JUDICIAL COUNCIL OF CALIFORNIA

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# REPORT TO THE JUDICIAL COUNCIL

*Item No.: 20-075*
For business meeting on September 25, 2020

**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 25, 2020

**Date of Report**
August 31, 2020

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## Executive Summary

The Advisory Committee on Criminal Jury Instructions recommends approving for publication the revised criminal jury instructions prepared by the committee under rule 2.1050 of the California Rules of Court. These changes will keep the instructions current with statutory and case authority. Once approved, the revised instructions will be published in the 2020 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 25, 2020, approve the following changes to the criminal jury instructions prepared by the committee:

1. Revisions to CALCRIM Nos. 105, 202, 226, 358, 505, 508, 511, 524, 525, 540B, 563, 571, 580, 581, 582, 590, 592, 604, 766, 767, 810, 820, 860, 862, 863, 875, 970, 982, 983, 1071, 1080, 1124, 1128, 1191B, 1201, 1202, 1300, 1402, 1501, 1530, 1551, 1945, 1950, 1952, 2501, 2503, 2514, 2578, 2622, 2623, 2720, 2721, 2745, 2746, 2747, 3100, 3101, 3102, 3103, 3130, 3145, 3149, 3150, 3160, 3161, 3162, 3163, 3456, 3457, 3177, and 3477; and

2. Updates to the Introduction to Felony-Murder Series to delete the reference to an appendix. The publisher will remove the appendix of revoked and former felony murder instructions now that appellate courts have upheld the constitutionality of the legislative changes to felony murder liability.

A table of contents and the full text of the revised instructions are attached at pages 21–338.

## 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 April 2020 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.

### *Instructions that define Great Bodily Injury* (CALCRIM Nos. 505, 508, 511, 524, 525, 571, 580, 581, 582, 590, 592, 604, 810, 820, 860, 862, 863, 875, 970, 982, 983, 1300, 1402, 1501, 1530, 1551, 2501, 2503, 2514, 2578, 2720, 2721, 2745, 2746, 2747, 3130, 3145, 3149, 3150, 3160, 3161, 3162, 3163, 3177, and 3477)

In *People v. Medellin* (2020) 45 Cal.App.5th 519, 524 [258 Cal.Rptr.3d 867], the court reversed felony assault convictions because "the prosecutor's closing argument, relying on and quoting CALCRIM's great bodily injury definition, prejudicially misstated the law." A few weeks after *Medellin* was decided, *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] upheld CALCRIM's great bodily injury definition over an objection that the definition was ambiguous and erroneous. Unlike *Medellin*, the prosecutor in *Quinonez* argued, consistent with the great bodily injury definition, that the victim's injuries were "significant or substantial." The committee added a bench note alerting users about these two cases and warning that the instruction's definition of great bodily injury could result in reversal if the prosecutor improperly argues that great bodily injury is anything that is more than minor injury alone.

[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."

### *Conspiracy to Commit Murder* (CALCRIM No. 563)

In *People v. Beck and Cruz* (2019) 8 Cal.5th 548, 639 [256 Cal.Rptr.3d 1, 453 P.3d 1038], the California Supreme Court found harmless error when the trial court failed to instruct that conspiracy to commit murder requires express malice. In its holding, the court noted that CALCRIM No. 563 "would avoid any possibility of confusion if [it] told the jury that when it refers to the instructions that define murder, it should not consider any instructions regarding implied malice because conspiracy to commit murder may not be based on a theory of implied malice." *Id.* at p. 642. Based on this suggestion, the committee added language to the instruction to clarify that the jury should not consider any theory of implied malice when determining whether the defendant is guilty of conspiracy to commit murder.

### *Death Penalty: Weighing Process* (CALCRIM Nos. 766 & 767)

An appellate attorney and a committee member both pointed out that a bracketed sentence in No. 766 is contrary to the holding in *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 203–206 [112 Cal.Rptr.3d 746, 235 P.3d 62]. The optional sentence states, "In making your decision about penalty, you must assume that the penalty you impose, death or life without the possibility of parole, will be carried out." This sentence, which is based on the holding in *People v. Kipp* (1988) 18 Cal.4th 349, 378–379 [75 Cal.Rptr.2d 716, 956 P.2d 1169], contradicts *Letner and Tobin,* which disapproved instructing the jury to assume that whatever sentence it chooses will be carried out. The committee deleted the sentence as well as the reference to *Kipp* in the bench notes. The committee also modified the title of No. 767 and the bench notes to clarify that No. 767 (which is based on the language in *Letner and Tobin*) should be given upon request, and not only in response to a jury question.

### *Contacting Minor With Intent to Commit Certain Felonies* (CALCRIM No. 1124)

In *People v. Korwin* (2019) 36 Cal.App.5th 683, 688 [248 Cal.Rptr.3d 763], the court held that the attempt prong of Penal Code section 288.3 does not require that the victim be an actual minor. The committee expanded the third element of the instruction to include when the defendant reasonably believed that the victim was a minor and cited the case in the authority section. The committee also deleted the bench note discussion about whether the court has a duty to instruct on good faith belief that the victim was not a minor.

### *Engaging in Oral Copulation or Sexual Penetration With a Child 10 Years of Age or Younger* (CALCRIM No. 1128)

In *People v. Vital* (2019) 40 Cal.App.5th 925 [254 Cal.Rptr.3d 22], the defendant was prosecuted as an aider and abettor for violating Penal Code section 288.7(b). The trial court instructed with CALCRIM No. 1128, which told the jury that the prosecutor had to prove that Vital (instead of the direct perpetrator) was at least 18 years old at the time of the offense. The appellate court found this was error, holding that the court should have instructed the jury that the direct perpetrator must satisfy the 18-year-old age requirement. The committee added a bench note to this instruction advising about the holding in *Vital* and directing the user to substitute the word "perpetrator" in place of "defendant" in the instruction if the defendant is charged under an aiding and abetting theory.

### *Kidnapping: For Ransom, Reward, or Extortion* (CALCRIM No. 1202)

*People v. Stringer* (2019) 41 Cal.App.5th 974, 983 [254 Cal.Rptr.3d 678] and *People v. Harper* (2020) 44 Cal.App.5th 172, 192–193 [257 Cal.Rptr.3d 440] both pointed out that CALCRIM No. 1202 failed to specify a secondary victim for the fourth type of aggravated kidnapping ("to exact from another person any money or valuable thing"). The committee added "from a different person" to element 3 and made other changes to distinguish the primary victim from the secondary victim. The committee also added both cases to the Authority section.

### *Filing False Document* (CALCRIM No. 1945)

In *People v. Schmidt* (2019) 41 Cal.App.5th 1042 [254 Cal.Rptr.3d 694], the court held that recording a deed acquired through fraud does not render the deed "false" or "forged" within the meaning of Penal Code section 115. The committee added this case to the Related Issues section.

### *Intimidating a Witness* (CALCRIM Nos. 2622 & 2623)

*People v. Brackins* (2019) 37 Cal.App.5th 56 [249 Cal.Rptr.3d 261] held that subdivision (b) of Penal Code section 136.1 does not require malice. In CALCRIM No. 2622, the committee deleted the bracketed word "maliciously" from Alternatives 1B, 1C, and 1D and added the case to the Authority section. In both instructions, the committee removed the discussion in the bench notes that suggested the malice requirements could apply to all violations of Penal Code section 136.1(b).

### *Prior Convictions* (CALCRIM Nos. 3100, 3101, 3102, & 3103)

A trial court judge noted that the commentary section in CALCRIM No. 3100 contained an outdated reference to *People v. McGee* (2006) 38 Cal.4th 682 [42 Cal.Rptr.3d 899, 133 P.3d 1054] and failed to mention *People v. Gallardo* (2017) 4 Cal.5th 120, 134 [226 Cal.Rptr.3d 379, 407 P.3d 55], which held that "the approach sanctioned in *McGee* is no longer tenable." The committee removed the reference to *McGee*, added *Gallardo*, and substantially edited the discussion about when the court or the jury should determine the prior conviction. The committee also made conforming changes to the authority sections in Nos. 3101, 3102, and 3103.

## 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 June 8 through July 10, 2020. The committee received responses from four commenters. The text of all comments received and the committee's responses are included in a comments chart attached at pages 6–20.

### 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 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 6–20
2. Full text of revised *CALCRIM* instructions, including table of contents, at pages 21–338

# CALCRIM-2020-01 Invitation to Comment
## Revised CALCRIM Instructions
All comments are verbatim unless indicated by an asterisk (*).

| Instruction | Commentator | Comment | Response |
|---|---|---|---|
| 105, 226, 202, 358, 540B, 563, 1124, 1128, 1191B, 1201, 1202, 1945, 2622, 2623, 3100, 3101, 3102, 3103, 3456, 3457, Introduction to Felony-Murder Series. | Scott B. Garner, president, on behalf of the Orange County Bar Association | Agree. | No response necessary. |
| Instructions that define Great Bodily Injury | Karl Fenske, Deputy Public Defender, Los Angeles County | Agree if modified.<br>GBI should be defined as follows:<br>"Great bodily injury means significant or substantial physical injury. It is an injury that is greater than moderate harm."<br><br>If something is greater than minor harm AND greater than moderate harm it logically must be greater than moderate harm. Use of the word "minor" at all just invites the argument that is error but also invites jurors to have similar confusion by the use of the adjective. | The committee declines to make the suggested change. *People v. Quinonez* recently upheld the GBI definition. Further, *People v. Medellin* held that the definition itself was not wrong; the prosecutor's erroneous argument was the basis for reversal. |
| 505, 508, 511, 524, 525, 571, 580, 581, 582, 590, 592, 604, 810, 820, 860, 862, 863, 875, 970, 982, 983, 1300, 1402, 1501, 1530, 1551, 2501, 2503, 2514, 2578, 2720, 2721, 2745, 2746, 2747, 3130, 3145, 3149, 3150, 3160, 3161, 3162, 3163, 3177, 3477 | Scott B. Garner, president, on behalf of the Orange County Bar Association | Agree if Modified.<br>The proposal adds new case authority under Bench Notes:<br>**The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)**<br>As proposed, the legal proposition from *People v. Medellin*, as stated, is confusing. The following change is suggested:<br>"It is error to argue great bodily injury is shown by greater than minor injury alone."<br>Citation to *People v. Quinonez* upholding the instruction is correctly cited and is an accurate statement of the legal proposition. | The committee disagrees with the comment that the proposed bench note is confusing. |

# CALCRIM-2020-01 Invitation to Comment
## Revised CALCRIM Instructions
All comments are verbatim unless indicated by an asterisk (*).

| Instruction | Commentator | Comment | Response |
|---|---|---|---|
| 563 | John Philipsborn[*] State Bar 83944 | Given the suggested revisions to this instruction contained at the foot of page 237 of the packet of proposed revisions, I respectfully suggest that the last sentence, which reiterates the requirement of an intent to kill in this type of conspiracy also reiterate the timing element specified in the case law and in (1) of the instruction. Please consider the following revision: "**Conspiracy to commit murder requires an intent to kill and an intent to agree at the time of the agreement**." [This phrasing is supported by the Supreme Court's discussion in *People v. Morante* (1999) 20 Cal.4th 403, 416-17. The proposal made here avoids misunderstandings caused by misleading or incomplete argument on both the elements and timing of the concurrence of intents of the time of the agreement.] | The committee decided not to add the suggested language about timing because it would be redundant. The instruction already sets forth the timing requirements in the elements section. |
| 766 & 767 | John Philipsborn* | CALCRIM Instruction 766 [Death Penalty: Weighing Process] and 767 [Jurors' Responsibility During Deliberation] each are revised significantly. In 766, the revision deletes what had been permissible language to the effect that jurors should "...assume that if they returned a verdict of death, the penalty of death would be carried out." *People v. Kipp* (1998) 18 Cal.4th 349, 377-78. The revisions proposed completely excise this option, notwithstanding the fact that the State Supreme Court's decision in *Kipp*, and that other decisions cited therein, make it clear that this instruction or one that is comparable may be given "if there is a reason to believe the jury may have some concerns or misunderstanding in this regard." *Id.*, at 379.<br><br>The proposed revision also affects the Bench Notes to CALCRIM 766 by deleting mention of *Kipp*. The indication going forward is that trial courts should place reliance on the discussion in *People v. Letner and Tobin* (2010) 50 Cal.4th 99 to offer the only acceptable response about jurors' responsibility during deliberations when questions arise about matters like future changes in law; postconviction litigation; the effect of the moratorium, etc. The revision is flawed for that reason.<br><br>First, the proposed revisions fail to underscore for the trial courts and parties in capital cases the discussion in *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-29, that it is "...constitutionally impermissible to rest a death sentence on a determination made by a | The committee disagrees with this comment. CALCRIM No. 767 incorporates the holding of *Letner and Tobin* and is in accordance with subsequent case law. Concerns about any apparent tension with *Caldwell* must be decided by the courts, not by this committee. Further, the proposed deletion in No. 766 would not prevent a court from giving a *Kipp* instruction upon a defendant's request. |

[*] Certified criminal law specialist; offered response to initial CALCRIM instructions; chair/vice chair of CACJ amicus curiae committee since 1992; author/co-author, CEB Criminal Law/Procedure book 3 chs; California Death Penalty Defense Manual, author/coauthor; extensive homicide trial experience; counsel in more than 30 death eligible cases.

| Instruction | Commentator | Comment | Response |
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| | | sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."<br><br>Second, the revisions ignore the statements by the State Supreme Court in the above-cited *Letner and Tobin* to the effect that: "We must acknowledge that our cases have displayed some inconsistency concerning instructions akin to the following one requested [in this case by the defense]...." *Id*., at 204-05. Part of what had been requested in that case was an instruction that the jurors "...'presume that if a defendant is sentenced to death, he will be executed in the gas chamber.'" *Ibid.*<br><br>A plain reading of the decision in *Letner and Tobin* makes it clear that the instruction now embodied in CALCRIM Revision 767 is language that the State Supreme Court explained as follows: "In the future, if in a particular case the parties and trial court decide that an instruction on this issue would be appropriate, the trial court might instruct the jury as follows: ...[setting forth the language that is now in proposed CALCRIM 767 revision]...." See 50 Cal.4th 99, at 206-07 [emphasis supplied]. The decision makes it clear that the Court was suggesting one possible acceptable approach– not the only acceptable approach.<br><br>The problems being encountered by trial courts, as demonstrated by some current pending litigation that CACJ is involved in, call for allowing trial courts (and parties requesting instructions) the kind of flexibility that is discussed in *Kipp, supra,* and in *Letner and Tobin* in addressing jurors' beliefs, preconceptions, and stated attitudes during jury selection and in avoiding the incursion of specified personal beliefs or allegedly 'informed opinions' about the actual operation of the death penalty at the time that jurors are either on the cusp of penalty deliberations or in those deliberations and questions about whether the legal or factual situation may change in the future. The revisions should recognize that given questions may require a different response than the one embodied in CALCRIM Revision 767 as currently formulated and discussed in the Bench Notes and subsequent appended explanatory material. The *Letner and Tobin* instruction may be insufficient in a given case to ensure compliance with the constitutionally rooted directive, cited above from *Caldwell v. Mississippi, supra*, at 328-29. | |

# CALCRIM-2020-01 Invitation to Comment
## Revised CALCRIM Instructions
All comments are verbatim unless indicated by an asterisk (*).

| Instruction | Commentator | Comment | Response |
|---|---|---|---|
| | | The proposed deletion of the bench notes and possible '*Kipp* Instruction' provided for in current CALCRIM 766, and the absence of further recommendations and discussion of recommended alternatives to merely sticking with the *Letner and Tobin, supra,* language is unwise, and appears to ignore the sorts of issues that trial courts and parties in death penalty cases have been dealing with for a number of years given California's insistence on going forward with death penalty prosecutions. A failure to provide trial courts the encouragement to carefully review the discussion in *Kipp* and *Letner and Tobin* risks further misleading prospective and actual death penalty jurors in future cases, should your current revisions persist as currently indicated. | |
| 766 & 767 | Miles David Jessup, Senior Deputy Public Defender on behalf of the Orange County Public Defender's Office | We believe that the modification of the above referenced jury instructions should improve rather than diminish jurors' appreciation of the gravity of their decision. Our concerns are particularly grave given recent amplification of public perception that death verdicts do not lead to actual executions, and the recent prosecution-backed ballot proposition to expedite and enforce death verdicts. A violation of the defendant's Eighth Amendment rights arises from any juror mindset to the effect that others may second-guess their decision to impose the death penalty because this diminishes the awesome responsibility[1] of the penalty phase jury in a capital case. Courts in California have implicitly assumed that no instruction on this point is warranted unless an explicit juror question or comment manifests to indicate a juror is considering the issue. That assumption is entirely unwarranted in California today.<br><br>The current CALCRIMs 766 and 767 contain one bracketed phrase to directly address this issue, and include use notes to support giving the instruction if requested by the defense. In response to court decisions finding fault in the wording of that admonition, the current proposed revisions would eliminate rather than fix it, leaving only an ambiguous and vaguely implied admonition in CALCRIM 767. | The committee disagrees with this comment, for the reasons stated above: CALCRIM No. 767 incorporates the guiding principle of *Letner and Tobin* and any apparent tension of its holding with *Caldwell* is beyond the scope of the committee's work. |

[1] In *Caldwell v. Mississippi* (1985) 472 U.S. 320, 329-330, the jury was told that if they voted for death, the defendant would not be taken behind the court that day and hanged, but rather he would have an automatic appeal to the state Supreme Court to correct any error. The United States Supreme Court found error in that a core and *constitutionally-necessary* premise of any capital sentencing scheme is "that jurors [are] confronted with the truly awesome responsibility of decreeing death for a fellow human [and they] will act with due regard for the consequences of their decision…" *(Ibid.)* Jurors must not be permitted to treat their potential death decision as anything but actually imposing death on another specific person.

| Instruction | Commentator | Comment | Response |
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| | | The phrase proposed to be cut from CALCRIM 766 is accurate and lawful in effect, but problematic in wording as it imposes an assumption not backed by fact. Rather the phrase should be reworded to accurately label as speculation any prospect that the condemned might escape execution. Further, CALCRIM 767 as currently drafted paraphrases and waters down the already vague actual instruction upon which it is based (*People v. Letner and Tobin* (2010) 50 Cal.4th 99); at a minimum, it should be revised to reflect that original instruction[2] and revised instructions should preserve recognition of a defense demand right.<br><br>***CALDWELL* JURY INSTRUCTIONS: THE POINT**<br>The issues presented by the *Caldwell* case, and by its progeny in California, centers upon the essential acceptance of responsibility by each juror for any decision to kill the defendant, a human being. The defense would assert that the essence of the constitutional violation in *Caldwell* was the imposition of a death verdict by jurors who might not have appreciated the gravity of their decision to put a human being to death: counsel's discussion of appellate review so denigrated the weight of that decision that the entire sentencing process failed. The prosecutor's statements – that any execution would not be immediate and only after an appellate process – was not *itself* the problem; *Caldwell* was not a prosecutorial misconduct case at its core. Rather the *likely effect* of the prosecutor's comments upon the mindset of the jurors was the problem, in particular as the court failed to remedy that issue. In short, the *Caldwell* trial court should have realized the jurors were likely operating under an inappropriate comfort to their psyches, and the court failed to dispossess the jurors of that balm and ensure the jurors really felt the weight of their decision.<br><br>Moreover, rather than relying upon the absolute minimum instruction that might allow a death verdict to avoid reversal on appeal, the goal of these jury instructions should be to engender the jury mindset deemed essential by the Supreme Court in *Caldwell*. Clearly, there would be no error in explicitly impressing upon a death-qualified jury the full weight of their decision. | |

[2] "It is your responsibility to decide which penalty is appropriate in this case. You must base your decision upon the evidence you have heard in court, informed by the instructions I have given you. You must not be influenced by speculation or by any considerations other than those upon which I have instructed you." *Id.* at p. 206

| Instruction | Commentator | Comment | Response |
|---|---|---|---|
| | | Historical court decisions have built upon an increasingly implausible premise that jurors will not feel their responsibility reduced by the rarity of executions actually conducted in California. This premise should be reexamined given increasingly well-publicized actions of judicial and executive authorities to wholesale block executions in California, together with the widespread action of the electorate to weigh in on the issue.<br><br>**I. JURORS ARE AWARE OF POSSIBLE IMPEDIMENTS TO ACTUAL IMPOSITION OF THE DEATH PENALTY IN CALIFORNIA, EVEN IF THOSE IMPEDIMENTS MAY HAVE DISSIPATED**<br>It is entirely implausible to assume that any capital case jury in California would not include several jurors who were entirely aware of California's difficulties in actually executing death row inmates for the last 14 years if not much longer. In 2006, a federal judge recognized serious lapses of reliability in the execution protocol then used in California, and halted executions until those issues could be fixed. In 2016, at least 44% of all California adults (a greater percentage of eligible jurors) voted on ballot Proposition 66, a measure specifically calling out the system's failures to carry out executions. And in 2019, Governor Newsom very publicly *paused* all executions in the State (but did not pardon those prisoners or commute the underlying death verdicts). Every capital jury will now have numerous jurors starting the case believing California's condemned prisoners do not face actual execution.<br><br>Compounding this issue, in *November 2016*, the electorate approved Proposition 66 which entirely changed the process that *until then* had failed to accomplish the killing of condemned prisoners. It is far too early to credibly assess the effectiveness of current efforts to execute those on death row, or prospects to execute new additions to that population. There is no reason to believe the historical progress of death verdicts will be similar to future results.<br><br>**A. Juror Awareness: Judicial Moratorium (2006)**<br>Any resident of California with any awareness of current events will be aware of California's historical difficulties with actually executing the condemned. In February 2006, U.S. District Court Judge Jeremy D. Fogel blocked the execution of convicted murderer Michael Morales in a lawsuit against the lethal injection protocol, finding that | |

| Instruction | Commentator | Comment | Response |
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| | | the procedure was unconstitutional but could be fixed.[3] This decision was a huge media event at the time, resurfacing sporadically into the headlines since then. From at least that time through passage of Proposition 66 in November 2016, the death penalty apparatus in California has been all but non-functional.<br><br>**B. Juror Awareness: Proposition 66 (2016)**<br>On November 8, 2016, nearly 13 million California voters expressed their will in a vote for (6,626,159) or against (6,333,731) then Proposition 66.[4] That total represents 44% of the total state adult population[5] as of 2018. Assuming the entire adult population of California was eligible to serve on juries, the average jury would have at least five jurors who voted on Proposition 66. Using common sense, a death qualified jury might reasonably be expected to include more jurors who voted for that proposition than those who voted against it. If we assume those voting on Proposition 66 had at least a rudimentary understanding of the point of that proposition, they would know that its entire point was fixing a death penalty apparatus previously incapable of actually executing the condemned. Advertising in the fight over 2016's Proposition 66 included significant publication of that issue. The official voter information guide included the following background statement in the Analysis by the Legislative Analyst:<br><br>"***Legal Challenges Can Take a Couple of Decades***. Of the 930 individuals who have received a death sentence since 1978, 15 have been executed, 103 have died prior to being executed, 64 have had their sentences reduced by the courts, and 748 are in state prison with death sentences. The vast majority of the 748 condemned inmates are at various stages of the direct appeal or habeas corpus petition process." | |

[3] https://en.wikipedia.org/wiki/Capital_punishment_in_California.
[4] https://elections.cdn.sos.ca.gov/sov/2016-general/ssov/ballot-measures-summary-by-county.pdf (final page) This 12.96 million voters included 88.7% of those voting in an election with just over 75% turnout of registered voters. (https://en.wikipedia.org/wiki/2016_California_Proposition_66.)
[5] This is based on the total 2018 State population of 38,745,900, including 9,324,800 minors and 29,421,100 adults as estimated by the Kaiser Family Foundation. (https://www.kff.org/other/stateindicator/distribution-by-age/?dataView=1&currentTimeframe=0&selectedRows=%7B%22states%22:%7B%22california%22:%7B%7D%7D%7D&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D.) Note that this percentage likely undercounts Proposition 66 voters, as all voters are eligible to serve as jurors, but the entire adult population number includes non-citizens, state prisoners, and some others ineligible to serve as jurors.

| Instruction | Commentator | Comment | Response |
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| | | (https://web.archive.org/web/20160924131440/http://voterguide.sos.ca.gov/en/propositions/66/analysis.htm [bold and italics in original].)<br><br>Proposition 66 was a measure specifically aimed at speeding up enforcement of death verdicts (with no impact upon life verdicts); the clear argument for this proposition was that virtually no condemned prisoner in California was being executed under the system then in place, and this proposition would remedy that shortcoming.<br><br>**C. Juror Awareness: Governor's Moratorium (2019)**<br>On March 13, 2019, Governor Newsom implemented a well publicized[6] temporary moratorium on enforcement of death penalty in California. There has been no indication that he would commute any death penalty sentence and those facing execution continue to exhaust their appeals and other remedies.<br><br>**D. Changed Circumstances: Proposition 66 (2016)**<br>For a bit less than the last three years, the rules governing what happens to a condemned prisoner have changed, due to this ballot proposition specifically designed to increase prospects for actual execution of death row inmates. As that proposition has only been in effect for a very brief period, there truly is no reliable way to predict what ratio of new death row inmates will be killed by the State.<br><br>**II. WHY EXPLICIT GUIDANCE IS NEEDED IN EVERY CAPITAL CASE IN CALIFORNIA**<br>It is now implausible to suggest that any California capital jury does not need instruction to satisfy Eighth Amendment concerns per *Caldwell v. Mississippi* (1985) 472 U.S. 320. Jurors must be clearly instructed as to the gravity of their decision to | |

[6] For a small sampling of the local, state-wide, industry specific and international/general–interest coverage, see e.g., https://www.npr.org/2019/03/12/702873258/gov-gavin-newsom-suspends-deathpenalty-in-california; https://www.reuters.com/article/us-usa-california-death-penaltyidUSKBN1QU099; https://abcnews.go.com/US/californias-suspension-death-penalty-trendexpert/story?id=61653865; https://www.sfchronicle.com/news/article/Gov-Newsom-orders-halt-to-California-s-death-13683693.php; https://sacramento.cbslocal.com/2019/03/13/gavin-newsom-death-penalty-execution-moratorium/; https://www.mercurynews.com/2019/03/13/newsom-death-penalty-moratorium-reaction/; https://www.desertsun.com/story/news/crime_courts/2020/03/02/death-penaltyquestion-riverside-county-and-gov-newsoms-execution-moratorium-california/2850096001/.

| Instruction | Commentator | Comment | Response |
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| | | impose the taking of the life of the defendant. They must be dispossessed of any notion that their decision to approve a death warrant is something other than the final decision that will kill the defendant.<br><br>The *Caldwell* rule has made clear that minimum constitutional compliance demands that no juror in a death penalty sentencing matter may be allowed to deflect any responsibility for his or her personal decision to authorize the killing of the defendant. In Caldwell, the violation of the Eighth Amendment occurred when the jury was told the truth: that the defendant would not be "strung up" behind the courthouse, but rather the verdict will be entitled to appellate review. This procedural fact conveyed to the Caldwell jury was entirely accurate, but that was not the issue. It watered down the solemnity of each juror's personal vote to take the life of a fellow human being, and that diluted solemnity had eroded a foundational premise of lawful execution in the United States: jurors deciding to impose death must each truly carry that awesome responsibility" on their own. This sense of responsibility adds crucial reliability to the process. The implication that a later process or decision of others might really make the final decision undermined that premise.<br><br>As discussed above, the idea that condemned prisoners in California do not actually get executed is both pervasive and unreliable. Historic neglect of the legal apparatus reviewing death sentences and two temporary moratoria (2006 and 2019) have contributed to an extraordinary run of inaction in the State's execution chamber, and in 2016 a vigorous public debate and high participation rate vote fast tracked the exhaustion of appeals to expedite killing of death row inmates.<br><br>For the last three years, rules governing the review process in death cases have changed, due to this ballot proposition specifically designed to increase rates of actual execution for death row inmates. As that proposition has only been in effect for a very brief period, there is no reliable way to predict what ratio of new death row inmates will be killed by the State.<br><br>While it is unclear if and when California executions will restart, any individual juror would have to be entirely disconnected from California news for well over the last decade to remain unaware of post-verdict developments' likely impact on actual | |

| Instruction | Commentator | Comment | Response |
|---|---|---|---|
| | | enforcement of any death verdict, much more than the *Caldwell* jurors who were simply advised of the truth that their decision would face an appeal. Explicit consideration of commutation (or similar post-sentencing relief) need not materialize to justify a *Caldwell* instruction. (*People v. Beames* (2007) 40 Cal.4th 907.) As discussed above, several jurors on any given capital jury will have read, considered and voted on legislation designed to address the poor enforcement record of California's death penalty over at least the last many years. No doubt, additional jurors will be aware that Governor Newsom halted all executions in California as of 2019 (actually pausing them, without slowing their march toward exhaustion of remedies for the condemned, and without commuting those sentences).<br><br>**PROPOSAL 1: CLEAR AND DIRECT INSTRUCTION**<br>We would propose an unbracketed phrase in CALCRIM 766 (or as a standalone CALCRIM 768) to be provided in every capital case to clearly inform the jury of the actual law and the actual nature of execution by this sovereign. Jurors will be much more likely to approach their capital sentencing task solemnly if instructed:<br><br>**"It is extremely important that every juror take personal responsibility for their own decision and personally confront the truly awesome responsibility of decreeing death for a fellow human being. Similarly, it is extremely important that every juror respect the personal nature of that responsibility [and that no juror seek to impose their will upon the decision of any other juror. If you witness any juror pressure another juror to change their vote, or otherwise seek to undermine a juror's personal decision to vote for or against execution, you should immediately notify the bailiff.]**<br><br>**In the penalty phase of this case, a jury approval of the death penalty is the final requirement to authorize the State of California [to restrain the defendant in a room designed for executions, without the presence of his friends, family or loved ones, and as he lies alone in that room,] to kill the defendant.**<br><br>**Given recent changes in California law, there is no valid reason to assume that any prisoner sentenced to death will not be actually killed by the State in the near future.** | The committee declines to incorporate this suggested instruction because it is contrary to the holding in *Letner and Tobin* and, further, contains optional language that could create more error than it purports to cure. |

| Instruction | Commentator | Comment | Response |
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| | | **Your decision will actually impose a sentence of either *life imprisonment without parole or death by execution*. Any thought or suggestion that your sentence might not be carried out for any reason would be pure speculation. You must not so speculate or allow any such speculation to enter into your deliberations or your decision in any way."**<br><br>Lawful imposition of the death penalty requires a jury that carries the mindset described above. Our jury instructions should proactively convey the responsibility of the jury, the accurate ramifications of their decision, and standards of behavior.<br><br>**PROPOSAL 2 (ALTERNATIVE): REPLACE, NOT DELETE**<br>The Judicial Council's proposal for CALCRIM 766 is short sighted, as it would entirely discard the core clause designed to address *Caldwell* concerns due to a problem of word choice. Jurors cannot lawfully give any thought to any possibility that their death sentence might not be carried out due to events after their sentence (*Caldwell*), yet some courts have found the subject clause was inaccurate and therefore improper because it told jurors to assume said death sentence will be carried out. This is a problem of diction, easily fixed. The Judicial Council should rather replace the problematic phrase with an equivalent but accurate phrase, thereby accurately addressing the current state California's death penalty apparatus, and focusing capital jurors on the awesome responsibility they face. The final paragraph above would go a long way to do just that:<br><br>"Your decision will actually impose a sentence of either life imprisonment without parole or death by execution. Any thought or suggestion that your sentence might not be carried out for any reason would be pure speculation. You must not so speculate or allow any such speculation to enter into your deliberations or your decision in any way."<br><br>**PROPOSAL 3: REVISE 767, RETAIN DEFENSE DEMAND**<br>In the event that some or all of our proposed instruction is not given, CALCRIM 767 should be revised to reflect at least the actual language suggested by the Supreme Court in the case upon which it is based. The current instruction is even more vague than the original wording. Our proposed changes would be: | The committee disagrees with this proposal for the reasons stated earlier.<br><br>The committee disagrees with this proposal. The language crafted in CALCRIM No. 767 incorporates the guiding |

| Instruction | Commentator | Comment | Response |
|---|---|---|---|
| | | **It is your responsibility to decide which penalty is appropriate for the defendant in this case. Base your decision only on the evidence you have heard in court, informed by ~~and on~~ the instructions that I have given you. ~~Do not speculate or consider anything other than the evidence and my instructions~~ You must not be influenced by speculation or by any considerations other than those upon which I have instructed you.**<br>(*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 206.)<br><br>Though taken directly from published authority (as adjusted above), CALCRIM 767 is fatally vague, instructing the jury to consider only the evidence heard and instructions given while avoiding any specific admonition about the elephant in the room. The specific admonition (as discussed above) would be deleted in the Judicial Council's proposed revision of CALCRIM 766.<br><br>These instructions, revised as proposed here, are utterly ineffectual to address the very specific and very serious concerns they purport to address. It is disingenuous to assert that they might sufficiently admonish the jury and effectively counter jurors' natural and impermissible tendency to consider possible barriers to actual imposition of death: commutations, pardons, and the effects of appeals. A critic might fairly examine the Judicial Council's willingness to address the People's concerns much more specifically in much less serious matters[7] and there is no reason to reduce instructions over parameters of death penalty imposition to hints at their bare bones.<br><br>While this proposal may seem just another example of the pervasive prosecution bias | principle in *Letner and Tobin*. The commenter's proposed changes are unnecessary. |

