined. ‣ Evid. Code, § 1108(d)(1).
- 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]; *People v. James, supra,* 81 Cal.App.4th at p. 1359; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 146 [89 Cal.Rptr.2d 28].
- Propensity Evidence Alone Is Not Sufficient to Support Conviction Beyond a Reasonable Doubt. ‣ *People v. Hill* (2001) 86 Cal.App.4th 273, 277–278 [103 Cal.Rptr.2d 127]; see *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [101 Cal.Rptr.2d 624] [in context of prior acts of domestic violence]; *People v. James, supra,* 81 Cal.App.4th at pp. 1357–1358, fn. 8 [same].
- Charged Offenses Proved Beyond a Reasonable Doubt May Be Evidence of Propensity. ‣ *People v. Cruz* (2016) 2 Cal.App.5th 1178, 1186-1186, 206 Cal.Rptr.3d 835]; *People v. Villatoro* (2012) 54 Cal.4th 1152, 1161 [144 Cal.Rptr.3d 401, 281 P.3d 390].

COMMENTARY

The fourth paragraph of this instruction tells the jury that they may draw an inference of disposition. (See *People v. Hill* (2001) 86 Cal.App.4th 273, 275–279 [103 Cal.Rptr.2d 127]; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334–1335 [92 Cal.Rptr.2d 433] [in context of prior acts of domestic violence].) One appellate court, however, suggests using more general terms to instruct the jury how they may use evidence of other sexual offenses, "leaving particular inferences for the argument of counsel and the jury's common sense." (*People v. James, supra,* 81 Cal.App.4th at p. 1357, fn. 8 [includes suggested instruction].) If the trial court adopts this approach, the fourth paragraph may be replaced with the following:

> If you decide that the defendant committed the other sexual offense[s], you may consider that evidence and weigh it together with all the other evidence received during the trial to help you determine whether the defendant committed _____ <*insert charged sex offense*>. Remember, however, that evidence of another sexual offense is not sufficient alone to find the defendant guilty of _____ <*insert charged sex offense*>. The People must still prove (the/each) _____(charge/

[and] allegation) of _____ <*insert charged sex offense*> beyond a reasonable doubt.

RELATED ISSUES

Constitutional Challenges
Evidence Code section 1108 does not violate a defendant's rights to due process (*People v. Falsetta* (1999) 21 Cal.4th 903, 915–922 [89 Cal.Rptr.2d 847, 986 P.2d 182]; *People v. Branch* (2001) 91 Cal.App.4th 274, 281 [109 Cal.Rptr.2d 870]; *People v. Fitch* (1997) 55 Cal.App.4th 172, 184 [63 Cal.Rptr.2d 753]) or equal protection (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310–1313 [97 Cal.Rptr.2d 727]; *People v. Fitch, supra,* 55 Cal.App.4th at pp. 184–185).

Expert Testimony
Evidence Code section 1108 does not authorize expert opinion evidence of sexual propensity during the prosecution's case-in-chief. (*People v. McFarland* (2000) 78 Cal.App.4th 489, 495–496 [92 Cal.Rptr.2d 884] [expert testified on ultimate issue of abnormal sexual interest in child].)

Rebuttal Evidence
When the prosecution has introduced evidence of other sexual offenses under Evidence Code section 1108(a), the defendant may introduce rebuttal character evidence in the form of opinion evidence, reputation evidence, and evidence of specific incidents of conduct under similar circumstances. (*People v. Callahan* (1999) 74 Cal.App.4th 356, 378–379 [87 Cal.Rptr.2d 838].)

Subsequent Offenses Admissible
"[E]vidence of subsequently committed sexual offenses may be admitted pursuant to Evidence Code section 1108." (*People v. Medina* (2003) 114 Cal.App.4th 897, 903 [8 Cal.Rptr.3d 158].)

Evidence of Acquittal
If the court admits evidence that the defendant committed a sexual offense that the defendant was previously acquitted of, the court must also admit evidence of the acquittal. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 663 [14 Cal.Rptr.3d 534].)

See also the Related Issues section of CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc*.

SECONDARY SOURCES

1 Witkin, California Evidence (5th ed. 2012) Circumstantial Evidence, §§ 98–100.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.23[3][e][ii], [4] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure § 12:9 (The Rutter Group).

1203 Kidnapping: For Robbery, Rape, or Other Sex Offenses (Pen. Code, § 209(b))

The defendant is charged [in Count __] with kidnapping for the purpose of (robbery/rape/spousal rape/oral copulation/sodomy/sexual penetration) [in violation of Penal Code section 209(b)].

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

1. **The defendant intended to commit (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/ [or]_____**<*insert other offense specified in statute*>**;**

2. **Acting with that intent, the defendant took, held, or detained another person by using force or by instilling a reasonable fear;**

3. **Using that force or fear, the defendant moved the other person [or made the other person move] a substantial distance;**

4. **The other person was moved or made to move a distance beyond that merely incidental to the commission of a (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/ [or]_____**<*insert other offense specified in statute*>**;**

5. **When that movement began, the defendant already intended to commit (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/ [or] _____**<*insert other offense specified in statute*>**;**

[AND]

6. **The other person did not consent to the movement(;/.)**

<*Give element 7 if instructing on reasonable belief in consent.*>
[AND

7. **The defendant did not actually and reasonably believe that the other person consented to the movement.]**

As used here, *substantial distance* means more than a slight or trivial distance. The movement must have increased the risk of [physical or psychological] harm to the person beyond that necessarily present in the (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/ [or]_____<*insert other offense specified in statute*>**. In deciding whether the movement was sufficient, consider all the circumstances relating to the movement.**

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

[To be guilty of kidnapping for the purpose of (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration), the defendant does not actually have to commit the (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/ [or]_____<*insert other offense specified in statute*>**.]**

To decide whether the defendant intended to commit (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/ [or]_____<*insert other offense specified in statute*>**), please refer to the separate instructions that I (will give/have given) you on that crime.**

<*Defense: Good Faith Belief in Consent*>
[The defendant is not guilty of kidnapping if (he/she) reasonably and actually believed that the other person consented to the movement. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person consented to the movement. If the People have not met this burden, you must find the defendant not guilty of this crime.]

<*Defense: Consent Given*>
[The defendant is not guilty of kidnapping if the other person consented to go with the defendant. The other person consented if (he/she) (1) freely and voluntarily agreed to go with or be moved by the defendant, (2) was aware of the movement, and (3) had sufficient mental capacity to choose to go with the defendant. The People have the burden of proving beyond a reasonable doubt that the other person did not consent to go with the defendant. If the People have not met this burden, you must find the defendant not guilty of this crime.]

[Consent may be withdrawn. If, at first, a person agreed to go with the defendant, that consent ended if the person changed his or her mind and no longer freely and voluntarily agreed to go with or be moved by the defendant. The defendant is guilty of kidnapping if after the other person withdrew consent, the defendant committed the crime as I have defined it.]

New January 2006; Revised June 2007, April 2008, February 2013, August 2013

BENCH NOTES

Instructional Duty

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

In addition, the court has a **sua sponte** duty to instruct on the elements of the alleged underlying crime.

Give the bracketed definition of "consent" on request.

Defenses—Instructional Duty

The court has a **sua sponte** duty to instruct on the defense of consent if there is sufficient evidence to support the defense. (See *People v. Davis* (1995) 10 Cal.4th 463, 516–518 [41 Cal.Rptr.2d 826, 896 P.2d 119] [approving consent instruction as given]; see also *People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 165 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [when court must instruct on defenses].) Give the bracketed paragraph on the defense of consent. On request, if supported by the evidence, also give the bracketed paragraph that begins with "Consent may be withdrawn." (See People v. Camden (1976) 16 Cal.3d 808, 814 [129 Cal.Rptr. 438, 548 P.2d 1110].)

The defendant's reasonable and actual belief in the victim's consent to go with the defendant may be a defense. (See *People v. Greenberger* (1997) 58 Cal.App.4th 298, 375 [68 Cal.Rptr.2d 61]; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [127 Cal.Rptr. 279] [reasonable, good faith belief that victim consented to movement is a defense to kidnapping].)

Timing of Necessary Intent

No court has specifically stated whether the necessary intent must precede all movement of the victim, or only one phase of it involving an independently adequate asportation.

Related Instructions
Kidnapping a child for the purpose of committing a lewd or lascivious act is a separate crime under Penal Code section 207(b). See CALCRIM No. 1200, *Kidnapping: For Child Molestation*.

AUTHORITY

- Elements. ▸ Pen. Code, § 209(b)(1); *People v. Robertson* (2012) 208 Cal. App. 4th 965, 982 [146 Cal.Rptr.3d 66]; People v. Vines (2011) 51 Cal.4th 830, 869–870 & fn. 20 [124 Cal.Rptr.3d 830, 251 P.3d 943]; People v. Martinez (1999) 20 Cal.4th 225, 232 & fn. 4 [83 Cal.Rptr.2d 533, 973 P.2d 512]; People v. Rayford (1994) 9 Cal.4th 1 [36 Cal.Rptr.2d 317]; People v. Daniels (1969) 71 Cal.2d. 1119 [80 Cal.Rptr. 897, 459 P.2d 225].
- Robbery Defined. ▸ Pen. Code, § 211.
- Rape Defined. ▸ Pen. Code, § 261.
- Other Sex Offenses Defined. ▸ Pen. Code, §§ 262 [spousal rape], 264.1 [acting in concert], 286 [sodomy], 287~~8a~~ [oral copulation], 289 [sexual penetration].
- Intent to Commit Robbery Must Exist at Time of Original Taking. ▸ *People v. Tribble* (1971) 4 Cal.3d 826, 830–832 [94 Cal.Rptr. 613, 484 P.2d 589]; *People v. Bailey* (1974) 38 Cal.App.3d 693, 699 [113 Cal.Rptr. 514]; see *People v. Thornton* (1974) 11 Cal.3d 738, 769–770 [114 Cal.Rptr. 467], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668 [160 Cal.Rptr. 84, 603 P.2d 1].
- Kidnapping to Effect Escape From Robbery. ▸ *People v. Laursen* (1972) 8 Cal.3d 192, 199–200 [104 Cal.Rptr. 425, 501 P.2d 1145] [violation of section 209 even though intent to kidnap formed after robbery commenced].
- Kidnapping Victim Need Not Be Robbery Victim. ▸ *People v. Laursen* (1972) 8 Cal.3d 192, 200, fn. 7 [104 Cal.Rptr. 425, 501 P.2d 1145].
- Use of Force or Fear. ▸ See *People v. Martinez* (1984) 150 Cal.App.3d 579, 599–600 [198 Cal.Rptr. 565], disapproved on other grounds in *People v. Hayes* (1990) 52 Cal.3d 577, 627–628, fn. 10 [276 Cal.Rptr. 874, 802 P.2d 376]; *People v. Jones* (1997) 58 Cal.App.4th 693, 713–714 [68 Cal.Rptr.2d 506].
- Movement of Victim Need Not Substantially Increase Risk of Harm to Victim. ▸ *People v. Robertson* (2012) 208 Cal.App.4th 965, 982 [146 Cal.Rptr.3d 66]; *People v. Vines* (2011) 51 Cal.4th 830, 870 fn. 20 [124 Cal.Rptr.3d 830, 251 P.3d 943]; *People v. Martinez* (1999) 20 Cal.4th 225, 232 fn. 4 [83 Cal.Rptr.2d 533, 973 P.2d 512].

- Movement Must Be for Illegal Purpose or Intent if Victim Incapable of Consent. ▸ *In re Michele D.* (2002) 29 Cal.4th 600, 610–611 [128 Cal.Rptr.2d 92, 59 P.3d 164]; *People v. Oliver* (1961) 55 Cal.2d 761, 768 [12 Cal.Rptr. 865, 361 P.2d 593].

LESSER INCLUDED OFFENSES

- Kidnapping. ▸ Pen. Code, § 207; *People v. Bailey* (1974) 38 Cal.App.3d 693, 699 [113 Cal.Rptr. 514]; see *People v. Jackson* (1998) 66 Cal.App.4th 182, 189 [77 Cal.Rptr.2d 564].
- Attempted Kidnapping. ▸ Pen. Code, §§ 664, 207.
- False Imprisonment. ▸ Pen. Code, §§ 236, 237; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1121 [281 Cal.Rptr. 338]; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547 [90 Cal.Rptr. 866]; *People v. Shadden* (2001) 93 Cal.App.4th 164, 171 [112 Cal.Rptr.2d 826].

RELATED ISSUES

Psychological Harm

Psychological harm may be sufficient to support conviction for aggravated kidnapping under Penal Code section 209(b). An increased risk of harm is not limited to a risk of bodily harm. (*People v. Nguyen* (2000) 22 Cal.4th 872, 885–886 [95 Cal.Rptr.2d 178, 997 P.2d 493] [substantial movement of robbery victim that posed substantial increase in risk of psychological trauma beyond that expected from stationary robbery].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 293–300, 310, 311–313.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.38[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.14 (Matthew Bender).

1502. Arson: Inhabited Structure or Property (Pen. Code, § 451(b))

The defendant is charged [in Count __] with arson that burned an (inhabited structure /[or] inhabited property) [in violation of Penal Code section 451(b)].

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

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

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

AND

3. **The fire burned an (inhabited structure /[or] inhabited property).**

To *set fire to or burn* means to damage or destroy with fire either all or part of something, no matter how small the part.

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

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.)

A (structure /[or] property) is *inhabited* if someone ~~lives there and either is present or has left but intends to return~~uses it as a dwelling, whether or not someone is inside at the time of the fire**. An (inhabited structure /[or] inhabited property) does not include the land on which it is located.**

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

New January 2006; Revised February 2013, August 2016, March 2017, September 2019

BENCH NOTES

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

Related Instructions
If attempted arson is charged, do not instruct generally on attempts but give CALCRIM No. 1520, *Attempted Arson*. (Pen. Code, § 455.)

AUTHORITY

- Elements ▸ Pen. Code, § 451(b).
- Inhabited Defined ▸ Pen. Code, § 450; *People v. Jones* (1988) 199 Cal.App.3d 543 [245 Cal.Rptr. 85].
- Inhabitant Must Be Alive at Time of Arson ▸ *People v. Vang* (2016) 1 Cal.App.5th 377, 382-387 [204 Cal.Rptr.3d 455].
- Structure and Maliciously Defined ▸ Pen. Code, § 450.
- To Burn Defined ▸ *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–167 [270 Cal.Rptr. 389].

LESSER INCLUDED OFFENSES

- Arson ▸ Pen. Code, § 451.
- Attempted Arson ▸ Pen. Code, § 455.
- Unlawfully Causing a Fire ▸ *People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [226 Cal.Rptr. 810], disapproved of in *People v. Barton* (1995) 12 Cal.4th 186 [47 Cal.Rptr.2d 569, 906 P.2d 531] on its holding that failure to instruct on this crime as a lesser included offense of arson was invited error because defense counsel objected to such instruction; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324 [3 Cal.Rptr.2d 816].

RELATED ISSUES

Inhabited Apartment
Defendant's conviction for arson of an inhabited structure was proper where he set fire to his estranged wife's apartment several days after she had vacated it. Although his wife's apartment was not occupied, it was in a large apartment building where many people lived; it was, therefore, occupied for purposes of the

arson statute. (*People v. Green* (1983) 146 Cal.App.3d 369, 378–379 [194 Cal.Rptr. 128].)

SECONDARY SOURCES

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

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.47[1] (Matthew Bender).

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

1503–1514. Reserved for Future Use

2100 Driving a Vehicle or Operating a Vessel Under the Influence Causing Injury (Veh. Code, § 23153(a), (f), (g))

The defendant is charged [in Count __] with causing injury to another person while (driving a vehicle/operating a vessel) under the [combined] influence of (an alcoholic beverage/ [or] a drug/ [or] an alcoholic beverage and a drug) [in violation of Vehicle Code section 23153(a)/(f)/(g)].

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

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

2. **When (he/she) (drove a vehicle/operated a vessel), the defendant was under the [combined] influence of (an alcoholic beverage/ [or] a drug/ [or] an alcoholic beverage and a drug);**

3. **While (driving a vehicle/operating a vessel) under the influence, the defendant also (committed an illegal act/ [or] neglected to perform a legal duty);**

AND

4. **The defendant's (illegal act/ [or] failure to perform a legal duty) caused bodily injury to another person.**

A person is *under the influence* if, as a result of (drinking [or consuming] an alcoholic beverage/ [and/or] taking a drug), his or her mental or physical abilities are so impaired that he or she is no longer able to (drive a vehicle/operate a vessel) with the caution of a sober person, using ordinary care, under similar circumstances.

[An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains ethanol. Ethanol is also known as ethyl alcohol, drinking alcohol, or alcohol. [An *alcoholic beverage* includes _____ *<insert type[s] of beverage[s] from Veh. Code, § 109 or Bus. & Prof. Code, § 23004, e.g., wine, beer>*.**]]**

[A *drug* is a substance or combination of substances, other than alcohol, that could so affect the nervous system, brain, or muscles of a person that it would appreciably impair his or her ability to (drive a vehicle/operate a vessel) as an ordinarily cautious person, in full possession of his or her faculties and using

reasonable care, would (drive a vehicle/operate a vessel) under similar circumstances.]

[If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent or more at the time of the chemical analysis, you may, but are not required to, conclude that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Public Health.

[The People allege that the defendant committed the following illegal act[s]: _____ *<list name[s] of offense[s]>***.**

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

[The People [also] allege that the defendant failed to perform the following legal (duty/duties) while (driving the vehicle/operating the vessel): (the duty to exercise ordinary care at all times and to maintain proper control of the (vehicle/vessel)/_____ *<insert other duty or duties alleged>***).]**

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (committed [at least] one illegal act/[or] failed to perform [at least] one duty).

<Alternative A—unanimity required; see Bench Notes>
[You must all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

<Alternative B—unanimity not required; see Bench Notes>
[But you do not have to all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]]

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

[An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act and the injury would not have happened without the act. A *natural and probable consequence* is one that a

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

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

[It is not a defense that the defendant was legally entitled to use the drug.]

[If the defendant was under the influence of (an alcoholic beverage/ [and/or] a drug), then it is not a defense that something else also impaired (his/her) ability to (drive a vehicle/operate a vessel).]

New January 2006; Revised June 2007, April 2008, December 2008, August 2015, September 2017, March 2018, September 2019

BENCH NOTES

Instructional Duty

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

If the prosecution alleges under element 3 that the defendant committed an act forbidden by law, the court has a **sua sponte** duty to specify the predicate offense alleged and to instruct on the elements of that offense. (*People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].)

If the prosecution alleges under element 3 that the defendant neglected to perform a duty imposed by law, the court has a **sua sponte** duty to instruct on the duty allegedly neglected. (See *People v. Minor, supra,* 28 Cal.App.4th at pp. 438–439.) If the prosecution alleges that the defendant neglected the general duty of every driver to exercise ordinary care (see *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243]), the court should give the bracketed definition of "ordinary care."

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of injury, the court should give the first bracketed paragraph on causation, which includes the "direct, natural, and probable" language. If there is evidence of multiple causes of injury, the court should also give the second bracketed paragraph on causation, which includes the "substantial factor" definition. (See *People v. Autry* (1995) 37

Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

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

The bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent" explains a rebuttable presumption created by statute. (See Veh. Code, § 23610; Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences.

The court **must not** give the bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent" if there is no substantial evidence that the defendant's blood alcohol level was at or above 0.08 percent at the time of the test. In addition, if the test falls within the range in which no presumption applies, 0.05 percent to just below 0.08 percent, do not give this bracketed sentence. (*People v. Wood* (1989) 207 Cal.App.3d Supp. 11, 15 [255 Cal.Rptr. 537].) The court should also consider whether there is sufficient evidence to establish that the test result exceeds the margin of error before giving this instruction for test results of 0.08 percent. (Compare *People v. Campos* (1982) 138 Cal.App.3d Supp. 1, 4–5 [188 Cal.Rptr. 366], with *People v. Randolph* (1989) 213 Cal.App.3d Supp. 1, 11 [262 Cal.Rptr. 378].)

The statute also creates a rebuttable presumption that the defendant was not under the influence if his or her blood alcohol level was less than 0.05 percent. (*People v. Gallardo* (1994) 22 Cal.App.4th 489, 496 [27 Cal.Rptr.2d 502].) Depending on the facts of the case, the defendant may be entitled to a pinpoint instruction on this presumption. It is not error to refuse an instruction on this presumption if the prosecution's theory is that the defendant was under the combined influence of drugs and alcohol. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250 [32 Cal.Rptr.2d 442].)

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with "In evaluating any test results in this case." (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

Give the bracketed sentence stating that "it is not a defense that something else also impaired (his/her) ability to drive" if there is evidence of an additional source of impairment such as an epileptic seizure, inattention, or falling asleep.

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra,* 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125*, Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].)

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

Defenses—Instructional Duty

On request, if supported by the evidence, the court must instruct on the "imminent peril/sudden emergency" doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) The court may use the bracketed instruction on sudden emergency in CALCRIM No. 590, *Gross Vehicular Manslaughter While Intoxicated*.

Related Instructions

CALCRIM No. 2101, *Driving With 0.08 Percent Blood Alcohol Causing Injury*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

CALCRIM No. 595, *Vehicular Manslaughter: Speeding Laws Defined*.