[7] For example, many jury instructions include specific disclaimers to point out that the People do *not* have to prove X, Y or Z; in each instance the *lack of* these elements would be implied in an instruction like CALCRIM 767 to stick to the facts heard and the instruction given. Yet more specific instructions to the benefit of the People are routine. Noted below are *unbracketed* portions of instructions given in every case where the related crime is charged. See e.g., CALCRIMs 820 [Assault causing death of child, "It is not required that he or she intend to break the law, hurt someone else, or gain any advantage"]; 841 [DV battery, "The slightest touching can be enough to commit a battery if it is done in 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."], and 861-863, 875 [Aggravated assaults, "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…" (emphasis added; note that this instruction omits any potential relevance of a scenario where *no injury* occurs); see next footnote].

| Instruction | Commentator | Comment | Response |
|---|---|---|---|
| | | in California jury instructions,[8] it is the core instruction that admonishes jurors to disregard certain improper topic areas when considering imposition of death. This instruction should plainly address the specific issues involved.<br><br>**PROPOSAL 4: RETAIN DEFENSE DEMAND**<br>Perhaps of greater concern is the deletion of use notes language regarding the longstanding recognition that this instruction must be given on request of the defense. The revised instructions would ignore the invidious effect of this issue unless expressly manifested in juror questions or comments. This defense demand concept finds longstanding support in California cases and the reason is obvious: improperly instructing the jury on this issue would only prejudice the defense. That is, this instruction should tell the jury to disregard any speculation that death might not be imposed, and this instruction could only do harm if it actually introduced the topic to a jurors that would not have considered that topic at all. Any improper/unnecessary use of this instruction would only disadvantage the defense. That said, the defense should be permitted to assess the public and reasonably conclude – as argued herein – that no capital jury in today's California will be entirely unaware of and immune to this issue.<br><br>**A *targeted* non-speculation instruction should be given in every capital case where it is requested by the defense.**<br><br>**CONCLUSION**<br>The proposed modification of CALCRIM 766 would cut rather than repair a poorly worded admonition crucial to death penalty sentencing. This proposal would roll back recognition that an admonition on this topic must be given on demand of the defense; that roll back would be unjust and unsupported in law. | The committee disagrees with this proposal. *Letner and Tobin* makes clear that this instructional language is an option "if in a particular case the parties and the trial court decide that an instruction on this issue would be appropriate." 50 Cal.4th 99, 206. |

[8] For example, many negative or otherwise disadvantageous jury instructions are specifically limited to the defendant in a case where they could be equally applicable in general concept to any other witness, albeit with slight adaptations (see, e.g., 357 [adoptive admissions], 361 [failure to explain or deny], 370 [motive], 371 [suppression or fabrication of evidence], 372 [flight]. Also, our jury instructions afford general witnesses more benefit of the doubt than the person facing trial; compare e.g., CALCRIM 362 [Defendant's false or misleading statements as consciousness of guilt] verses CALCRIMs 105, 226 ["Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently."]

| Instruction | Commentator | Comment | Response |
|---|---|---|---|
| | | An updated prophylactic instruction is needed to address *Caldwell* issues. The public carry obvious and widespread perceptions of an ineffectual death penalty system, and this threatens capital defendants' legitimate right to a solemn and thoughtful jury. Aggressive advertising and media coverage have pushed a narrative of low rates of actual execution, and yet voters recently targeted and specifically addressed the root causes of that issue. This perception of low enforcement rates – entirely speculative – lessens the gravity required in capital sentencing decisions under the Eighth Amendment and should be addressed in a clear and direct manner in every capital case. | |
| 766 | Scott B. Garner, president, on behalf of the Orange County Bar Association | Disagree. This instruction removes the bracketed language of Calcrim 766 which states the following: "In making your decision about penalty, you must assume that the penalty you impose, death or life without the possibility of parole, will be carried out."<br><br>It is a mistake to remove this bracketed clause, as this language is in place to ensure that jurors seriously weigh their potential death decision as the truly remarkable responsibility that it is. Jurors' individual beliefs and perceptions about the likelihood of a death sentence being carried out likely varies widely considering the recent passage of Proposition 66 and the various moratoria on the death penalty issued in other states, by federal judges in this state, and by California Governor Gavin Newsom.<br><br>A similar issue was analyzed in the case of *Caldwell v. Mississippi* (1985) 472 U.S. 320, 329-330. In *Caldwell*, the jury was told that if they voted for death, the defendant would not be taken out behind the court that day and hanged but rather that he would have an automatic appeal to the state Supreme Court to correct any error. (*Ibid.*) In finding such comments to be error, the United States Supreme Court held that a constitutionally necessary premise of any capital sentencing scheme is "that jurors [are] confronted with the truly awesome responsibility of decreeing death for a fellow human [and that they] will act with due regard for the consequences of their decision." (*Id.*) | The committee disagrees with this comment, for the reasons stated above. |
| 767 | Scott B. Garner, president, on behalf of the Orange County Bar Association | Agree as Modified.<br>This instruction amends the accompanying use notes to Calcrim 767.<br><br>The amendment removes the portion of the use note which indicates that the court should give this instruction if the defendant requests it. It permits that a defendant may request this instruction be provided to the jurors. | The committee disagrees with this comment for the reasons stated above. |

# CALCRIM-2020-01 Invitation to Comment
## Revised CALCRIM Instructions
All comments are verbatim unless indicated by an asterisk (*).

| Instruction | Commentator | Comment | Response |
|---|---|---|---|
| | | The amendment appropriately indicates the instruction "must" be given in response to a jury question about commutation and removes the requirement that the instruction "only" be used for this purpose. However, the amendment goes too far in that it deletes the provision indicating that the instruction should be given at the request of the defendant and instead gives the court the discretion to give the instruction upon request.<br><br>This instruction is neutral, it is a correct statement of the law, and it focuses jurors on the important aspects of their deliberations. As such, the original language that a court "should" give this instruction on the request of the defendant should remain. | |
| 1071 | Scott B. Garner, president, on behalf of the Orange County Bar Association | Agree as Modified. The amendment to this CALCRIM should include the citation to *Mendoza*, but parties would be better served if the Committee also included a citation to *Fontenot* and Penal Code 1159. Specifically, as *Fontenot* noted, "[a]ttempts may be lesser included offenses of the completed crime – and, at the very least, application of the elements test may not always be straightforward." (*Id.* at p. 70.) | The committee agrees with the suggestion to add *People v. Mendoza* and has made this change to the related issues section. The committee, however, declines to add *People v. Fontenot* and Penal Code, section 1159. |
| 1080 | Scott B. Garner, president, on behalf of the Orange County Bar Association | Agree as Modified. The amendment to this CALCRIM should include the citation to *Mendoza*, but parties would be better served if the Committee also included a citation to *Fontenot* and Penal Code 1159. Specifically, as *Fontenot* noted, "[a]ttempts may be lesser included offenses of the completed crime – and, at the very least, application of the elements test may not always be straightforward." (*Id.* at p. 70.) | The committee disagrees with the suggestion to add *People v. Fontenot* and Penal Code, section 1159 as additional authority. |
| 1950 & 1952 | Scott B. Garner, president, on behalf of the Orange County Bar Association | Agree as Modified. Adds appropriate instructional language pursuant to Penal Code section 490.2(a) (Prop. 47) for jury to determine whether value of access card was more than $950.00 upon a finding of guilt. Under Authority adds case citation to *Romanowski* in support of added instructional language. Citation given for *Romanowski* is incorrect. Correct citation is: *People v. Romanowski* (2017) 2 Cal. 5th 903, 908 [ 215 Cal. Rptr. 3d 758, 391 P.3d 633]. | The committee agrees with this comment and has made the suggested change. |

# CALCRIM Proposed Changes:
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| 982 & 983 | Brandishing Firearm or Deadly Weapon |
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| 1080 | Oral Copulation With Person Under 14 |
| 1124 | Contacting Minor With Intent to Commit Certain Felonies |
| 1128 | Engaging in Oral Copulation or Sexual Penetration With Child |
| 1191B | Evidence of Charged Sex Offense |
| 1201 | Kidnapping |
| 1202 | Kidnapping: For Ransom, Reward, or Extortion |
| 1300 | Criminal Threat |
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| Instruction Number | Instruction Title |
|---|---|
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| 3477 | Presumption that Resident was Reasonably Afraid of Death or GBI |
| (N/A) | Introduction to Felony-Murder Series |

## 105 Witnesses

**You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe.**

**In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are:**

- **How well could the witness see, hear, or otherwise perceive the things about which the witness testified?**
- **How well was the witness able to remember and describe what happened?**
- **What was the witness's behavior while testifying?**
- **Did the witness understand the questions and answer them directly?**
- **Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?**
- **What was the witness's attitude about the case or about testifying?**
- **Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?**
- **How reasonable is the testimony when you consider all the other evidence in the case?**
- **[Did other evidence prove or disprove any fact about which the witness testified?]**
- **[Did the witness admit to being untruthful?]**

- **[What is the witness's character for truthfulness?]**
- **[Has the witness been convicted of a felony?]**
- **[Has the witness engaged in [other] conduct that reflects on his or her believability?]**
- **[Was the witness promised immunity or leniency in exchange for his or her testimony?]**

**Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently.**

**[If the evidence establishes that a witness's character for truthfulness has not been discussed among the people who know him or her, you may conclude from the lack of discussion that the witness's character for truthfulness is good.]**

**[If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject.]**

**[If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest.]**

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*New January 2006; Revised June 2007, April 2008, September 2020*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to instruct on factors relevant to a witness's credibility. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–884 [123 Cal.Rptr. 119, 538 P.2d 247].) Although there is no sua sponte duty to instruct on inconsistencies in testimony or a witness who lies, there is authority approving instruction on both topics. (*Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 426 [175 P.2d 607]; *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107 [55 Cal.Rptr.2d 21].)

The court may strike any of the enumerated impermissible bases for bias that are clearly inapplicable in a given case.

Give all of the bracketed factors that are relevant based on the evidence. (Evid. Code, § 780(e), (i), and (k).)

Give any of the final three bracketed paragraphs if relevant based on the evidence.

## AUTHORITY

- Factors. ▸ Evid. Code, § 780; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–884 [123 Cal.Rptr. 119, 538 P.2d 247].
- Proof of Character For Truthfulness From ~~by Negative~~ Evidence of Lack of Discussion. ▸ *People v. Jimenez* (2016) 246 Cal.App.4th 726, 732 [201 Cal.Rptr.3d 76]; *People v. Adams* (1902) 137 Cal. 580, 582 [70 P. 662].
- Inconsistencies. ▸ *Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 426 [175 P.2d 607].
- Witness Who Lies. ▸ *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107 [55 Cal.Rptr.2d 21]; *People v. Reyes* (1987) 195 Cal.App.3d 957, 965 [240 Cal.Rptr. 752]; *People v. Johnson* (1986) 190 Cal.App.3d 187, 192–194 [237 Cal.Rptr. 479].

## SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 725.

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

## 226 Witnesses

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**You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have.**
**You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe.**

**In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are:**

- **How well could the witness see, hear, or otherwise perceive the things about which the witness testified?**
- **How well was the witness able to remember and describe what happened?**
- **What was the witness's behavior while testifying?**
- **Did the witness understand the questions and answer them directly?**
- **Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?**
- **What was the witness's attitude about the case or about testifying?**
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- **How reasonable is the testimony when you consider all the other evidence in the case?**
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- **[What is the witness's character for truthfulness?]**
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- **[Was the witness promised immunity or leniency in exchange for his or her testimony?]**

**Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently.**

**[If the evidence establishes that a witness's character for truthfulness has not been discussed among the people who know him or her, you may conclude from the lack of discussion that the witness's character for truthfulness is good.]**

**[If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject.]**

**[If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest.]**

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*New January 2006; Revised June 2007, April 2008, September 2020*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to instruct on factors relevant to a witness's credibility. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–884 [123 Cal.Rptr. 119, 538 P.2d 247].) Although there is no sua sponte duty to instruct on inconsistencies in testimony or a witness who lies, there is authority approving instruction on both topics. (*Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 426 [175 P.2d 607]; *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107 [55 Cal.Rptr.2d 21].)

The court may strike any of the enumerated impermissible bases for bias that are clearly inapplicable in a given case.

Give all of the bracketed factors that are relevant based on the evidence. (Evid. Code, § 780(e), (i), and (k).)

Give any of the final three bracketed paragraphs if relevant based on the evidence.

If the court instructs on a prior felony conviction or prior misconduct admitted pursuant to *People v. Wheeler* (1992) 4 Cal.4th 284 [14 Cal.Rptr.2d 418, 841 P.2d 938], the court should consider whether to give CALCRIM No. 316, *Additional Instructions on Witness Credibility—Other Conduct*. (See Bench Notes to that instruction.)

## AUTHORITY

- Factors. ▸ Evid. Code, § 780; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–884 [123 Cal.Rptr. 119, 538 P.2d 247].
- Inconsistencies. ▸ *Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 426 [175 P.2d 607].
- Witness Who Lies. ▸ *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107 [55 Cal.Rptr.2d 21].
- Proof of Character For Truthfulness From ~~by Negative~~ Evidence of Lack of Discussion. ▸ *People v. Jimenez* (2016) 246 Cal.App.4th 726, 732 [201 Cal.Rptr.3d 76]; *People v. Adams* (1902) 137 Cal. 580, 582 [70 P. 662].
- This Instruction Upheld. ▸ *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1187–1188 [67 Cal.Rptr.3d 871].

## SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 725.

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

## 202 Note-Taking and Reading Back of Testimony

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**[You have been given notebooks and may have taken notes during the trial. You may use your notes during deliberations.] Your notes are for your own individual use to help you remember what happened during the trial. Please keep in mind that your notes may be inaccurate or incomplete.**

**If there is a disagreement about the testimony [and stipulations] at trial, you may ask that the (court reporter's record be read to/court's recording be played for) you. It is the record that must guide your deliberations, not your notes. You must accept the (court reporter's record /court's recording) as accurate. Do not ask the court reporter questions during the readback and do not discuss the case in the presence of the court reporter.**

**Please do not remove your notes from the jury room.**

**At the end of the trial, your notes will be (collected and destroyed/collected and retained by the court but not as a part of the case record/_____**<*specify other disposition*>**).**

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*New January 2006; Revised June 2007, April 2008, August 2009, February 2012, March 2019, September 2020*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to instruct the members of the jury that they may take notes. California Rules of Court, Rule 2.1031.

The court may specify its preferred disposition of the notes after trial. No statute or rule of court requires any particular disposition.

## AUTHORITY

- Jurors' Use of Notes. ▸ California Rules of Court, Rule 2.1031.
- Juror Deliberations Must Be Private and Confidential. ▸ *People v. Oliver* (1987) 196 Cal.App.3d 423, 429 [241 Cal.Rptr. 804].

## SECONDARY SOURCES

6 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Judgment, § 21.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.05[1], Ch. 85, *Submission to Jury and Verdict*, § 85.05[2], [3], Ch. 87, *Death Penalty*, §§ 87.20, 87.24 (Matthew Bender).

## 358. Evidence of Defendant's Statements

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

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

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

## BENCH NOTES

***Instructional Duty***

There is no sua sponte duty to give this instruction. *People v. Diaz* (2015) 60 Cal.4th 1176, 1190 [185 Cal.Rptr.3d 431, 345 P.3d 62].Give the bracketed cautionary instruction on request if there is evidence of an incriminating out-of-court oral statement made by the defendant. (*People v. Diaz* (2015) 60 Cal.4th 1176 [185 Cal.Rptr.3d 431, 345 P.3d 62].) In the penalty phase of a capital trial, the bracketed paragraph should be given only if the defense requests it. (*People v. Livaditis* (1992) 2 Cal.4th 759, 784 [9 Cal.Rptr.2d 72, 831 P.2d 297].)

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

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

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

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

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

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

## AUTHORITY

- Instructional Requirements ▸ *People v. Diaz* (2015) 60 Cal.4th 1176 [185 Cal.Rptr.3d 431, 345 P.3d 62]**;** *People v. Livaditis* (1992) 2 Cal.4th 759, 784 [9 Cal.Rptr.2d 72, 831 P.2d 297].
- Custodial Statements by Minors Suspected of Murder ▸ Pen. Code, § 859.5, effective 1/1/2014.

## SECONDARY SOURCES

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

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

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

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

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

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

1. **The defendant reasonably believed that (he/she/ [or] someone else/ [or] _____ <*insert name or description of third party*>) was in imminent danger of being killed or suffering great bodily injury [or was in imminent danger of being (raped/maimed/robbed/ _____ <*insert other forcible and atrocious crime*>)];**

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

**AND**

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

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

**When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.**

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

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

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

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

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

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

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

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

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*New January 2006; Revised February 2012, August 2012, September 2020*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to instruct on self-defense when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rtpr.2d 870, 960 P.2d 1094] [addressing duty to instruct on voluntary

manslaughter as lesser included offense, but also discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [249 Cal.Rptr. 897] [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses].)

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

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

Forcible and atrocious crimes are generally those crimes whose character and manner reasonably create a fear of death or serious bodily harm. (*People v. Ceballos* (1974) 12 Cal.3d 470, 479 [116 Cal.Rptr. 233, 526 P.2d 241].) The following crimes have been deemed forcible and atrocious as a matter of law: murder, mayhem, rape, and robbery. (*Id.* at p. 478.) If the defendant is asserting that he or she was resisting the commission of one of these felonies or another specific felony, the court should include the bracketed language at the end of element 1 and select "raped," "maimed," or "robbed," or insert another appropriate forcible and atrocious crime. In all other cases involving death or great bodily injury, the court should use element 1 without the bracketed language.

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

***Related Instructions***
CALCRIM Nos. 506–511, Justifiable and Excusable Homicides.

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

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

## AUTHORITY

- Justifiable Homicide. ▸ Pen. Code, §§ 197–199.
- Fear. ▸ Pen. Code, § 198.
- Lawful Resistance. ▸ Pen. Code, §§ 692–694.
- Burden of Proof. ▸ Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements. ▸ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Forcible and Atrocious Crimes. ▸ *People v. Ceballos* (1974) 12 Cal.3d 470, 478–479 [116 Cal.Rptr. 233, 526 P.2d 241].
- Imminence. ▸ *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167], overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [56 Cal.Rptr.2d 142].
- No Duty to Retreat. ▸ *People v. Hughes* (1951) 107 Cal.App.2d 487, 493 [237 P.2d 64]; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22 [132 P.2d 51].
- Reasonable Belief. ▸ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1]; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].
- Must Act Under Influence of Fear Alone. ▸ Pen. Code, § 198.
- This Instruction Upheld. ▸ *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1306 [132 Cal.Rptr.3d 248]; *People v. Genovese* (2008) 168 Cal.App.4th 817, 832 [85 Cal.Rptr.3d 664].

## COMMENTARY

Penal Code section 197, subdivision 1 provides that self-defense may be used in response to threats of death or great bodily injury, or to resist the commission of a felony. (Pen. Code, § 197, subd. 1.) However, in *People v. Ceballos* (1974) 12 Cal.3d 470, 477–479 [116 Cal.Rptr. 233, 526 P.2d 241], the court held that although the latter part of section 197 appears to apply when a person resists the commission of any felony, it should be read in light of common law principles that

require the felony to be "some atrocious crime attempted to be committed by force." (*Id.* at p. 478.) This instruction is therefore written to provide that self-defense may be used in response to threats of great bodily injury or death or to resist the commission of forcible and atrocious crimes.

## RELATED ISSUES

### *Imperfect Self-Defense*

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

### *No Defense for Initial Aggressor*

An aggressor whose victim fights back in self-defense may not invoke the doctrine of self-defense against the victim's legally justified acts. (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1 [30 Cal.Rptr.2d 33, 872 P.2d 574].) If the aggressor attempts to break off the fight and communicates this to the victim, but the victim continues to attack, the aggressor may use self-defense against the victim to the same extent as if he or she had not been the initial aggressor. (Pen. Code, § 197, subd. 3; *People v. Trevino* (1988) 200 Cal.App.3d 874, 879 [246 Cal.Rptr. 357]; see CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.) In addition, if the victim responds with a sudden escalation of force, the aggressor may legally defend against the use of force. (*People v. Quach* (2004) 116 Cal.App.4th 294, 301–302 [10 Cal.Rptr.3d 196]; see CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.)

### *Transferred Intent Applies*

"[T]he doctrine of self-defense is available to insulate one from criminal responsibility where his act, justifiably in self-defense, inadvertently results in the

injury of an innocent bystander." (*People v. Mathews* (1979) 91 Cal.App.3d 1018, 1024 [154 Cal.Rptr. 628]; see also *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1357 [37 Cal.Rptr.2d 304].) There is no sua sponte duty to instruct on this principle, although such an instruction must be given on request when substantial evidence supports it. (*People v. Mathews, supra,* 91 Cal.App.3d at p. 1025; see also CALCRIM No. 562, *Transferred Intent*.)

***Definition of "Imminent"***
In *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167], overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [56 Cal.Rptr.2d 142, 921 P.2d 1], the jury requested clarification of the term "imminent." In response, the trial court instructed:

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

*(Ibid.)*

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

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

## SECONDARY SOURCES

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

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

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

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

## 508 Justifiable Homicide: Citizen Arrest (Non-Peace Officer)

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**The defendant is not guilty of (murder/ [or] manslaughter/attempted murder/ [or] attempted voluntary manslaughter) if (he/she) (killed/attempted to kill) someone while trying to arrest him or her for a violent felony. Such (a/an) [attempted] killing is justified, and therefore not unlawful, if:**

1. **The defendant committed the [attempted] killing while lawfully trying to arrest or detain _____** *<insert name of decedent>* **for committing (the crime of _____***<insert forcible and atrocious crime, i.e., felony that threatened death or great bodily injury>*/**_____***<insert crime decedent was suspected of committing, e.g., burglary>***, and that crime threatened the defendant or others with death or great bodily injury);**

2. **_____** *<insert name of decedent>* **actually committed (the crime of _____***<insert forcible and atrocious crime, i.e., felony that threatened death or great bodily injury>*/**_____***<insert crime decedent was suspected of committing, e.g., burglary>* **, and that crime threatened the defendant or others with death or great bodily injury);**

3. **The defendant *had reason to believe* that _____ <***insert name of decedent***> had committed (the crime of _____***<insert forcible and atrocious crime, i.e., felony that threatened death or great bodily injury>*/**_____***<insert crime decedent was suspected of committing, e.g.,* **burglary**> **, and that crime threatened the defendant or others with death or great bodily injury);**

**[4. The defendant *had reason to believe* that _____ <*ins*ert name of decedent> posed a threat of death or great bodily injury, either to the defendant or to others];**

***AND***

5. **The [attempted] killing was necessary to prevent _____*'s* <***insert name of dece*dent**> **escape.**

**A person has *reason to believe* that someone [poses a threat of death or great bodily injury or] committed (the crime of _____***<insert forcible and atrocious crime, i.e., felony that threatened death or great bodily injury>*/**_____***<insert crime decedent was suspected of committing, e.g.,***

*burglary*> **, and that crime threatened the defendant or others with death or great bodily injury) when facts known to the person would persuade someone of reasonable caution to have (that/those) belief[s].**

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

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

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*New January 2006; Revised April 2011, February 2012, September 2020*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to instruct on justifiable homicide when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [addressing sua sponte duty to instruct on self-defense].)

It is unclear whether the defendant must always have probable cause to believe that the victim poses a threat of future harm or if it is sufficient if the defendant knows that the victim committed a forcible and atrocious crime. In *Tennessee v. Garner* (1985) 471 U.S. 1, 3, 11 [105 S.Ct. 1694, 85 L.Ed.2d 1], the Supreme Court held that, under the Fourth Amendment, deadly force may not be used by a law enforcement officer to prevent the escape of an apparently unarmed suspected felon unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. "*Garner* necessarily limits the scope of justification for homicide under section 197, subdivision 4, and other similar statutes from the date of that decision." (*People v. Martin* (1985) 168 Cal.App.3d 1111, 1124 [214 Cal.Rptr. 873].) In a footnote, *Garner*, *supra*, 471 U.S. 1, 16, fn. 15, noted that California law permits a killing in either situation, that is either when the suspect has committed an atrocious crime or when the suspect poses a threat of future harm. (See also *Long Beach Police Officers Assn v. City of Long Beach* (1976) 61 Cal.App.3d 364, 371–375 [132 Cal.Rptr. 348] [also stating the rule as "either" but quoting police regulations, which require that the officer always believe there is a risk of future harm].) The committee has provided both options. See *People v.*

*Ceballos* (1974) 12 Cal.3d 470, 478-479 [116 Cal.Rptr. 233, 526 P.2d 241]. The court should review relevant case law before giving bracketed element 4.

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

***Related Instructions***
CALCRIM No. 507, *Justifiable Homicide: By Public Officer*.

CALCRIM No. 509, *Justifiable Homicide: Non-Peace Officer Preserving the Peace*.

## AUTHORITY

- Justifiable Homicide to Preserve the Peace. ▸ Pen. Code, §§ 197, subd. 4, 199.
- Lawful Resistance to Commission of Offense. ▸ Pen. Code, §§ 692–694.
- Private Persons, Authority to Arrest. ▸ Pen. Code, § 837.
- Burden of Proof. ▸ Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217].
- Felony Must Threaten Death or Great Bodily Injury. ▸ *People v. Piorkowski* (1974) 41 Cal.App.3d 324, 328–329 [115 Cal.Rptr. 830].

## RELATED ISSUES

***Felony Must Actually Be Committed***
A private citizen may use deadly force to apprehend a fleeing felon only if the suspect in fact committed the felony and the person using deadly force had reasonable cause to believe so. (*People v. Lillard* (1912) 18 Cal.App. 343, 345 [123 P. 221].)

***Felony Committed Must Threaten Death or Great Bodily Injury***
Deadly force is permissible to apprehend a felon if "the felony committed is one which threatens death or great bodily injury. . . ." (*People v. Piorkowski* (1974) 41 Cal.App.3d 324, 328–329 [115 Cal.Rptr. 830]).

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, §§ 90–96

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.15[1], [3] (Matthew Bender).

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

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

## 511 Excusable Homicide: Accident in the Heat of Passion

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**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).**

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*New January 2006; Revised April 2011, September 2019, September 2020*

## 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].)

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

***Related Instructions***

CALCRIM No. 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 (4th ed. 2012) Defenses, § 274.

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 230.

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).

## 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).]**

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*New January 2006; Revised August 2009, February 2013, September 2019, September 2020*

## BENCH NOTES

***Instructional Duty***
The court has a **sua sponte** duty to give 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].)

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

## AUTHORITY

- 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 (4th ed. 2012) Crimes Against the Person, § 186.

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).

## 525 Second Degree Murder: Discharge From Motor Vehicle (Pen. Code, § 190(d))

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**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 the murder was committed by shooting a firearm from a motor vehicle.**

**To prove this allegation, the People must prove that:**

1. **(The defendant/_____** *<insert name or description of principal if not defendant>***) killed a person by shooting a firearm from a motor vehicle;**

2. **(The defendant/_____** *<insert name or description of principal if not defendant>***) intentionally shot at a person who was outside the vehicle;**

**AND**

3. **When (the defendant/_____** *<insert name or description of principal if not defendant>***) shot a firearm, (the defendant/_____** *<insert name or description of principal if not defendant>***) intended to inflict great bodily injury on the person outside the vehicle.**

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

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

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

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

**[The People must prove that the defendant intended that the person shot at suffer great bodily injury when (he/she/_____ <*insert name or description of principal if not defendant*>) shot from the vehicle. However, the People do not have to prove that the defendant intended to injure the specific person who was actually killed.]**

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

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*New January 2006; Revised September 2020*

## BENCH NOTES

***Instructional Duty***

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

The statute does not specify whether the defendant must personally intend to inflict great bodily injury or whether accomplice liability may be based on a principal who intended to inflict great bodily injury even if the defendant did not. The instruction has been drafted to provide the court with both alternatives in element 3.

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 that begins with "The People must prove that the defendant intended," if the evidence shows that the person killed was not the person the defendant intended to harm when shooting from the vehicle. (*People v. Sanchez* (2001) 26 Cal.4th 834, 851, fn. 10 [111 Cal.Rptr.2d 129, 29 P.3d 209].)

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

## AUTHORITY

- Second Degree Murder, Discharge From Vehicle. ▸ Pen. Code, § 190(d).

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 186.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[1][a], [2][a][vii], [4][c] (Matthew Bender).

## 526–539. Reserved for Future Use

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

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

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

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

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

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

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

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

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

**AND**

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

**[OR]**

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

**AND**

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

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

**AND**

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

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

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

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

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

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

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

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

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

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

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

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

**[●** _____**<***insert any other relevant factors***>]]**

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

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

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

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

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

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

## BENCH NOTES

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

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

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

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

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

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

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

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

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

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

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

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

If the prosecutor is proceeding under both malice and felony-murder theories, or is proceeding under multiple felony-murder theories, give CALCRIM No. 548, *Murder: Alternative Theories*. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (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].

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

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

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

***Related Instructions—Other Causes of Death***

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

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

If the evidence indicates that someone other than the defendant or a coparticipant committed the fatal act, then the crime is not felony murder. (*People v. Washington* (1965) 62 Cal.2d 777, 782–783 [44 Cal.Rptr. 442, 402 P.2d 130]; *People v. Caldwell* (1984) 36 Cal.3d 210, 216 [203 Cal.Rptr. 433, 681 P.2d 274]; see also *People v. Gardner* (1995) 37 Cal.App.4th 473, 477 [43 Cal.Rptr.2d 603].)

Liability may be imposed, however, under the provocative act doctrine. (*Pizano v. Superior Court of Tulare County* (1978) 21 Cal.3d 128, 134 [145 Cal.Rptr. 524, 577 P.2d 659]; see CALCRIM No. 560, *Homicide: Provocative Act by Defendant*.)

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

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

## AUTHORITY

- Felony Murder: First Degree. ▸ Pen. Code, § 189.
- Specific Intent to Commit Felony Required. ▸ *People v. Gutierrez (*2002) 28 Cal.4th 1083, 1140 [124 Cal.Rptr.2d 373, 52 P.3d 572].
- Infliction of Fatal Injury. ▸ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Defendant Must Join Felonious Enterprise Before or During Killing of Victim. ▸ *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].
- Logical Nexus Between Felony and Killing. ▸ *People v. Dominguez* (2006) 39 Cal.4th 1141]; *People v. Cavitt* (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. Banks* (2015) 61 Cal.4th 788, 807-811 [189 Cal.Rptr.3d 208, 351 P.3d 330]; *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.]~~

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).

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

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

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

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

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

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

**AND**

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

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

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

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

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

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

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

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

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

**[Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the crime is not a member of the conspiracy.]**

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

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

## BENCH NOTES

***Instructional Duty***

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

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

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

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

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

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

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

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

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

***Defenses—Instructional Duty***

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

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

***Related Instructions***
CALCRIM No. 415, *Conspiracy*.
CALCRIM No. 520, *Murder With Malice Aforethought*.
CALCRIM No. 521, *First Degree Murder*

## AUTHORITY

- Elements. ▸ Pen. Code, §§ 182(a), 183; *People v. Morante* (1999) 20 Cal.4th 403, 416 [84 Cal.Rptr.2d 665, 975 P.2d 1071]; *People v. Swain* (1996) 12 Cal.4th 593, 600 [49 Cal.Rptr.2d 390, 909 P.2d 994]; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1128 [54 Cal.Rptr.2d 578].
- Overt Act Defined. ▸ Pen. Code, § 184; *People v. Saugstad* (1962) 203 Cal.App.2d 536, 549–550 [21 Cal.Rptr. 740]; *People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8 [134 Cal.Rptr. 784, 557 P.2d 75].
- Elements of Underlying Offense. ▸ *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608]; *People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239 [77 Cal.Rptr.2d 733, 960 P.2d 537].
- Express Malice Murder. ▸ *People v. Swain* (1996) 12 Cal.4th 593, 602-603, 607 [49 Cal.Rptr.2d 390, 909 P.2d 994].
- Premeditated First Degree Murder. ▸ *People v. Cortez* (1998) 18 Cal.4th 1223, 1232 [77 Cal.Rptr.2d 733, 960 P.2d 537].
- ~~Two Specific Intents for Conspiracy. ▸ *People v. Miller* (1996) 46 Cal.App.4th 412, 423–426 [53 Cal.Rptr.2d 773], disapproved by *People v. Cortez* (1998) 18 Cal.4th 1223 [77 Cal.Rptr.2d 733, 960 P.2d 537] to the extent it suggests instructions on premeditation and deliberation must be given in every conspiracy to murder case .~~
- Unanimity on Specific Overt Act Not Required. ▸ *People v. Russo* (2001) 25 Cal.4th 1124, 1133–1135 [108 Cal.Rptr.2d 436, 25 P.3d 641].
- No Conspiracy to Commit Second Degree Murder. ▸ *People v. Beck and Cruz* (2019) 8 Cal.5th 548, 641 [256 Cal.Rptr.3d 1, 453 P.3d 1038].)