AUTHORITY

- Elements. ▸ Veh. Code, § 23153(a), (f), (g); *People v. Minor* (1994) 28 Cal.App.4th 431, 438 [33 Cal.Rptr.2d 641].
- Alcoholic Beverage Defined. ▸ Veh. Code, § 109, Bus. & Prof. Code, § 23004.
- Drug Defined. ▸ Veh. Code, § 312.
- Presumptions. ▸ Veh. Code, § 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Under the Influence Defined. ▸ *People v. Schoonover* (1970) 5 Cal.App.3d 101, 105–107 [85 Cal.Rptr. 69]; *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665–666 [49 Cal.Rptr.2d 710].
- Must Instruct on Elements of Predicate Offense. ▸ *People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Negligence—Ordinary Care. ▸ Pen. Code, § 7, subd. 2; Restatement Second of Torts, § 282; *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243] [ordinary negligence standard applies to driving under the influence causing injury].
- Causation. ▸ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Legal Entitlement to Use Drug Not a Defense. ▸ Veh. Code, § 23630.
- Unanimity Instruction. ▸ *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].
- Prior Convictions. ▸ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

LESSER INCLUDED OFFENSES

- Misdemeanor Driving Under the Influence or With 0.08 Percent. ▸ Veh. Code, § 23152(a) & (b); *People v. Capetillo* (1990) 220 Cal.App.3d 211, 220 [269 Cal.Rptr. 250].

- Driving Under the Influence Causing Injury is not a lesser included offense of vehicular manslaughter without gross negligence. ▸ *People v. Binkerd* (2007) 155 Cal.App.4th 1143, 1148–1149 [66 Cal.Rptr.3d 675].

- Violations of Vehicle Code section 23153(a), are not lesser included offenses of Vehicle Code section 23153(f) [now 23153(g)]. ▸ *People v. Cady* (2016) 7 Cal.App.5th 134, 145-146 [212 Cal.Rptr.3d 319].

RELATED ISSUES

DUI Cannot Serve as Predicate Unlawful Act

"[T]he evidence must show an unlawful act or neglect of duty *in addition* to driving under the influence." (*People v. Minor* (1994) 28 Cal.App.4th 431, 438 [33 Cal.Rptr.2d 641] [italics in original]; *People v. Oyaas* (1985) 173 Cal.App.3d 663, 668 [219 Cal.Rptr. 243].)

Act Forbidden by Law

The term " 'any act forbidden by law' . . . refers to acts forbidden by the Vehicle Code . . . ." (*People v. Clenney* (1958) 165 Cal.App.2d 241, 253 [331 P.2d 696].) The defendant must commit the act when driving the vehicle. (*People v. Capetillo* (1990) 220 Cal.App.3d 211, 217 [269 Cal.Rptr. 250] [violation of Veh. Code, § 10851 not sufficient because offense not committed "when" defendant was driving the vehicle but by mere fact that defendant was driving the vehicle].)

Neglect of Duty Imposed by Law

"In proving the person neglected any duty imposed by law in driving the vehicle, it is not necessary to prove that any specific section of [the Vehicle Code] was violated." (Veh. Code, § 23153(c); *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243].) "[The] neglect of duty element . . . is satisfied by evidence which establishes that the defendant's conduct amounts to no more than ordinary negligence." (*People v. Oyaas, supra,* 173 Cal.App.3d at p. 669.) "[T]he law imposes on any driver [the duty] to exercise ordinary care at all times and to maintain a proper control of his or her vehicle." (*Id.* at p. 670.)

Multiple Victims to One Drunk Driving Accident

"In *Wilkoff v. Superior Court* [(1985) 38 Cal.3d 345, 352 [211 Cal.Rptr. 742, 696 P.2d 134]] we held that a defendant cannot be charged with multiple counts of felony drunk driving under Vehicle Code section 23153, subdivision (a), where injuries to several people result from one act of drunk driving." (*People v. McFarland* (1989) 47 Cal.3d 798, 802 [254 Cal.Rptr. 331, 765 P.2d 493].) However, when "a defendant commits vehicular manslaughter with gross negligence[,] . . . he may properly be punished for [both the vehicular manslaughter and] injury to a separate individual that results from the same incident." (*Id.* at p. 804.) The prosecution may also charge an enhancement for multiple victims under Vehicle Code section 23558.

See also the Related Issues section in CALCRIM No. 2110, *Driving Under the Influence*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare §§ 272-277.

2 Witkin, California Evidence (5th ed. 2012) Demonstrative, Experimental, and Scientific Evidence § 56.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.36 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02 (Matthew Bender).

2101 Driving With 0.08 Percent Blood Alcohol Causing Injury (Veh. Code, § 23153(b))

The defendant is charged [in Count __] with causing injury to another person while driving with a blood alcohol level of 0.08 percent or more [in violation of Vehicle Code section 23153(b)].

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

1. **The defendant drove a vehicle;**

2. **When (he/she) drove, the defendant's blood alcohol level was 0.08 percent or more by weight;**

3. **When the defendant was driving with that blood alcohol level, (he/she) also (committed an illegal act/ [or] neglected to perform a legal duty);**

AND

4. **The defendant's (illegal act/ [or] failure to perform a legal duty) caused bodily injury to another person.**

[If the People have proved beyond a reasonable doubt that a sample of the defendant's (blood/breath) was taken within three hours of the defendant's [alleged] driving and that a chemical analysis of the sample showed a blood alcohol level of 0.08 percent or more, you may, but are not required to, conclude that the defendant's blood alcohol level was 0.08 percent or more at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Public Health.]

[The People allege that the defendant committed the following illegal act[s]: _____ *<list name[s] of offense[s]>*

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

[The People [also] allege that the defendant failed to perform the following legal (duty/duties) while driving the vehicle: (the duty to exercise ordinary care at all times and to maintain proper control of the vehicle/_____ *<insert other duty or duties alleged>***).]**

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (committed [at least] one illegal act/[or] failed to perform [at least] one duty).

<Alternative A—unanimity required; see Bench Notes>
[You must all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

<Alternative B—unanimity not required; see Bench Notes>
[But you do not have to all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]]

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

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

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

New January 2006; Revised August 2006, April 2008, August 2015, March 2018, September 2019

BENCH NOTES

Instructional Duty

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

If the prosecution alleges under element 3 that the defendant committed an act forbidden by law, the court has a **sua sponte** duty to specify the predicate offense alleged and to instruct on the elements of that offense. (*People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].)

If the prosecution alleges under element 3 that the defendant neglected to perform a duty imposed by law, the court has a **sua sponte** duty to instruct on the duty allegedly neglected. (See *People v. Minor, supra,* 28 Cal.App.4th at pp. 438–439.) If the prosecution alleges that the defendant neglected the general duty of every driver to exercise ordinary care (see *People v. Oyass* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243]), the court should give the bracketed definition of "ordinary care."

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of injury, the court should give the first bracketed paragraph on causation, which includes the "direct, natural, and probable" language. If there is evidence of multiple causes of injury, the court should also give the second bracketed paragraph on causation, which includes the "substantial factor" definition. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

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

The bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that a sample of" explains a rebuttable presumption created by statute. (See Veh. Code, § 23152(b); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences.

The court **must not** give the bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that a sample of" if there is no substantial evidence that the defendant's blood alcohol level was ~~below~~ at or above 0.08 percent at the time of the test.

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with "In evaluating any test results in this case." (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra,* 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal. Rptr. 2d 690].)

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

Defenses—Instructional Duty

On request, if supported by the evidence, the court must instruct on the "imminent peril/sudden emergency" doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) The court may use the bracketed instruction on sudden emergency in CALCRIM No. 590, *Gross Vehicular Manslaughter While Intoxicated*.

Related Instructions
CALCRIM No. 2100, *Driving a Vehicle or Operating a Vessel Under the Influence Causing Injury.*

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

CALCRIM No. 595, *Vehicular Manslaughter: Speeding Laws Defined*.

AUTHORITY

- Elements. ▸ Veh. Code, § 23153(b); *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266 [198 Cal.Rptr. 145, 673 P.2d 732].
- Partition Ratio. ▸ Veh. Code, § 23152(b); *People v. Bransford* (1994) 8 Cal.4th 885, 890 [35 Cal.Rptr.2d 613, 884 P.2d 70].
- Presumptions. ▸ Veh. Code, § 23153(b); Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Must Instruct on Elements of Predicate Offense. ▸ *People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Negligence—Ordinary Care. ▸ Pen. Code, § 7(2); Restatement Second of Torts, § 282.
- Causation. ▸ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Unanimity Instruction. ▸ *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].

- Statute Constitutional. ▸ *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 273 [198 Cal.Rptr. 145, 673 P.2d 732].
- Prior Convictions. ▸ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

LESSER INCLUDED OFFENSES

- Misdemeanor Driving Under the Influence or With 0.08 Percent. ▸ Veh. Code, § 23152(a) & (b); *People v. Capetillo* (1990) 220 Cal.App.3d 211, 220 [269 Cal.Rptr. 250].

RELATED ISSUES

See the Related Issues section in CALCRIM No. 2111, *Driving With 0.08 Percent Blood Alcohol* and CALCRIM No. 2100, *Driving a Vehicle or Operating a Vessel Under the Influence Causing Injury*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare §§ 272-277.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.36 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.02[1] (Matthew Bender).

2102 Driving With 0.04 Percent Blood Alcohol Causing Injury With a Passenger for Hire (Veh. Code, § 23153(e))

The defendant is charged [in Count __] with causing injury to another person while driving with a blood-alcohol level of 0.04 percent or more [in violation of Vehicle Code section 23153(e)].

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

1. **The defendant drove a vehicle;**

2. **When (he/she) drove, the defendant's blood-alcohol level was 0.04 percent or more by weight;**

3. **When (he/she) drove with that blood-alcohol level, (he/she) also (committed an illegal act/ [or] neglected to perform a legal duty);**

4. **When (he/she) drove, there was a passenger for hire in the vehicle;**

   AND

5. **The defendant's (illegal act/ [or] failure to perform a legal duty) caused bodily injury to another person.**

A person is a *passenger for hire* when the person or someone else pays, or is expected to pay, for the ride, the payment is or will be with money or something else of value, and the payment is made to, or expected to be made to, the owner, operator, agent or any other person with an interest in the vehicle.

[If the People have proved beyond a reasonable doubt that a sample of the defendant's (blood/breath) was taken within three hours of the defendant's [alleged] driving and that a chemical analysis of the sample showed a blood-alcohol level of 0.04 percent or more, you may, but are not required to, conclude that the defendant's blood-alcohol level was 0.04 percent or more at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Public Health.]

[The People allege that the defendant committed the following illegal act[s]: _____ *<list name[s] of offense[s]>***.**

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

[The People [also] allege that the defendant failed to perform the following legal (duty/duties) while driving the vehicle: (the duty to exercise ordinary care at all times and to maintain proper control of the vehicle/_____ *<insert other duty or duties alleged>***).]**

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (committed [at least] one illegal act/[or] failed to perform [at least] one duty).

<Alternative A—unanimity required; see Bench Notes>
[You must all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

<Alternative B—unanimity not required; see Bench Notes>
[But you do not have to all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

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

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

New March 2018, effective July 2018; Revised September 2019

BENCH NOTES

Instructional Duty

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

If the prosecution alleges under element 3 that the defendant committed an act forbidden by law, the court has a **sua sponte** duty to specify the predicate offense alleged and to instruct on the elements of that offense. (*People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].)

If the prosecution alleges under element 3 that the defendant neglected to perform a duty imposed by law, the court has a **sua sponte** duty to instruct on the duty allegedly neglected. (See *People v. Minor, supra,* 28 Cal.App.4th at pp. 438–439.) If the prosecution alleges that the defendant neglected the general duty of every driver to exercise ordinary care (see *People v. Oyass* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243]), the court should give the bracketed definition of "ordinary care."

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of injury, the court should give the first bracketed paragraph on causation, which includes the "direct, natural, and probable" language. If there is evidence of multiple causes of injury, the court should also give the second bracketed paragraph on causation, which includes the "substantial factor" definition. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

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

instruction is appropriate, give the unanimity alternative A. If the court concludes that unanimity is not required, give the unanimity alternative B.

The bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that a sample of" explains a rebuttable presumption created by statute. (See Veh. Code, § 23153(e); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences.

The court **must not** give the bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that a sample of" if there is no substantial evidence that the defendant's blood-alcohol level was ~~below~~ at or above 0.04 percent at the time of the test.

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with "In evaluating any test results in this case." (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

Do **not** give this instruction if the court has bifurcated the trial. Instead, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. See the Bench Notes to CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, for an extensive discussion of bifurcation. If the court does not grant a bifurcated trial, give CALCRIM No. 2110, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*

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

Defenses—Instructional Duty

On request, if supported by the evidence, the court must instruct on the "imminent peril/sudden emergency" doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) The court may use the bracketed instruction on sudden emergency in CALCRIM No. 590, *Gross Vehicular Manslaughter While Intoxicated*.

Related Instructions
CALCRIM No. 2100, *Driving a Vehicle or Operating a Vessel Under the Influence Causing Injury.*

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

CALCRIM No. 595, *Vehicular Manslaughter: Speeding Laws Defined*.

AUTHORITY

- Elements. ▸ Veh. Code, § 23153(e); *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266 [198 Cal.Rptr. 145, 673 P.2d 732].
- Partition Ratio. ▸ Veh. Code, § 23152; *People v. Bransford* (1994) 8 Cal.4th 885, 890 [35 Cal.Rptr.2d 613, 884 P.2d 70].
- Presumptions. ▸ Veh. Code, § 23153(e); Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Must Instruct on Elements of Predicate Offense. ▸ *People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Negligence—Ordinary Care. ▸ Pen. Code, § 7(2); Restatement Second of Torts, § 282.
- Causation. ▸ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Unanimity Instruction. ▸ *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].
- Statute Constitutional. ▸ *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 273 [198 Cal.Rptr. 145, 673 P.2d 732].
- Prior Convictions. ▸ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

LESSER INCLUDED OFFENSES

- Driving With 0.04 Percent Blood Alcohol With a Passenger for Hire. ▸ Veh. Code, § 23152(e).

RELATED ISSUES

See the Related Issues section in CALCRIM No. 2111, *Driving With 0.08 Percent Blood Alcohol* and CALCRIM No. 2100, *Driving Under the Influence*.

2306. Possession of Controlled Substance with Intent to Commit Sexual Assault (Health & Saf. Code, §§ 11350.5, 11377.5)

The defendant is charged [in Count ___] with possession of _____ *<insert type of controlled substance from sections 11056(c)(11), (g), 11054(e)(3); or 11057(d)(13) of the Health and Safety Code>***, a controlled substance, with intent to commit _____** *<insert description of alleged target crime or crimes from sections 243.4, 261, 262, 286, 287~~8a~~, or 289 of the Penal Code>***, [in violation of Health and Safety Code section[s] (11350.5[,]/ [and/or] 11377.5)].**

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

1. **The defendant possessed a controlled substance;**

2. **The defendant knew of its presence;**

3. **The defendant knew of the substance's nature or character as a controlled substance;**

4. **When the defendant possessed the controlled substance, (he/she) intended to use it to commit _____** *<insert description of alleged target crime or crimes from sections 243.4, 261, 262, 286, 287~~8a~~, or 289 of the Penal Code>***;**

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

6. **The controlled substance was in a usable amount.**

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

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

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

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

New September 2017

BENCH NOTES

Instructional Duty

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

The court must also give the appropriate instructions on the target sexual offense or offenses in element 4.

AUTHORITY

- Elements ▸ Health & Saf. Code, §§ 11350.5, 11377.5.
- Prohibited Controlled Substances ▸ Health & Saf. Code, §§ 11054(e)(3), 11056(c)(11) or (g); 11057(d)(13).
- Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge ▸ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Usable Amount ▸ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 105, 106.

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 1-69.

2503. Possession of Deadly Weapon With Intent to Assault (Pen. Code, § 17500)

The defendant is charged [in Count __] with possessing a deadly weapon with intent to assault [in violation of Penal Code section 17500].

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

1. **The defendant possessed a deadly weapon on (his/her) person;**

2. **The defendant knew that (he/she) possessed the weapon;**

AND

3. **At the time the defendant possessed the weapon, (he/she) intended to assault someone.**

A person intends to assault someone else if he or she intends to do an act that by its nature would directly and probably result in the application of force to a person.

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

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

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

[The term *deadly weapon* is defined in another instruction to which you should refer.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed[,] [and] [where the person who possessed the object was going][,] [and] [whether the object was changed from its standard form] and any other evidence that indicates that the object would be used for a dangerous, rather than a harmless, purpose.]

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

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

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

[The People allege that the defendant possessed the following weapons: _____ <*insert description of each weapon when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant possessed at least one of these weapons and you all agree on which weapon (he/she) possessed.]

New January 2006; Revised February 2012, February 2013, September 2019

BENCH NOTES

Instructional Duty

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

If the prosecution alleges under a single count that the defendant possessed multiple weapons and the possession was "fragmented as to time [or] space," the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph that begins with "The People allege that the defendant possessed the following weapons," inserting the items alleged.

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

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

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

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

Defenses—Instructional Duty

Evidence of voluntary intoxication or mental impairment may be admitted to show that the defendant did not form the required mental state. (See *People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364].) The court has no sua sponte duty to instruct on these defenses; however, the trial court must give these instructions on request if supported by the evidence. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588] [on duty to instruct generally]; *People v. Stevenson* (1978) 79 Cal.App.3d 976, 988 [145 Cal.Rptr. 301] [instructions applicable to possession of weapon with intent to assault].) See Defenses and Insanity, CALCRIM No. 3400 et seq.

AUTHORITY

- Elements ▸ Pen. Code, § 17500.
- Deadly Weapon Defined ▸ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Objects With Innocent Uses ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].
- Knowledge Required ▸ See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885].
- Assault ▸ Pen. Code, § 240; see also *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Inherently Deadly Defined ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 140.

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

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

2572. Possession of Explosive or Destructive Device in Specified Place (Pen. Code, § 18715)

The defendant is charged [in Count __] with recklessly or maliciously possessing (an explosive/ [or] a destructive device) (in[,]/ on[,]/ [or] near) _____ *<insert type of place alleged from Pen. Code, § 18715>* **[in violation of Penal Code section 18715].**

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

1. **The defendant recklessly or maliciously possessed (an explosive/ [or] a destructive device);**

AND

2. **At the time the defendant possessed the (substance/ [or] device), (he/she) was**

<2A.>
[on a public street or highway](;[or]/.)

<2B.>
[in or near a (theater[,]/ hall[,]/ school[,]/ college[,]/ church[,]/ hotel[,]/ [or] other public building/ [or] private habitation](;[or]/.)

<2C.>
[in, on, or near a (plane[,]/ passenger train[,]/ car[,]/ cable road or cable car[,]/ boat carrying paying passengers)](; or/.)

<2D.>
[in, on, or near another public place ordinarily passed by human beings].

A person acts *recklessly* when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk, (2) he or she ignores that risk, and (3) the person's behavior is grossly different from what a reasonable person would have done in the same situation.

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

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

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

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

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

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

[The term[s] (*explosive/* [and] *destructive device*) (is/are) defined in another instruction.]

[The People do not need to prove that the (explosive/ [or] destructive device) was set to explode.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[The People allege that the defendant possessed the following (explosive[s]/ [or] destructive device[s]): _____ *<insert description of each explosive or destructive device when multiple items alleged>*. **You may not find the defendant guilty unless all of you agree that the People have proved that the defendant possessed at least one of the alleged items and you all agree on which alleged item (he/she) possessed.]**

New January 2006; Revised February 2012, September 2019

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant possessed multiple items, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Heideman* (1976) 58 Cal.App.3d 321, 333 [130 Cal.Rptr. 349].) Give the bracketed paragraph that begins, "The People allege that the defendant possessed the following," inserting the items alleged. The jury does not have to be unanimous about whether the defendant acted recklessly or maliciously. *(Ibid.)* The jury also does not have to agree on whether the item was an explosive or a destructive device. (*People v. Westoby* (1976) 63 Cal.App.3d 790, 797 [134 Cal.Rptr. 97]; see also *People v. Quinn*, (1976) 57 Cal.App.3d 251, 257 [129 Cal.Rptr. 139] [a bomb may be an explosive and may be a destructive device].)

Depending on the device or substance used, give the bracketed definitions of "explosive" or "destructive device," inserting the appropriate definition from Penal Code section 16460, unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere. If the case involves a specific device listed in Health and Safety Code section 12000 or Penal Code section 16460, the court may instead give the bracketed sentence stating that the listed item "is an explosive" or "is a destructive device." For example, "A grenade is a destructive device." However, the court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that "the defendant used a destructive device, a grenade," or "the device used by the defendant, a grenade, was a destructive device." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

If the device used is a bomb, the court may insert the word "bomb" in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn, supra,* 57 Cal.App.3d at p. 258; *People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A bomb is a device carrying an explosive charge fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8 [3 Cal.Rptr.2d 343].)