## COMMENTARY

It is sufficient to refer to coconspirators in the accusatory pleading as "persons unknown." (*People v. Sacramento Butchers' Protective Association* (1910) 12 Cal.App. 471, 483 [107 P. 712]; *People v. Roy* (1967) 251 Cal.App.2d 459, 463 [59 Cal.Rptr. 636]; see 1 Witkin & Epstein, California Criminal Law (4th~~3d~~ ed. 2012~~00~~) Elements, § 82.) Nevertheless, this instruction assumes the prosecution has named at least two members of the alleged conspiracy, whether charged or not.

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

## LESSER INCLUDED OFFENSES

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

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

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

## RELATED ISSUES

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

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

## SECONDARY SOURCES

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

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

## 564–569. Reserved for Future Use

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

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

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

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

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

   **AND**

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

   **BUT**

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

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

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

<*The following definition may be given if requested*>
**[A danger is *imminent* if, when the fatal wound occurred, the danger actually existed or the defendant believed it existed. The danger must seem immediate**

**and present, so that it must be instantly dealt with. It may not be merely prospective or in the near future.]**

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

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

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

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

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

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

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

## BENCH NOTES

***Instructional Duty***

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

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

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than

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

***Related Instructions***

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

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

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

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

## AUTHORITY

- Elements. ▸ Pen. Code, § 192(a).
- Imperfect Self-Defense Defined. ▸ *People v. Flannel* (1979) 25 Cal.3d 668, 680–683 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531]; *In re Christian S.* (1994) 7 Cal.4th 768, 773 [30 Cal.Rptr.2d 33, 872 P.2d 574]; see *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197–198 [272 Cal.Rptr. 693] [insufficient evidence to support defense of another person].
- Imperfect Defense of Others. ▸ *People v. Randle* (2005) 35 Cal.4th 987, 995-1000 [28 Cal.Rptr.3d 725, 111 P.3d 987], overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172 [91 Cal.Rptr.3d 106, 203 P.3d 425].
- Imperfect Self-Defense May be Available When Defendant Set in Motion Chain of Events Leading to Victim's Attack, but Not When Victim was Legally Justified in Resorting to Self-Defense. ▸ *People v. Enraca* (2012) 53 Cal.4th 735, 761 [137 Cal.Rptr.3d 117, 269 P.3d 543]; *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179–1180 [39 Cal.Rptr.3d 433].
- Imperfect Self-Defense Does Not Apply When Defendant's Belief in Need for Self-Defense is Entirely Delusional. ▸ *People v. Elmore* (2014) 59 Cal.4th 121, 145 [172 Cal.Rptr.3d 413, 325 P.3d 951].
- This Instruction Upheld. ▸ *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1306 [132 Cal.Rptr.3d 248]; *People v. Genovese* (2008) 168 Cal.App.4th 817, 832 [85 Cal.Rptr.3d 664].

- Defendant Relying on Imperfect Self-Defense Must Actually, Although Not Reasonably, Associate Threat With Victim. ▸ *People v. Minifie* (1996) 13 Cal.4th 1055, 1069 [56 Cal.Rptr.2d 133, 920 P.2d 1337] [in dicta].

## LESSER INCLUDED OFFENSES

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

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

## RELATED ISSUES

***Battered Woman's Syndrome***

Evidence relating to battered woman's syndrome may be considered by the jury when deciding if the defendant actually feared the batterer and if that fear was reasonable. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082–1089 [56 Cal.Rptr.2d 142, 921 P.2d 1].)

**Blakeley *Not Retroactive***

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

***Inapplicable to Felony Murder***

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

***Fetus***
Manslaughter does not apply to the death of a fetus. (*People v. Carlson* (1974) 37 Cal.App.3d 349, 355 [112 Cal.Rptr. 321].) While the Legislature has included the killing of a fetus, as well as a human being, within the definition of murder under Penal Code section 187, it has "left untouched the provisions of section 192, defining manslaughter [as] the 'unlawful killing of a human being.'" (*Ibid*.)

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

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

## SECONDARY SOURCES

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

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

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

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

## 580 Involuntary Manslaughter: Lesser Included Offense (Pen. Code, § 192(b))

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**When a person commits an unlawful killing but does not intend to kill and does not act with conscious disregard for human life, then the crime is involuntary manslaughter.**

**The difference between other homicide offenses and involuntary manslaughter depends on whether the person was aware of the risk to life that his or her actions created and consciously disregarded that risk. An unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life of another, and done in conscious disregard of that risk, is voluntary manslaughter or murder. An unlawful killing resulting from a willful act committed without intent to kill and without conscious disregard of the risk to human life is involuntary manslaughter.**

**The defendant committed involuntary manslaughter if:**

1. **The defendant committed (a crime/ [or] a lawful act in an unlawful manner);**
2. **The defendant committed the (crime/ [or] act) with criminal negligence;**

**AND**

3. **The defendant's acts unlawfully caused the death of another person.**

**[The People allege that the defendant committed the following crime[s]: _____** *<insert misdemeanor[s]/infraction[s])/noninherently dangerous (felony/felonies)>***.**

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

**[The People [also] allege that the defendant committed the following lawful act[s] with criminal negligence: _____** *<insert act[s] alleged>***.]**

***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 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 criminal 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.**

**[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.]**

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

**[The People allege that the defendant committed the following (crime[s]/ [and] lawful act[s] with criminal negligence): _____** *<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 acts and you all agree that the same act or acts were proved.]**

**In order to prove murder or voluntary manslaughter, the People have the burden of proving beyond a reasonable doubt that the defendant acted with intent to kill or with conscious disregard for human life. If the People have not met either of these burdens, you must find the defendant not guilty of murder and not guilty of voluntary manslaughter.**

*New January 2006; Revised April 2011, February 2013, September 2018, September 2020*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to instruct on involuntary manslaughter as a lesser included offense of murder when there is sufficient evidence that the defendant lacked malice. (*People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465–1467 [280 Cal.Rptr. 609], overruled in part in *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675].)

When instructing on involuntary manslaughter as a lesser offense, the court has a **sua sponte** duty to instruct on both theories of involuntary manslaughter (misdemeanor/infraction/noninherently dangerous felony and lawful act committed without due caution and circumspection) if both theories are supported by the evidence. (*People v. Lee* (1999) 20 Cal.4th 47, 61 [82 Cal.Rptr.2d 625, 971 P.2d 1001].) In element 2, instruct on either or both of theories of involuntary manslaughter as appropriate.

The court has a **sua sponte** duty to specify the predicate misdemeanor, infraction or noninherently dangerous felony 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]; *People v. Burroughs* (1984) 35 Cal.3d 824, 835 [201 Cal.Rptr. 319, 678 P.2d 894], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451].)

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].) See also CALCRIM No. 620, *Causation: Special Issues*.

In cases involving vehicular manslaughter (Pen. Code, § 192(c)), there is a split in authority on 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], 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].) A unanimity instruction is included in a bracketed paragraph, should the court determine that such an instruction is appropriate.

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

## AUTHORITY

- Involuntary Manslaughter Defined. ▸ Pen. Code, § 192(b).
- Due Caution and Circumspection. ▸ *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].
- Criminal Negligence Requirement; This Instruction Upheld. ▸ *People v. Butler* (2010) 187 Cal.App.4th 998, 1014 [114 Cal.Rptr.3d 696].
- Unlawful Act Not Amounting to a Felony. ▸ *People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].
- Unlawful Act Must Be 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]; *People v. Cox* (2000) 23 Cal.4th 665, 674 [97 Cal.Rptr.2d 647, 2 P.3d 1189].
- Proximate Cause. ▸ *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Lack of Due Caution and Circumspection Contrasted With Conscious Disregard of Life. ▸ *People v. Watson* (1981) 30 Cal.3d 290, 296–297 [179 Cal.Rptr. 43, 637 P.2d 279]; *People v. Evers* (1992) 10 Cal.App.4th 588, 596 [12 Cal.Rptr.2d 637].
- Inherently Dangerous Assaultive Felonies ▸ *People v. Bryant* (2013) 56 Cal.4th 959, 964 [157 Cal.Rptr.3d 522, 301 P.3d 1136]; *People v. Brothers* (2015) 236 Cal.App.4th 24, 33-34 [186 Cal.Rptr.3d 98].

## LESSER INCLUDED OFFENSES

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

There is no crime of attempted involuntary manslaughter. (*People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332 [59 Cal.Rptr.2d 798]; *People v. Broussard* (1977) 76 Cal.App.3d 193, 197 [142 Cal.Rptr. 664].)

Aggravated assault is not a lesser included offense of involuntary manslaughter. (*People v. Murray* (2008) 167 Cal.App.4th 1133, 1140 [84 Cal.Rptr.3d 676].)

## RELATED ISSUES

***Imperfect Self-Defense and Involuntary Manslaughter***

Imperfect self-defense is a "mitigating circumstance" that "reduce[s] an intentional, unlawful killing from murder to voluntary manslaughter by *negating the element of malice* that otherwise inheres in such a homicide." (*People v. Rios* (2000) 23 Cal.4th 450, 461 [97 Cal.Rptr.2d 512, 2 P.3d 1066] [citations omitted, emphasis in original].) However, evidence of imperfect self-defense may support a finding of *involuntary* manslaughter, where the evidence demonstrates *the absence of* (as opposed to *the negation of*) the elements of malice. (*People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675] [discussing dissenting opinion of Mosk, J.].) Nevertheless, a court should not instruct on involuntary manslaughter unless there is evidence supporting the statutory elements of that crime.

See also the Related Issues section to CALCRIM No. 581, *Involuntary Manslaughter: Murder Not Charged*.

## SECONDARY SOURCES

4 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 246–260.

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,* §§ 140.02[4], 140.04, Ch. 142, *Crimes Against the Person,* §§ 142.01[3][d.1], [e], 142.02[1][a], [b], [e], [f], [2][b], [3][c] (Matthew Bender).

## 581 Involuntary Manslaughter: Murder Not Charged (Pen. Code, § 192(b))

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**The defendant is charged [in Count ____] with involuntary manslaughter [in violation of Penal Code section 192(b)].**

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

1. **The defendant committed (a crime/ [or] a lawful act in an unlawful manner);**
2. **The defendant committed the (crime/ [or] act) with criminal negligence;**

**AND**

3. **The defendant's acts caused the death of another person.**

**[The People allege that the defendant committed the following crime[s]:** _____ *<insert misdemeanor[s]/infraction[s])/noninherently dangerous (felony/felonies)>***.**

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

**[The People [also] allege that the defendant committed the following lawful act[s] with criminal negligence:** _____ *<insert act[s] alleged>***.]**

***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 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 criminal 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.**

**[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.]**

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

**[The People allege that the defendant committed the following (crime[s]/ [and] lawful act[s] with criminal negligence): _____** *<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 acts and you all agree on which act (he/she) committed.]**

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*New January 2006; Revised April 2011, September 2020*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to instruct on the elements of the offense.

The court has a **sua sponte** duty to instruct on both theories of involuntary manslaughter (misdemeanor/infraction/noninherently dangerous felony and lawful act committed without due caution and circumspection) if both theories are supported by the evidence. (*People v. Lee* (1999) 20 Cal.4th 47, 61 [82 Cal.Rptr.2d 625, 971 P.2d 1001].) In element 1, instruct on either or both theories of involuntary manslaughter as appropriate.

The court has a **sua sponte** duty to specify the predicate misdemeanor, infraction or noninherently dangerous felony 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]; *People v. Burroughs* (1984) 35 Cal.3d 824, 835 [201 Cal.Rptr. 319, 678 P.2d 894], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675].)

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].)

In cases involving vehicular manslaughter (Pen. Code, § 192(c)), there is a split in authority on 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], 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].) A unanimity instruction is included in a bracketed paragraph for the court to use at its discretion.

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

## AUTHORITY

- Involuntary Manslaughter Defined. ▸ Pen. Code, § 192(b).
- Due Caution and Circumspection. ▸ *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].
- Unlawful Act Not Amounting to a Felony. ▸ *People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].

- Criminal Negligence Requirement ‣ *People v. Butler* (2010) 187 Cal.App.4th 998, 1014 [114 Cal.Rptr.3d 696].
- Unlawful Act Must Be 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]; *People v. Cox* (2000) 23 Cal.4th 665, 674 [97 Cal.Rptr.2d 647, 2 P.3d 1189].
- Proximate Cause. ‣ *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Lack of Due Caution and Circumspection Contrasted With Conscious Disregard of Life. ‣ *People v. Watson* (1981) 30 Cal.3d 290, 296–297 [179 Cal.Rptr. 43, 637 P.2d 279]; *People v. Evers* (1992) 10 Cal.App.4th 588, 596 [12 Cal.Rptr.2d 637].

## LESSER INCLUDED OFFENSES

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

Aggravated assault is not a lesser included offense of involuntary manslaughter. (*People v. Murray* (2008) 167 Cal.App.4th 1133, 1140 [84 Cal.Rptr.3d 676].)

## RELATED ISSUES

***Due Caution and Circumspection***

"The words lack of 'due caution and circumspection' have been heretofore held to be the equivalent of 'criminal negligence.' " (*People v. Penny* (1955) 44 Cal.2d 861, 879[285 P.2d 926].)

***Felonies as Predicate "Unlawful Act"***

"[T]he only logically permissible construction of section 192 is that an unintentional homicide committed in the course of a noninherently dangerous felony may properly support a conviction of involuntary manslaughter, if that felony is committed without due caution and circumspection." (*People v. Burroughs* (1984) 35 Cal.3d 824, 835 [201 Cal.Rptr. 319, 678 P.2d 894], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675] [practicing medicine without a license cannot be predicate offense for second degree murder because not inherently dangerous but can be for involuntary manslaughter even though Penal Code section 192 specifies

an "unlawful act, not amounting to a felony"].)

***No Inherently Dangerous Requirement for Predicate Misdemeanor/Infraction***
"[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].)

***Fetus***
Manslaughter does not apply to the death of a fetus. (*People v. Carlson* (1974) 37 Cal.App.3d 349, 355 [112 Cal.Rptr. 321].) While the Legislature has included the killing of a fetus, as well as a human being, within the definition of murder under Penal Code section 187, it has "left untouched the provisions of section 192, defining manslaughter [as] the 'unlawful killing of a human being.'" (*Ibid*.)

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 225, 246–260.

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,* §§ 140.02[4], 140.04, Ch. 142, *Crimes Against the Person,* § 142.02[1][a], [b], [e], [f], [2][b], [3][c] (Matthew Bender).

## 582 Involuntary Manslaughter: Failure to Perform Legal Duty—Murder Not Charged (Pen. Code, § 192(b))

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**The defendant is charged [in Count ____] with involuntary manslaughter [in violation of Penal Code section 192(b)] based on failure to perform a legal duty.**

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

1. **The defendant had a legal duty to _____** *<insert name of decedent>***;**

2. **The defendant failed to perform that legal duty;**

3. **The defendant's failure was criminally negligent;**

   **AND**

4. **The defendant's failure caused the death of _____** *<insert name of decedent>***.**

**(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, not name>***.**

***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 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 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.**

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

**[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.]**

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*New January 2006; Revised September 2020*

## BENCH NOTES

***Instructional Duty***

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

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

***Legal Duty***

The existence of a legal duty is a matter of law to be decided by the judge. (*Kentucky Fried Chicken v. Superior Court* (1997) 14 Cal.4th 814, 819 [59 Cal.Rtpr.2d 756, 927 P.2d 1260]; *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 124 [211 Cal.Rptr. 356, 695 P.2d 653].) The court should instruct the jury if a legal duty exists. (See *People v. Burden* (1977) 72 Cal.App.3d 603, 614 [140 Cal.Rptr. 282] [proper instruction that parent has legal duty to furnish necessary clothing, food, and medical attention for his or her minor child].) In the

instruction on legal duty, the court should use generic terms to describe the relationship and duty owed. For example:

> A parent has a legal duty to care for a child.
>
> A paid caretaker has a legal duty to care for the person he or she was hired to care for.
>
> A person who has assumed responsibility for another person has a legal duty to care for that other person.

The court should not state "the defendant had a legal duty to the decedent." (See *People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135] [correct to state "a Garden Grove Regular Police Officer [is a] peace officer"; would be error to state "Officer Reed was a peace officer"].)

However, in a small number of cases where the legal duty to act is based on the defendant having created or increased risk to the victim, the existence of the legal duty may depend on facts in dispute. (See *People v. Oliver* (1989) 210 Cal.App.3d 138, 149 [258 Cal.Rptr. 138].) If there is a conflict in testimony over the facts necessary to establish that the defendant owed a legal duty to the victim, then the issue must be submitted to the jury. In such cases, the court should insert a section similar to the following:

> **The People must prove that the defendant had a legal duty to (help/rescue/warn/**_____ *<insert other required action[s]>***)** _____ *<insert name of decedent>***.**
>
> **In order to prove that the defendant had this legal duty, the People must prove that the defendant** _____ *<insert facts that establish legal duty>***.**
>
> **If you decide that the People have proved that the defendant** _____ *<insert facts that establish legal duty>***, then the defendant had a legal duty to (help/rescue/warn/**_____ *<insert other required action[s]>***)** _____ *<insert name of decedent>***.**
>
> **If you have a reasonable doubt whether the defendant** _____ *<insert facts that establish legal duty>***, then you must find (him/her) not guilty.**

## AUTHORITY

- Elements. ▸ Pen. Code, § 192(b); *People v. Oliver* (1989) 210 Cal.App.3d 138, 146 [258 Cal.Rptr. 138].
- Criminal 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].
- Legal Duty. ▸ *People v. Heitzman* (1994) 9 Cal.4th 189, 198–199 [37 Cal.Rptr.2d 236, 886 P.2d 1229]; *People v. Oliver* (1989) 210 Cal.App.3d 138, 149 [258 Cal.Rptr. 138].
- Causation. ▸ *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274].

## LESSER INCLUDED OFFENSES

Aggravated assault is not a lesser included offense of involuntary manslaughter. (*People v. Murray* (2008) 167 Cal.App.4th 1133, 1140 [84 Cal.Rptr.3d 676].)

## RELATED ISSUES

***Legal Duty to Aid***

In *People v. Oliver* (1989) 210 Cal.App.3d 138, 147 [258 Cal.Rptr. 138], the court explained the requirement of a legal duty to act as follows:

> A necessary element of negligence, whether criminal or civil, is a duty owed to the person injured and a breach of that duty. . . . Generally, one has no legal duty to rescue or render aid to another in peril, even if the other is in danger of losing his or her life, absent a special relationship which gives rise to such duty. . . . In California civil cases, courts have found a special relationship giving rise to an affirmative duty to act where some act or omission on the part of the defendant either created or increased the risk of injury to the plaintiff, or created a dependency relationship inducing reliance or preventing assistance from others. . . . Where, however, the defendant took no affirmative action which contributed to, increased, or changed the risk which would otherwise have existed, and did not voluntarily assume any responsibility to protect the person or induce a false sense of security, courts have refused to find a special relationship giving rise to a duty to act.

***Duty Based on Dependency/Voluntary Assumption of Responsibility***
A legal duty to act exists when the defendant is a caretaker or has voluntarily assumed responsibility for the victim. (*Walker v. Superior Court* (1988) 47 Cal.3d 112,134–138 [253 Cal.Rptr. 1, 763 P.2d 852] [parent to child]; *People v. Montecino* (1944) 66 Cal.App.2d 85, 100 [152 P.2d 5] [contracted caretaker to dependent].)

***Duty Based on Conduct Creating or Increasing Risk***
A legal duty to act may also exist where the defendant's behavior created or substantially increased the risk of harm to the victim, either by creating the dangerous situation or by preventing others from rendering aid. (*People v. Oliver* (1989) 210 Cal.App.3d 138, 147–148 [258 Cal.Rptr. 138] [defendant had duty to act where she drove victim to her home knowing he was drunk, knowingly allowed him to use her bathroom to ingest additional drugs, and watched him collapse on the floor]; *Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, 456 [30 Cal.Rptr. 2d 681] [defendant had duty to prevent horses from running onto adjacent freeway creating risk].)

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 258–260.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* §§ 140.03, 140.04, Ch. 142, *Crimes Against the Person,* § 142.02[2][b] (Matthew Bender).

## 583–589. Reserved for Future Use

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

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**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/drove while having a blood alcohol level of 0.05 or higher 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]>***.]**

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*New January 2006; Revised June 2007, September 2020*

## 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.)

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than

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

## AUTHORITY

- Gross Vehicular Manslaughter 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); *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 (4th ed. 2012) Crimes Against the Person, §§ 263–272.

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).

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

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

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

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

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

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

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

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

**AND**

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

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

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

**AND**

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

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

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

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

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

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

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

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

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

**[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant committed at least one alleged**

**(misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) and you all agree on which (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) the defendant committed.]**

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

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

## BENCH NOTES

***Instructional Duty***

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

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

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

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but

preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, harmless error if was required].) A unanimity instruction is included in a bracketed paragraph for the court to use at its discretion.

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

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

## AUTHORITY

- Gross Vehicular Manslaughter. ▸ Pen. Code, § 192(c)(1).
- Gross Vehicular Manslaughter During Operation of a Vessel. ▸ Pen. Code, § 192.5(a).
- Unlawful Act Dangerous Under the Circumstances of Its Commission. ▸ *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374].
- Specifying Predicate Unlawful Act. ▸ *People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688].
- Elements of 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. Bennett* (1992) 54 Cal.3d 1032, 1036 [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].

## LESSER INCLUDED OFFENSES

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

## RELATED ISSUES

***Predicate Act Need Not Be Inherently Dangerous***

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

***Lawful Act in an Unlawful Manner: Negligence***

The statute uses the phrase "lawful act which might produce death, in an unlawful manner." (Pen. Code, § 192(c)(1).) "[C]ommitting a lawful act in an unlawful manner simply means to commit a lawful act with negligence, that is, without reasonable caution and care." (*People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].) Because the instruction lists the negligence requirement as element 3, the phrase "in an unlawful manner" is omitted from element 2 as repetitive.

## SECONDARY SOURCES

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

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

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

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

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

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

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

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

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

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

**AND**

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

**BUT**

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

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

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

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

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

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

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

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

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

## BENCH NOTES

***Instructional Duty***

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

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

***Perfect Self-Defense***

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

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

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

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

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

## AUTHORITY

- Attempt Defined. ▸ Pen. Code, §§ 21a, 664.
- Manslaughter Defined. ▸ Pen. Code, § 192.
- Attempted Voluntary Manslaughter. ▸ *People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824–825 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].

- Imperfect Self-Defense Defined. ▸ *People v. Flannel* (1979) 25 Cal.3d 668, 680–683 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531]; *In re Christian S.* (1994) 7 Cal.4th 768, 773 [30 Cal.Rptr.2d 33, 872 P.2d 574]; see *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197–198 [272 Cal.Rptr. 693] [insufficient evidence to support defense of another person].
- This Instruction Upheld. ▸ *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1307 [132 Cal.Rptr.3d 248].

## RELATED ISSUES

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

## SECONDARY SOURCES

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

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

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

**605–619. Reserved for Future Use**

## 766 Death Penalty: Weighing Process

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**You have sole responsibility to decide which penalty (the/each) defendant will receive.**

**You must consider the arguments of counsel and all the evidence presented [during (both/all) phases of the trial] [except for the items of evidence I specifically instructed you not to consider].**

**In reaching your decision, you must consider, take into account, and be guided by the aggravating and mitigating circumstances. Each of you is free to assign whatever moral or sympathetic value you find appropriate to each individual factor and to all of them together. Do not simply count the number of aggravating and mitigating factors and decide based on the higher number alone. Consider the relative or combined weight of the factors and evaluate them in terms of their relative convincing force on the question of punishment.**

**Each of you must decide for yourself whether aggravating or mitigating factors exist. You do not all need to agree whether such factors exist. If any juror individually concludes that a factor exists, that juror may give the factor whatever weight he or she believes is appropriate.**

**Determine which penalty is appropriate and justified by considering all the evidence and the totality of any aggravating and mitigating circumstances. Even without mitigating circumstances, you may decide that the aggravating circumstances are not substantial enough to warrant death. To return a judgment of death, each of you must be persuaded that the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.**

~~**[In making your decision about penalty, you must assume that the penalty you impose, death or life without the possibility of parole, will be carried out.]**~~

**To return a verdict of either death or life without the possibility of parole, all 12 of you must agree on that verdict.**

**[You must separately consider which sentence to impose on each defendant. If you cannot agree on the sentence[s] for one [or more] defendant[s] but you do**

**agree on the sentence[s] for the other defendant[s], then you must return a verdict for (the/each) defendant on whose sentence you do agree.]**

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*New January 2006; Revised February 2012, September 2020*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to instruct the jury on the weighing process in a capital case. (*People v. Brown* (1985) 40 Cal.3d 512, 544 [230 Cal.Rptr. 834, 726 P.2d 516]; *People v. Benson* (1990) 52 Cal.3d 754, 799 [276 Cal.Rptr. 827, 802 P.2d 330].)

Following this instruction, the court **must give** CALCRIM No. 3550, *Pre-Deliberation Instructions*, explaining how to proceed in deliberations.

~~On request, give the bracketed sentence that begins with "In making your decision about penalty." (*People v. Kipp* (1988) 18 Cal.4th 349, 378–379 [75 Cal.Rptr.2d 716, 956 P.2d 1169].)~~

~~Give CALCRIM No. 767, *Response to Juror Inquiry During Deliberations About Commutation of Sentence in Death Penalty Case*, if there is an inquiry from jurors or at the request of the defendant.~~

## AUTHORITY

- Death Penalty Statute. ▸ Pen. Code, § 190.3.
- Error to Instruct "Shall Impose Death." ▸ *People v. Brown* (1985) 40 Cal.3d 512, 544 [230 Cal.Rptr. 834, 726 P.2d 516].
- Must Instruct on Weighing Process. ▸ *People v. Brown* (1985) 40 Cal.3d 512, 544 [230 Cal.Rptr. 834, 726 P.2d 516]; *People v. Benson* (1990) 52 Cal.3d 754, 799 [276 Cal.Rptr. 827, 802 P.2d 330]; *People v. Duncan* (1991) 53 Cal.3d 955, 977–979 [281 Cal.Rptr. 273, 810 P.2d 131].
- Aggravating Factors "So Substantial in Comparison to" Mitigating. ▸ *People v. Duncan* (1991) 53 Cal.3d 955, 977–979 [281 Cal.Rptr. 273, 810 P.2d 131].
- ~~Error to Instruct on Commutation. ▸ *People v. Ramos* (1982) 37 Cal.3d 136, 159 [207 Cal.Rptr. 800, 689 P.2d 430].~~
- This Instruction Approved in Dicta. ▸ *People v. Murtishaw* (2011) 51 Cal.4th 574, 588–589 [121 Cal.Rptr.3d 586, 247 P.3d 941].

- Responding to Juror Inquiry re Commutation of Sentence. ▸ *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 204-207 [112 Cal.Rptr.3d 746, 235 P.3d 62].

## RELATED ISSUES

***No Presumption of Life and No Reasonable Doubt Standard***
The court is not required to instruct the jury that there is a presumption in favor of a life sentence; that the aggravating factors (other than prior crimes) must be found beyond a reasonable doubt; or that the jury must find beyond a reasonable doubt that the aggravating factors substantially outweigh the mitigating factors. (*People v. Benson* (1990) 52 Cal.3d 754, 800 [276 Cal.Rptr. 827, 802 P.2d 330]; *People v. Miranda* (1987) 44 Cal.3d 57, 107 [241 Cal.Rptr. 594, 744 P.2d 1127]; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777–779 [230 Cal.Rptr. 667, 726 P.2d 113].)

***Unanimity on Factors Not Required***
The court is not required to instruct the jury that they must unanimously agree on any aggravating circumstance. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 777–779 [230 Cal.Rtpr. 667, 726 P.2d 113].)

***Commutation Power***
The court must not state or imply to the jury that the ultimate authority for selecting the sentence to be imposed lies elsewhere. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328–329 [105 S.Ct. 2633, 86 L.Ed.2d 231].)

***Deadlock—No Duty to Inform Jury Not Required to Return Verdict***
"[W]here, as here, there is no jury deadlock, a court is not required to instruct the jury that it has the choice not to deliver any verdict." (*People v. Miranda* (1987) 44 Cal.3d 57, 105 [241 Cal.Rptr. 594, 744 P.2d 1127].)

***Deadlock—Questions From the Jury About What Will Happen***
If the jury inquires about what will happen in the event of a deadlock, the court should instruct jurors: "[T]hat subject is not for the jury to consider or to concern itself with. You must make every effort to reach [a] unanimous decision if at all possible." (*People v. Virgil* (2011) 51 Cal.4th 1210, 1281, 126 Cal.Rptr.3d 465, 253 P.3d 553, citing *People v. Thomas* (1992) 2 Cal.4th 489, 7 Cal.Rptr.2d 199, 828 P.2d 101.)

***No Duty to Instruct Not to Consider Deterrence or Costs***
"Questions of deterrence or cost in carrying out a capital sentence are for the Legislature, not for the jury considering a particular case." (*People v. Benson* (1990) 52 Cal.3d 754, 807 [276 Cal.Rptr. 827, 802 P.2d 330] [citation and internal

quotation marks omitted].) Where "[t]he issue of deterrence or cost [is] not raised at trial, either expressly or by implication," the court need not instruct the jury to disregard these matters. *(Ibid.)*

## SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 549–550, 584–587, 589–591.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty,* §§ 87.23[2], 87.24[1] (Matthew Bender).

## 767 ~~Response to Juror Inquiry During Deliberations About~~ Jurors' Responsibility During Deliberation ~~Commutation of Sentence~~ in Death Penalty Case

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**It is your responsibility to decide which penalty is appropriate for the defendant in this case. Base your decision only on the evidence you have heard in court and on the instructions that I have given you. Do not speculate or consider anything other than the evidence and my instructions.**

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*New April 2010; Revised April 2011, September 2020*

## BENCH NOTES

***Instructional Duty***

This instruction may be given on request and must ~~should~~ be given ~~only~~ in response to a jury question about commutation of sentence ~~or at the request of the defendant~~. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 204-207 [112 Cal.Rptr.3d 746, 235 P.3d 62]; *People v. Ramos* (1984) 37 Cal.3d 136, 159, fn. 12 [207 Cal.Rptr. 800, 689 P.2d 430]). "The key in *Ramos* is whether the jury raises the commutation issue so that it 'cannot be avoided.'" (*People v. Bramit* (2009) 46 Cal.4th 1221, 1251 [96 Cal.Rptr.3d 574, 210 P.3d 1171] (conc. opn. of Moreno, J.)) Commutation instructions are proper, however, when the jury implicitly raises the issue of commutation. No direct question is necessary. (*People v. Beames* (2007) 40 Cal.4th 907, 932 [55 Cal.Rptr.3d 865, 153 P.3d 955].)

## AUTHORITY

Instructional Requirements ▸ Pen. Code, § 190.3; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 204-207 [112 Cal.Rptr.3d 746, 235 P.3d 62]; *People v. Ramos* (1984) 37 Cal.3d 136, 159, fn. 12 [207 Cal.Rptr. 800, 689 P.2d 430]).

## SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 589.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty*, § 87.02 (Matthew Bender).

## 768–774. Reserved for Future Use

## 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; Revised September 2020*

## 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].)

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

***Related Instructions***

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(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 (4th ed. 2012) Crimes Against the Person, §§ 92–95.