AUTHORITY

- Elements ▸ Pen. Code, § 18715.
- Explosive Defined ▸ Health & Saf. Code, § 12000.
- Destructive Device Defined ▸ Pen. Code, § 16460.
- Recklessly Defined ▸ *People v. Heideman* (1976) 58 Cal.App.3d 321, 334 [130 Cal.Rptr. 349]; *In re Steven S.* (1994) 25 Cal.App.4th 598, 614–615 [31 Cal.Rptr.2d 644]; Model Pen. Code, § 2.02(2)(c).
- Maliciously Defined ▸ Pen. Code, § 7(4); *People v. Lopez* (1986) 176 Cal.App.3d 545, 550 [222 Cal.Rptr. 101]; see also *People v. Heideman* (1976) 58 Cal.App.3d 321, 335 [130 Cal.Rptr. 349].
- Constructive vs. Actual Possession ▸ See *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297]; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619 [154 Cal.Rptr. 314].
- Unanimity ▸ *People v. Heideman* (1976) 58 Cal.App.3d 321, 333 [130 Cal.Rptr. 349].

LESSER INCLUDED OFFENSES

- Possession of Destructive Device ▸ Pen. Code, § 18710; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795 [134 Cal.Rptr. 97].
- Possession of Explosive ▸ Health & Saf. Code, § 12305; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795 [134 Cal.Rptr. 97].

RELATED ISSUES

Need Not Be Set to Explode

"One need not possess a destructive device already set to explode in order to violate [now-repealed] Penal Code section 12303.2." (*People v. Westoby* (1976) 63 Cal.App.3d 790, 795 [134 Cal.Rptr. 97].) Thus, the defendant in *Westoby* was guilty of possessing a destructive device even though the battery wires were not connected on the pipe bomb. *(Ibid.)* Similarly, in *People v. Heideman* (1976) 58 Cal.App.3d 321, 335–336 [130 Cal.Rptr. 349], the defendant was guilty of illegally possessing dynamite even though he did not have the blasting caps necessary to ignite the dynamite. (See also *People v. Morse* (1992) 2 Cal.App.4th 620, 646–647 [3 Cal.Rptr.2d 343] [instruction on this point proper].)

~~***Felony Murder***~~

~~Penal Code section 18715 is an inherently dangerous felony supporting a conviction for second degree felony murder. (*People v. Morse* (1992) 2~~

~~Cal.App.4th 620, 646 [3 Cal.Rptr.2d 343].) However, in *People v. Morse*, the trial court erred in instructing that if the jury convicted the defendant of second degree murder on the basis of felony murder, the murder was then elevated to first degree murder based on the use of a destructive device. (*Id.* at pp. 654-655.)~~

Multiple Charges Based on Multiple Explosives or Destructive Devices
The defendant may be charged with multiple counts of violating Penal Code section 18715 based on possession of multiple explosives or destructive devices. (*People v. DeGuzman* (2003) 113 Cal.App.4th 538, 548 [6 Cal.Rptr.3d 739].)

Maliciously—People v. Heideman
In *People v. Heideman* (1976) 58 Cal.App.3d 321 [130 Cal.Rptr. 349], the defendant offered to commit murder for hire using explosives and possessed the explosives. (*Id.* at pp. 327–329.) The defendant asserted that he did not actually intend to physically injure anyone but simply to defraud the individuals offering to pay for the murders. (*Id.* at pp. 330–331.) On appeal, the defendant contended that the court had improperly instructed on the meaning of "recklessness," which the prosecution conceded. (*Id.* at p. 334.) Noting that the "[d]efendant admitted that his purpose in storing the dynamite in his room was to carry out a nefarious scheme to defraud his victims," the court found sufficient evidence to establish malice. (*Id.* at p. 335.) The court stated that under the facts of the case before it, the term "maliciously" did not "require an actual intent to physically injure, intimidate or terrify others." *(Ibid.)* Accordingly, the court found that the error in the instruction on "recklessness" was harmless given that there was sufficient evidence to support the higher culpability standard of malice. *(Ibid.)* The committee did not incorporated the language from *Heideman* in the definition of "maliciously" in this instruction because the committee concluded that this case reflects unique facts and that the language quoted is dicta, not essential to the ruling of the case.

See the Related Issues section to CALCRIM No. 2571, *Carrying or Placing Explosive or Destructive Device on Common Carrier*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 168–169.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][c] (Matthew Bender).

2651. Trying to Prevent an Executive Officer From Performing Duty (Pen. Code, § 69)

The defendant is charged [in Count __] with trying to (prevent/ [or] deter) an executive officer from performing that officer's duty [in violation of Penal Code section 69].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully and unlawfully used (violence/ [or] a threat of violence) to try to (prevent/ [or] deter) an executive officer from performing the officer's lawful duty;**

~~**AND**~~

2. **When the defendant acted, (he/she) intended to (prevent/ [or] deter) the executive officer from performing the officer's lawful duty;**

AND

3. **When the defendant acted, (he/she) knew that the person was an executive officer.**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

An *executive officer* is a government official who may use his or her own discretion in performing his or her job duties. [(A/An) _____ <*insert title, e.g., peace officer, commissioner, etc.*> is an *executive officer.*]

The executive officer does not need to be performing his or her job duties at the time the threat is communicated.

A threat may be oral or written and may be implied by a pattern of conduct or a combination of statements and conduct.

[Photographing or recording an *executive officer* while the officer is in a public place or while the person photographing or recording is in a place where he or she has the right to be is not, by itself, a crime.]

[The defendant does not have to communicate the threat directly to the intended victim, but may do so through someone else. The defendant must, however, intend that (his/her) statement be taken as a threat by the intended victim.]

[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].]

[A sworn member of _____ *<insert name of agency that employs peace officer>***, authorized by** _____ *<insert appropriate section from Pen. Code, § 830 et seq.>* **to** _____ *<describe statutory authority>***, is a *peace officer*.]**

[The duties of (a/an) _____ *<insert title of officer specified in Pen. Code, § 830 et seq.>* **include** _____ *<insert job duties>***.]**

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>
[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

New January 2006; Revised August 2014, August 2016, September 2019

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In order to be "performing a lawful duty," an executive officer, including a peace officer, must be acting lawfully. (*In re Manuel G.* (1997) 16 Cal.4th 805, 816–817 [66 Cal.Rptr.2d 701, 941 P.2d 880]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) The court has a **sua sponte** duty to instruct on lawful performance and the defendant's reliance on self-defense as it relates to the use of excessive force when this is an issue in the case. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].)

For this offense, "the relevant factor is simply the lawfulness of the official conduct that the defendant (through threat or violence) has attempted to deter, and

not the lawfulness (or official nature) of the conduct in which the officer is engaged at the time the threat is made." (*In re Manuel G., supra,* 16 Cal.4th at p. 817.) Thus, if the evidence supports the conclusion that the defendant attempted to deter the officer's current performance of a duty, the court should instruct on the lawfulness of that duty. *(Ibid.)* Where the evidences supports the conclusion that the defendant attempted to deter the officer from performing a duty in the future, the court should only instruct on the lawfulness of that future duty. *(Ibid.)*

If there is an issue in the case as to the lawful performance of a duty by a peace officer, give the last bracketed paragraph and CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

If a different executive officer was the alleged victim, the court will need to draft an appropriate definition of lawful duty if this is an issue in the case.

AUTHORITY

- Elements. ▸ Pen. Code, § 69; ~~.~~ *People v. Atkins* (2019) 31 Cal.App.5th 963, 979 [243 Cal.Rptr.3d 283] [statute requires actual knowledge that person was an executive officer].
- Specific Intent Required. ▸ *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1154 [124 Cal.Rptr.2d 373, 52 P.3d 572].
- Immediate Ability to Carry Out Threat Not Required. ▸ *People v. Hines* (1997) 15 Cal.4th 997, 1061 [64 Cal.Rptr.2d 594, 938 P.2d 388].
- Lawful Performance Element to Attempting to Deter. ▸ *In re Manuel G.* (1997) 16 Cal.4th 805, 816–817 [66 Cal.Rptr.2d 701, 941 P.2d 880].
- Statute Constitutional. ▸ *People v. Hines* (1997) 15 Cal.4th 997, 1061 [64 Cal.Rptr.2d 594, 938 P.2d 388].
- Merely Photographing or Recording Officers Not a Crime ▸ Pen. Code, § 69(b).

RELATED ISSUES

Resisting an Officer Not Lesser Included Offense
Resisting an officer, Penal Code section 148(a), is not a lesser included offense of attempting by force or violence to deter an officer. (*People v. Smith* (2013) 57 Cal.4th 232, 240-245 [159 Cal.Rptr.3d 57, 303 P.3d 368].)

Statute as Written Is Overbroad

The statute as written would prohibit lawful threatening conduct. To avoid overbreadth, this instruction requires that the defendant act both "willfully" and "unlawfully." (*People v. Superior Court (Anderson)* (1984) 151 Cal.App.3d 893, 895–896 [199 Cal.Rptr. 150].)

State of Mind of Victim Irrelevant

Unlike other threat crimes, the state of mind of the intended victim is irrelevant. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153 [124 Cal.Rptr.2d 373, 52 P.3d 572]; *People v. Hines* (1997) 15 Cal.4th 997, 1061, fn. 15 [64 Cal.Rptr.2d 594, 938 P.2d 388].)

Immediate Ability to Carry Out Threat Not Required

"As long as the threat reasonably appears to be a serious expression of intention to inflict bodily harm and its circumstances are such that there is a reasonable tendency to produce in the victim a fear that the threat will be carried out, a statute proscribing such threats is not unconstitutional for lacking a requirement of immediacy or imminence. Thus, threats may be constitutionally prohibited even when there is no *immediate* danger that they will be carried out." (*People v. Hines* (1997) 15 Cal.4th 997, 1061 [64 Cal.Rptr.2d 594, 938 P.2d 388] [quoting *In re M.S.* (1995) 10 Cal.4th 698, 714 [42 Cal.Rptr.2d 355, 896 P.2d 1365], citation and internal quotation marks removed, emphasis in original]; see also *People v. Gudger* (1994) 29 Cal.App.4th 310, 320–321 [34 Cal.Rptr.2d 510]; *Watts v. United States* (1969) 394 U.S. 705, 707 [89 S.Ct. 1399, 22 L.Ed.2d 664]; *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, 1027.)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2000) Crimes Against Governmental Authority, § 128.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.11A[1][b] (Matthew Bender).

2652. Resisting an Executive Officer in Performance of Duty (Pen. Code, § 69)

The defendant is charged [in Count __] with resisting an executive officer in the performance of that officer's duty [in violation of Penal Code section 69].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] used force [or violence] to resist an executive officer;**

2. **When the defendant acted, the officer was performing (his/her) lawful duty;**

3. **When the defendant acted, the defendant knew that the person (he/she) resisted was an executive officer;**

AND

4. **When the defendant acted, (he/she) knew the executive officer was performing (his/her) duty.**

An *executive officer* is a government official who may use his or her own discretion in performing his or her job duties. [(A/An) _____ *<insert title, e.g., peace officer, commissioner, etc.>* **is an *executive officer.*]**

[A sworn member of _____ *<insert name of agency that employs peace officer>***, authorized by _____** *<insert appropriate section from Pen. Code, § 830 et seq.>* **to _____** *<describe statutory authority>***, is a *peace officer*.]**

[The duties of (a/an) _____ *<insert title of officer specified in Pen. Code, § 830 et seq.>* **include _____** *<insert job duties>***.]**

[Taking a photograph or making an audio or video recording of an *executive officer* while the officer is in a public place or the person taking the photograph or making the recording is in a place where he or she has the right to be is not, by itself, a crime.]