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

## 811–819. Reserved for Future Use

## 820. Assault Causing Death of Child (Pen. Code, § 273ab(a))

**The defendant is charged [in Count __] with killing a child under the age of 8 by assaulting the child with force likely to produce great bodily injury [in violation of Penal Code section 273ab(a)].**

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

1. **The defendant had care or custody of a child who was under the age of 8;**

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

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

4. **The force used was likely to produce great bodily injury;**

5. **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 great bodily injury to the child;**

6. **When the defendant acted, (he/she) had the present ability to apply force likely to produce great bodily injury to the child;**

**[AND]**

7. **The defendant's act caused the child's death(;/.)**

*<Give element 8 when instructing on parental right to discipline>*
**[AND**

8. **When the defendant acted, (he/she) was not reasonably disciplining a child.]**

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

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

**An act *causes death* if:**

1. **The death was the natural and probable consequence of the act;**

2. **The act was a direct and substantial factor in causing the death;**

**AND**

3. **The death would not have happened without the act.**

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

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

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

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*New January 2006; Revised February 2014, September 2020*

## 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, the court has a **sua sponte** duty to instruct on the defense of disciplining a child. (*People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1049 [12 Cal.Rptr.2d 33].) Give bracketed element 8 and CALCRIM No. 3405, Parental Right to Punish a Child.

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].)

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than

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

***Related Instructions***
CALCRIM No. 875, *Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury*.

## AUTHORITY

- Elements ▸ Pen. Code, § 273ab(a); see *People v. Malfavon* (2002) 102 Cal.App.4th 727, 735 [125 Cal.Rptr.2d 618] [sometimes called "child abuse homicide"].
- Great Bodily Injury Defined ▸ Pen. Code, § 12022.7(f); *People v. Albritton* (1998) 67 Cal.App.4th 647, 658 [79 Cal.Rptr.2d 169].
- Willful Defined ▸ Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Force Likely to Produce Great Bodily Injury ▸ *People v. Preller* (1997) 54 Cal.App.4th 93, 97–98 [62 Cal.Rptr.2d 507] [need not prove that reasonable person would believe force would be likely to result in child's death].
- General Intent Crime ▸ *People v. Albritton* (1998) 67 Cal.App.4th 647, 658–659 [79 Cal.Rptr.2d 169].
- Mental State for Assault ▸ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].

## LESSER INCLUDED OFFENSES

- Attempted Assault on Child With Force Likely to Produce Great Bodily Injury ▸ Pen. Code, §§ 664, 273ab(b).
- Assault ▸ Pen. Code, § 240.
- Assault With Force Likely to Produce Great Bodily Injury ▸ Pen. Code, § 245(a)(1); *People v. Basuta* (2001) 94 Cal.App.4th 370, 392 [114 Cal.Rptr.2d 285].

Involuntary manslaughter is not a lesser included offense of Penal Code section 273ab. (*People v. Stewart* (2000) 77 Cal.App.4th 785, 796 [91 Cal.Rptr.2d 888]; *Orlina v. Superior Court* (1999) 73 Cal.App.4th 258, 261–262 [86 Cal.Rptr.2d 384].)

Neither murder nor child abuse homicide is a necessarily included offense within the other. (*People v. Malfavon* (2002) 102 Cal.App.4th 727, 743–744 [125 Cal.Rptr.2d 618].)

## RELATED ISSUES

***Care or Custody***

"The terms 'care or custody' do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver." (*People v. Cochran* (1998) 62 Cal.App.4th 826, 832 [73 Cal.Rptr.2d 257].)

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 115.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.13[2A], 142.23[7] (Matthew Bender).

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

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

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

*<Alternative 1A—force with weapon>*

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

**[OR]**

*<Alternative 1B—force without weapon>*

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

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

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

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

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

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

**[AND]**

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

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

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

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

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

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

**[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.]**

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*New January 2006; Revised April 2011, February 2012, February 2013, September 2019, April 2020, September 2020*

## 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].)

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

## AUTHORITY

- Elements ▸ Pen. Code, §§ 240, 245(c) & (d)(1)–(3).
- Assault Weapon Defined ▸ Pen. Code, §§ 30510, 30515.
- Firearm Defined ▸ Pen. Code, § 16520.
- Machine Gun Defined ▸ Pen. Code, § 16880.
- Semiautomatic Pistol Defined ▸ Pen. Code, § 17140.
- .50 BMG Rifle Defined ▸ Pen. Code, § 30530.
- Peace Officer Defined ▸ Pen. Code, § 830 et seq.
- Firefighter Defined ▸ Pen. Code, § 245.1.
- Willful Defined ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▸ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault ▸ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

- Inherently Deadly Defined ▸ *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [232 Cal.Rptr.3d 51, 416 P.3d 42]; *People v. Aguilar* (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*.

***Dual Convictions Prohibited***

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

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

## SECONDARY SOURCES

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

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

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

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**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.]**

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*New January 2006; Revised April 2011, February 2013, September 2019, September 2020*

## 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].)

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

## AUTHORITY

- Elements ▸ Pen. Code, §§ 240, 245, 245.3.
- Custodial Officer Defined ▸ Pen. Code, § 831.
- Local Detention Facility Defined ▸ Pen. Code, § 6031.4.

- Willful Defined ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▸ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (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 (4th ed. 2012) Crimes Against the Person, §§ 72-74.

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

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

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**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.]**

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*New January 2006; Revised February 2013, September 2019, September 2020*

## 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].)

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

## AUTHORITY

- Elements ▸ Pen. Code, §§ 240, 245, 245.2.
- Willful Defined ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▸ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (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 (4th ed. 2012) Crimes Against the Person, § 79.

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

### 864–874. Reserved for Future Use

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

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**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.]**

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

## 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].)

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

## AUTHORITY

- Elements ▸ Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- To Have Present Ability to Inflict Injury, Gun Must Be Loaded Unless Used as Club or Bludgeon ▸ *People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3 [82 Cal.Rptr.2d 413, 971 P.2d 618].
- This Instruction Affirmed ▸ *People v. Golde* (2008) 163 Cal.App.4th 101, 122-123 [77 Cal.Rptr.3d 120].
- Assault Weapon Defined ▸ Pen. Code, §§ 30510, 30515.
- Semiautomatic Pistol Defined ▸ Pen. Code, § 17140.
- Firearm Defined ▸ Pen. Code, § 16520.
- Machine Gun Defined ▸ Pen. Code, § 16880.
- .50 BMG Rifle Defined ▸ Pen. Code, § 30530.
- Willful Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▸ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (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).

## 970. Shooting Firearm or BB Device in Grossly Negligent Manner (Pen. Code, § 246.3)

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**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.]**

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*New January 2006; Revised June 2007, February 2012, September 2019, September 2020*

## 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 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.

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

## AUTHORITY

- Elements ▸ Pen. Code, § 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

***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 (4th ed. 2012) 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)

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**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">***.]**

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*New January 2006; Revised February 2012, February 2013, September 2019, September 2020*

## 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."

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

***Related Instructions***
CALCRIM No. 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 (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 8-10.

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))

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**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.]**

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*New January 2006; Revised October 2010, February 2012, February 2013, September 2019, September 2020*

## BENCH NOTES

***Instructional Duty***

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

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

If 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.

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

## AUTHORITY

- Elements ▸ Pen. Code, § 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 (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 4-7.

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

## 1071 Unlawful Sexual Intercourse: Minor More Than Three Years Younger (Pen. Code, § 261.5(a) & (c))

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**The defendant is charged [in Count __] with unlawful sexual intercourse with a minor who was more than three years younger than the defendant [in violation of Penal Code section 261.5(c)].**

**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;**

**AND**

3. **At the time of the intercourse, the other person was under the age of 18 and more than three years younger than the defendant.**

***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. 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.]**

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*New January 2006; Revised September 2020*

## 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.Rprtr.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, § 261.5(a) & (c).
- Minor's Consent Not a Defense. ▸ *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].
- Mistake of Fact Regarding Age. ▸ *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673]; see *People v. Zeihm* (1974) 40 Cal.App.3d 1085, 1089 [115 Cal.Rptr. 528] [belief about age is a defense], disapproved on other grounds in *People v. Freeman* (1988) 46 Cal.3d 419, 428, fn. 6 [250 Cal.Rptr. 598, 758 P.2d 1128].
- 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].

## 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

***Minor Perpetrator***

The fact that a minor may be a victim does not exclude a minor from being charged as a perpetrator. (*In re T.A.J.* (1998) 62 Cal.App.4th 1350, 1364 [73 Cal.Rptr.2d 331] [construing Pen. Code, § 261.5(b)].) There is no privacy right among minors to engage in consensual sexual intercourse. (*Id.* at p. 1361.) However, a minor victim of unlawful sexual intercourse cannot be held liable as an aider and abettor, a coconspirator, or an accomplice. (*In re Meagan R.* (1996) 42 Cal.App.4th 17, 25 [49 Cal.Rptr.2d 325].)

***Attempted Sexual Intercourse is Not a Lesser Included Offense***

*People v. Mendoza* (2015) 240 Cal.App.4th 72, 83 [191 Cal.Rptr.3d 905].

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, §§ 53–54.

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 22–26, 178.

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(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(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; Revised September 2020*

## 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(c)(1).
- Oral Copulation Defined. ▸ Pen. Code, § 287(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 (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.

***Attempted Oral Copulation is Not a Lesser Included Offense***
*People v. Mendoza* (2015) 240 Cal.App.4th 72, 84 [191 Cal.Rptr.3d 905].

## SECONDARY SOURCES

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] (Matthew Bender).

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

## 1124 Contacting Minor With Intent to Commit Certain Felonies (Pen. Code, § 288.3(a))

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**The defendant is charged [in Count __] with (contacting/[or] attempting to contact) a minor with the intent to commit _____**<*insert enumerated offense from statute*>**[in violation of Penal Code section 288.3(a)].**

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

1. **The defendant (contacted or communicated with/ [or] attempted to contact or communicate with) a minor;**

2. **When the defendant did so, (he/she) intended to commit _____**<*insert enumerated offense from statute*>**involving that minor;**

**AND**

3. **[The defendant knew or reasonably should have known that the person was a minor(;/.)]**

   **[OR]**

   **[The defendant believed that the person was a minor.]**

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

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

***Contacting or communicating* with a minor includes direct and indirect contact or communication. [That contact or communication may take place personally or by using (an agent or agency/ [or] any print medium/ [or] any postal service/ [or] a common carrier/ [or] communication common carrier/ [or] any electronic communications system/ [or] any telecommunications/ [or] wire/ [or] computer/ [or] radio communications [device or system]).]**

**To decide whether the defendant intended to commit** <*specify sex offense[s] listed in Pen. Code, § 288.3(a)*>**, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].**

*New August 2009; Revised March 2017, September 2020*

## 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 define the elements of the underlying/target sex offense. (See *People v. Hughes* (2002) 27 Cal.4th 287, 349 [116 Cal.Rptr.2d 401, 39 P.3d 432 and *People v. May* (1989) 213 Cal.App.3d 118, 129 [261 Cal.Rptr. 502].)

~~The court has a sua sponte duty to instruct on the good faith belief that the victim was not a minor as a defense for certain sex crimes with minors, including statutory rape, when that defense is supported by evidence. Until courts of review clarify whether this defense is available in prosecutions for violations of Pen. Code, § 288.3(a), the court will have to exercise its own discretion. Suitable language for such an instruction is found in CALCRIM No. 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older*.~~

## AUTHORITY

- Elements and Enumerated Offenses. ▸ Pen. Code, § 288.3(a).
- Calculating Age. ▸ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849-850 [21 Cal.Rptr.2d 373, 855 P.2d 391].
- Attempted Contact or Communication Does Not Require Minor Victim. ▸ *People v. Korwin* (2019) 36 Cal.App.5th 682, 688 [248 Cal.Rptr.3d 763].

## LESSER INCLUDED OFFENSES

Attempted oral copulation is not a necessarily included offense of Penal Code section 288.3 under the statutory elements test, because luring can be committed without a direct act. (*People v. Medelez* (2016) 2 Cal.App.5th 659, 663, 206 Cal.Rptr.3d 402].)

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 67, 178.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21 (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:17, 12:18 (The Rutter Group).

## 1128 Engaging in Oral Copulation or Sexual Penetration With Child 10 Years of Age or Younger (Pen. Code, § 288.7(b))

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**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.]**

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*New August 2009; Revised April 2010, February 2013, February 2015, September 2017, September 2019, September 2020*

## 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 section 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].

A conviction for Penal Code section 288.7(b) under an aiding and abetting theory requires that the direct perpetrator be at least 18 years old. *People v. Vital* (2019) 40 Cal.App.5th 925, 930 [254 Cal.Rptr.3d 22]. If the defendant is charged under an aiding and abetting theory, substitute the word "perpetrator" instead of "defendant" in elements 1, 2, and 3.

## 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).

## 1191B Evidence of Charged Sex Offense

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**The People presented evidence that the defendant committed the crime[s] of _____<*insert description of offense[s]*> charged in Count[s]____ <*insert count[s] of sex offense[s] charged in this case* >.**

**If the People have proved beyond a reasonable doubt that the defendant committed one or more of these crimes, 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] the other sex offense[s] charged in this case.**

**If you find that the defendant committed one or more of these crimes, 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 another crime. The People must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt.**

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*New March 2017; Revised September 2020*

## BENCH NOTES

***Instructional Duty***

The court must give this instruction on request if the People rely on charged offenses as evidence of predisposition to commit similar crimes charged in the same case, Evid. Code section 355.

***Related Instructions***

CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*

CALCRIM No. 1191A, *Evidence of Uncharged 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

- 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].
- This Instruction Upheld. ▸ *People v. Meneses* (2019) 41 Cal.App.5th 63, 68 [253 Cal.Rptr.3d 859]

## 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).

## 1201 Kidnapping: Child or Person Incapable of Consent (Pen. Code, § 207(a), (e))

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**The defendant is charged [in Count __] with kidnapping (a child/ [or] a person with a mental impairment who was not capable of giving legal consent to the movement) [in violation of Penal Code section 207].**

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

1. **The defendant used (physical force/deception) to take and carry away an unresisting (child/ [or] person with a mental impairment);**

2. **The defendant moved the (child/ [or] person with a mental impairment) a substantial distance(;/.)**

**[AND]**

*<Section 207(e)>*
**[3. The defendant moved the child with an illegal intent or for an illegal purpose(;/.)]**

**[AND]**

*<Alternative 4A—alleged victim under 14 years.>*
**[4. The child was under 14 years old at the time of the movement(;/.)]**

*<Alternative 4B—alleged victim has mental impairment.>*
**[(3/4). _____** *<Insert name of complaining witness>* **suffered from a mental impairment that made (him/her) incapable of giving legal consent to the movement.]**

***Substantial distance*** **means more than a slight or trivial distance. In deciding whether the distance was substantial, consider all the circumstances relating to the movement. [Thus, in addition to considering the actual distance moved, you may also consider other factors such as whether the movement increased the risk of [physical or psychological] harm, increased the danger of a foreseeable escape attempt, gave the attacker a greater opportunity to commit additional crimes, or decreased the likelihood of detection.]**

**A person is incapable of giving legal consent if he or she is unable to understand the act, its nature, and possible consequences.**

**[*Deception* includes tricking the (child/mentally impaired person) into accompanying him or her a substantial distance for an illegal purpose.]**

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

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*New January 2006; Revised April 2008, April 2020, September 2020*

## BENCH NOTES

***Instructional Duty***

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

Give alternative 4A if the defendant is charged with kidnapping a person under 14 years of age. (Pen. Code, § 208(b).) Do not use this bracketed language if a biological parent, a natural father, an adoptive parent, or someone with access to the child by a court order takes the child. (*Ibid.*) Give alternative 4B if the alleged victim has a mental impairment.

In the paragraph defining "substantial distance," give the bracketed sentence listing factors that the jury may consider, when evidence permits, in evaluating the totality of the circumstances. (*People v. Martinez* (1999) 20 Cal.4th 225, 237 [83 Cal.Rptr.2d 533, 973 P.2d 512].) However, in the case of simple kidnapping, if the movement was for a substantial distance, the jury does not need to consider any other factors. (*People v. Martinez, supra*, 20 Cal.4th at p. 237; see *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058].)

Give this instruction when the defendant is charged under Penal Code section 207(a) with using force to kidnap an unresisting infant or child, or person with a mental impairment, who was incapable of consenting to the movement. (See, e.g., *In re Michele D.* (2002) 29 Cal.4th 600, 610 [128 Cal.Rptr.2d 92, 59 P.3d 164]; see also 2003 Amendments to Pen. Code, § 207(e) [codifying holding of *In re Michele D.*].) Give CALCRIM No. 1200, *Kidnapping: For Child Molestation*, when the defendant is charged under Penal Code section 207(b) with kidnapping a child without the use of force for the purpose of committing a lewd or lascivious act.

Give the final bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

***Related Instructions***

A defendant may be prosecuted for both the crimes of child abduction and kidnapping. Child abduction or stealing is a crime against the parents, while kidnapping is a crime against the child. (*In re Michele D.* (2002) 29 Cal.4th 600, 614 [128 Cal.Rptr.2d 92, 59 P.3d 164]; *People v. Campos* (1982) 131 Cal.App.3d 894, 899 [182 Cal.Rptr. 698].) See CALCRIM No. 1250, *Child Abduction: No Right to Custody*.

For instructions relating to defenses to kidnapping, see CALCRIM No. 1225, *Defense to Kidnapping: Protecting Child From Imminent Harm.*

## AUTHORITY

- Elements. ▸ Pen. Code, § 207(a), (e).
- Punishment If Victim Under 14 Years of Age. ▸ Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206] [ignorance of victim's age not defense].
- Asportation Requirement. ▸ See *People v. Martinez* (1999) 20 Cal.4th 225, 235–237 [83 Cal.Rptr.2d 533, 973 P.2d 512] [adopting modified two-pronged asportation test from *People v. Rayford* (1994) 9 Cal.4th 1, 12–14 [36 Cal.Rptr.2d 317, 884 P.2d 1369] and *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225]].
- Force Required to Kidnap Unresisting Infant or Child. ▸ *In re Michele D.* (2002) 29 Cal.4th 600, 610 [128 Cal.Rptr.2d 92, 59 P.3d 164]; Pen. Code, § 207(e).
- Force Required to Kidnap Unconscious and Intoxicated Adult. ▸ *People v. Daniels* (2009) 176 Cal.App.4th 304, 333 [97 Cal.Rptr.3d 659].
- 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].
- Substantial Distance Requirement. ▸ *People v. Daniels* (1993) 18 Cal.App.4th 1046, 1053 [22 Cal.Rptr.2d 877]; *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058] [since movement must be more than slight or trivial, it must be substantial in character].

- Deceit May Substitute for Force. ▸ *People v. Dalerio* (2006) 144 Cal.App.4th 775, 783 [50 Cal.Rptr.3d 724] [taking requirement satisfied when defendant relies on deception to obtain child's consent and through verbal directions and his constant physical presence takes the child substantial distance].
- This Instruction Upheld. ▸ *People v. Singh* (2019) 42 Cal.App.5th 175, 181-183 [254 Cal.Rptr.3d 871] [no sua sponte duty to define "illegal intent" or "illegal purpose"].

## COMMENTARY

Penal Code section 207(a) uses the term "steals" in defining kidnapping not in the sense of a theft, but in the sense of taking away or forcible carrying away. (*People v. McCullough* (1979) 100 Cal.App.3d 169, 176 [160 Cal.Rptr. 831].) The instruction uses "take and carry away" as the more inclusive terms, but the statutory terms "steal," "hold," "detain" and "arrest" may be used if any of these more closely matches the evidence.

## LESSER INCLUDED OFFENSES

Attempted kidnapping is not a lesser included offense of simple kidnapping under subdivision (a) of section 207. (*People v. Fontenot* (2019) 8 Cal.5th 57, 65-71 [251 Cal.Rptr.3d 341, 447 P.3d 252].)

## RELATED ISSUES

***Victim Must Be Alive***

A victim must be alive when kidnapped. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 498 [117 Cal.Rptr.2d 45, 40 P.3d 754].)

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 286-289.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.38[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person* § 142.14[1], [2][a] (Matthew Bender).

## 1202 Kidnapping: For Ransom, Reward, or Extortion (Pen. Code, § 209(a))

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**The defendant is charged [in Count __] with kidnapping for the purpose of (ransom[,]/ [or] reward[,]/ [or] extortion) [that resulted in (death[,]/ [or] bodily harm[,]/ [or] exposure to a substantial likelihood of death)] [in violation of Penal Code section 209(a)].**

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

1. **The defendant (kidnapped[,]/ [or] abducted[,]/ [or] seized[,]/ [or] confined[,]/ [or] concealed[,]/ [or] carried away[,]/ [or] inveigled[,]/ [or] enticed[,]/ [or] decoyed) a~~nother~~ person;**

*<Alternative 2A—held or detained>*

**[2. The defendant held or detained that ~~the other~~ person;]**

*<Alternative 2B—intended to hold or detain that person>*

**[2. When the defendant acted, (he/she) intended to hold or detain that ~~the other~~ person;]**

3. **The defendant did so (for ransom[,]/ [or] for reward[,]/ [or] to commit extortion[,]/ [or] to get from a different person money or something valuable);**

   **[AND]**

4. **The ~~other~~ person did not consent to being (kidnapped[,]/ [or] abducted[,]/ [or] seized[,]/ [or] confined[,]/ [or] concealed[,]/ [or] carried away[,]/ [or] inveigled[,]/ [or] enticed[,]/ [or] decoyed)(;/.)**

*<Give element 5 if instructing on reasonable belief in consent>*

**[AND**

5. **The defendant did not actually and reasonably believe that the ~~other~~ person consented to being (kidnapped[,]/ [or] abducted[,]/ [or] seized[,]/ [or] confined[,]/ [or] concealed[,]/ [or] carried away[,]/ [or] inveigled[,]/ [or] enticed[,]/ [or] decoyed).**

**[It is not necessary that the person be moved for any distance.]**

**[In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]**

*<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.]**

**[Someone intends to commit *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 intends to commit *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 a person does in his or her official capacity using the authority of his or her public office.]**

*<Sentencing Factor>*
**[If you find the defendant guilty of kidnapping for (ransom [,]/ [or] reward[,]/ [or] extortion), you must then decide whether the People have proved the additional allegation that the defendant (caused the kidnapped person to**

**(die/suffer bodily harm)/ [or] intentionally confined the kidnapped person in a way that created a substantial likelihood of death).**

**[*Bodily harm* means any substantial physical injury resulting from the use of force that is more than the force necessary to commit kidnapping.]**

**[The defendant caused _____'s** <*insert name of allegedly kidnapped person*> **(death/bodily harm) if:**

1. **A reasonable person in the defendant's position would have foreseen that the defendant's use of force or fear could begin a chain of events likely to result in _____'s** <*insert name of allegedly kidnapped person*> **(death/bodily harm);**

2. **The defendant's use of force or fear was a direct and substantial factor in causing _____'s** <*insert name of allegedly kidnapped person*> **(death/bodily harm);**

**AND**

3. **_____'s** <*insert name of allegedly kidnapped person*> **(death/bodily harm) would not have happened if the defendant had not used force or fear to hold or detain _____** <*insert name of allegedly kidnapped person*>**.**

**A *substantial factor* is more than a trivial or remote factor. However, it need not have been the only factor that caused _____'s** <*insert name of allegedly kidnapped person*> **(death/bodily harm).]**

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

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*New January 2006; Revised April 2011, February 2015, March 2017, September 2020*

## BENCH NOTES

***Instructional Duty***

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

If the prosecution alleges that the kidnapping resulted in death or bodily harm, or exposed the victim to a substantial likelihood of death (see Pen. Code, § 209(a)),

the court has a **sua sponte** duty to instruct on the sentencing factor. (See *People v. Schoenfeld* (1980) 111 Cal.App.3d 671, 685–686 [168 Cal.Rptr. 762] [bodily harm defined]); see also *People v. Ryan* (1999) 76 Cal.App.4th 1304, 1318 [76 Cal.Rptr.2d 160] [court must instruct on general principles of law relevant to issues raised by the evidence].) The court must also give the jury a verdict form on which the jury can indicate whether this allegation has been proved. If causation is an issue, the court has a **sua sponte** duty to give the bracketed section that begins "The defendant caused." (See Pen. Code, § 209(a); *People v. Monk* (1961) 56 Cal.2d 288, 296 [14 Cal.Rptr. 633, 363 P.2d 865]; *People v. Reed* (1969) 270 Cal.App.2d 37, 48–49 [75 Cal.Rptr. 430].)

Give the bracketed definition of "consent" on request.

Give alternative 2A if the evidence supports the conclusion that the defendant actually held or detained the alleged victim. Otherwise, give alternative 2B. (See Pen. Code, § 209(a).)

"Extortion" is defined in Penal Code section 518. If the kidnapping was for purposes of extortion, give one of the bracketed definitions of extortion on request. Give the second definition if the defendant is charged with intending to extort an official act. (*People v. Hill* (1983) 141 Cal.App.3d 661, 668 [190 Cal.Rptr. 628]; see *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1229–1230 [277 Cal.Rptr. 382]; *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].) It appears that this type of extortion rarely occurs in the context of kidnapping, so it is excluded from this instruction.

***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].)

***Related Instructions***
For the elements of extortion, see CALCRIM No. 1830, *Extortion by Threat or Force*.

## AUTHORITY

- Elements. ▸ Pen. Code, § 209(a).
- Requirement of Lack of Consent. ▸ *People v. Eid* (2010) 187 Cal.App.4th 859, 878 [114 Cal.Rptr.3d 520].
- Extortion. ▸ Pen. Code, § 518; *People v. Hill* (1983) 141 Cal.App.3d 661, 668 [190 Cal.Rptr. 628]; see *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1229–1230 [277 Cal.Rptr. 382].
- Amount of Physical Force Required. ▸ *People v. Chacon* (1995) 37 Cal.App.4th 52, 59 [43 Cal.Rptr.2d 434]; *People v. Schoenfeld* (1980) 111 Cal.App.3d 671, 685–686 [168 Cal.Rptr. 762].
- Bodily Injury Defined. ▸ *People v. Chacon* (1995) 37 Cal.App.4th 52, 59; *People v. Schoenfeld* (1980) 111 Cal.App.3d 671, 685–686; see *People v. Reed* (1969) 270 Cal.App.2d 37, 48–50 [75 Cal.Rptr. 430] [injury reasonably foreseeable from defendant's act].
- Control Over Victim When Intent Formed. ▸ *People v. Martinez* (1984) 150 Cal.App.3d 579, 600–602 [198 Cal.Rptr. 565] [disapproved on other ground in *People v. Hayes* (1990) 52 Cal.3d 577, 627–628, fn. 10 [276 Cal.Rptr. 874, 802 P.2d 376].]
- No Asportation Required. ▸ *People v. Macinnes* (1973) 30 Cal.App.3d 838, 844 [106 Cal.Rptr. 589]; see *People v. Rayford* (1994) 9 Cal.4th 1, 11–12, fn. 8 [36 Cal.Rptr.2d 317, 884 P.2d 1369]; *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1227 [277 Cal.Rptr. 382].
- Official Act Defined. ▸ *People v. Mayfield* (1997) 14 Cal.4th 668, 769–773 [60 Cal.Rptr.2d 1, 928 P.2d 485]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [219 Cal.Rptr. 7, 706 P.2d 1141].
- Kidnapping To Extract From Another Person Any Money or Valuable Thing Requires That The Other Person Not Be The Person Kidnapped. ▸ *People v.*

*Harper* (2020) 44 Cal.App.5th 172, 192-193 [257 Cal.Rptr.3d 440]; *People v. Stringer* (2019) 41 Cal.App.5th 974, 983 [254 Cal.Rptr.3d 678].

## COMMENTARY

A trial court may refuse to define "reward." There is no need to instruct a jury on the meaning of terms in common usage. Reward means something given in return for good or evil done or received, and especially something that is offered or given for some service or attainment. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 367–368 [68 Cal.Rptr.2d 61].) In the absence of a request, there is also no duty to define "ransom." The word has no statutory definition and is commonly understood by those familiar with the English language. (*People v. Hill* (1983) 141 Cal.App.3d 661, 668 [190 Cal.Rptr. 628].)

## LESSER INCLUDED OFFENSES

- False Imprisonment ▸ Pen. Code, §§ 236, 237; *People v. Chacon* (1995) 37 Cal.App.4th 52, 65 [43 Cal.Rptr.2d 434]; *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].
- Extortion ▸ Pen. Code, § 518.
- Attempted Extortion ▸ Pen. Code, §§ 664, 518.
- Multiple Convictions of Lesser Included Offenses of Pen. Code, § 209(a) Possible ▸ *People v. Eid* (2014) 59 Cal.4th 650, 655–658 [174 Cal.Rptr.3d 82, 328 P.3d 69].

If the prosecution alleges that the kidnapping resulted in death or bodily harm, or exposed the victim to a substantial likelihood of death (see Pen. Code, § 209(a)), then kidnapping for ransom without death or bodily harm is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the allegation has been proved.

Simple kidnapping under section 207 of the Penal Code is not a lesser and necessarily included offense of kidnapping for ransom, reward, or extortion. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 368, fn. 56 [68 Cal.Rptr.2d. 61] [kidnapping for ransom can be accomplished without asportation while simple kidnapping cannot]; see *People v. Macinnes* (1973) 30 Cal.App.3d 838, 843–844 [106 Cal.Rptr. 589]; *People v. Bigelow* (1984) 37 Cal.3d 731, 755, fn. 14 [209 Cal.Rptr. 328, 691 P.2d 994].)

## RELATED ISSUES

***Extortion Target***

The kidnapped victim may also be the person from whom the defendant wishes to extort something. (*People v. Ibrahim* (1993) 19 Cal.App.4th 1692, 1696–1698 [24 Cal.Rptr.2d 269.)

***No Good-Faith Exception***

A good faith exception to extortion or kidnapping for ransom does not exist. Even actual debts cannot be collected by the reprehensible and dangerous means of abducting and holding a person to be ransomed by payment of the debt. (*People v. Serrano* (1992) 11 Cal.App.4th 1672, 1677–1678 [15 Cal.Rptr.2d 305].)

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 301–302.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.14 (Matthew Bender).

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

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

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

1. **The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to _____**<*insert name of complaining witness or member[s] of complaining witness's immediate family*>**;**

2. **The defendant made the threat (orally/in writing/by electronic communication device);**

3. **The defendant intended that (his/her) statement be understood as a threat [and intended that it be communicated to _____**<*insert name of complaining witness*>**];**

4. **The threat was so clear, immediate, unconditional, and specific that it communicated to _____**<*insert name of complaining witness*> **a serious intention and the immediate prospect that the threat would be carried out;**

5. **The threat actually caused _____**<*insert name of complaining witness*>**to be in sustained fear for (his/her) own safety [or for the safety of (his/her) immediate family];**

**AND**

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

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

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

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

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

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

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

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

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

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*New January 2006; Revised August 2006, June 2007, February 2015, February 2016, March 2018, September 2020*

## BENCH NOTES

***Instructional Duty***

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

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

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

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

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

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

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

## AUTHORITY

- Elements ▸ Pen. Code, § 422; *In re George T.* (2004) 33 Cal.4th 620, 630 [16 Cal.Rptr.3d 61, 93 P.3d 1007]; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536 [70 Cal.Rptr.2d 878].
- Great Bodily Injury Defined ▸ Pen. Code, § 12022.7(f).
- Sufficiency of Threat Based on All Surrounding Circumstances ▸ *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340 [69 Cal.Rptr.2d 728]; *People v. Butler* (2000) 85 Cal.App.4th 745, 752–753 [102 Cal.Rptr.2d 269]; *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1218–1221 [62 Cal.Rptr.2d 303]; *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137–1138 [105 Cal.Rptr.2d 165]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1013–1014 [109 Cal.Rptr.2d 464]; see *People v. Garrett* (1994) 30 Cal.App.4th 962, 966–967 [36 Cal.Rptr.2d 33].
- Crime that Will Result in Great Bodily Injury Judged on Objective Standard ▸ *People v. Maciel* (2003) 113 Cal.App.4th 679, 685 [6 Cal.Rptr.3d 628].
- Threatening Hand Gestures Not Verbal Threats Under Penal Code Section 422 ▸ *People v. Gonzalez* (2017) 2 Cal.5th 1138, 1147 [218 Cal.Rptr.3d 150, 394 P.3d 1074].
- Threat Not Required to Be Unconditional ▸ *People v. Bolin* (1998) 18 Cal.4th 297, 339–340 [75 Cal.Rptr.2d 412, 956 P.2d 374], disapproving *People v.*

*Brown* (1993) 20 Cal.App.4th 1251, 1256 [25 Cal.Rptr.2d 76]; *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1162 [38 Cal.Rptr.2d 328].