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A *peace officer* is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

New January 2006; Revised August 2014, February 2015, August 2016, September 2019

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In order to be "performing a lawful duty," an executive officer, including a peace officer, must be acting lawfully. (*In re Manuel G.* (1997) 16 Cal.4th 805, 816 [66 Cal.Rptr.2d 701, 941 P.2d 880]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) The court has a **sua sponte** duty to instruct on lawful performance and the defendant's reliance on self-defense as it relates to the use of excessive force when this is an issue in the case. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].)

If there is an issue in the case as to the lawful performance of a duty by a peace officer, give the last bracketed paragraph and CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

If a different executive officer was the alleged victim, the court will need to draft an appropriate definition of lawful duty if this is an issue in the case.

AUTHORITY

- Elements ▸ Pen. Code, § 69.
- General Intent Offense ▸ *People v. Roberts* (1982) 131 Cal.App.3d Supp. 1, 9 [182 Cal.Rptr. 757].
- Lawful Performance Element to Resisting Officer ▸ *In re Manuel G.* (1997) 16 Cal.4th 805, 816 [66 Cal.Rptr.2d 701, 941 P.2d 880].
- Merely Photographing or Recording Officers Not a Crime ▸ Pen. Code, § 69(b).

LESSER INCLUDED OFFENSES

Penal Code section 148(a) is not a lesser included offense of this crime under the statutory elements test, but may be one under the accusatory pleading test. (*People v. Smith* (2013) 57 Cal.4th 232, 241-242 [159 Cal.Rptr.3d 57, 303 P.3d 368]; see also *People v. Belmares* (2003) 106 Cal.App.4th 19, 26 [130 Cal.Rptr.2d 400] and *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1532 [29 Cal.Rptr.3d 586].

Assault may be a lesser included offense of this crime under the accusatory pleading test. See *People v. Brown* (2016) 245 Cal.App.4th 140, 153 [199 Cal.Rptr.3d 303].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, § 128.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest,* § 11.06[3] (Matthew Bender).

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.15[2] (Matthew Bender).

2720. Assault by Prisoner Serving Life Sentence (Pen. Code, § 4500)

The defendant is charged [in Count __] with assault with (force likely to produce great bodily injury/a deadly weapon) with malice aforethought, while serving a life sentence [in violation of Penal Code section 4500].

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—force with weapon>

[1. The defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;]

<Alternative 1B—force without weapon>

[1. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and the force used was likely to produce great bodily injury;]

2. The defendant did that act willfully;

3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;

4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;

5. The defendant acted with malice aforethought;

[AND]

<Alternative 6A—defendant sentenced to life term>

[6. When (he/she) acted, the defendant had been sentenced to a maximum term of life in state prison [in California](;/.)]

<Alternative 6B—defendant sentenced to life and to determinate term>

[6. When (he/she) acted, the defendant had been sentenced to both a specific term of years and a maximum term of life in state prison [in California](;/.)]

<Give element 7 when self-defense or defense of another is an issue raised by the evidence.>

[AND

7. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[A *deadly weapon* is any object, instrument, or weapon [that is inherently deadly or dangerous or one] that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[The term (*great bodily injury/deadly weapon*) is defined in another instruction.]

There are two kinds of *malice aforethought*, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for this crime.

The defendant acted with *express malice* if (he/she) unlawfully intended to kill the person assaulted.

The defendant acted with *implied malice* if:

1. **(He/She) intentionally committed an act.**

2. **The natural and probable consequences of the act were dangerous to human life.**

3. **At the time (he/she) acted, (he/she) knew (his/her) act was dangerous to human life.**

AND

4. **(He/She) deliberately acted with conscious disregard for human life.**

Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act is committed. It does not require deliberation or the passage of any particular period of time.

[A person is *sentenced to a term in a state prison* if he or she is (sentenced to confinement in _____ <*insert name of institution from Pen. Code, § 5003*>/committed to the Department of Corrections and Rehabilitation[, Division of Juvenile Justice,]) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *sentenced to a term in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is *not sentenced to a term in a state prison*.]]

New January 2006; Revised February 2013, August 2016, September 2019

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give ~~this~~ an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In element 1, give alternative 1A if it is alleged the assault was committed with a deadly weapon. Give alternative 1B if it is alleged that the assault was committed with force likely to produce great bodily injury.

In element 6, give alternative 6A if the defendant was sentenced to only a life term. Give element 6B if the defendant was sentenced to both a life term and a determinate term. (*People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836].)

Give the bracketed definition of "application of force and apply force" on request.

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Give the bracketed phrase "that is inherently deadly or one" and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with "In deciding whether" if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

On request, give the bracketed definition of "sentenced to a term in state prison." Within that definition, give the bracketed portion that begins with "regardless of

the purpose," or the bracketed second or third sentence, if requested and relevant based on the evidence.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

Penal Code section 4500 provides that the punishment for this offense is death or life in prison without parole, unless "the person subjected to such assault does not die within a year and a day after" the assault. If this is an issue in the case, the court should consider whether the time of death should be submitted to the jury for a specific factual determination pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].

Defense—Instructional Duty

As with murder, the malice required for this crime may be negated by evidence of heat of passion or imperfect self-defense. (*People v. St. Martin* (1970) 1 Cal.3d 524, 530–531 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781 [73 Cal.Rptr. 10, 447, P.2d 106].) If the evidences raises an issue about one or both of these potential defenses, the court has a **sua sponte** duty to give the appropriate instructions, CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion–Lesser Included Offense*, or CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense–Lesser Included Offense*. The court must modify these instructions for the charge of assault by a life prisoner.

Related Instructions

CALCRIM No. 875, *Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury*.

CALCRIM No. 520, *Murder With Malice Aforethought*.

AUTHORITY

- Elements of Assault by Life Prisoner ▸ Pen. Code, § 4500.
- Elements of Assault With Deadly Weapon or Force Likely ▸ Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- Willful Defined ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].

- Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Malice Equivalent to Malice in Murder ▸ *People v. St. Martin* (1970) 1 Cal.3d 524, 536–537 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781 [73 Cal.Rptr. 10, 447 P.2d 106].
- Malice Defined ▸ Pen. Code, § 188; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1217–1222 [264 Cal.Rptr. 841, 783 P.2d 200]; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103–105 [13 Cal.Rptr.2d 864, 840 P.2d 969].
- Ill Will Not Required for Malice ▸ *People v. Sedeno* (1974) 10 Cal.3d 703, 722 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1].
- Undergoing Sentence of Life ▸ *People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836].
- Inherently Deadly Defined ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].

LESSER INCLUDED OFFENSES

- Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury—Not a Prisoner ▸ Pen. Code, § 245; see *People v. St. Martin* (1970) 1 Cal.3d 524, 536 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].
- Assault ▸ Pen. Code, § 240; *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].

Note: In *People v. Noah* (1971) 5 Cal.3d 469, 476–477 [96 Cal.Rptr. 441, 487 P.2d 1009], the court held that assault by a prisoner not serving a life sentence, Penal Code section 4501, is not a lesser included offense of assault by a prisoner serving a life sentence, Penal Code section 4500. The court based its on conclusion on the fact that Penal Code section 4501 includes as an element of the offense that the prisoner was not serving a life sentence. However, Penal Code section 4501 was amended, effective January 1, 2005, to remove this element. The trial court should, therefore, consider whether Penal Code section 4501 is now a lesser included offense to Penal Code section 4500.

RELATED ISSUES

Status as Life Prisoner Determined on Day of Alleged Assault
Whether the defendant is sentenced to a life term is determined by his or her status on the day of the assault. (*People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836]; *Graham v. Superior Court* (1979) 98 Cal.App.3d 880, 890 [160 Cal.Rptr. 10].) It does not matter if the conviction is later overturned or the sentence is later reduced to something less than life. (*People v. Superior Court of Monterey (Bell), supra,* 99 Cal.App.4th at p. 1341; *Graham v. Superior Court, supra,* 98 Cal.App.3d at p. 890.)

Undergoing Sentence of Life
This statute applies to "[e]very person undergoing a life sentence . . . ." (Pen. Code, § 4500.) In *People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836], the defendant had been sentenced both to life in prison and to a determinate term and, at the time of the assault, was still technically serving the determinate term. The court held that he was still subject to prosecution under this statute, stating "a prisoner who commits an assault is subject to prosecution under section 4500 for the crime of assault by a life prisoner if, on the day of the assault, the prisoner was serving a sentence which potentially subjected him to actual life imprisonment, and therefore the prisoner might believe he had 'nothing left to lose' by committing the assault." *(Ibid.)*

Error to Instruct on General Definition of Malice and General Intent
"Malice," as used in Penal Code section 4500, has the same meaning as in the context of murder. (*People v. St. Martin* (1970) 1 Cal.3d 524, 536–537 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781 [73 Cal.Rptr. 10, 447 P.2d 106].) Thus, it is error to give the general definition of malice found in Penal Code section 7, subdivision 4. (*People v. Jeter* (2005) 125 Cal.App.4th 1212, 1217 [23 Cal.Rptr.3d 402].) It is also error to instruct that Penal Code section 4500 is a general intent crime. *(Ibid.)*

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 58–60.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.11[3] (Matthew Bender).

2721. Assault by Prisoner (Pen. Code, § 4501)

The defendant is charged [in Count __] with assault with (force likely to produce great bodily injury/a deadly weapon) while serving a state prison sentence [in violation of Penal Code section 4501].

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—force with weapon>

[1. The defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;]

<Alternative 1B—force without weapon>

[1. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and the force used was likely to produce great bodily injury;]

2. The defendant did that act willfully;

3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;

4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;

[AND]

5. When (he/she) acted, the defendant was confined in a [California] state prison(;/.)

<Give element 6 when self-defense or defense of another is an issue raised by the evidence.>

[AND

6. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[A *deadly weapon* is any object, instrument, or weapon [that is inherently deadly or dangerous or one] that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[The term (*great bodily injury/deadly weapon*) is defined in another instruction.]

A person is *confined in a state prison* if he or she is (confined in _____ *<insert name of institution from Pen. Code, § 5003>*/**committed to the Department of Corrections and Rehabilitation[, Division of Juvenile Justice,]) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the**

(confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *confined in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is not *confined in a state prison*.]

New January 2006; Revised August 2016, September 2019

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give ~~this~~ an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 6 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In element 1, give alternative 1A if it is alleged the assault was committed with a deadly weapon. Give alternative 1B if it is alleged that the assault was committed with force likely to produce great bodily injury.

Give the bracketed definition of "application of force and apply force" on request.

Give the bracketed phrase "that is inherently deadly or one" and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with "In deciding whether" if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

In the definition of "serving a sentence in a state prison," give the bracketed portion that begins with "regardless of the purpose," or the bracketed second or third sentence, if requested and relevant based on the evidence.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

Related Instructions
CALCRIM No. 875, *Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury*.

AUTHORITY

- Elements of Assault by Prisoner ▸ Pen. Code, § 4501.
- Elements of Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury ▸ Pen. Code, §§ 240, 245(a)(1)–(3) & (b).

- Willful Defined ▸ Pen. Code, § 7 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Confined in State Prison Defined ▸ Pen. Code, § 4504.
- Underlying Conviction Need Not Be Valid ▸ *Wells v. California* (9th Cir. 1965) 352 F.2d 439, 442.
- Inherently Deadly Defined ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].

LESSER INCLUDED OFFENSES

- Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury—Not a Prisoner ▸ Pen. Code, § 245; see *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].

- Assault ▸ Pen. Code, § 240; *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].

RELATED ISSUES

Not Serving a Life Sentence

Previously, this statute did not apply to an inmate "undergoing a life sentence." (See *People v. Noah* (1971) 5 Cal.3d 469, 477 [96 Cal.Rptr. 441, 487 P.2d 1009].) The statute has been amended to remove this restriction, effective January 1, 2005. If the case predates this amendment, the court must add to the end of element 5, "for a term other than life."

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 61, 63.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.11[3] (Matthew Bender).

2900 Vandalism (Pen. Code, § 594)

The defendant is charged [in Count __] with vandalism [in violation of Penal Code section 594].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant maliciously (defaced with graffiti or with other inscribed material[,]/ [or] damaged[,]/ [or] destroyed) (real/ [or] personal) property;**

[AND]

2. **The defendant (did not own the property/owned the property with someone else)(;/.)**

<See Bench Notes regarding when to give element 3.>
[AND

3. **The amount of damage caused by the vandalism was $400 or more.]**

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.

***Graffiti or other inscribed material* includes an unauthorized inscription, word, figure, mark, or design that is written, marked, etched, scratched, drawn, or painted on real or personal property.**

New January 2006; Revised June 2007, February 2013, August 2013, September 2019

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with a felony for causing $400 or more in damage and the court is *not* instructing on the misdemeanor offense, give element 3. If the

court *is* instructing on both the felony and the misdemeanor offenses, give CALCRIM No. 2901, *Vandalism: Amount of Damage*, with this instruction. (Pen. Code, § 594(b)(1).) The court should also give CALCRIM No. 2901 if the defendant is charged with causing more than $10,000 in damage under Penal Code section 594(b)(1).

In element 2, give the alternative language "owned the property with someone else" if there is evidence that the property was owned by the defendant jointly with someone else. (*People v. Wallace* (2004) 123 Cal.App.4th 144, 150–151 [19 Cal.Rptr.3d 790]; *People v. Kahanic* (1987) 196 Cal.App.3d 461, 466 [241 Cal.Rptr. 722] [Pen. Code, § 594 includes damage by spouse to spousal community property].)

AUTHORITY

- Elements. ▸ Pen. Code, § 594.
- Malicious Defined. ▸ Pen. Code, § 7, subd. 4; *People v. Lopez* (1986) 176 Cal.App.3d 545, 550 [222 Cal.Rptr. 101].
- Damage to Jointly Owned Property. ▸ *People v. Wallace* (2004) 123 Cal.App.4th 144, 150–151 [19 Cal.Rptr.3d 790]; *People v. Kahanic* (1987) 196 Cal.App.3d 461, 466 [241 Cal.Rptr. 722].
- Wrongful Act Need Not Be Directed at Victim. ▸ *People v. Kurtenbach* (2012) 204 Cal.App.4th 1264, 1282 [139 Cal.Rptr.3d 637].
- This Instruction Upheld. ▸ People v. Carrasco (2012) 209 Cal.App.4th 715, 722–723 [147 Cal.Rptr.3d 383].
- General Intent Crime. ▸ *People v. Moore* (2018) 19 Cal.App.5th 889, 895-896 [228 Cal.Rptr.3d 261].

LESSER INCLUDED OFFENSES

This offense is a misdemeanor unless the amount of damage is $400 or more. (Pen. Code, § 594(b)(1) & (2)(A).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. When instructing on both the felony and misdemeanor, the court must provide the jury with a verdict form on which the jury will indicate if the amount of damage has or has not been proved to be $400 or more. If the jury finds that the damage has not been proved to be $400 or more, then the offense should be set at a misdemeanor.

RELATED ISSUES

Lack of Permission Not an Element
The property owner's lack of permission is not an element of vandalism. (*In re Rudy L*. (1994) 29 Cal.App.4th 1007, 1014 [34 Cal.Rptr.2d 864].)

Damage Need Not Be Permanent
To "deface" under Penal Code section 594 does not require that the defacement be permanent. (*In re Nicholas Y.* (2000) 85 Cal.App.4th 941, 944 [102 Cal.Rptr.2d 511] [writing on a glass window with a marker pen was defacement under the statute].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 277–285.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.11[2], Ch. 144, *Crimes Against Order,* § 144.03[2] (Matthew Bender).

2902 Damaging Phone or Electrical Line (Pen. Code, § 591)

The defendant is charged [in Count __] with (taking down[,]/ [or] removing [,]/ [or] damaging[,]/ [or] disconnecting/ [or] cutting/[or] obstructing/severing/making an unauthorized connection to) a (telegraph/telephone/cable television/electrical) line [in violation of Penal Code section 591].

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—removed, damaged, or obstructed>

[1. The defendant unlawfully (took down[,]/ [or] removed[,]/ [or] damaged[,]/ [or] obstructed/ [or] disconnected/ [or] cut) [part of] a (telegraph/telephone/cable television/electrical) line [or mechanical equipment connected to the line];]

<Alternative 1B—severed>

[1. The defendant unlawfully severed a wire of a (telegraph/telephone/cable television/electrical) line;]

<Alternative 1C—unauthorized connection>

[1. The defendant unlawfully made an unauthorized connection with [part of] a line used to conduct electricity [or mechanical equipment connected to the line];]

AND

2. The defendant did so maliciously.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.

[As used here, *mechanical equipment* includes a telephone.]

New January 2006; Revised August 2015, September 2019

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The statute uses the term "injure." (Pen. Code, § 591.) The committee has replaced the word "injure" with the word "damage" because the word "injure" generally refers to harm to a person rather than to property.

The statute uses the phrase "appurtenances or apparatus." (Pen. Code, § 591.) The committee has chosen to use the more understandable "mechanical equipment" in place of this phrase.

Give the bracketed sentence that states "*mechanical equipment* includes a telephone" on request. (*People v. Tafoya* (2001) 92 Cal.App.4th 220, 227 [111 Cal.Rptr.2d 681]; *People v. Kreiling* (1968) 259 Cal.App.2d 699, 704 [66 Cal.Rptr. 582].)

AUTHORITY

- Elements ▸ Pen. Code, § 591.
- Maliciously Defined ▸ Pen. Code, § 7, subd. 4; *People v. Lopez* (1986) 176 Cal.App.3d 545, 550 [222 Cal.Rptr. 101].
- Applies to Damage to Telephone ▸ *People v. Tafoya* (2001) 92 Cal.App.4th 220, 227; *People v. Kreiling* (1968) 259 Cal.App.2d 699, 704 [66 Cal.Rptr. 582].
- "Obstruct" Not Unconstitutionally Vague ▸ *Kreiling v. Field* (9th Cir. 1970) 431 F.2d 502, 504.
- Applies to Theft of Service ▸ *People v. Trieber* (1946) 28 Cal.2d 657, 661 [171 P.2d 1].
- General Intent Crime. ▸ *People v. Quarles* (2018) 25 Cal.App.5th 631, 636 [236 Cal.Rptr.3d 49].

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property §§ 304, 305.

3130. Personally Armed With Deadly Weapon (Pen. Code, § 12022.3)

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant was personally armed with a deadly weapon in the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

A *deadly weapon* is any object, instrument, or weapon [that is inherently deadly or one] that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed[,] [and] [where the person who possessed the object was going][,] [and] [whether the object was changed from its standard form] [and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.]]

***Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

A person is *armed* with a deadly weapon when that person:

1. **Carries a deadly weapon [or has a deadly weapon available] for use in either offense or defense in connection with the crime[s] charged;**

AND

2. **Knows that he or she is carrying the deadly weapon [or has it available].**

<If there is an issue in the case over whether the defendant was armed with the weapon "in the commission of" the offense, see Bench Notes.>

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 December 2008, February 2013, September 2019

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give ~~this~~ an instruction when the enhancement is charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed phrase "that is inherently deadly or one" and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with "~~When~~ In deciding whether" if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

In the definition of "armed," the court may give the bracketed phrase "or has a deadly weapon available" on request if the evidence shows that the weapon was at the scene of the alleged crime and "available to the defendant to use in furtherance of the underlying felony." (*People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; see also *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274] [language of instruction approved; sufficient evidence defendant had firearm available for use]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214] [evidence that firearm was two blocks away from scene of rape insufficient to show available to defendant].)

If the case involves an issue of whether the defendant was armed "in the commission of" the offense, the court may give CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996)

13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancement ▸ Pen. Code, § 12022.3.
- Deadly Weapon Defined ▸ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086–1087 [130 Cal.Rptr.2d 717].
- Objects With Innocent Uses ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].
- Armed ▸ *People v. Pitto* (2008) 43 Cal.4th 228, 236–240 [74 Cal.Rptr.3d 590, 180 P.3d 338]; *People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214]; *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274].
- Must Be Personally Armed ▸ *People v. Rener* (1994) 24 Cal.App.4th 258, 267 [29 Cal.Rptr.2d 392]; *People v. Reed* (1982) 135 Cal.App.3d 149, 152–153 [185 Cal.Rptr. 169].
- "In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].
- Inherently Deadly Defined ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].

RELATED ISSUES

Penal Code Section 220

A defendant convicted of violating Penal Code section 220 may receive an enhancement under Penal Code section 12022.3 even though the latter statute does not specifically list section 220 as a qualifying offense. (*People v. Rich* (2003) 109 Cal.App.4th 255, 261 [134 Cal.Rptr.2d 553].) Section 12022.3 does apply to attempts to commit one of the enumerated offenses, and a conviction for violating section 220, assault with intent to commit a sexual offense, "translates into an

attempt to commit" a sexual offense. (*People v. Rich, supra,* 109 Cal.App.4th at p. 261.)