- Conditional Threat May Be True Threat, Depending on Context ▸ *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1540 [70 Cal.Rptr.2d 878].
- Immediate Ability to Carry Out Threat Not Required ▸ *People v. Lopez* (1999) 74 Cal.App.4th 675, 679 [88 Cal.Rptr.2d 252].
- Sustained Fear ▸ *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1139–1140 [105 Cal.Rptr.2d 165]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1024 [109 Cal.Rptr.2d 464]; *People v. Allen* (1995) 33 Cal.App.4th 1149, 1155–1156 [40 Cal.Rptr.2d 7].
- Verbal Statement, Not Mere Conduct, Is Required ▸ *People v. Franz* (2001) 88 Cal.App.4th 1426, 1441–1442 [106 Cal.Rptr.2d 773].
- Statute Not Unconstitutionally Vague ▸ *People v. Maciel* (2003) 113 Cal.App.4th 679, 684–686 [6 Cal.Rptr.3d 628].
- Attempted Criminal Threats ▸ *People v. Chandler* (2014) 60 Cal.4th 508, 525 [176 Cal.Rptr.3d 548, 332 P.3d 538].
- Statute Authorizes Only One Conviction and One Punishment Per Victim, Per Threatening Encounter ▸ *People v. Wilson* (2015) 234 Cal.App.4th 193, 202 [183 Cal.Rptr.3d 541].

## COMMENTARY

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

## LESSER INCLUDED OFFENSES

- Attempted Criminal Threat ▸ See Pen. Code, § 422; *People v. Toledo* (2001) 26 Cal.4th 221, 230–231 [109 Cal.Rptr.2d 315, 26 P.3d 1051].

- Threatening a public officer of an educational institution in violation of Penal Code section 71 may be a lesser included offense of a section 422 criminal threat under the accusatory pleadings test. (*In re Marcus T.* (2001) 89 Cal.App.4th 468, 472–473 [107 Cal.Rptr.2d 451].) But see *People v. Chaney* (2005) 131 Cal.App.4th 253, 257–258 [31 Cal.Rptr.3d 714], finding that a violation of section 71 is not a lesser included offense of section 422 under the accusatory pleading test when the pleading does not specifically allege the

intent to cause (or attempt to cause) a public officer to do (or refrain from doing) an act in the performance of official duty.

## RELATED ISSUES

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

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

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

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

## SECONDARY SOURCES

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

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

## 1402. Gang-Related Firearm Enhancement (Pen. Code, § 12022.53)

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**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]*>] and you find that the defendant committed (that/those) crime[s] for the benefit of, at the direction of, or in association with a criminal street gang with the intent to promote, further, or assist in any criminal conduct by gang members, you must then decide whether[, for each crime,] the People have proved the additional allegation that one of the principals (personally used/personally and intentionally discharged) a firearm during that crime [and caused (great bodily injury/ [or] death)]. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

**To prove this allegation, the People must prove that:**

**[1.] Someone who was a principal in the crime personally (used/discharged) a firearm during the commission [or attempted commission] of the _____**<*insert appropriate crime listed in Penal Code section 12022.53(a)*>**(./;)**

**[AND]**

**[2. That person intended to discharge the firearm(./;)]**

**[AND**

**3. That person's act caused (great bodily injury to/ [or] the death of) another person [who was not an accomplice to the crime].]**

**A person is a *principal* in a crime if he or she directly commits [or attempts to commit] the crime or if he or she aids and abets someone else who commits [or attempts to commit] the crime.**

**[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.]**

**[The term *firearm* is defined in another instruction.]**

**[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.] [A firearm does not need to be loaded.]**

**[A principal *personally uses* a firearm if he or she intentionally does any of the following:**

1. **Displays the firearm in a menacing manner.**

2. **Hits someone with the firearm.**

**OR**

3. **Fires the firearm].**

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

**[An act causes (great bodily injury/ [or] death) if the (injury/ [or] death) is the direct, natural, and probable consequence of the act and the (injury/ [or] 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 (great bodily injury/ [or] death). An act causes (injury/ [or] death) only if it is a substantial factor in causing the (injury/ [or] 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 (injury/ [or] death).]**

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

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

**AND**

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

*<If there is an issue in the case over whether the defendant used the firearm "during 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.**

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*New January 2006; Revised June 2007, April 2010, February 2012, September 2020*

## BENCH NOTES

***Instructional Duty***

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

In order for the defendant to receive an enhancement under Penal Code section 12022.53(e), the jury must find both that the defendant committed a felony for the benefit of a street gang and that a principal used or intentionally discharged a firearm in the offense. Thus, the court **must give** CALCRIM No. 1401, *Felony or Misdemeanor Committed for Benefit of Criminal Street Gang*, with this instruction and the jury must find both allegations have been proved before the enhancement may be applied.

In this instruction, the court **must** select the appropriate options based on whether the prosecution alleges that the principal used the firearm, intentionally discharged the firearm, and/or intentionally discharged the firearm causing great bodily injury or death. The court should review CALCRIM Nos. 3146, 3148, and 3149 for guidance. Give the bracketed definition of "personally used" only if the prosecution specifically alleges that the principal "personally used" the firearm. Do not give the bracketed definition of "personally used" if the prosecution alleges intentional discharge or intentional discharge causing great bodily injury or death.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause (*People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335 [121 Cal.Rptr.2d 546, 48 P.3d 1107]); give the bracketed paragraph that begins with "An act causes . . . ." 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 . . . ." (*Id.* at pp. 335–338.)

The court should give the bracketed definition of "firearm" 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 an issue of whether the principal used the weapon "during 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].)

If, in the elements, the court gives the bracketed phrase "who was not an accomplice to the crime," the court should also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

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

## AUTHORITY

- Enhancement ▸ Pen. Code, § 12022.53(e).
- Vicarious Liability Under Subdivision (e) ▸ *People v. Garcia* (2002) 28 Cal.4th 1166, 1171 [124 Cal.Rptr.2d 464, 52 P.3d 648]; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 12 [104 Cal.Rptr.2d 247].
- Principal Defined ▸ Pen. Code, § 31.
- Firearm Defined ▸ Pen. Code, § 16520.
- Personally Uses ▸ *People v. Marvin 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].
- Proximate Cause ▸ *People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335–338 [121 Cal.Rptr.2d 546, 48 P.3d 1107].

- Accomplice Defined ▸ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].

## RELATED ISSUES

***Principal Need Not Be Convicted***

It is not necessary that the principal who actually used or discharged the firearm be convicted. (*People v. Garcia* (2002) 28 Cal.4th 1166, 1176 [124 Cal.Rptr.2d 464, 52 P.3d 648].)

***Defendant Need Not Know Principal Armed***

For an enhancement charged under Penal Code section 12022.53(e) where the prosecution is pursuing vicarious liability, it is not necessary for the prosecution to prove that the defendant knew that the principal intended to use or discharge a firearm. (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 14–15 [104 Cal.Rptr.2d 247].)

See the Related Issues sections of CALCRIM Nos. 3146–3149.

## SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 359-360.

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[5] (Matthew Bender).

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

## 1501. Arson: Great Bodily Injury (Pen. Code, § 451)

**The defendant is charged [in Count __] with arson that caused great bodily injury [in violation of Penal Code section 451].**

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

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

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

**AND**

3. **The fire caused great bodily injury to another person.**

**To *set fire to or burn* means to damage or destroy with fire either all or part of something, no matter how small the part.**

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

**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.**

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

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

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

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

**[A person does not commit arson if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire also injures someone else or someone else's structure, forest land, or property.]**

*New January 2006; Revised February 2013, March 2020, September 2020*

## BENCH NOTES

***Instructional Duty***

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

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

***Related Instructions***

If attempted arson is charged, do not instruct generally on attempts but give CALCRIM No. 1520, *Attempted Arson*. (Pen. Code, § 455.)

## AUTHORITY

- Elements ▸ Pen. Code, § 451.
- Great Bodily Injury ▸ Pen. Code, § 12022.7(f).
- Structure, Forest Land, 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

See the Related Issues section under CALCRIM No. 1515, *Arson*.

***Dual Convictions Prohibited***
A single act of arson cannot result in convictions under different subdivisions of Penal Code section 451. (*People v. Shiga* (2019) 34 Cal.App.5th 466, 475 [246 Cal.Rptr.3d 198].)

## SECONDARY SOURCES

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

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.47[1] (Matthew Bender).

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

## 1530. Unlawfully Causing a Fire: Great Bodily Injury (Pen. Code, § 452)

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**The defendant is charged [in Count __] with unlawfully causing a fire that caused great bodily injury [in violation of Penal Code section 452].**

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

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

2. **The defendant did so recklessly;**

   **AND**

3. **The fire caused great bodily injury to another person.**

*<Alternative A—Recklessness: General Definition>*
**[A person acts recklessly when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk of causing a fire, (2) he or she ignores that risk, and (3) ignoring the risk is a gross deviation from what a reasonable person would have done in the same situation.]**

*<Alternative B—Recklessness: Voluntary Intoxication>*
**[A person acts recklessly when (1) he or she does an act that presents a substantial and unjustifiable risk of causing a fire but (2) he or she is unaware of the risk because he or she is voluntarily intoxicated. Intoxication is voluntary if the defendant willingly used any intoxicating drink, drug, or other substance knowing that it could produce an intoxicating effect.]**

**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.**

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

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

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

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

**[A person does not unlawfully cause a fire if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire also injures someone else or someone else's structure, forest land, or property.]**

**[Arson and unlawfully causing a fire require different mental states. For arson, a person must act willfully and maliciously. For unlawfully causing a fire, a person must act recklessly.]**

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*New January 2006; Revised September 2020*

## BENCH NOTES

***Instructional Duty***

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

If the prosecution's theory is that the defendant did not set the fire but "caused" the fire, the court has a **sua sponte** duty to instruct on aiding and abetting. (*People v. Sarkis* (1990) 222 Cal.App.3d 23, 28 [272, Cal.Rptr. 34].) See CALCRIM Nos. 400–403.

Depending upon the theory of recklessness the prosecutor is alleging, the court should instruct with alternative A or B.

If the defendant is also charged with arson, the court may wish to give the last bracketed paragraph, which explains the difference in intent between unlawfully causing a fire and arson. (*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 the point that defense counsel's objection to instruction on lesser included offense constituted invited error; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324 [3 Cal.Rptr.2d 816].)

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

with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

## AUTHORITY

- Elements ▸ Pen. Code, § 452.
- Great Bodily Injury ▸ Pen. Code, § 12022.7(fe).
- Structure, Forest Land Defined ▸ Pen. Code, § 450.
- Difference Between This Crime and Arson ▸ *People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [226 Cal.Rptr. 810].
- 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

- Unlawfully Causing a Fire ▸ Pen. Code, § 452.

## RELATED ISSUES

See the Related Issues sections under CALCRIM No. 1515, *Arson* and CALCRIM No. 1532, *Unlawfully Causing a Fire*.

## 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[2] (Matthew Bender).

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

## 1551. Arson Enhancements (Pen. Code, §§ 451.1, 456(b))

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**If you find the defendant guilty of arson [as charged in Count[s] __], you must then decide whether[, for each crime of arson,] the People have proved (the additional allegation that/one or more of the following additional allegations):**

*<Alternative A—monetary gain>*

- **[The defendant intended to obtain monetary gain when (he/she) committed the arson.]**

*<Alternative B—injury to firefighter, peace officer, or EMT>*

- **[(A/An) (firefighter[,]/ peace officer[,]/ [or ] emergency worker) suffered great bodily injury as a result of the arson.]**

*<Alternative C—great bodily injury to more than one person>*

- **[The defendant caused great bodily injury to more than one person during the commission of the arson.]**

*<Alternative D—multiple structures burned>*

- **[The defendant caused multiple structures to burn during the commission of the arson.]**

*<Alternative E—device designed to accelerate fire>*

- **[The arson (caused great bodily injury[,]/ [or] caused an inhabited structure or inhabited property to burn[,]/ [or] burned a structure or forest land), and was caused by use of a device designed to accelerate the fire or delay ignition.]**

**[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">*.**]**

**[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.]**

**[An *emergency worker* includes an emergency medical technician. An *emergency medical technician* is someone who holds a valid certificate under the Health and Safety Code as an emergency medical technician.]**

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

**[A (structure/ [or] property) is *inhabited* if someone lives there and either is present or has left but intends to return.]**

**[A (structure/ [or] property) is *inhabited* if someone used it as a dwelling and left only because a natural or other disaster caused him or her to leave.]**

**[A (structure/ [or] property) is not *inhabited* if the former residents have moved out and do not intend to return, even if some personal property remains inside.]**

**[A *device designed to accelerate the fire* means a piece of equipment or a mechanism intended, or devised, to hasten or increase the fire's progress.]**

**[In order to prove that the defendant *caused* (great bodily injury to more than one person/ [or] more than one structure to burn), the People must prove that:**

1. **A reasonable person in the defendant's position would have foreseen that committing arson could begin a chain of events likely to result in (great bodily injury to more than one person/ [or] the burning of more than one structure);**

2. **The commission of arson was a direct and substantial factor in causing (great bodily injury to more than one person/ [or] the burning of more than one structure);**

**AND**

3. **The (great bodily injury to more than one person/ [or the] burning of more than one structure) would not have happened if the defendant had not committed arson.]**

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

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

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*New January 2006; Revised September 2020*

## BENCH NOTES

***Instructional Duty***

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

The reference to "arson" in the first paragraph refers to all crimes charged under Penal Code section 451, including arson of a structure, forest land, or property (see CALCRIM No. 1515), arson causing great bodily injury (see CALCRIM No. 1501), and arson of an inhabited structure (see CALCRIM No. 1502). It does not refer to aggravated arson under Penal Code section 451.5 (see CALCRIM No. 1500).

Give one of the bracketed alternatives, A–E, depending on the enhancement alleged.

If the defendant is charged with a qualifying prior conviction under Penal Code section 451.1(a)(1), give either CALCRIM No. 3100, *Prior Conviction*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant has stipulated to the truth of the prior conviction.

Give all relevant bracketed definitions, based on the enhancement alleged.

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."

Give the bracketed paragraph that begins with "In order to prove that the defendant *caused*" if the prosecution alleges that the defendant caused great bodily injury to multiple people or caused multiple structures to burn. (Pen. Code, § 451.1(a)(5); see Pen. Code, § 451(a)–(c).)

Give the bracketed sentence that begins with "You must decide whether the People have proved" if the same enhancement is alleged for multiple counts of arson.

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

## AUTHORITY

- Enhancements ▸ Pen. Code, §§ 451.1, 456(b).
- Device Designed to Accelerate Fire Defined ▸ *People v. Andrade* (2000) 85 Cal.App.4th 579, 587 [102 Cal.Rptr.2d 254].
- Peace Officer Defined ▸ Pen. Code, § 830 et seq.
- Firefighter Defined ▸ Pen. Code, § 245.1.
- Emergency Medical Technician Defined ▸ Health & Saf. Code, §§ 1797.80–1797.84.
- Duty to Define Proximate Cause ▸ See *People v. Bland* (2002) 28 Cal.4th 313, 334–335 [121 Cal.Rptr.2d 546, 48 P.3d 1107] [in context of firearm enhancement].

## RELATED ISSUES

***Discretion to Strike Enhancement***
The trial court retains discretion under Penal Code section 1385 to strike an arson sentence enhancement. (*People v. Wilson* (2002) 95 Cal.App.4th 198, 203 [115 Cal.Rptr.2d 355] [enhancement for use of an accelerant under Pen. Code, § 451.1(a)(5)].)

## SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 372.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.47 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11[3] (Matthew Bender).

## 1552–1599. Reserved for Future Use

## 1945. Procuring Filing of False Document or Offering False Document for Filing (Pen. Code, § 115)

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**The defendant is charged [in Count __] with (offering a (false/ [or] forged) document for (filing[,]/ [or] recording[,]/ [or] registration)/having a (false/ [or] forged) document (filed[,]/ [or] recorded[,]/ [or] registered)) [in violation of Penal Code section 115].**

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

*<Alternative 1A—offering>*

**[1. The defendant offered a (false/ [or] forged) document for (filing[,]/ [or] recording[,]/ [or] registration) in a public office in California;**

*<Alternative 1B—procuring>*

**[1. The defendant caused a (false/ [or] forged) document to be (filed[,]/ [or] recorded[,]/ [or] registered) in a public office in California;**

**2. When the defendant did that act, (he/she) knew that the document was (false/ [or] forged);**

**AND**

**3. The document was one that, if genuine, could be legally (filed[,]/ [or] recorded[,]/ [or] registered).**

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*New January 2006; Revised September 2020*

## BENCH NOTES

***Instructional Duty***

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

## AUTHORITY

- Elements ▸ Pen. Code, § 115.

- Materiality of Alteration Not Element ▸ *People v. Feinberg* (1997) 51 Cal.App.4th 1566, 1578–1579 [60 Cal.Rptr.2d 323].
- Meaning of Instrument as Used in Penal Code section 115 ▸ *People v. Parks* (1992) 7 Cal.App.4th 883, 886–887 [9 Cal.Rptr.2d 450]; *Generes v. Justice Court* (1980) 106 Cal.App.3d 678, 682–684 [165 Cal.Rptr. 222]; *People v. Powers* (2004) 117 Cal.App.4th 291, 295–297 [11 Cal.Rptr.3d 619].

## RELATED ISSUES

***Meaning of Instrument***

Penal Code section 115 applies to any "instrument" that, "if genuine, might be filed, registered, or recorded under any law of this state or of the United States. . . ." (Pen. Code, § 115(a).) Modern cases have interpreted the term "instrument" expansively, including any type of document that is filed or recorded with a public agency that, if acted on as genuine, would have the effect of deceiving someone. (See *People v. Parks* (1992) 7 Cal.App.4th 883, 886–887 [9 CalRptr.2d 450]; *Generes v. Justice Court* (1980) 106 Cal.App.3d 678, 682–684 [165 Cal.Rptr. 222].) Thus, the courts have held that "instrument" includes a modified restraining order (*People v. Parks, supra,* 7 Cal.App.4th at p. 886), false bail bonds (*People v. Garcia* (1990) 224 Cal.App.3d 297, 306–307 [273 Cal.Rptr.666]), and falsified probation work referrals (*People v. Tate* (1997) 55 Cal.App.4th 663, 667 [64 Cal.Rptr.2d 206]). In ~~the recent case of~~ *People v. Powers* (2004) 117 Cal.App.4th 291, 297 [11 Cal.Rptr.3d 619], the court held that fishing records were "instruments" under Penal Code section 115. The court stated that "California courts have shown reluctance to interpret section 115 so broadly that it encompasses any writing that may be filed in a public office." (*Id.* at p. 295.) The court adopted the following analysis for whether a document is an "instrument," quoting the Washington Supreme Court:

> (1) the claimed falsity relates to a material fact represented in the instrument; and (2a) the information contained in the document is of such a nature that the government is required or permitted by law, statute or valid regulation to act in reliance thereon; or (2b) the information contained in the document materially affects significant rights or duties of third persons, when this effect is reasonably contemplated by the express or implied intent of the statute or valid regulation which requires the filing, registration, or recording of the document.

(*Id.* at p. 297 [quoting *State v. Price* (1980) 94 Wash.2d 810, 819 [620 P.2d 994].)

***Each Document Constitutes a Separate Offense***

Penal Code section 115 provides that each fraudulent instrument filed or offered for filing constitutes a separate violation (subdivision (b)) and may be punished separately (subdivision (d)). "Thus, the Legislature has unmistakably authorized the imposition of separate penalties for each prohibited act even though they may be part of a continuous course of conduct and have the same objective." (*People v. Gangemi* (1993) 13 Cal.App.4th 1790, 1800 [17 Cal.Rptr.2d 462].)

***Meaning of False***

Unlawful procurement of a deed does not make it a false or forged document. (*People v. Schmidt* (2019) 41 Cal.App.5th 1042, 1056-1058 [254 Cal.Rptr.3d 694].)

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 188-189.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1][b] (Matthew Bender).

## 1946–1949. Reserved for Future Use

## 1950. Sale or Transfer of Access Card or Account Number (Pen. Code, § 484e(a))

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**The defendant is charged [in Count __] with (selling[,]/ [or] transferring[,]/ [or] conveying) an access card [in violation of Penal Code section 484e(a)].**

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

1. **The defendant (sold[,]/ [or] transferred[,]/ [or] conveyed) an access card;**

2. **The defendant did so without the consent of the cardholder or the issuer of the card;**

**AND**

3. **When the defendant (sold[,]/ [or] transferred[,]/ [or] conveyed) the access card, (he/she) intended to defraud.**

**An *access card* is a card, plate, code, account number, or other means of account access that can be used, alone or with another access card, to obtain (money[,]/ [or] goods[,]/ [or] services[,]/ [or] anything of value), or that can be used to begin a transfer of funds[, other than a transfer originated solely by a paper document].**

**[(A/An) _____** *<insert description, e.g., ATM card, credit card>* **is an access card.]**

**A *cardholder* is someone who has been issued an access card [or who has agreed with a card issuer to pay debts arising from the issuance of an access card to someone else].**

**A *card issuer* is a company [or person] [or the agent of a company or person] that issues an access card to a cardholder.**

**[*Selling* means exchanging something for money, services, or anything of value.]**

**Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.**

**[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]**

**[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]**

**[The People allege that the defendant (sold[,]/ [or] transferred[,]/ [or] conveyed) the following access cards: _____** <*insert description of each card when multiple items alleged*>**. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (sold[,]/ [or] transferred[,]/ [or] conveyed) at least one of these cards and you all agree on which card (he/she) (sold[,]/ [or] transferred[,]/ [or] conveyed).]**

**[If you find the defendant guilty of (selling[,]/ [or] transferring[,]/ [or] conveying) an access card, you must then decide whether the value of the access card was more than $950. If you have a reasonable doubt whether the value of the access card was more than $950, you must find this allegation has not been proved.]**

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*New January 2006; Revised September 2020*

## 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 sold or transferred multiple cards, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

In the definition of "access card," the court may give the bracketed portion that begins with "other than a transfer" at its discretion. This statement is included in the statutory definition of access card. (Pen. Code, § 484(2).) However, the committee believes it would rarely be relevant.

The court may also give the bracketed sentence stating "(A/An) _____ is an access card" if the parties agree on that point.

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P2d 75].)

## AUTHORITY

- Elements ▸ Pen. Code, § 484e(a).
- Definitions ▸ Pen. Code, § 484d.
- Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity ▸ Pen. Code, § 8.
- Unanimity Instruction If Multiple Items ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr. 752].
- Value Must Exceed $950 For Felony ▸ *People v. Romanowski* (2017) 2 Cal.5th 903, 908-910 [215 Cal.Rptr.3d 758, 391 P.3d 633].

## LESSER INCLUDED OFFENSES

Possession of Access Card With Intent to Sell (Pen. Code, § 484e(c)) may be a lesser included offense. (But see *People v. Butler* (1996) 43 Cal.App.4th 1224, 1245–1246 [51 Cal.Rptr.2d 150].)

## RELATED ISSUES

***Multiple Charges Based on Single Act***

Prosecution under Penal Code section 484d et seq. does not preclude simultaneous prosecution under other statutes for the same conduct. (*People v. Braz* (1997) 57 Cal.App.4th 1, 8 [66 Cal.Rptr.2d 553]; *People v. Butler* (1996) 43 Cal.App.4th 1224, 1243–1244 [51 Cal.Rptr.2d 150].) Thus, the defendant may also be charged with such offenses as burglary (Pen. Code, § 459), forgery (Pen. Code, § 470), grand theft (Pen. Code, § 487), or telephone fraud (Pen. Code, § 502.7). (*People v.*

*Braz, supra,* 57 Cal.App.4th at p. 8; *People v. Butler, supra,* 43 Cal.App.4th at pp. 1243–1244.) However, Penal Code section 654 may preclude punishment for multiple offenses. (*People v. Butler, supra,* 43 Cal.App.4th at p. 1248.)

***Cloned Cellular Phone***

"[T]he Legislature intended that the definition of access card be broad enough to cover future technologies, the only limitation being on purely paper transactions. As the evidence disclosed here, a cloned cellular phone is a sophisticated and unlawful 'means of account access' to the account of a legitimate telephone subscriber." (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1244 [51 Cal.Rptr.2d 150].)

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 215-216.

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. 143, *Crimes Against Property,* § 143.04[1], [2] (Matthew Bender).

## 1952. Acquiring or Retaining Account Information (Pen. Code, § 484e(d))

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**The defendant is charged [in Count __] with (acquiring/ [or] retaining) the account information of an access card [in violation of Penal Code section 484e(d)].**

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

1. **The defendant (acquired/ [or] retained) the account information of an access card that was validly issued to someone else;**

2. **The defendant did so without the consent of the cardholder or the issuer of the card;**

**AND**

3. **When the defendant (acquired/ [or] retained) the account information, (he/she) intended to use that information fraudulently.**

**An *access card* is a card, plate, code, account number, or other means of account access that can be used, alone or with another access card, to obtain (money[,]/ [or] goods[,]/ [or] services[,]/ [or] anything of value), or that can be used to begin a transfer of funds[, other than a transfer originated solely by a paper document].**

**[(A/An) _____** *<insert description, e.g., ATM card, credit card>* **is an access card.]**

**A *cardholder* is someone who has been issued an access card [or who has agreed with a card issuer to pay debts arising from the issuance of an access card to someone else].**

**A *card issuer* is a company [or person] [or the agent of a company or person] that issues an access card to a cardholder.**

**Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.**

**[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]**

**[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]**

**[The People allege that the defendant (acquired/ [or] retained) the account information of the following access cards: _____** *<insert description of each card when multiple items alleged>***. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (acquired/ [or] retained) the account information of at least one of these cards and you all agree on which card's account information (he/she) (acquired/ [or] retained).]**

**[If you find the defendant guilty of (acquiring/ [or] retaining) the account information of an access card, you must then decide whether the value of the account information was more than $950. If you have a reasonable doubt whether the value of the account information was more than $950, you must find this allegation has not been proved.]**

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*New January 2006; Revised September 2020*

## 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 the account information of multiple cards, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

In the definition of "access card," the court may give the bracketed portion that begins with "other than a transfer" at its discretion. This statement is included in the statutory definition of access card. (Pen. Code, § 484d(2).) However, the committee believes it would rarely be relevant.

The court may also give the bracketed sentence stating "(A/An) _____ is an access card" if the parties agree on that point.

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

## AUTHORITY

- Elements ▸ Pen. Code, § 484e(d).
- Definitions ▸ Pen. Code, § 484d.
- Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity ▸ Pen. Code, § 8.
- Unanimity Instruction If Multiple Items ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].
- Value Must Exceed $950 for Felony ▸ *People v. Romanowski* (2017) 2 Cal.5th 903, 908-910 [215 Cal.Rptr.3d 758, 391 P.3d 633].

## RELATED ISSUES

***Acquires***

"If appellant is arguing that only the person who *first* acquires this information with the requisite intent is guilty of the crime, we disagree. We interpret the crime to apply to any person who acquires that information with the intent to use it fraudulently." (*People v. Smith* (1998) 64 Cal.App.4th 1458, 1470 [76 Cal.Rptr.2d 75].)

***Includes Possession of Cancelled Card***

In *People v. Molina* (2004) 120 Cal.App.4th 507, 511 15 Cal.Rptr.3d 493], the defendant possessed a cancelled access card that had been issued to someone else. The court held that this constituted a violation of Penal Code section 484e(d). (*Id.* at pp. 514–515.) The court further held that, although the defendant's conduct also violated Penal Code section 484e(c), a misdemeanor, the defendant's right to equal protection was not violated by being prosecuted for the felony offense. (*Id.* at pp. 517–518.)

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 215-216.

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. 143, *Crimes Against Property,* § 143.04[1], [2] (Matthew Bender).

## 2501. Carrying Concealed Explosive or Dirk or Dagger (Pen. Code, §§ 21310, 16470)

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**The defendant is charged [in Count __] with unlawfully carrying a concealed (explosive/dirk or dagger) [in violation of Penal Code section 21310].**

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

1. **The defendant carried on (his/her) person (an explosive/a dirk or dagger);**

2. **The defendant knew that (he/she) was carrying it;**

3. **It was substantially concealed on the defendant's person;**

**AND**

4. **The defendant knew that it (was an explosive/could readily be used as a stabbing weapon).**

**The People do not have to prove that the defendant used or intended to use the alleged (explosive/dirk or dagger) as a weapon.**

**[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) that 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 *dirk or dagger* is a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death. *Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]**

**[A (pocketknife/nonlocking folding knife/folding knife that is not prohibited by Penal Code section 21510) is not a *dirk or dagger* unless the blade of the knife is exposed and locked into position.]**

**[A knife carried in a sheath and worn openly suspended from the waist of the wearer is not *concealed*.]**

*<Give only if object may have innocent uses.>*
**[When deciding whether the defendant knew the object (was an explosive/could be used as a stabbing weapon), consider all the surrounding circumstances, including the time and place of possession. Consider also (the destination of the defendant[,]/ the alteration of the object from standard form[,]) and other facts, if any.]**

**[The People allege that the defendant carried the following weapons: _____ <*insert description of each weapon when multiple items alleged*>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant carried at least one of these weapons and you all agree on which weapon (he/she) carried and when (he/she) carried it.]**

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*New January 2006; Revised February 2012, September 2020*

## 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 beginning "The People allege that the defendant possessed the following weapons," inserting the items alleged.

Give the bracketed paragraph that begins with "When deciding whether" only if the object was not designed solely for use as a stabbing weapon but may have innocent uses. (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404 [111 Cal.Rptr.2d 496]; *People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. 9 [47 Cal.Rptr. 772, 408 P.2d 100].)

When instructing on the meaning of "explosive," if the explosive is listed in Health and Safety Code section 12000, the court may use the bracketed sentence

stating, "_____ is an explosive." For example, "Nitroglycerine is an explosive." However, the court may not instruct the jury that the defendant used an explosive. For example, the court may not state, "The defendant used an explosive, nitroglycerine," or "The substance used by the defendant, nitroglycerine, was an explosive." (See *People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257]; *People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].)

If the court gives the instruction on a "folding knife that is not prohibited by Penal Code section 21510," give a modified version of CALCRIM No. 2502, *Possession, etc., of Switchblade Knife.*

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

## AUTHORITY

- Elements ▸ Pen. Code, § 21310.
- Need Not Prove Intent to Use ▸ *People v. Rubalcava* (2000) 23 Cal.4th 322, 328 [96 Cal.Rptr.2d 735, 1 P.3d 52].
- Knowledge Required ▸ *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52].
- Substantial Concealment ▸ *People v. Wharton* (1992) 5 Cal.App.4th 72, 75 [6 Cal.Rptr.2d 673]; *People v. Fuentes* (1976) 64 Cal.App.3d 953, 955 [134 Cal.Rptr. 885].
- Explosive Defined ▸ Health & Saf. Code, § 12000; *People v. Clark* (1990) 50 Cal.3d 583, 604 [789 P.2d 127, 268 Cal.Rptr. 399].
- Dirk or Dagger Defined ▸ Pen. Code, § 16470.
- Dirk or Dagger—No Length Requirement ▸ *In re Victor B.* (1994) 24 Cal.App.4th 521, 526 [29 Cal.Rptr.2d 362].
- Dirk or Dagger—Object Not Originally Designed as Knife ▸ *In re Victor B.* (1994) 24 Cal.App.4th 521, 525–526 [29 Cal.Rptr.2d 362].
- Dirk or Dagger—Capable of Ready Use ▸ *People v. Sisneros* (1997) 57 Cal.App.4th 1454, 1457 [67 Cal.Rptr.2d 782].

- Dirk or Dagger—Pocketknives ▸ *In re Luke W.* (2001) 88 Cal.App.4th 650, 655–656 [105 Cal.Rptr.2d 905]; *In re George W.* (1998) 68 Cal.App.4th 1208, 1215 [80 Cal.Rptr.2d 868].

## RELATED ISSUES

***Knowledge Element***

"[T]he relevant language of section 12020 is unambiguous and establishes that carrying a concealed dirk or dagger does not require an intent to use the concealed instrument as a stabbing weapon." (*People v. Rubalcava* (2000) 23 Cal.4th 322, 328 [96 Cal.Rptr.2d 735, 1 P.3d 52] [interpreting now-repealed Pen. Code, § 12020].) However, "to commit the offense, a defendant must still have the requisite *guilty mind*: that is, the defendant must knowingly and intentionally carry concealed upon his or her person an instrument 'that is capable of ready use as a stabbing weapon.' ([now repealed] § 12020(a), (c)(24).) A defendant who does not know that he is carrying the weapon or that the concealed instrument may be used as a stabbing weapon is therefore not guilty of violating section 12020." (*Id.* at pp. 331–332 [emphasis in original] [referencing repealed Pen. Code § 12020; see now Pen. Code, §§ 16479, 21310].)

***Definition of Dirk or Dagger***

The definition of "dirk or dagger" contained in Penal Code section 16470 was effective on January 1, 2012. Prior decisions interpreting the meaning of "dirk or dagger" should be viewed with caution. (See *People v. Mowatt* (1997) 56 Cal.App.4th 713, 719–720 [65 Cal.Rptr.2d 722] [comparing old and new definitions]; *People v. Sisneros* (1997) 57 Cal.App.4th 1454, 1457 [67 Cal.Rptr.2d 782] [same]; *In re George W.* (1998) 68 Cal.App.4th 1208, 1215 [80 Cal.Rptr.2d 868] [discussing 1997 amendment].)

***Dirk or Dagger—"Capable of Ready Use"***

"[T]he 'capable of ready use' requirement excludes from the definition of dirk or dagger a device carried in a configuration that requires assembly before it can be utilized as a weapon." (*People v. Sisneros* (1997) 57 Cal.App.4th 1454, 1457 [67 Cal.Rptr.2d 782].)

***Dirk or Dagger—"Pocketknife"***

"Although they may not have folding blades, small knives obviously designed to be carried in a pocket in a closed state, and which cannot be used until there have been several intervening manipulations, comport with the implied legislative intent that such knives do not fall within the definition of proscribed dirks or daggers but

are a type of pocketknife excepted from the statutory proscription." (*In re Luke W.* (2001) 88 Cal.App.4th 650, 655–656 [105 Cal.Rptr.2d 905].)

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 213.

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][a] (Matthew Bender).

## 2503. Possession of Deadly Weapon With Intent to Assault (Pen. Code, § 17500)

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**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.]**

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*New January 2006; Revised February 2012, February 2013, September 2019, September 2020*

## 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 and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

If determining whether the item is an inherently deadly weapon requires resolution of a factual issue, give both bracketed instructions.***Defenses—Instructional Duty*** Evidence of voluntary intoxication or mental impairment may be admitted to show that the defendant did not form the required mental state. (See *People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364].) The court has no sua sponte duty to instruct on these defenses; however, the trial court must give these instructions on request if supported by the evidence. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588] [on duty to instruct generally]; *People v. Stevenson* (1978) 79 Cal.App.3d 976, 988 [145 Cal.Rptr. 301] [instructions applicable to possession of weapon with intent to assault].) See Defenses and Insanity, CALCRIM No. 3400 et seq.

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

## AUTHORITY

- Elements ▸ Pen. Code, § 17500.
- Deadly Weapon Defined ▸ *People v. Brown* (2012) 210 Cal.App.4th 1, 6–8 [147 Cal.Rptr.3d 848]; *People v. Aguilar* (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 (4th ed. 2012) Crimes Against Public Peace and Welfare, § 189.

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

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

## 2514. Possession of Firearm by Person Prohibited by Statute: Self–Defense

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**The defendant is not guilty of unlawful possession of a firearm[, as charged in Count __,] if (he/she) temporarily possessed the firearm in (self-defense/ [or] defense of another). The defendant possessed the firearm in lawful (self-defense/ [or] defense of another) if:**

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

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

3. **A firearm became available to the defendant without planning or preparation on (his/her) part;**

4. **The defendant possessed the firearm temporarily, that is, for a period no longer than was necessary [or reasonably appeared to have been necessary] for self-defense;**

5. **No other means of avoiding the danger of injury was available;**

**AND**

6. **The defendant's use of the firearm was reasonable under the circumstances.**

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

**When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar**

**knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.**

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

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

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

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

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

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

**The People have the burden of proving beyond a reasonable doubt that the defendant did not temporarily possess the firearm in (self-defense/ [or] defense of another). If the People have not met this burden, you must find the defendant not guilty of this crime.**

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*New January 2006; Revised December 2008, February 2012, September 2020*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to instruct on self-defense when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (See *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [249 Cal.Rptr. 897] [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses]; *People v. King* (1978) 22 Cal.3d 12, 24 [148 Cal.Rptr. 409, 582 P.2d 1000] [self-defense applies to charge under now repealed Pen. Code, § 12021].)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of "antecedent threats or assaults against the defendant on the reasonableness of defendant's conduct." (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488 [1 Cal.Rptr.3d 774].) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475 [198 Cal.Rptr. 819]; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068 [56 Cal.Rptr.2d 133, 920 P.2d 1337]; see also CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.) If these instructions have already been given in CALCRIM No. 3470 or CALCRIM No. 505, the court may delete them here.

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

***Related Instructions***

CALCRIM No. 3470, *Right to Self-Defense or Defense of Another (Non-Homicide)*.
CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.
CALCRIM No. 3472, *Right to Self-Defense: May Not Be Contrived*.
CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

## AUTHORITY

- Temporary Possession of Firearm by Felon in Self-Defense ▸ *People v. King* (1978) 22 Cal.3d 12, 24 [148 Cal.Rptr. 409, 582 P.2d 1000].
- Duty to Retreat Limited to Felon in Possession Cases ▸ *People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1343–1346 [29 Cal.Rptr.3d 226].
- Possession Must Be Brief and Not Planned ▸ *People v. McClindon* (1980) 114 Cal.App.3d 336, 340 [170 Cal.Rptr. 492].
- Instructional Requirements ▸ *People v. Moody* (1943) 62 Cal.App.2d 18 [143 P.2d 978]; *People v. Myers* (1998) 61 Cal.App.4th 328, 335, 336 [71 Cal.Rptr.2d 518].
- Lawful Resistance ▸ Pen. Code, §§ 692, 693, 694; Civ. Code, § 50.
- Burden of Proof ▸ Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements ▸ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Imminence ▸ *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167], disapproved on other grounds by *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088–1089 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Reasonable Belief ▸ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1]; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, §§ 86, 87, 68, 71, 72, 73.

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 233-237.

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

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction,* § 93.06 (Matthew Bender).

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

## 2515–2519. Reserved for Future Use

## 2578. Explosion of Explosive or Destructive Device Causing Death, Mayhem, or Great Bodily Injury (Pen. Code, § 18755)

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**The defendant is charged [in Count __] with (exploding/ [or] igniting) (an explosive/ [or] a destructive device) causing (death[,]/ mayhem[,]/ [or] great bodily injury) to another person [in violation of Penal Code section 18755].**

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

1. **The defendant willfully and maliciously (exploded/ [or] ignited) (an explosive/ [or] a destructive device);**

**AND**

2. **The explosion caused (death[,]/ mayhem[,]/ [or] great bodily injury) to another person.**

**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.**

**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.**

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

**[*Mayhem* means unlawfully:**

*<A. Removing Body Part>*
**[Removing a part of someone's body](;[ or]/.)**

*<B. Disabling Body Part>*
**[Disabling or making useless a part of someone's body and the disability is more than slight or temporary](;[ or]/.)**

*<C. Disfigurement>*
**[Permanently disfiguring someone](;[ or]/.)**

*<D. Tongue Injury>*
**[Cutting or disabling someone's tongue](;[ or]/.)**

*<E. Slitting Nose, Ear, or Lip>*
**[Slitting someone's (nose[, ]/ear[,]/ [or] lip)](; or/.)**

*<F. Significant Eye Injury>*
**[Putting out someone's eye or injuring someone's eye in a way that so significantly reduces his or her ability to see that the eye is useless for the purpose of ordinary sight.]]**

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

**[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.]**

**[An act causes (death[,]/ mayhem[,]/ [or] great bodily injury) if the (death/injury) is the direct, natural, and probable consequence of the act, and the (death[,]/ mayhem[,]/ [or] great bodily 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 (death[,]/ mayhem[,]/ [or] great bodily injury). An act causes (death/injury) only if it is a substantial factor in causing the (death/injury). A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the (death/injury).]**

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*New January 2006; Revised February 2012, September 2020*

## BENCH NOTES

***Instructional Duty***

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

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (See *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401] [causation issue in homicide].) If the evidence indicates that there was only one cause of injury, 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 injury, the court should also give the "substantial factor" instruction and definition in the second bracketed 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].)

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* (1976) 57 Cal.App.3d 251, 258 [129 Cal.Rptr. 139];

*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].)

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

## AUTHORITY

- Elements ▸ Pen. Code, § 18755.
- Explosive Defined ▸ Health & Saf. Code, § 12000.
- Destructive Device Defined ▸ Pen. Code, § 16460.
- 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].
- Must Injure Another Person ▸ See *People v. Teroganesian* (1995) 31 Cal.App.4th 1534, 1538 [37 Cal.Rptr.2d 489].
- General Intent Crime ▸ See *People v. Thompson* (1992) 7 Cal.App.4th 1966, 1970–1971 [10 Cal.Rptr.2d 15].
- Great Bodily Injury Defined ▸ *People v. Poulin* (1972) 27 Cal.App.3d 54, 61 [103 Cal.Rptr. 623].

## 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].

- Explosion of a Destructive Device Causing Injury ▸ Pen. Code, § 18750; see *People v. Poulin* (1972) 27 Cal.App.3d 54, 60 [103 Cal.Rptr. 623].

## RELATED ISSUES

See the Related Issues section to CALCRIM No. 2571, *Carrying or Placing Explosive or Destructive Device on Common Carrier,* and CALCRIM No. 2577, *Explosion of Explosive or Destructive Device Causing Bodily Injury*.

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 225–226, 227.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04, Ch. 142, *Crimes Against the Person,* § 142.01[2][a][i], [ii], Ch. 144, *Crimes Against Order,* § 144.01[1][c] (Matthew Bender).

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

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

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

*<Alternative 1A—attending or giving testimony>*

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

*<Alternative 1B—report of victimization>*

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

*<Alternative 1C—causing prosecution>*

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

*<Alternative 1D—causing arrest>*

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

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

**AND**

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

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

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

*<Give the appropriate bracketed paragraph[s].>*

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

  **[OR]**

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

  **[OR]**

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

  **[OR**

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

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

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

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

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*New January 2006; Revised September 2020*

## BENCH NOTES

***Instructional Duty***

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

In element 1, alternative 1A applies to charges under Penal Code section 136.1(a), which prohibits "knowingly and maliciously" preventing or attempting to prevent a witness or victim from giving testimony. Alternatives 1B through 1D apply to charges under Penal Code section 136.1(b). ~~Subdivision (b) does not use the words "knowingly and maliciously." However, subdivision (c) provides a higher punishment if a violation of either subdivision (a) or (b) is done "knowingly and maliciously," and one of the other listed sentencing factors is proved. An argument can be made that the knowledge and malice requirements apply to all violations of Penal Code section 136.1(b), not just those charged with the additional sentencing factors under subdivision (c).~~ Because the offense always requires specific intent, the committee has included the knowledge requirement with the specific intent requirement in element 3. (*People v. Ford* (1983) 145 Cal.App.3d 985, 990 [193 Cal.Rptr. 684]; see also *People v. Womack* (1995) 40 Cal.App.4th 926, 929–930 [47 Cal.Rptr.2d 76].) ~~If the court concludes that the malice requirement also applies to all violations of subdivision (b), the court should give the bracketed word "maliciously" in element 1, in alternatives 1B through 1D, and the definition of this word.~~

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

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

## AUTHORITY

- Elements ▸ Pen. Code, § 136.1(a) & (b).
- Malice Defined ▸ Pen. Code, § 136(1).
- Witness Defined ▸ Pen. Code, § 136(2).
- Victim Defined ▸ Pen. Code, § 136(3).
- Specific Intent Required ▸ *People v. Ford* (1983) 145 Cal.App.3d 985, 990 [193 Cal.Rptr. 684]; see also *People v. Womack* (1995) 40 Cal.App.4th 926, 929–930 [47 Cal.Rptr.2d 76].
- Malice Not Required For Violations of Penal Code Section 136.1(b) ▸ *People v. Brackins* (2019) 37 Cal.App.5th 56, 66-67 [249 Cal.Rptr.3d 261].

## LESSER INCLUDED OFFENSES

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

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

## RELATED ISSUES

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

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

## SECONDARY SOURCES

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

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

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

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

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

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

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

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

**[AND]**

*<Alternative A—furtherance of a conspiracy>*

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

*<Alternative B—used or threatened force>*

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

*<Alternative C—financial gain>*

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

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

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

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

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*New January 2006; Revised September 2020*

## BENCH NOTES

***Instructional Duty***

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

As noted in the Bench Notes to CALCRIM No. 2622, the court will instruct the jury that knowledge and malice are elements of a violation of Penal Code section 136.1(a). ~~and may, in some circumstances, also instruct that malice is an element of a violation of Penal Code section 136.1(b).~~ If the court has given the malice element in CALCRIM No. 2622, the court may delete it here. If the court has not already given this element and the defendant is charged under subdivision (c), the court must give the bracketed element requiring malice here.

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

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

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

## AUTHORITY

- Factors ▸ Pen. Code, § 136.1(c).
- Malice Defined ▸ Pen. Code, § 136(1).

## SECONDARY SOURCES

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

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

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

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

## 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, September 2020*

## BENCH NOTES

***Instructional Duty***

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

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

In element 1, give alternative 1A if it is alleged the assault was committed with a deadly weapon. Give alternative 1B if it is alleged that the assault was committed with force likely to produce great bodily injury.

In element 6, give alternative 6A if the defendant was sentenced to only a life term. Give element 6B if the defendant was sentenced to both a life term and a determinate term. (*People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836].)

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

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

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

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

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

On request, give the bracketed definition of "sentenced to a term in state prison." Within that definition, give the bracketed portion that begins with "regardless of

the purpose," or the bracketed second or third sentence, if requested and relevant based on the evidence.

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

Penal Code section 4500 provides that the punishment for this offense is death or life in prison without parole, unless "the person subjected to such assault does not die within a year and a day after" the assault. If this is an issue in the case, the court should consider whether the time of death should be submitted to the jury for a specific factual determination pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].

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

***Defense—Instructional Duty***

As with murder, the malice required for this crime may be negated by evidence of heat of passion or imperfect self-defense. (*People v. St. Martin* (1970) 1 Cal.3d 524, 530–531 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781 [73 Cal.Rptr. 10, 447, P.2d 106].) If the evidences raises an issue about one or both of these potential defenses, the court has a **sua sponte** duty to give the appropriate instructions, CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion–Lesser Included Offense*, or CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense–Lesser Included Offense*. The court must modify these instructions for the charge of assault by a life prisoner.

***Related Instructions***

CALCRIM No. 875, *Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury*.

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

## AUTHORITY

- Elements of Assault by Life Prisoner ▸ Pen. Code, § 4500.

- Elements of Assault With Deadly Weapon or Force Likely ▸ Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- Willful Defined ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▸ *People v. Aguilar* (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)

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**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*.]**

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*New January 2006; Revised August 2016, September 2019, September 2020*

## BENCH NOTES

***Instructional Duty***

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 6 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In element 1, give alternative 1A if it is alleged the assault was committed with a deadly weapon. Give alternative 1B if it is alleged that the assault was committed with force likely to produce great bodily injury.

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

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

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

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

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

In the definition of "serving a sentence in a state prison," give the bracketed portion that begins with "regardless of the purpose," or the bracketed second or third sentence, if requested and relevant based on the evidence.

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

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

***Related Instructions***
CALCRIM No. 875, *Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury*.

## AUTHORITY

- Elements of Assault by Prisoner ‣ Pen. Code, § 4501.
- Elements of Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury ‣ Pen. Code, §§ 240, 245(a)(1)–(3) & (b).

- Willful Defined ‣ Pen. Code, § 7 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ‣ *People v. Aguilar* (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).

## 2745. Possession or Manufacture of Weapon in Penal Institution (Pen. Code, § 4502)

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**The defendant is charged [in Count __] with (possessing[,]/ [or] manufacturing[,]/ [or] attempting to manufacture) a weapon, specifically [(a/an)]** _____ *<insert type of weapon from Pen. Code, § 4502, e.g., "explosive">*, **while (in a penal institution/being taken to or from a penal institution/under the custody of an (official/officer/employee) of a penal institution) [in violation of Penal Code section 4502].**

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

1. **The defendant was (present at or confined in a penal institution/being taken to or from a penal institution/under the custody of an (official/officer/employee) of a penal institution);**

2. **The defendant (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) [(a/an)]** _____ *<insert type of weapon from Pen. Code, § 4502, e.g., "explosive">*;

3. **The defendant knew that (he/she) (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) the** _____ *<insert type of weapon from Pen. Code, § 4502, e.g., "explosive">*;

**AND**

4. **The defendant knew that the object (was [(a/an)]** _____ *<insert type of weapon from Pen. Code, § 4502, e.g., "explosive">*/**could be used** _____ *<insert description of weapon's use, e.g., "as a stabbing weapon," or "for purposes of offense or defense">*).

**A *penal institution* is a (state prison[,]/ [or] prison camp or farm[,]/ [or] county jail[,]/ [or] county road camp).**

**[*Metal knuckles* means any device or instrument made wholly or partially of metal that is worn in or on the hand for purposes of offense or defense and**

**that either protects the wearer's hand while striking a blow or increases the injury or force of impact from the blow. The metal contained in the device may help support the hand or fist, provide a shield to protect it, or consist of projections or studs that would contact the individual receiving a blow.]**

**[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/are) [an] *explosive[s]*.]**

**[*Fixed ammunition* is a projectile and powder enclosed together in a case ready for loading.]**

**[A *dirk or dagger* is a knife or other instrument, with or without a handguard, that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death.] [*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 firearm need not be in working order if it was designed to shoot and appears capable of shooting.]**

**[*Tear gas* is a liquid, gaseous, or solid substance intended to produce temporary physical discomfort or permanent injury when vaporized or otherwise dispersed in the air.]**

**[A *tear gas weapon* is a shell, cartridge, or bomb capable of being discharged or exploded to release or emit tear gas.] [A *tear gas weapon* [also] means a revolver, pistol, fountain pen gun, billy, or other device, portable or fixed, intended specifically to project or release tear gas.] [A *tear gas weapon* does not include a device regularly manufactured and sold for use with firearm ammunition.]**

**[[(A/An)]** _____ *<insert type of weapon from Pen. Code, § 4502, not covered in above definitions>* **(is/means/includes)** _____ *<insert appropriate definition, see Bench Notes>***.]**

**The People do not have to prove that the defendant used or intended to use the object as a weapon.**

**[You may consider evidence that the object could be used in a harmless way in deciding if the object is (a/an) _____** *<insert type of weapon from Pen. Code, § 4502>*, **as defined here.]**

**[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/visible)).]**

**[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[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) the following weapons: _____** *<insert description of each weapon 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[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) at least one of these weapons and you all agree on which weapon (he/she) (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture).]**

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*New January 2006; Revised February 2012, September 2020*

## BENCH NOTES

***Instructional Duty***

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

Where indicated in the instruction, insert one or more of the following weapons from Penal Code section 4502, based on the evidence presented:

metal knuckles
explosive substance
fixed ammunition

dirk or dagger
sharp instrument
pistol, revolver, or other firearm
tear gas or tear gas weapon
an instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag

Following the elements, give the appropriate definition of the alleged weapon. If the prosecution alleges that the defendant possessed an "instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, [or] sandbag," the court should give an appropriate definition based on case law. (See *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1402 [111 Cal.Rptr.2d 496] [definition of "slungshot"]; *People v. Mulherin* (1934) 140 Cal.App. 212, 215 [35 P.2d 174] [definition of this class of weapons].)
If the prosecution alleges under a single count that the defendant possessed multiple weapons, 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]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with "The People allege that the defendant possessed," inserting the items alleged.

If there is sufficient evidence of a harmless use for the object possessed, give the bracketed sentence that begins with "You may consider evidence that the object could be used in a harmless way . . . ." (*People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744 [19 Cal.Rptr.2d 115].)

If the prosecution alleges that the defendant attempted to manufacture a weapon, give CALCRIM No. 460, *Attempt Other Than Attempted Murder*.

It is unclear if the defense of momentary possession for disposal applies to a charge of weapons possession in a penal institution. In *People v. Brown* (2000) 82 Cal.App.4th 736, 740 [98 Cal.Rptr.2d 519], the court held that the defense was not available on the facts of the case before it but declined to consider whether "there can *ever* be a circumstance justifying temporary possession in a penal institution." (*Ibid.* [emphasis in original].) The California Supreme Court has reaffirmed that the momentary possession defense is available to a charge of illegal possession of a weapon. (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) However, the Supreme Court has yet to determine whether the defense is available in a penal institution. If the trial court determines that an instruction on momentary possession is warranted on the facts of the case before it, give a modified version of the instruction on momentary possession contained in CALCRIM No. 2510, *Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction*.

If there is sufficient evidence of imminent death or bodily injury, the defendant may be entitled to an instruction on the defense of duress or threats. (*People v. Otis* (1959) 174 Cal.App.2d 119, 125–126 [344 P.2d 342].) Give CALCRIM No. 3402, *Duress or Threats*, modified as necessary.

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

## AUTHORITY

- Elements ▸ Pen. Code, § 4502.
- Metal Knuckles Defined ▸ Pen. Code, § 21810.
- Explosive Defined ▸ Health & Saf. Code, § 12000.
- Fixed Ammunition ▸ *The Department of Defense Dictionary of Military Terms*, http://www.dtic.mil/doctrine/dod_dictionary/ (accessed January 11, 2012).
- Dirk or Dagger Defined ▸ Pen. Code, § 16470.
- Firearm Defined ▸ Pen. Code, § 16520.
- Tear Gas Defined ▸ Pen. Code, § 17240.
- Tear Gas Weapon Defined ▸ Pen. Code, § 17250.
- Blackjack, etc., Defined ▸ *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1402 [111 Cal.Rptr.2d 496]; *People v. Mulherin* (1934) 140 Cal.App. 212, 215 [35 P.2d 174].
- Knowledge ▸ See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735]; *People v. Reynolds* (1988) 205 Cal.App.3d 776, 779 [252 Cal.Rptr. 637], overruled on other grounds, *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].
- Harmless Use ▸ *People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744 [19 Cal.Rptr.2d 115]; *People v. Martinez* (1998) 67 Cal.App.4th 905, 910–913 [79 Cal.Rptr.2d 334].
- Unanimity ▸ *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].

- Constructive vs. Actual Possession ▸ *People v. Reynolds* (1988) 205 Cal.App.3d 776, 782, fn. 5 [252 Cal.Rptr. 637], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].

## RELATED ISSUES

***Administrative Punishment Does Not Bar Criminal Action***

"[P]rison disciplinary measures do not bar subsequent prosecution in a criminal action for violation of a penal statute prohibiting the same act which was the basis of the prison discipline by virtue of the proscription against double punishment provided in section 654 [citation] or by the proscription against double jeopardy provided in the California Constitution (art. I, § 13) and section 1023." (*People v. Vatelli* (1971) 15 Cal.App.3d 54, 58 [92 Cal.Rptr. 763] [citing *People v. Eggleston* (1967) 255 Cal.App.2d 337, 340 [63 Cal.Rptr. 104]].)

***Possession of Multiple Weapons at One Time Supports Only One Conviction***

"[D]efendant is subject to only one conviction for his simultaneous possession of three sharp wooden sticks in prison." (*People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].)

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 244, 248.

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

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 94, *Prisoners' Rights,* § 94.04 (Matthew Bender).

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

## 2746. Possession of Firearm, Deadly Weapon, or Explosive in a Jail or County Road Camp (Pen. Code, § 4574(a))

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**The defendant is charged [in Count __] with possessing a weapon while confined in a (jail/county road camp) [in violation of Penal Code section 4574(a)].**

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

1. **The defendant was lawfully confined in a (jail/county road camp);**

2. **While confined there, the defendant [unlawfully] possessed [(a/an)] (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon) within the (jail/county road camp);**

3. **The defendant knew that (he/she) possessed the (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon);**

**AND**

4. **The defendant knew that the object was [(a/an)] (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon).**

**[A *jail* is a place of confinement where people are held in lawful custody.]**

**[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 firearm need not be in working order if it was designed to shoot and appears capable of shooting.]**

**[As used here, a *deadly weapon* is any weapon, instrument, or object that has the reasonable potential of being used in a manner that would cause great bodily injury or death.] [*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]**

**[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/are) [an] *explosive[s]*.]**

**[*Tear gas* is a liquid, gaseous, or solid substance intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispersed in the air.]**

**[A *tear gas weapon* is a shell, cartridge, or bomb capable of being discharged or exploded to release or emit tear gas.] [A *tear gas weapon* [also] means a revolver, pistol, fountain pen gun, billy, or other device, portable or fixed, intended specifically to project or release tear gas.] [A *tear gas weapon* does not include a device regularly manufactured and sold for use with firearm ammunition.]**

**The People do not have to prove that the defendant used or intended to use the object as a weapon.**

**[You may consider evidence that the object could be used in a harmless way in deciding whether the object is a deadly weapon as defined here.]**

**[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/visible)).]**

**[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 knowingly 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 weapons:** _____ *<insert description of each weapon 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 these weapons and you all agree on which weapon (he/she) possessed.]**

*<Defense: Possession Authorized>*

**[The defendant is not guilty of this offense if (he/she) was authorized to possess the weapon by (law[,]/ [or] a person in charge of the (jail/county road camp)[,]/ [or] an officer of the (jail/county road camp) empowered by the person in charge of the (jail/camp) to give such authorization). The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess the weapon. If the People have not met this burden, you must find the defendant not guilty of this offense.]**

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*New January 2006; Revised February 2012, September 2020*

## 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, 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]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with "The People allege that the defendant possessed," inserting the items alleged.

Note that the definition of "deadly weapon" in the context of Penal Code section 4574 differs from the definition given in other instructions. (*People v. Martinez* (1998) 67 Cal.App.4th 905, 909 [79 Cal.Rptr.2d 334].)

If there is sufficient evidence of a harmless use for the object possessed, give the bracketed sentence that begins with "You may consider evidence that the object could be used in a harmless way . . . ." (*People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744 [19 Cal.Rptr.2d 115].)

If there is sufficient evidence that the defendant was authorized to possess the weapon, give the bracketed word "unlawfully" in element 2. Give also the bracketed paragraph headed "Defense: Possession Authorized."

It is unclear if the defense of momentary possession for disposal applies to a charge of weapons possession in a penal institution. In *People v. Brown* (2000) 82 Cal.App.4th 736, 740 [98 Cal.Rptr.2d 519], the court held that the defense was not available on the facts of the case before it but declined to consider whether "there can *ever* be a circumstance justifying temporary possession in a penal institution." (*Ibid.* [emphasis in original].) The California Supreme Court has reaffirmed that the momentary possession defense is available to a charge of illegal possession of

a weapon. (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) However, the Supreme Court has yet to determine whether the defense is available in a penal institution. If the trial court determines that an instruction on momentary possession is warranted on the facts of the case before it, give a modified version of the instruction on momentary possession contained in CALCRIM No. 2510, *Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction*.

If there is sufficient evidence of imminent death or bodily injury, the defendant may be entitled to an instruction on the defense of duress or threats. (*People v. Otis* (1959) 174 Cal.App.2d 119, 125–126 [344 P.2d 342].) Give CALCRIM No. 3402, *Duress or Threats*, modified as necessary.

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

## AUTHORITY

- Elements ▸ Pen. Code, § 4574(a).
- Firearm Defined ▸ Pen. Code, § 16520.
- Explosive Defined ▸ Health & Saf. Code, § 12000.
- Tear Gas Defined ▸ Pen. Code, § 17240.
- Tear Gas Weapon Defined ▸ Pen. Code, § 17250.
- Deadly Weapon Defined ▸ *People v. Martinez* (1998) 67 Cal.App.4th 905, 909 [79 Cal.Rptr.2d 334].
- Jail Defined ▸ *People v. Carter* (1981) 117 Cal.App.3d 546, 550 [172 Cal.Rptr. 838].
- Knowledge ▸ See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. James* (1969) 1 Cal.App.3d 645, 650 [81 Cal.Rptr. 845].
- Harmless Use ▸ *People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744 [19 Cal.Rptr.2d 115]; *People v. Martinez* (1998) 67 Cal.App.4th 905, 910–913 [79 Cal.Rptr.2d 334].

- Unanimity ▸ *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].
- Firearm Need Not Be Operable ▸ *People v. Talkington* (1983) 140 Cal.App.3d 557, 563 [189 Cal.Rptr. 735].
- Constructive vs. Actual Possession ▸ *People v. Reynolds* (1988) 205 Cal.App.3d 776, 782, fn. 5 [252 Cal.Rptr. 637], overruled on other grounds, *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].

## RELATED ISSUES

***Administrative Punishment Does Not Bar Criminal Action***

"[P]rison disciplinary measures do not bar subsequent prosecution in a criminal action for violation of a penal statute prohibiting the same act which was the basis of the prison discipline by virtue of the proscription against double punishment provided in section 654 [citation] or by the proscription against double jeopardy provided in the California Constitution (art. I, § 13) and section 1023." (*People v. Vatelli* (1971) 15 Cal.App.3d 54, 58 [92 Cal.Rptr. 763]; [citing *People v. Eggleston* (1967) 255 Cal.App.2d 337, 340 [63 Cal.Rptr. 104]].)

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 244, 248.

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

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 94, *Prisoners' Rights,* § 94.04 (Matthew Bender).

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

## 2747. Bringing or Sending Firearm, Deadly Weapon, or Explosive Into Penal Institution (Pen. Code, § 4574(a)-(c))

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**The defendant is charged [in Count __] with (bringing/sending/ [or] assisting in (bringing/sending)) a weapon into a penal institution [in violation of Penal Code section 4574].**

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

1. **The defendant [unlawfully] (brought/sent/ [or] assisted in (bringing/sending)) [(a/an)] (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon) into a penal institution [or onto the grounds (of/ [or] adjacent to) a penal institution];**

2. **The defendant knew that (he/she) was (bringing/sending/ [or] assisting in (bringing/sending)) an object into a penal institution [or onto the grounds (of/ [or] adjacent to) a penal institution];**

**AND**

3. **The defendant knew that the object was [(a/an)] (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon).**

**A *penal institution* is a (state prison[,]/ [or] prison camp or farm[,]/ [or] jail[,]/ [or] county road camp[,]/ [or] place where prisoners of the state prison are located under the custody of prison officials, officers, or employees).**

**[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 firearm need not be in working order if it was designed to shoot and appears capable of shooting.]**

**[As used here, a *deadly weapon* is any weapon, instrument or object that has the reasonable potential of being used in a manner that would cause great bodily injury or death.] [*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]**

**[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[s] of explosive[s] from Health & Saf. Code, § 12000>* **(is/are) [an] *explosive[s]*.]**

**[*Tear gas* means a liquid, gaseous, or solid substance intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispersed in the air.]**

**[A *tear gas weapon* means any shell, cartridge, or bomb capable of being discharged or exploded to release or emit tear gas.] [A *tear gas weapon* [also] means a revolver, pistol, fountain pen gun, billy, or other device, portable or fixed, intended specifically to project or release tear gas.] [A *tear gas weapon* does not include a device regularly manufactured and sold for use with firearm ammunition.]**

**The People do not have to prove that the defendant used or intended to use the object as a weapon.**

**[You may consider evidence that the object could be used in a harmless way in deciding if the object is a deadly weapon as defined here.]**

**[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/visible)).]**

**[The People allege that the defendant (brought/sent/ [or] assisted in (bringing/sending)) the following weapons:** _____ *<insert description of each weapon when multiple items alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (brought/sent/ [or] assisted in (bringing/sending)) at least one of these weapons and you all agree on which weapon (he/she) (brought/sent/ [or] assisted in (bringing/sending)).]**

*<Defense: Conduct Authorized>*

**[The defendant is not guilty of this offense if (he/she) was authorized to (bring/send) a weapon into the penal institution by (law[,]/ [or] a person in charge of the penal institution[,]/ [or] an officer of the penal institution empowered by the person in charge of the institution to give such authorization). The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to (bring/send) the weapon into the institution. If the People have not met this burden, you must find the defendant not guilty of this offense.]**

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*New January 2006; Revised February 2012, September 2020*

## 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 brought or sent multiple weapons into the institution, 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]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with "The People allege that the defendant (brought/sent/ [or] assisted in (bringing/sending)),"
inserting the items alleged.

If the defendant is charged with a felony for bringing or sending tear gas or a tear gas weapon into a penal institution resulting in the release of tear gas (Pen. Code, § 4574(b)), the court has a **sua sponte** duty to instruct the jury on this additional allegation. The court should give the jury an additional instruction on this issue and a verdict form on which the jury may indicate if this fact has or has not been proved.