Multiple Weapons

There is a split in the Court of Appeal over whether a defendant may receive multiple enhancements under Penal Code section 12022.3 if the defendant has multiple weapons in his or her possession during the offense. (*People v. Maciel* (1985) 169 Cal.App.3d 273, 279 [215 Cal.Rptr. 124] [defendant may only receive one enhancement for each sexual offense, either for being armed with a rifle or for using a knife, but not both]; *People v. Stiltner* (1982) 132 Cal.App.3d 216, 232 [182 Cal.Rptr. 790] [defendant may receive both enhancement for being armed with a knife and enhancement for using a pistol for each sexual offense].) The court should review the current state of the law before sentencing a defendant to multiple weapons enhancements under Penal Code section 12022.3.

Pepper Spray

In *People v. Blake* (2004) 117 Cal.App.4th 543, 559 [11 Cal.Rptr.3d 678], the court upheld the jury's determination that pepper spray was a deadly weapon.

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 311, 329.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.31 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.20[7][c], 142.21[1][d][iii] (Matthew Bender).

3145. Personally Used Deadly Weapon (Pen. Code, §§ 667.61(e)(3), 1192.7(c)(23), 12022(b)(1) & (2), 12022.3)

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally used a deadly [or dangerous] weapon during the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

A *deadly* [*or dangerous*] *weapon* is any object, instrument, or weapon that is [inherently deadly] [or] [dangerous] [or one that is] used in such a way that it is capable of causing and likely to cause death or great bodily injury.

[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed[,] [and] [where the person who possessed the object was going][,] [and] [whether the object was changed from its standard form] [and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.]]

***Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

Someone *personally uses* a deadly [or dangerous] weapon if he or she intentionally [does any of the following]:

[1. Displays the weapon in a menacing manner(./;)]

[OR]

[(2/1). Hits someone with the weapon(./;)]

[OR]

[(3/2). Fires the weapon(./;)]

[OR

(4/3). _____ <*insert description of use*>. **]**

<*If there is an issue in the case over whether the defendant used the weapon "in the commission of" the offense, see Bench Notes.*>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised June 2007, February 2013, September 2017, September 2019

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give ~~this~~ an instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give all of the bracketed "or dangerous" phrases if the enhancement charged uses both the words "deadly" and "dangerous" to describe the weapon. (Pen. Code, §§ 667.61, 1192.7(c)(23), 12022(b).) Do not give these bracketed phrases if the enhancement uses only the word "deadly." (Pen. Code, § 12022.3.)

Give the bracketed phrase "inherently deadly" and give the bracketed definition of *inherently deadly* only if the object is a deadly weapon as a matter of law. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317-318 [240 Cal.Rptr.3d 156].)

Give the bracketed portion that begins with "In deciding whether" if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.

In the definition of "personally uses," the court may give the bracketed item 3 if the case involves an object that may be "fired."

If the case involves an issue of whether the defendant used the weapon "in the commission of" the offense, the court may give CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancements ▸ Pen. Code, §§ 667.61(e)(3), 1192.7(c)(23), 12022(b)(1) & (2), 12022.3.
- Deadly Weapon Defined ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086–1087 [130 Cal.Rptr.2d 717].
- Objects With Innocent Uses ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].
- Personally Uses ▸ *People v. Bland* (1995) 10 Cal.4th 991, 997 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320 [45 Cal.Rptr.2d 602]; see also Pen. Code, § 1203.06(b)(2).
- "In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].
- May Not Receive Enhancement for Both Using and Being Armed With One Weapon ▸ *People v. Wischemann* (1979) 94 Cal.App.3d 162, 175–176 [156 Cal.Rptr. 386].
- Inherently Deadly Defined ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].

RELATED ISSUES

No Duty to Instruct on "Lesser Included Enhancements"

"[A] trial court's sua sponte obligation to instruct on lesser included offenses does not encompass an obligation to instruct on 'lesser included enhancements.' " (*People v. Majors* (1998) 18 Cal.4th 385, 411 [75 Cal.Rptr.2d 684, 956 P.2d 1137].) Thus, if the defendant is charged with an enhancement for use of a weapon, the court does not need to instruct on an enhancement for being armed.

Weapon Displayed Before Felony Committed
Where a weapon is displayed initially and the underlying crime is committed some time after the initial display, the jury may conclude that the defendant used the weapon in the commission of the offense if the display of the weapon was "at least … an aid in completing an essential element of the subsequent crimes. . . ." (*People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705].)

Weapon Used Did Not Cause Death
In *People v. Lerma* (1996) 42 Cal.App.4th 1221, 1224 [50 Cal.Rptr.2d 580], the defendant stabbed the victim and then kicked him. The coroner testified that the victim died as a result of blunt trauma to the head and that the knife wounds were not life threatening. *(Ibid.)* The court upheld the finding that the defendant had used a knife during the murder even though the weapon was not the cause of death. (*Id.* at p. 1226.) The court held that in order for a weapon to be used in the commission of the crime, there must be "a nexus between the offense and the item at issue, [such] that the item was an instrumentality of the crime." *(Ibid.)* [ellipsis and brackets omitted] Here, the court found that "[t]he knife was instrumental to the consummation of the murder and was used to advantage." *(Ibid.)*

"One Strike" Law and Use Enhancement
Where the defendant's use of a weapon has been used as a basis for applying the "one strike" law for sex offenses, the defendant may not also receive a separate enhancement for use of a weapon in commission of the same offense. (*People v. Mancebo* (2002) 27 Cal.4th 735, 754 [117 Cal.Rptr.2d 550, 41 P.3d 556].)

Assault and Use of Deadly Weapon Enhancement
"A conviction [for assault with a deadly weapon or by means of force likely to cause great bodily injury] under [Penal Code] section 245, subdivision (a)(1) cannot be enhanced pursuant to section 12022, subdivision (b)." (*People v. Summersville* (1995) 34 Cal.App.4th 1062, 1070 [40 Cal.Rptr.2d 683].)

Robbery and Use of Deadly Weapon Enhancement
A defendant may be convicted and sentenced for both robbery and an enhancement for use of a deadly weapon during the robbery. (*In re Michael L.* (1985) 39 Cal.3d 81, 88 [216 Cal.Rptr. 140, 702 P.2d 222].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 40.

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 356-357, 361–369.

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 727.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.30, 91.81[1][d] (Matthew Bender).

3406. Mistake of Fact

The defendant is not guilty of _____ *<insert crime[s]>* **if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact.**

If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit _____ *<insert crime[s]>***.**

If you find that the defendant believed that _____ *<insert alleged mistaken facts>* **[and if you find that belief was reasonable], (he/she) did not have the specific intent or mental state required for _____** *<insert crime[s]>***.**

If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for _____ *<insert crime[s]>***, you must find (him/her) not guilty of (that crime/those crimes).**

New January 2006; Revised April 2008, December 2008, August 2014, September 2018

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case.

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389–390 [88 Cal.Rptr.2d 111]; *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's

guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982–983 [38 Cal.Rptr.3d 624, 127 P.3d 40].)

If the defendant is charged with a general intent crime, the trial court must instruct with the bracketed language requiring that defendant's belief be both actual and reasonable.

If the mental state element at issue is either specific criminal intent or knowledge, do not use the bracketed language requiring the belief to be reasonable. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 984 & fn. 6 [61 Cal.Rptr.2d 39]; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425–1426 [51 Cal.Rptr.3d 263].)

Mistake of fact is not a defense to the following crimes under the circumstances described below:

1. Involuntary manslaughter (*People v. Velez* (1983) 144 Cal.App.3d 558, 565–566 [192 Cal.Rptr. 686] [mistake of fact re whether gun could be fired]).
2. Furnishing cannabis to a minor (Health & Saf. Code, § 11352; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760–762 [77 Cal.Rptr. 59]).
3. Selling narcotics to a minor (Health & Saf. Code, § 11353; *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454] [specific intent for the crime of selling narcotics to a minor is the intent to sell cocaine, not to sell it to a minor]).
4. Aggravated kidnapping of a child under the age of 14 (Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206]).
5. Unlawful sexual intercourse or oral copulation by person 21 or older with minor under the age of 16 (Pen. Code, §§ 261.5(d), 287~~8a~~(b)(2); *People v. Scott* (2000) 83 Cal.App.4th 784, 800–801 [100 Cal.Rptr.2d 70]).
6. Lewd and lascivious conduct with a child under the age of 14 (Pen. Code, § 288(a); *People v. Olsen* (1984) 36 Cal.3d 638, 645–646 [205 Cal.Rptr. 492, 685 P.2d 52]).

AUTHORITY

- Instructional Requirements. ▸ Pen. Code, § 26(3).
- Burden of Proof. ▸ *People v. Mayberry* (1975) 15 Cal.3d 143, 157 [125 Cal.Rptr 745, 542 P.2d 1337].
- This Defense Applies to Attempted Lewd and Lascivious Conduct With Minor Under 14. ▸ *People v. Hanna* (2013) 218 Cal.App.4th 455, 461 [160 Cal.Rptr.3d 210].

RELATED ISSUES

Mistake of Fact Based on Involuntary Intoxication

A mistake of fact defense can be based on involuntary intoxication. (*People v. Scott* (1983) 146 Cal.App.3d 823, 829–833 [194 Cal.Rptr. 633].) In *Scott*, the court held that the defendant was entitled to an instruction on mistake of fact, as a matter of law, where the evidence established that he unknowingly and involuntarily ingested a hallucinogen. As a result he acted under the delusion that he was a secret agent in a situation where it was necessary to steal vehicles in order to save his own life and possibly that of the President. The court held that although defendant's mistake of fact was irrational, it was reasonable because of his delusional state and had the mistaken facts been true, his actions would have been justified under the doctrine of necessity. The court also stated that mistake of fact would not have been available if defendant's mental state had been caused by voluntary intoxication. (*Id.* at pp. 829–833; see also *People v. Kelly* (1973) 10 Cal.3d 565, 573 [111 Cal.Rptr. 171, 516 P.2d 875] [mistake of fact based on voluntary intoxication is not a defense to a general intent crime].)

Mistake of Fact Based on Mental Disease

Mistake of fact is not a defense to general criminal intent if the mistake is based on mental disease. (*People v. Gutierrez* (1986) 180 Cal.App.3d 1076, 1084 [225 Cal.Rptr. 885]; see *People v. Castillo* (1987) 193 Cal.App.3d 119, 124–125 [238 Cal.Rptr. 207].) In *Gutierrez*, the defendant was charged with inflicting cruel injury on a child, a general intent crime, because she beat her own children under the delusion that they were evil birds she had to kill. The defendant's abnormal mental state was caused in part by mental illness. (*People v. Gutierrez, supra,* 180 Cal.App.3d at pp. 1079–1080.) The court concluded that evidence of her mental illness was properly excluded at trial because mental illness could not form the basis of her mistake of fact defense. (*Id.* at pp. 1083–1084.)

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, § 47.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.06 (Matthew Bender).