Note that the definition of "deadly weapon" in the context of Penal Code section 4574 differs from the definition given in other instructions. (*People v. Martinez* (1998) 67 Cal.App.4th 905, 909 [79 Cal.Rptr.2d 334].)

If there is sufficient evidence of a harmless use for the object, give the bracketed sentence that begins with "You may consider evidence that the object could be used in a harmless way . . . ." (*People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744 [19 Cal.Rptr.2d 115].)

If there is sufficient evidence that the defendant was authorized to bring or send the weapon, give the bracketed word "unlawfully" in element 1. Give also the bracketed paragraph headed "Defense: Conduct Authorized."

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

## AUTHORITY

- Elements ▸ Pen. Code, § 4574(a), (b) & (c).
- Firearm Defined ▸ Pen. Code, § 16520.
- Explosive Defined ▸ Health & Saf. Code, § 12000.
- Tear Gas Defined ▸ Pen. Code, § 17240.
- Tear Gas Weapon Defined ▸ Pen. Code, § 17250.
- Deadly Weapon Defined ▸ *People v. Martinez* (1998) 67 Cal.App.4th 905, 909 [79 Cal.Rptr.2d 334].
- Jail Defined ▸ *People v. Carter* (1981) 117 Cal.App.3d 546, 550 [172 Cal.Rptr. 838].
- Knowledge of Nature of Object ▸ See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. James* (1969) 1 Cal.App.3d 645, 650 [81 Cal.Rptr. 845].
- Knowledge of Location as Penal Institution ▸ *People v. Seale* (1969) 274 Cal.App.2d 107, 111 [78 Cal.Rptr. 811].
- Harmless Use ▸ *People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744 [19 Cal.Rptr.2d 115]; *People v. Martinez* (1998) 67 Cal.App.4th 905, 910–913 [79 Cal.Rptr.2d 334].
- Unanimity ▸ *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].
- Firearm Need Not Be Operable ▸ *People v. Talkington* (1983) 140 Cal.App.3d 557, 563 [189 Cal.Rptr. 735].
- "Adjacent to" and "Grounds" Not Vague ▸ *People v. Seale* (1969) 274 Cal.App.2d 107, 114–115 [78 Cal.Rptr. 811].

## LESSER INCLUDED OFFENSES

- Attempt to Bring or Send Weapon Into Penal Institution ▸ Pen. Code, §§ 664, 4574(a), (b), or (c); *People v. Carter* (1981) 117 Cal.App.3d 546, 548 [172 Cal.Rptr. 838].

If the defendant is charged with bringing or sending tear gas or a tear gas weapon into a penal institution, the offense is a misdemeanor unless tear gas was released in the institution. (Pen. Code, § 4574(b) & (c).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has proved that tear gas was released. If the jury finds that this has not been proved, then the offense should be set at a misdemeanor.

## RELATED ISSUES

***Inmate Transferred to Mental Hospital***

A prison inmate transferred to a mental hospital for treatment pursuant to Penal Code section 2684 is not "under the custody of prison officials." (*People v. Superior Court (Ortiz)* (2004) 115 Cal.App.4th 995, 1002 [9 Cal.Rptr.3d 745].)

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, § 105.

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 (Matthew Bender).

## 3100. Prior Conviction: Nonbifurcated Trial (Pen. Code, §§ 1025, 1158)

**If you find the defendant guilty of a crime, you must also decide whether the People have proved the additional allegation that the defendant was previously convicted of (another/other) crime[s]. It has already been determined that the defendant is the person named in exhibit[s] _____** *<insert number[s] or description[s] of exhibit[s]>***. You must decide whether the evidence proves that the defendant was convicted of the alleged crime[s].**

**The People allege that the defendant has been convicted of:**

> **[1.] A violation of _____** *<insert code section alleged>***, on _____** *<insert date of conviction>***, in the _____** *<insert name of court>***, in Case Number _____** *<insert docket or case number>***(;/.)**
>
> **[AND** *<Repeat for each prior conviction alleged>***.]**

**[Consider the evidence presented on this allegation only when deciding whether the defendant was previously convicted of the crime[s] alleged [or for the limited purpose of _____** *<insert other permitted purpose, e.g., assessing credibility of the defendant>***]. Do not consider this evidence as proof that the defendant committed any of the crimes with which he is currently charged or for any other purpose.]**

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

*New January 2006; Revised March 2018, September 2020*

## BENCH NOTES

***Instructional Duty***

If the defendant is charged with a prior conviction, the court has a **sua sponte** duty to instruct on the allegation.

If identity is an issue, the court must make the factual determination that the defendant is the person who has suffered the convictions in question before giving this instruction.

Do **not** give this instruction if the court has bifurcated the trial. -Instead, give CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

If the defendant is charged with a prison prior, the court must determine whether the jury should decide if the defendant served a separate prison term for the conviction and whether the defendant remained free of prison custody for the "washout" period. (Pen. Code, § 667.5(a) & (b).) The Commentary below discusses these issues further. If the court chooses to submit these issues to the jury, give CALCRIM No. 3102, *Prior Conviction: Prison Prior*, with this instruction.

If the court determines that there is a factual issue regarding the prior conviction that must be submitted to the jury, give CALCRIM No. 3103, *Prior Conviction: Factual Issue for Jury*, with this instruction. The Commentary below discusses this issue further.

On request, the court should give the limiting instruction that begins with "Consider the evidence presented on this allegation only when deciding. . . ." (See *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913].) There is no sua sponte duty to give the limiting instruction, and the defense may request that no limiting instruction be given. (See *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].)

The court must provide the jury with a verdict form on which the jury will indicate whether the prior conviction has been proved. (Pen. Code, § 1158.)

## AUTHORITY

- Statutory Authority ▸ Pen. Code, §§ 1025, 1158.
- Bifurcation ▸ *People v. Calderon* (1994) 9 Cal.4th 69, 77–79 [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].
- Judge Determines Whether Defendant Is Person Named in Documents ▸ Pen. Code, § 1025(c); *People v. Epps* (2001) 25 Cal.4th 19, 25 [104 Cal.Rptr.2d 572, 18 P.3d 2]; *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165 [132 Cal.Rptr.2d 694].
- Limiting Instruction on Prior Conviction ▸ See *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].

- Disputed Factual Issues ▸ See *People v. Gallardo* (2017) 4 Cal.5th 120, 136 [226 Cal.Rptr.3d 379, 407 P.3d 55]; ~~*People v. Epps* (2001) 25 Cal.4th 19, 23 [104 Cal.Rptr.2d 572, 18 P.3d 2]; *People v. Kelii* (1999) 21 Cal.4th 452, 458–459 [87 Cal.Rptr.2d 674, 981 P.2d 518]; *People v. Wiley* (1995) 9 Cal.4th 580, 592 [38 Cal.Rptr.2d 347, 889 P.2d 541];~~ *Descamps v. United States* (2013) 570 U.S. 254, 268–70 [133 S.Ct. 2276, 186 L.Ed.2d 438]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]~~; *People v. McGee* (2006) 38 Cal.4th 682 [42 Cal.Rptr.3d 899, 133 P.3d 1054]; *People v. Winslow* (1995) 40 Cal.App.4th 680, 687 [46 Cal.Rptr.2d 901]~~.
- Three-Strikes Statutes ▸ Pen. Code, §§ 667(e), 1170.12.
- Five-Year Enhancement for Serious Felony ▸ Pen. Code, § 667(a)(1).
- Three-Year Enhancement for Prison Prior If Violent Felony~~-~~ ▸ Pen. Code, § 667.5(a).
- One-Year Enhancement for Prison Prior ▸ Pen. Code, § 667.5(b).
- Serious Felony Defined ▸ Pen. Code, § 1192(c).
- Violent Felony Defined ▸ Pen. Code, § 667.5(c).

## COMMENTARY

***Factual Issues—Decided by Jury or Court?***

Penal Code sections 1025 and 1158 state that when an accusation charges a defendant with having suffered a prior conviction, the jury must decide whether the defendant "suffered the prior conviction" (unless the right to a jury trial is waived). Under Penal Code section 1025, the court, not the jury, must determine whether the defendant is the person named in the documents submitted to prove the prior conviction. (Pen. Code, § 1025(c); see also *People v. Epps* (2001) 25 Cal.4th 19, 24-25 [104 Cal.Rptr.2d 572, 18 P.3d 2].)

In some cases, however, ~~A~~a prior conviction may present an ancillary factual issue that must be decided before the conviction may be used under a particular enhancement or sentencing statute. For example, if the prosecution ~~might~~ seeks sentencing under the "three strikes" law and~~,~~ alleges~~ing~~ that the defendant was previously convicted of two burglaries~~. T~~, these prior convictions would qualify as "strikes" only if the burglaries were residential. (See *People v. Kelii* (1999) 21 Cal.4th 452, 455 [87 Cal.Rptr.2d 674, 981 P.2d 518].) If the defendant had been specifically convicted of first degree burglary of an inhabited dwelling, then there would be no issue over whether the prior convictions qualified. If, on the other hand, the defendant had been convicted simply of "burglary," then whether the offenses were residential would be a factual issue. *(Ibid.)* ~~The question then arises: who decides these ancillary factual issues, the jury or the court?~~

Penal Code sections 1025(b) and 1158 specifically state that the jury must decide whether the defendant "suffered the prior conviction." The California Supreme Court has observed that "sections 1025 and 1158 are limited in nature. [Citation.] By their terms, [these sections] grant a defendant the right to have the jury determine only whether he or she 'suffered' the alleged prior conviction." (*People v. Epps* (2001) 25 Cal.4th 19, 23 [104 Cal.Rptr.2d 572, 18 P.3d 2] [internal quotation marks and citation omitted].) Thus, the California Supreme Court has held that the court, not the jury, must decide ancillary facts necessary to establish that a prior conviction comes within a particular recidivist statute. (*People v. Kelii, supra,* 21 Cal.4th at pp. 458–459; *People v. Wiley* (1995) 9 Cal.4th 580, 592 [38 Cal.Rptr.2d 347, 889 P.2d 541]; *People v. McGee* (2006) 38 Cal.4th 682 [42 Cal.Rptr.3d 899, 133 P.3d 1054].) Specifically, the court must determine whether the facts of a prior conviction make the conviction a "serious" felony (*People v. Kelii, supra,* 21 Cal.4th at p. 457); and whether prior convictions charged as serious felonies were "brought and tried separately." (*People v. Wiley, supra,* 9 Cal.4th at p. 592.)

Penal Code section 1025 was amended in 1997 to further provide that the court, not the jury, must determine whether the defendant is the person named in the documents submitted to prove the prior conviction. (Pen. Code, § 1025(c); see also *People v. Epps, supra,* 25 Cal.4th at pp. 24–25.) The California Supreme Court has held that the defendant still has a statutory right to a jury trial on whether he or she "suffered" the prior conviction, which "may include the question whether the alleged prior conviction *ever even occurred*. For example, in a rare case, the records of the prior conviction may have been fabricated, or they may be in error, or they may otherwise be insufficient to establish the existence of the prior conviction." (*People v. Epps, supra,* 25 Cal.4th at p. 25 [italics in original].) At the same time, the court also observed that "[t]his procedure would appear to leave the jury little to do except to determine whether those documents are authentic and, if so, are sufficient to establish that the convictions the defendant suffered are indeed the ones alleged." (*Id.* at p. 27 [italics omitted] [quoting *People v. Kelii, supra,* 21 Cal.4th at p. 459].)

However, in 2000, the United States Supreme Court held that the federal due process clause requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]; see also *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403].) In *People v. Epps, supra,* 25 Cal.4th at p. 28, the California Supreme Court noted that *Apprendi* might have overruled the holdings of *Kelii* and *Wiley*. In *People v. McGee* (2006) 38 Cal.4th 682 [42 Cal.Rptr.3d 899, 133 P.3d 1054], however, the

~~California Supreme Court determined that it was not error for the trial court to examine the record of a prior conviction to determine whether it constitutes a qualifying prior conviction for purposes of a recidivist sentencing statute, because there is a "significant difference" between a "hate crime" enhancement and a traditional sentencing determination.~~

The court's role is "limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea." (See *People v. Gallardo* (2017) 4 Cal.5th 120, 136-137 [226 Cal.Rptr.3d 379, 407 P.3d 55].) A court considering whether to impose an increased sentence based on a prior conviction may not make its own findings about what facts or conduct "realistically" supported the conviction. (*Ibid.*) To allow otherwise would constitute impermissible judicial factfinding violative of the Sixth Amendment right to a jury trial. (*Ibid.*; see also *Descamps v. United States* (2013) 570 U.S. 254, 268-70 [133 S.Ct. 2276, 186 L.Ed.2d 438] [under federal Constitution's Sixth Amendment right to jury trial, the only facts related to a prior conviction that a sentencing court can rely on in imposing recidivist punishment are the facts necessarily implied by the elements of the relevant prior offense].)

***Prior Prison Term and "Washout" Period***

A similar issue arises over whether the jury or the court must decide if the defendant served a prison term as a result of a particular conviction and if the defendant has been free of custody for sufficient time to satisfy the "washout" period. (See Pen. Code, § 667.5(a) & (b).) In *People v. Winslow* (1995) 40 Cal.App.4th 680, 687 [46 Cal.Rptr.2d 901], the Court of Appeal held that the jury must determine whether the defendant served a prior prison term for a felony conviction. The other holdings in *Winslow* were rejected by the California Supreme Court. (*People v. Kelii, supra,* 21 Cal.4th at pp. 458–459; *People v. Wiley* (1995) 9 Cal.4th 580, 592 [38 Cal.Rptr.2d 347, 889 P.2d 541]~~*People v. Wiley, supra,* 9 Cal.4th at p. 592~~.) However, the *Winslow* holding that the jury must determine if the defendant served a prison term for a felony conviction remains controlling authority.

But, in *People v. Epps, supra,* 25 Cal.4th at pp. 25–26, the Court expressed doubt, in dicta, about whether the fact of having served a prison term is properly submitted to the jury. Discussing the 1997 amendment to Penal Code section 1025, the Court noted that

> [t]he analysis lists the following questions that the jury would still decide if Senate Bill 1146 became law: . . . 'Was the defendant sentenced to prison based on that conviction? How long has the

> defendant been out of custody since he or she suffered the prior conviction?' . . .
>
> [T]hough we do not have a case before us raising the issue, it appears that many of the listed questions are the sort of legal questions that are for the court under [*Wiley*]. For example, determining . . . whether the defendant was sentenced to prison is "largely legal" (*Kelii*, *supra*, 21 Cal. 4th at p. 455, quoting *Wiley*, *supra*, 9 Cal. 4th at p. 590), and though these questions require resolution of some facts, "a factual inquiry, limited to examining court documents, is . . . 'the type of inquiry traditionally performed by judges as part of the sentencing function.'" (*Kelii*, at p. 457, quoting *Wiley*, at p. 590.) . . . Therefore, the list of questions in the committee analysis should not be read as creating new jury trial rights that did not exist under *Wiley*.

*(Ibid.)*

On the other hand, *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] ~~*Apprendi*, discussed above,~~ could be interpreted as requiring the jury to make these factual findings. (But see *People v. Thomas* (2001) 91 Cal.App.4th 212, 223 [110 Cal.Rptr.2d 571] [even under *Apprendi*, no federal due process right to have jury determine whether defendant served a prior prison term].)

Until the California Supreme Court resolves this question, the court should consider submitting to the jury the issues of whether the defendant served a prison term and whether the defendant has remained free of custody for sufficient time to satisfy the "washout" period. The court may use CALCRIM No. 3102, *Prior Conviction: Prison Prior*.

## RELATED ISSUES

~~***Review Limited to Record of Conviction***~~

~~When determining if a prior conviction comes under a particular recidivist statute, "the trier of fact may consider the entire record of the proceedings leading to imposition of judgment on the prior conviction" but may not consider facts outside the record of conviction. (*People v. Myers* (1993) 5 Cal.4th 1193, 1195 [22 Cal.Rptr.2d 911, 858 P.2d 301]; see also *People v. Riel* (2000) 22 Cal.4th 1153, 1204–1205 [96 Cal.Rptr.2d 1, 998 P.2d 969]; *People v. Henley* (1999) 72 Cal.App.4th 555, 564 [85 Cal.Rptr.2d 123].) The prosecution bears the burden of proving that the prior conviction meets the requirements of the enhancement statute. (*People v. Henley, supra,* 72 Cal.App.4th at pp. 564–565.)~~

***Constitutionality of Prior***

The prosecution is not required to prove the constitutional validity of a prior conviction as an "element" of the enhancement. (*People v. Walker* (2001) 89 Cal.App.4th 380, 386 [107 Cal.Rptr.2d 264].) Rather, following the procedures established in *People v. Sumstine* (1984) 36 Cal.3d 909, 922–924 [206 Cal.Rptr. 707, 687 P.2d 904], and *People v. Allen* (1999) 21 Cal.4th 424, 435–436 [87 Cal.Rptr.2d 682, 981 P.2d 525], the defense may bring a motion challenging the constitutional validity of the prior. These questions are matters of law to be determined by the trial court.

***Defense Stipulation to Prior Convictions***

The defendant may stipulate to the truth of the prior convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) If the defendant stipulates, 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].)

***Motion for Bifurcated Trial***

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]; *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.)

## SECONDARY SOURCES

4 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 618.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 42, *Arraignment, Pleas, and Plea Bargaining,* § 42.21[6][a] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.21[2], 91.60, 91.80 (Matthew Bender).

## 3101. Prior Conviction: Bifurcated Trial (Pen. Code, §§ 1025, 1158)

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**The People have alleged that the defendant was previously convicted of (another/other) crime[s]. It has already been determined that the defendant is the person named in exhibit[s]** _____ *<insert number[s] or description[s] of exhibit[s]>***. You must decide whether the evidence proves that the defendant was convicted of the alleged crime[s].**

**The People allege that the defendant has been convicted of:**

> **[1.] A violation of** _____ *<insert code section[s] alleged>***, on** _____ *<insert date>***, in the** _____ *<insert name of court>***, Case Number** _____ *<insert docket or case number>***(;/.)**
>
> **[AND** *<Repeat for each prior conviction alleged.>***]**

**[In deciding whether the People have proved the allegation[s], consider only the evidence presented in this proceeding. Do not consider your verdict or any evidence from the earlier part of the trial.]**

**You may not return a finding that (the/any) alleged conviction has or has not been proved unless all 12 of you agree on that finding.**

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*New January 2006; Revised September 2020*

## BENCH NOTES

***Instructional Duty***

If the defendant is charged with a prior conviction, the court has a **sua sponte** duty to instruct on the allegation. Give this instruction if the court has granted a bifurcated trial. The court **must also give** CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

If the defendant is charged with a prison prior, the court must determine whether the jury should decide if the defendant served a separate prison term for the conviction and whether the defendant remained free of prison custody for the "washout" period. (Pen. Code, § 667.5(a) & (b).) The Commentary to CALCRIM No. 3100 discusses this issue. If the court chooses to submit these issues to the jury, give CALCRIM No. 3102, *Prior Conviction: Prison Prior*, with this instruction.

If the court determines that there is a factual issue regarding the prior conviction that must be submitted to the jury, give CALCRIM No. 3103: *Prior Conviction: Factual Issue for Jury*, with this instruction. The Commentary to CALCRIM No. 3100 discusses this issue.

Give the bracketed paragraph that begins with "In deciding whether the People have proved" on request.

The court must provide the jury with a verdict form on which the jury will indicate whether each prior conviction has been proved. (Pen. Code, § 1158.)

## AUTHORITY

- Statutory Authority ▸ Pen. Code, §§ 1025, 1158.
- Bifurcation ▸ *People v. Calderon* (1994) 9 Cal.4th 69, 77–79 [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].
- Judge Determines Whether Defendant Is Person Named in Documents ▸ Pen. Code, § 1025(b); *People v. Epps* (2001) 25 Cal.4th 19, 25 [104 Cal.Rptr.2d 572, 18 P.3d 2]; People *v. Garcia* (2003) 107 Cal.App.4th 1159, 1165 [132 Cal.Rptr.2d 694].
- Disputed Factual Issues ▸ See *People v. Gallardo* (2017) 4 Cal.5th 120, 136 [226 Cal.Rptr.3d 379, 407 P.3d 55]; ~~*People v. Epps* (2001) 25 Cal.4th 19, 23 [104 Cal.Rptr.2d 572, 18 P.3d 2]; *People v. Kelii* (1999) 21 Cal.4th 452, 458–459 [87 Cal.Rptr.2d 674, 981 P.2d 518]; *People v. Wiley* (1995) 9 Cal.4th 580, 592 [38 Cal.Rptr.2d 347, 889 P.2d 541];~~ *Descamps v. United States* (2013) 570 U.S. 254, 268–70 [133 S.Ct. 2276, 186 L.Ed.2d 438]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]~~; *People v. McGee* (2006) 38 Cal.4th 682 [42 Cal.Rptr.3d 899, 133 P.3d 1054]; *People v. Winslow* (1995) 40 Cal.App.4th 680, 687 [46 Cal.Rptr.2d 901]~~.
- Three-Strikes Statutes ▸ Pen. Code, §§ 667(e), 1170.12.
- Five-Year Enhancement for Serious Felony ▸ Pen. Code, § 667(a)(1).
- Three-Year Enhancement for Prison Prior If Violent Felony ▸ Pen. Code, § 667.5(a).
- One-Year Enhancement for Prison Prior ▸ Pen. Code, § 667.5(b).
- Serious Felony Defined ▸ Pen. Code, § 1192(c).
- Violent Felony Defined ▸ Pen. Code, § 667.5(c).

## RELATED ISSUES

See *Motion for Bifurcated Trial* in the Related Issues section of CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*.

## SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 618.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 42, *Arraignment, Pleas, and Plea Bargaining,* § 42.21[6][a] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.21[2], 91.60, 91.80 (Matthew Bender).

## 3102. Prior Conviction: Prison Prior

**If you find that the defendant was previously convicted of _____ <*insert description of prior conviction*>, you must also decide whether the People have proved that the defendant served a separate prison term for the crime and did not remain (out of prison custody/ [and] free of a new felony conviction) for (5/10) years.**

**To prove this allegation, the People must prove that:**

**1. The defendant served a separate prison term for the crime of _____ <*insert description of prior conviction*>;**

**AND [EITHER]**

**[2[A]. The defendant did not remain out of prison custody for (5/10) years after (he/she) was no longer in prison custody for that crime(;/.)]**

**[OR]**

**[2[B]. The defendant was convicted of a new felony that (he/she) committed within (5/10) years after (he/she) was no longer in prison custody.]**

**A person *served a separate prison term for a crime* if he or she served a continuous period of prison confinement imposed for that crime. [The prison term may have been served for that crime alone or in combination with prison terms imposed at the same time for other crimes.] [A person is still *serving a separate prison term for a crime* if he or she is placed back in custody (following an escape/ [or] for a parole violation).] [If a person is returned to custody following (an escape/ [or] a parole violation) and is also sentenced to prison for a new crime, then that person is serving a new separate prison term.]**

**A person is *in prison custody* until he or she is discharged from prison or released on parole, whichever happens first. [A person is also *in prison custody* if he or she (is placed back in custody for a parole violation/ [or] has unlawfully escaped from custody).]**

**A *prison term* includes confinement in [(a/the)] (state prison/federal penal institution/California Youth Authority/Division of Juvenile Justice/Department of Youth and Community Restoration/_____** *<insert name of hospital or other institution where confinement entitles person to prison credits>***).**

**[A *prison term* includes commitment to the State Department of Mental Health as a mentally disordered sex offender following a felony conviction if the commitment lasts more than one year.]**

**[A conviction of _____** *<insert name of offense from other state or federal offense>* **is the same as a conviction for a felony if the defendant served one year or more in prison for the crime.]**

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

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*New January 2006; Revised September 2020*

## BENCH NOTES

***Instructional Duty***

Review the Commentary to CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, regarding the current state of the law on whether the court must submit these issues to the jury. If the court gives this instruction, the court **must** also give either CALCRIM No. 3100 or CALCRIM No. 3101.

The court must give one of the bracketed elements (did not remain out of prison custody or was convicted of a new felony), depending on the prosecution's theory. The court may give both of the bracketed elements with the bracketed words "either" and "or."

The court may give the bracketed sentence that begins with "If a person is returned to custody following (an escape/ [or] a parole violation) and is also sentenced to prison for a new offense" on request if relevant based on the evidence. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241 [17 Cal.Rptr.3d 596, 95 P.3d 865].)

If the court gives this instruction, the court must provide the jury with a verdict form on which the jury will indicate whether the allegation has been proved. (Pen. Code, § 1158.)

## AUTHORITY

- Disputed Factual Issues ▸ See *People v. Gallardo* (2017) 4 Cal.5th 120, 136 [226 Cal.Rptr.3d 379, 407 P.3d 55]; *People v. Epps* (2001) 25 Cal.4th 19, 23 [104 Cal.Rptr.2d 572, 18 P.3d 2]; ~~*People v. Kelii* (1999) 21 Cal.4th 452, 458–459 [87 Cal.Rptr.2d 674, 981 P.2d 518]; *People v. Wiley* (1995) 9 Cal.4th 580, 592 [38 Cal.Rptr.2d 347, 889 P.2d 541];~~ *Descamps v. United States* (2013) 570 U.S. 254, 268–70 [133 S.Ct. 2276, 186 L.Ed.2d 438]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]~~; *People v. McGee* (2006) 38 Cal.4th 682 [42 Cal.Rptr.3d 899, 133 P.3d 1054]; *People v. Winslow* (1995) 40 Cal.App.4th 680, 687 [46 Cal.Rptr.2d 901]~~.
- Burden of Proof ▸ *People v. Fielder* (2004) 114 Cal.App.4th 1221, 1231 [8 Cal.Rptr.3d 247].
- Continuous, Completed Term ▸ *People v. Medina* (1988) 206 Cal.App.3d 986, 991–992 [254 Cal.Rptr. 89]; *People v. Cardenas* (1987) 192 Cal.App.3d 51, 56 [237 Cal.Rptr. 249].
- Term for Offense Committed in Prison Is Separate ▸ *People v. Langston* (2004) 33 Cal.4th 1237, 1242 [17 Cal.Rptr.3d 596, 95 P.3d 865]; *People v. Walkkein* (1993) 14 Cal.App.4th 1401, 1410 [18 Cal.Rptr.2d 383]; *People v. Cardenas* (1987) 192 Cal.App.3d 51, 56 [237 Cal.Rptr. 249].
- Direct Commitment to Youth Authority as Minor Is Not Prison Prior ▸ *People v. Seals* (1993) 14 Cal.App.4th 1379, 1384–1385 [18 Cal.Rptr.2d 676].
- New Commitment Following Escape Is Separate Prison Term ▸ *People v. Langston* (2004) 33 Cal.4th 1237, 1241, 1246 [17 Cal.Rptr.3d 596, 95 P.3d 865].
- Three-Year Enhancement for Prison Prior If Violent Felony ▸ Pen. Code, § 667.5(a).
- One-Year Enhancement for Prison Prior ▸ Pen. Code, § 667.5(b).
- Violent Felony Defined ▸ Pen. Code, § 667.5(c).

## RELATED ISSUES

***Commitment to Youth Authority***

A direct commitment to the Department of Youth and Community Restoration (DYCR) (formerly known as California Youth Authority (CYA) and Division of Juvenile Justice (DJJ)) under Welfare and Institutions Code section 1731.5(a) is not a prison prior for the purposes of Penal Code section 667.5. (Pen. Code, § 667.5(j); *People v. Seals* (1993) 14 Cal.App.4th 1379, 1383–1385 [18 Cal.Rptr.2d 676].) Time at one of the above facilities ~~the CYA~~ qualifies as a prison prior only

if the person was sentenced to state prison and transferred to the facility ~~CYA~~ for housing under Welfare and Institutions Code section 1731.5(c). (*People v. Seals, supra,* 14 Cal.App.4th at pp. 1383–1385.)

***Term for Offense Committed in Prison Is Separate***

"When a consecutive sentence is imposed under section 1170.1, subdivision (c), for an offense committed in state prison, section 1170.1 requires such sentence to commence *after* the completion of the term for which the defendant was originally imprisoned. Thus, each term is a separate, 'continuous completed' term, which is available for enhancement under section 667.5 if the defendant is subsequently convicted of a felony." (*People v. Walkkein* (1993) 14 Cal.App.4th 1401, 1409–1410 [18 Cal.Rptr.2d 383] [footnote and citations omitted; italics in original]; see also *People v. Langston* (2004) 33 Cal.4th 1237, 1242 [17 Cal.Rptr.3d 596, 95 P.3d 865].)

***Calculating "Washout" Period***

Penal Code section 667.5, subdivisions (a) and (b), contain "washout" periods of 10 and 5 years, respectively. The prosecution bears the burden of proving that the "washout" period does not apply to a particular conviction. (*People v. Fielder* (2004) 114 Cal.App.4th 1221, 1232 [8 Cal.Rptr.3d 247].) The "washout" period commences when the defendant is discharged from custody or released on parole, "whichever first occurs." (Pen. Code, § 667.5(d); *People v. Nobleton* (1995) 38 Cal.App.4th 76, 84–85 [44 Cal.Rptr.2d 611].) Any return to prison on a parole violation is considered part of the original prison term. (Pen. Code, § 667.5(d).) Thus, in calculating whether the defendant has remained free of prison custody and a felony conviction for sufficient time, the calculation begins from when the defendant was released on parole without subsequently returning to prison on a parole violation. (*People v. Nobleton, supra,* 38 Cal.App.4th at pp. 84–85.) The calculation ends when the defendant commits a new offense that ultimately results in a felony conviction. (*People v. Fielder, supra,* 114 Cal.App.4th at p. 1233.) The date the offense is committed, not the date of the ultimate conviction, is controlling. (*Id.* at pp. 1233–1234.) The new felony ends the allowable time for the "washout" period regardless of whether the defendant was sentenced to prison for the new felony. (*Id.* at p. 1230.)

See the Related Issues section of CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*.

## SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 727.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 42, *Arraignment, Pleas, and Plea Bargaining,* § 42.21[6][a] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.21[2], 91.80 (Matthew Bender).

## 3103. Prior Conviction: Factual Issue for Jury (Pen. Code, §§ 1025, 1158)

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**If you find that the defendant was previously convicted of the crime of** _____ <*insert description of prior conviction*>**, you must also decide whether the People have proved that in the commission of that prior crime** _____ <*insert description of other factual issue, e.g., the defendant personally used a firearm*>**.**

**To prove this allegation, the People must prove that:**

<*INSERT ELEMENTS REQUIRED.*>

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

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*New January 2006; Revised September 2020*

## BENCH NOTES

***Instructional Duty***

To determine whether or not this instruction is required, review the Commentary to CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, regarding the current state of the law on whether the jury must determine ancillary factual issues.

If the court gives this instruction, the court must provide the jury with a verdict form on which the jury will indicate whether the allegation has been proved. (Pen. Code, § 1158.)

## AUTHORITY

- Statutory Authority ▸ Pen. Code, §§ 1025, 1158.
- Disputed Factual Issues ▸ See *People v. Gallardo* (2017) 4 Cal.5th 120, 136 [226 Cal.Rptr.3d 379, 407 P.3d 55]; ~~*People v. Epps* (2001) 25 Cal.4th 19, 23 [104 Cal.Rptr.2d 572, 18 P.3d 2]; *People v. Kelii* (1999) 21 Cal.4th 452, 458–459 [87 Cal.Rptr.2d 674, 981 P.2d 518]; *People v. Wiley* (1995) 9 Cal.4th 580, 592 [38 Cal.Rptr.2d 347, 889 P.2d 541];~~ *Descamps v. United States* (2013) 570 U.S. 254, 268–70 [133 S.Ct. 2276, 186 L.Ed.2d 438]; *Apprendi v. New Jersey*

(2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]~~; *People v. McGee* (2006) 38 Cal.4th 682 [42 Cal.Rptr.3d 899, 133 P.3d 1054]; *People v. Winslow* (1995) 40 Cal.App.4th 680, 687 [46 Cal.Rptr.2d 901]~~.

## RELATED ISSUES

See the Related Issues section of CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*.

## SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 727.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 42, *Arraignment, Pleas, and Plea Bargaining,* § 42.21[6][a] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.21[2], 91.60[2][b], [c][ii], [3][b], 91.80[1][c], [2][a][ii] (Matthew Bender).

## 3104–3114. Reserved for Future Use

## 3130. Personally Armed With Deadly Weapon (Pen. Code, § 12022.3)

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**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.**

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*New January 2006; Revised December 2008, February 2013, September 2019, September 2020*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give 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 "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].)

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

## AUTHORITY

- 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 (4th ed. 2012) Punishment, §§ 349, 364, 388.

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 727.

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)

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**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.**

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*New January 2006; Revised June 2007, February 2013, September 2017, September 2019, September 2020*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give 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].)

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

## AUTHORITY

- 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).

## 3149. Personally Used Firearm: Intentional Discharge Causing Injury or Death (Pen. Code, §§ 667.61(e)(3), 12022.53(d))

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**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 and intentionally discharged a firearm during that crime causing (great bodily injury/ [or] death). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

**To prove this allegation, the People must prove that:**

1. **The defendant personally discharged a firearm during the commission [or attempted commission] of that crime;**

2. **The defendant intended to discharge the firearm;**

**AND**

3. **The defendant's act caused (great bodily injury to/ [or] the death of) a person [who was not an accomplice to the crime].**

**[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.]**

**[The term *firearm* is defined in another instruction.]**

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

**[An act causes (great bodily injury/ [or] death) if the (injury/ [or] death) is the direct, natural, and probable consequence of the act and the (injury/ [or] 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 (great bodily injury/ [or] death). An act causes (injury/ [or] death) only if it is a substantial factor in causing the (injury/ [or] 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 (injury/ [or] death).]**

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

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

**AND**

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

*<If there is an issue in the case over whether the defendant used the firearm "during 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.**

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*New January 2006; Revised February 2012, September 2020*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this 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].) If the defendant is charged with an enhancement for both intentional discharge *and* intentional discharge causing great bodily injury or death, the court may give CALCRIM No. 3150, *Personally Used Firearm: Intentional Discharge and Discharge Causing Injury or Death Both Charged*, instead of this instruction.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause (*People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335 [121 Cal.Rptr.2d 546, 48 P.3d 1107]); give the bracketed paragraph that begins with "An act causes . . . ." 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 . . . ." (*Id.* at pp. 335–338.)

The court should give the bracketed definition of "firearm" 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 an issue of whether the defendant used the firearm "during the commision 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].)

If, in element 3, the court gives the bracketed phrase "who was not an accomplice to the crime," the court should also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

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

## AUTHORITY

- Enhancement ▸ Pen. Code, §§ 667.61(e)(3), 12022.53(d).
- Firearm Defined ▸ Pen. Code, § 16520.
- "During 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].
- Proximate Cause ▸ *People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335–338 [121 Cal.Rptr.2d 546, 48 P.3d 1107].

- Accomplice Defined ▸ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].

## RELATED ISSUES

***Need Not Personally Cause Injury or Death***

"[Penal Code] Section 12022.53(d) requires that the defendant 'intentionally and *personally* discharged a firearm' (italics added), but only that he 'proximately caused' the great bodily injury or death. . . . The statute states nothing else that defendant must *personally* do. Proximately causing and personally inflicting harm are two different things." (*People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 336 [121 Cal.Rptr.2d 546, 48 P.3d 1107] [italics in original].)

***Person Injured or Killed Need Not Be Victim of Crime***

In *People v. Oates* (2004) 32 Cal.4th 1048, 1052 [12 Cal.Rptr.3d 325, 88 P.3d 56], the defendant fired two shots into a group of people, hitting and injuring one. He was convicted of five counts of premeditated attempted murder. The Court held that the subdivision (d) enhancement for causing great bodily injury applied to each of the five counts even though the defendant only injured one person. (*Id.* at p. 1056.) The Court observed that "the phrase, 'any person other than an accomplice,' does not mean 'the victim' of the underlying crime." (*Id.* at p. 1055.) Note, however, that the Supreme Court has again granted review in this case. (See *People v. Oates* (Dec. 1, 2004, S128181) [21 Cal.Rptr.3d 890, 101 P.3d 956].)

***Multiple Enhancements for Single Injury***

The Court in *Oates* ((2004) 32 Cal.4th 1048 [12 Cal.Rptr.3d 325, 88 P.3d 56]; discussed above) also held that the trial court was required to impose all five subdivision (d) enhancements because Penal Code section 12022.53(f) requires a court to impose the longest enhancement available. (*Id.* at p. 1056.) The Court further found that Penal Code section 654 did not preclude imposition of multiple subdivision (d) enhancements due to "the long-recognized, judicially-created exception for cases involving multiple victims of violent crime." (*Id.* at p. 1062.) Note, however, that the Supreme Court has again granted review in this case. (See *People v. Oates* (Dec. 1, 2004, S128181) [21 Cal.Rptr.3d 890, 101 P.3d 956].)

***Multiple Enhancements May Not Be Imposed Based on Multiple Participants***

In *People v. Cobb* (2004) 124 Cal.App.4th 1051, 1054, fn. 3 [21 Cal.Rptr.3d 869], the defendant and two others simultaneously shot at the decedent. The defendant was convicted of personally inflicting death by use of a firearm. (*Id.* at p. 1053; Pen. Code, § 12022.53(d).) In addition to the sentence for personally using a firearm, the trial court also imposed two sentences under Penal Code section

12022.53(e)(1) based on the other two participants having also fired at the decedent (*People v. Cobb, supra*, at p. 1053.) The Court of Appeal reversed the latter two enhancements, holding that Penal Code section 12022.53(f) did not permit multiple sentence enhancements based on multiple participants in one crime. (*Id.* at p. 1058.)

***Self-Defense and Imperfect Self-Defense***

Penal Code section 12022.53(*l*) provides that "[t]he enhancements specified in this section shall not apply to the lawful use or discharge of a firearm by a public officer, as provided in Section 196, or by any person in lawful self-defense, lawful defense of another, or lawful defense of property, as provided in Sections 197, 198, and 198.5." In *People v. Watie* (2002) 100 Cal.App.4th 866, 884 [124 Cal.Rptr.2d 258], the court held, "[t]his subdivision, on its face, exempts lawful (perfect) self-defense from the section's application. It does not exempt imperfect self-defense." Further, an instruction informing the jury that the defense of self-defense applies to the enhancement is not necessary. (*Id.* at p. 886.)

## SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 359-360.

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[5] (Matthew Bender).

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

## 3160. Great Bodily Injury (Pen. Code, §§ 667.5(c)(8), 667.61(d)(6), 1192.7(c)(8), 12022.7, 12022.8)

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**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 inflicted great bodily injury on _____** *<insert name of injured person>* **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.]**

**[The People must also prove that _____** *<insert name of injured person>* **was not an accomplice to the crime.]**

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

**[Committing the crime of _____** *<insert sexual offense charged>* **is not by itself the infliction of great bodily injury.]**

*<Group Assault>*
**[If you conclude that more than one person assaulted _____** *<insert name of injured person>* **and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily injury on _____** *<insert name of injured person>* **if the People have proved that:**

1. **Two or more people, acting at the same time, assaulted _____** *<insert name of injured person>* **and inflicted great bodily injury on (him/her);**

2. **The defendant personally used physical force on _____** *<insert name of injured person>* **during the group assault;**

**AND**

**[3A. The amount or type of physical force the defendant used on _____** *<insert name of injured person>* **was enough that it alone**

**could have caused _____ <*insert name of injured person*> to suffer great bodily injury(;/.)]**

**[OR]**

**[3B. The physical force that the defendant used on _____ <*insert name of injured person*> was sufficient in combination with the force used by the others to cause _____ <*insert name of injured person*> to suffer great bodily injury.]**

**The defendant must have applied substantial force to _____ <*insert name of injured person*>. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]**

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

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

**AND**

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

*<If there is an issue in the case over whether the defendant inflicted the injury "during 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.**

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*New January 2006; Revised June 2007, February 2015, September 2020*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed sentence that begins with "Committing the crime of" if the defendant is charged with a sexual offense. (*People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100] [injury must be more than that which is present in every offense of rape].)

The bracketed section beneath the heading "Group Assault" is designed to be used in cases where the evidence shows a group assault.

If the court gives the bracketed sentence instructing that the People must prove that the person assaulted "was not an accomplice to the crime," the court should also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

The jury must determine whether an injury constitutes "great bodily injury." (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If there is an issue in the case over whether the defendant inflicted the injury "during the commission of" the offense, the court may give CALCRIM No. 3261, ~~*In Commission of*~~ *While Committing a 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].)

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

## AUTHORITY

- Enhancements ▸ Pen. Code, §§ 667.5(c)(8), 667.61(d)(6), 12022.7, 12022.8.

- Great Bodily Injury Enhancements Do Not Apply to Conviction for Murder or Manslaughter. ▸ *People v. Cook* (2015) 60 Cal.4th 922, 924 [183 Cal.Rptr.3d 502].
- Great Bodily Injury Defined ▸ Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Great Bodily Injury May Be Established by Pregnancy or Abortion ▸ *People v. Cross* (2008) 45 Cal.4th 58, 68 [82 Cal.Rptr.3d 373, 190 P.3d 706].
- Must Personally Inflict Injury ▸ *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Sex Offenses—Injury Must Be More Than Incidental to Offense ▸ *People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Group Beating Instruction ▸ *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762, 139 P.3d 136].
- This Instruction Is Correct In Defining Group Beating ▸ *People v. Dunkerson* (2007) 155 Cal.App.4th 1413, 1418 [66 Cal.Rptr.3d 795].
- Accomplice Defined ▸ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- "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].
- This Instruction Correctly Omits Requirement Of Intent to Inflict GBI ▸ *People v. Poroj* (2010) 190 Cal.App.4th 165, 176 [117 Cal.Rptr.3d 884].

## RELATED ISSUES

### *Specific Intent Not Required*

Penal Code section 12022.7 was amended in 1995, deleting the requirement that the defendant act with "the intent to inflict such injury." (Stats. 1995, ch. 341, § 1; see also *People v. Carter* (1998) 60 Cal.App.4th 752, 756 [70 Cal.Rptr.2d 569] [noting amendment].)

### *Instructions on Aiding and Abetting*

In *People v. Magana* (1993) 17 Cal.App.4th 1371, 1378–1379 [22 Cal.Rptr.2d 59], the evidence indicated that the defendant and another person both shot at the victims. The jury asked for clarification of whether the evidence must establish that the bullet from the defendant's gun struck the victim in order to find the enhancement for personally inflicting great bodily injury true. (*Id.* at p. 1379.) The trial court responded by giving the instructions on aiding and abetting. *(Ibid.)* The Court of Appeal reversed, finding the instructions erroneous in light of the requirement that the defendant must personally inflict the injury for the enhancement to be found true. (*Id.* at p. 1381.)

***Sex Offenses—Examples of Great Bodily Injury***

The following have been held to be sufficient to support a finding of great bodily injury: transmission of a venereal disease (*People v. Johnson* (1986) 181 Cal.App.3d 1137, 1140 [225 Cal.Rptr. 251]); pregnancy (*People v. Sargent* (1978) 86 Cal.App.3d 148, 151 [150 Cal.Rptr. 113]); and a torn hymen (*People v. Williams* (1981) 115 Cal.App.3d 446, 454 [171 Cal.Rptr. 401]).

***Enhancement May be Applied Once Per Victim***

The court may impose one enhancement under Penal Code section 12022.7 for each injured victim. (Pen. Code, § 12022.7(h); *People v. Ausbie* (2004) 123 Cal.App.4th 855, 864 [20 Cal.Rptr.3d 371].)

## SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 350-351.

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

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.35 (Matthew Bender).

## 3150. Personally Used Firearm: Intentional Discharge and Discharge Causing Injury or Death—Both Charged (Pen. Code, §§ 667.61(e)(3), 12022.53(d))

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**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 allegations that the defendant personally and intentionally discharged a firearm during (that/those) crime[s] and, if so, whether the defendant's act caused (great bodily injury/ [or] death). [You must decide whether the People have proved these allegations for each crime and return a separate finding for each crime.]**

**To prove that the defendant intentionally discharged a firearm, the People must prove that:**

1. **The defendant personally discharged a firearm during the commission [or attempted commission] of that crime;**

**AND**

2. **The defendant intended to discharge the firearm.**

**If the People have proved both 1 and 2, you must then decide whether the People also have proved that the defendant's act caused (great bodily injury to/ [or] the death of) a person [who was not an accomplice to the crime].**

**[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.]**

**[The term *firearm* is defined in another instruction.]**

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

**[An act causes (great bodily injury/ [or] death) if the (injury/ [or] death) is the direct, natural, and probable consequence of the act and the (injury/ [or] 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 (great bodily injury/ [or] death). An act causes (injury/ [or] death) only if it is a substantial factor in causing the (injury/ [or] 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 (injury/ [or] death).]**

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

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

**AND**

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

*<If there is an issue in the case over whether the defendant used the firearm "during the commission of" the offense, see Bench Notes.>*

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

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*New January 2006; Revised February 2012, September 2020*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this 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].) This instruction may be used when the defendant is charged with an enhancement both for intentional discharge *and* for intentional discharge causing great bodily injury or death. If only one of these enhancements is charged, do not use this instruction. Instead, give CALCRIM No. 3148, *Personally Used Firearm: Intentional Discharge*, or CALCRIM No. 3149, *Personally Used Firearm: Intentional Discharge Causing Injury or Death*, whichever is appropriate.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause (*People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335 [121 Cal.Rptr.2d 546, 48 P.3d 1107]); give the bracketed paragraph that begins with "An act causes . . . ." If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins wtih "There may be more than one cause . . . ." (*Id.* at pp. 335–338.)

The court should give the bracketed definition of "firearm" 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 an issue of whether the defendant used the weapon "during the commision 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].)

If, in the paragraph following the elements, the court gives the bracketed phrase "who was not an accomplice to the crime," the court should also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

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

## AUTHORITY

- Enhancement ▸ Pen. Code, §§ 667.61(e)(3), 12022.53(d).
- Firearm Defined ▸ Pen. Code, § 16520.
- "During 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].

- Proximate Cause ▸ *People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335–338 [121 Cal.Rptr.2d 546, 48 P.3d 1107].
- Accomplice Defined ▸ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].

## RELATED ISSUES

See the Related Issues sections of CALCRIM No. 3148, *Personally Used Firearm: Intentional Discharge*, and CALCRIM No. 3149, *Personally Used Firearm: Intentional Discharge Causing Injury or Death*.

## SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 359-360.

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[5] (Matthew Bender).

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

## 3151–3159. Reserved for Future Use

## 3161. Great Bodily Injury: Causing Victim to Become Comatose or Paralyzed (Pen. Code, § 12022.7(b))

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**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 inflicted great bodily injury that caused _____ <*insert name of injured person*> to become (comatose/ [or] permanently paralyzed). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

**To prove this allegation, the People must prove that:**

1. **The defendant personally inflicted great bodily injury on _____ <*insert name of injured person*> during the commission [or attempted commission] of the crime;**

**[AND]**

2. **The defendant's acts caused _____ <*insert name of injured person*> to (become comatose due to brain injury/ [or] suffer permanent paralysis)(./;)**

<*Give element 3 when instructing on whether injured person was an accomplice.*>
**[AND**

3. **_____ <*insert name of injured person*> was not an accomplice to the crime.]**

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

**[*Paralysis* is a major or complete loss of motor function resulting from injury to the nervous system or to a muscular mechanism.]**

<*Group Assault*>
**[If you conclude that more than one person assaulted _____ <*insert name of injured person*> and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily**

**injury on _____ <*insert name of injured person*> if the People have proved that:**

1. **Two or more people, acting at the same time, assaulted _____ <*insert name of injured person*> and inflicted great bodily injury on (him/her);**

2. **The defendant personally used physical force on _____ <*insert name of injured person*> during the group assault;**

**AND**

**[3A. The amount or type of physical force the defendant used on _____ <*insert name of injured person*> was enough that it alone could have caused _____ <*insert name of injured person*> to suffer great bodily injury(;/.)]**

**[OR]**

**[3B. The physical force that the defendant used on _____ <*insert name of injured person*> was sufficient in combination with the force used by the others to cause _____ <*insert name of injured person*> to suffer great bodily injury.]**

**The defendant must have applied substantial force to _____ <*insert name of injured person*>. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]**

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

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

**AND**

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

*<If there is an issue in the case over whether the defendant inflicted the injury "during 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.**

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*New January 2006; Revised June 2007, December 2008, September 2020*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

The bracketed section beneath the heading "Group Assault" is designed to be used in cases where the evidence shows a group assault.

If the court gives bracketed element 3 instructing that the People must prove that the person assaulted "was not an accomplice to the crime," the court should also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

The jury must determine whether an injury constitutes "great bodily injury." (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If the case involves an issue of whether the defendant inflicted the injury "during 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].)

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than

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

## AUTHORITY

- Enhancement ▸ Pen. Code, § 12022.7(b).
- Great Bodily Injury Defined ▸ Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Must Personally Inflict Injury ▸ *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Group Beating Instruction ▸ *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762].
- Accomplice Defined ▸ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- "During 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].

## RELATED ISSUES

***Coma Need Not Be Permanent***

In *People v. Tokash* (2000) 79 Cal.App.4th 1373, 1378 [94 Cal.Rptr. 2d 814], the court held that an enhancement under Penal Code section 12022.7(b) was proper where the victim was maintained in a medically induced coma for two months following brain surgery necessitated by the assault.

See the Related Issues section of CALCRIM No. 3160, *Great Bodily Injury*.

## SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 350–354.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.35 (Matthew Bender).

## 3162. Great Bodily Injury: Age of Victim (Pen. Code, § 12022.7(c) & (d))

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**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 inflicted great bodily injury on someone who was (under the age of 5 years/70 years of age or older). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

**To prove this allegation, the People must prove that:**

1. **The defendant personally inflicted great bodily injury on** _____ *<insert name of injured person>* **during the commission [or attempted commission] of the crime;**

**[AND]**

2. **At that time,** _____ *<insert name of injured person>* **was (under the age of 5 years/70 years of age or older)(./;)**

*<Give element 3 when instructing on whether injured person was an accomplice.>*

**[AND**

3. _____ *<insert name of injured person>* **was not an accomplice to the crime.]**

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

**[Committing the crime of** _____ *<insert sexual offense charged>* **is not by itself the infliction of great bodily injury.]**

*<Group Assault>*
**[If you conclude that more than one person assaulted** _____ *<insert name of injured person>* **and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily**

**injury on _____ <*insert name of injured person*> if the People have proved that:**

1. **Two or more people, acting at the same time, assaulted _____ <*insert name of injured person*> and inflicted great bodily injury on (him/her);**

2. **The defendant personally used physical force on _____ <*insert name of injured person*> during the group assault;**

**AND**

**[3A. The amount or type of physical force the defendant used on _____ <*insert name of injured person*> was enough that it alone could have caused _____ <*insert name of injured person*> to suffer great bodily injury(;/.)]**

**[OR]**

**[3B. The physical force that the defendant used on _____ <*insert name of injured person*> was sufficient in combination with the force used by the others to cause _____ <*insert name of injured person*> to suffer great bodily injury.**

**The defendant must have applied substantial force to _____ <*insert name of injured person*>. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]**

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

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

**AND**

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

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

*<If there is an issue in the case over whether the defendant inflicted the injury "during 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**

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*New January 2006; Revised June 2007, December 2008, September 2020*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed sentence that begins with "Committing the crime of" if the defendant is charged with a sexual offense. (*People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100] [injury must be more than that which is present in every offense of rape].)

The bracketed section beneath the heading "Group Assault" is designed to be used in cases where the evidence shows a group assault. If the court gives bracketed element 3 instructing that the People must prove that the person assaulted "was not an accomplice to the crime," the court should also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

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].)

The jury must determine whether an injury constitutes "great bodily injury." (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If the case involves an issue of whether the defendant inflicted the injury "during 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].)

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

## AUTHORITY

- Enhancements ▸ Pen. Code, § 12022.7(c) & (d).
- Great Bodily Injury Defined ▸ Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Must Personally Inflict Injury ▸ *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Sex Offenses—Injury Must Be More Than Incidental to Offense ▸ *People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Group Beating Instruction ▸ *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762].
- Accomplice Defined ▸ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- "During 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].

## RELATED ISSUES

See the Related Issues section of CALCRIM No. 3160, *Great Bodily Injury*.

## SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 350–354.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.35 (Matthew Bender).

## 3163. Great Bodily Injury: Domestic Violence (Pen. Code, § 12022.7(e))

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**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 inflicted great bodily injury on _____ <*insert name of injured person*> during the commission [or attempted commission] of that crime, under circumstances involving domestic violence. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

**[The People must also prove that _____ <*insert name of injured person*> was not an accomplice to the crime.]**

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

***Domestic violence*** **means abuse committed against (an adult/a fully emancipated minor) who is a (spouse[,]/ [or] former spouse[,]/ [or] cohabitant[,]/ [or] former cohabitant[,]/ [or] person with whom the defendant has had a child[,]/ [or] person with whom the defendant is having or has had a dating relationship[,]/ [or] person who was or is engaged to the defendant).**

***Abuse*** **means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else.**

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

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

**[A *fully emancipated minor* is a person under the age of 18 who has gained certain adult rights by marrying, being on active duty for the United States armed services, or otherwise being declared emancipated under the law.]**

**[Committing the crime of _____** *<insert sexual offense charged>* **is not by itself the infliction of great bodily injury.]**

*<Group Assault>*
**[If you conclude that more than one person assaulted _____** *<insert name of injured person>* **and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily injury on _____** *<insert name of injured person>* **if the People have proved that:**

1. **Two or more people, acting at the same time, assaulted _____** *<insert name of injured person>* **and inflicted great bodily injury on (him/her);**

2. **The defendant personally used physical force on _____** *<insert name of injured person>* **during the group assault;**

**AND**

**[3A. The amount or type of physical force the defendant used on _____** *<insert name of injured person>* **was enough that it alone could have caused _____** *<insert name of injured person>* **to suffer great bodily injury(;/.)]**

**[OR]**

**[3B. The physical force that the defendant used on _____** *<insert name of injured person>* **was sufficient in combination with the force used by the others to cause _____** *<insert name of injured person>* **to suffer great bodily injury.]**

**The defendant must have applied substantial force to _____** *<insert name of injured person>***. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]**

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

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

**AND**

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

*<If there is an issue in the case over whether the defendant inflicted the injury "in the commission of" the offense, see Bench Notes.>*

**[The person who was injured does not have to be a person with whom the defendant had a relationship.]**

**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.**

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*New January 2006; Revised June 2007, December 2008, September 2020*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give the bracketed sentence that begins with "Committing the crime of" if the defendant is charged with a sexual offense. (*People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100] [injury must be more than that which is present in every offense of rape].)

The bracketed section beneath the heading "Group Assault" is designed to be used in cases where the evidence shows a group assault

The jury must determine whether an injury constitutes "great bodily injury." (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If the case involves an issue of whether the defendant inflicted the injury "in the commission of" the offense, the court may give CALCRIM No. 3261, ~~*In Commission of*~~ *While Committing a 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].)

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

## AUTHORITY

- Enhancement ‣ Pen. Code, § 12022.7(e).
- Great Bodily Injury Defined ‣ Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Dating Relationship Defined ‣ Fam. Code, § 6210; Pen. Code, § 243(f)(10).
- Must Personally Inflict Injury ‣ *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- General Intent Only Required ‣ *People v. Carter* (1998) 60 Cal.App.4th 752, 755–756 [70 Cal.Rptr.2d 569].
- Sex Offenses—Injury Must Be More Than Incidental to Offense ‣ *People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Group Beating Instruction ‣ *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762].
- "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].

## RELATED ISSUES

***Person Who Suffers Injury Need Not Be "Victim" of Domestic Abuse***
Penal Code section 12022.7(e) does not require that the injury be inflicted on the "victim" of the domestic violence. (*People v. Truong* (2001) 90 Cal.App.4th 887, 899 [108 Cal.Rptr.2d 904].) Thus, the enhancement may be applied where "an angry husband physically abuses his wife and, as part of the same incident, inflicts great bodily injury upon the man with whom she is having an affair." (*Id.* at p. 900.)

See also the Related Issues section of CALCRIM No. 3160, *Great Bodily Injury*.

## SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 350–354.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.35 (Matthew Bender).

## 3164–3174. Reserved for Future Use

## 3177. Sex Offenses: Sentencing Factors—Torture (Pen. Code, § 667.61(d)(3))

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**If you find the defendant guilty of the crime[s] charged in Count[s] __ <*insert counts charging sex offense[s] from Pen. Code, § 667.61(c)*>, you must then decide whether[, for each crime,] the People have proved the additional allegation that, while committing that crime, the defendant also committed torture. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

**To prove this allegation, the People must prove that:**

1. **During the commission of the crime, 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, or 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.]**

*<If there is an issue in the case over whether the torture was inflicted "during 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.**

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*New January 2006; Revised September 2020*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Unlike murder by torture, the crime of torture under Penal Code section 206 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 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 bracketed sentence stating that "It is not required that a victim actually suffer pain" on request if there is no proof that the alleged victim actually suffered pain.

"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].)

If the case involves an issue of whether the defendant inflicted the injury "during the commission of" the offense, the court may give CALCRIM No. 3261, ~~*During Commission of*~~ *While Committing a 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].)

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

## AUTHORITY

- One-Strike Sex Offense Statute—Torture Factor ▸ Pen. Code, § 667.61(d)(3).
- Factors Must Be Pleaded and Proved ▸ Pen. Code, § 667.61(j); *People v. Mancebo* (2002) 27 Cal.4th 735, 743 [117 Cal.Rptr.2d 550, 41 P.3d 556].
- Elements of Torture ▸ 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. 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].
- "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].

## RELATED ISSUES

See the Related Issues section of CALCRIM No. 810, *Torture*.

## SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 459–463.

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 727.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.102[2][a][i] (Matthew Bender).

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

Couzens & Bigelow, Sex Crimes: California Law and Procedure § 13:9 (The Rutter Group).

## 3456. Initial Commitment of Mentally Disordered Offender as Condition of Parole (Pen. Code, § 2970)

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**The petition alleges that _____ <*insert name of respondent*> is a mentally disordered offender.**

**To prove this allegation, the People must prove beyond a reasonable doubt that at the time of (his/her) hearing before the Board of Parole Hearings:**

1. **(He/She) was convicted of _____ <*specify applicable offense(s) from Penal Code section 2962, subdivision (e)(2)*> and received a prison sentence for a fixed period of time;**

2. **(He/She) had a severe mental disorder;**

3. **The severe mental disorder was one of the causes of the crime for which (he/she) was sentenced to prison or was an aggravating factor in the commission of the crime;**

4. **(He/She) was treated for the severe mental disorder in a state or federal prison, a county jail, or a state hospital for 90 days or more within the year before (his/her) parole release date;**

5. **The severe mental disorder either was not in remission, or could not be kept in remission without treatment;**

**AND**

6. **Because of (his/her) severe mental disorder, (he/she) represented a substantial danger of physical harm to others.**

**A *severe mental disorder* is an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or that grossly impairs his or her behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. [It does not include (a personality or adjustment disorder[,]/ [or] epilepsy[,]/ [or] mental retardation or other developmental disabilities[,]/ [or] addiction to or abuse of intoxicating substances).]**

***Remission* means that the external signs and symptoms of the severe mental disorder are controlled by either psychotropic medication or psychosocial support.**

**[A severe mental disorder cannot be *kept in remission without treatment* if during the year before the Board of Parole hearing, [on _____** *<insert date of hearing, if desired>*, **] the person:**

*<Give one or more alternatives, as applicable>*

**[1. Was physically violent except in self-defense; [or]]**

**[2. Made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family; [or]]**

**[3. Intentionally caused property damage; [or]]**

**[4. Did not voluntarily follow the treatment plan.]]**

**[A person has voluntarily followed the treatment plan if he or she has acted as a reasonable person would in following the treatment plan.]**

**[A *substantial danger of physical harm* does not require proof of a recent overt act.]**

**You will receive [a] verdict form[s] on which to indicate your finding whether the allegation that _____** *<insert name of respondent>* **is a mentally disordered offender is true or not true. To find the allegation true or not true, all of you must agree. You may not find it to be true unless all of you agree the People have proved it beyond a reasonable doubt.**

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*New December 2008; Revised August 2014, September 2017, September 2020*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a respondent is a mentally disordered offender.

Give this instruction for an initial commitment as a condition of parole. For recommitments, give CALCRIM No. 3457, *Extension of Commitment as Mentally Disordered Offender.*

The court also **must give** CALCRIM No. 219, *Reasonable Doubt in Civil Proceedings*, CALCRIM No. 222, *Evidence*, CALCRIM No. 226, *Witnesses*, CALCRIM No. 3550, *Pre-Deliberation Instructions*, and any other relevant post-trial instructions. These instructions may need to be modified.

Case law provides no direct guidance about whether a finding of an enumerated act is necessary to show that the disorder cannot be kept in remission without treatment or whether some alternative showing, such as medical opinion or non-enumerated conduct evidencing lack of remission, would suffice. One published case has said in dictum that "the option of 'cannot be kept in remission without treatment' requires a further showing that the prisoner, within the preceding year, has engaged in violent or threatening conduct or has not voluntarily followed the treatment plan." (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1161, fn. 4 [88 Cal.Rptr.2d 696]). The *Buffington* case involved a sexually violent predator.

## AUTHORITY

- Elements and Definitions. ▸ Pen. Code, §§ 2962, 2966(b); *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2 [54 Cal.Rptr.3d 834].
- Unanimous Verdict, Burden of Proof. ▸ Pen. Code, § 2966(b); *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Institutions That May Fulfill the 90-Day Treatment Requirement. ▸ Pen. Code, § 2981.
- Treatment Must Be for Serious Mental Disorder Only. ▸ *People v. Sheek* (2004) 122 Cal.App.4th 1606, 1611 [19 Cal.Rptr.3d 737].
- Definition of Remission. ▸ Pen. Code, § 2962(a).
- Need for Treatment Established by One Enumerated Act. ▸ *People v. Burroughs* (2005) 131 Cal.App.4th 1401, 1407 [32 Cal.Rptr.3d 729].
- Evidence of Later Improvement Not Relevant. ▸ Pen. Code, § 2966(b); *People v. Tate* (1994) 29 Cal.App.4th 1678, 1683 [35 Cal.Rptr.2d 250].

- Board of Parole Hearings. ‣ Pen. Code, § 5075.
- This Instruction Cited As Authority With Implicit Approval. ‣ *People v. Harrison* (2013) 57 Cal.4th 1211, 1230 [164 Cal.Rptr.3d 167, 312 P.3d 88].
- Proof of Recent Overt Act Not Required. ‣ Pen. Code, § 2962(g).
- 90-Day Treatment Period Includes Extension Under Pen. Code, § 2963. ‣ *People v. Parker* (2020) 44 Cal.App.5th 286, 289 [257 Cal.Rptr.3d 493].

## SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 763-767.

## 3457. Extension of Commitment as Mentally Disordered Offender (Pen. Code, § 2970)

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**The petition alleges that _____ <*insert name of respondent*> is a mentally disordered offender.**

**To prove this allegation, the People must prove beyond a reasonable doubt that [at the time of (his/her) hearing before the Board of Prison Terms]:**

**1. (He/She) (has/had) a severe mental disorder;**

**2. The severe mental disorder (is/was) not in remission or (cannot/could not) be kept in remission without continued treatment;**

**AND**

**3. Because of (his/her) severe mental disorder, (he/she) (presently represents/represented) a substantial danger of physical harm to others.**

**A *severe mental disorder* is an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or that grossly impairs his or her behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. [It does not include (a personality or adjustment disorder[,]/ [or] epilepsy[,]/ [or] mental retardation or other developmental disabilities[,]/ [or] addiction to or abuse of intoxicating substances).]**

***Remission* means that the external signs and symptoms of the severe mental disorder are controlled by either psychotropic medication or psychosocial support.**

**[A severe mental disorder cannot be *kept in remission without treatment* if, during the period of the year prior to _____ <*insert the date the trial commenced*> the person:**

*<Give one or more alternatives, as applicable.>*

**[1. Was physically violent except in self-defense; [or]]**

**[2. Made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family; [or]]**

**[3. Intentionally caused property damage; [or]]**

**[4. Did not voluntarily follow the treatment plan.]]**

**[A person has voluntarily followed the treatment plan if he or she has acted as a reasonable person would in following the treatment plan.]**

**[A *substantial danger of physical harm* does not require proof of a recent overt act.]**

**You will receive [a] verdict form[s] on which to indicate your finding whether the allegation that _____**<*insert name of respondent*>** is a mentally disordered offender is true or not true. To find the allegation true or not true, all of you must agree. You may not find it to be true unless all of you agree the People have proved it beyond a reasonable doubt.**

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*New December 2008; Revised September 2017, September 2020*

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a respondent is a mentally disordered offender.

Give this instruction for a successive commitment. For an initial commitment as a condition of parole, give CALCRIM No. 3456, *Initial Commitment of Mentally Disordered Offender as Condition of Parole.*

The court also **must give** CALCRIM No. 219, *Reasonable Doubt in Civil Proceedings,* CALCRIM No. 222, *Evidence*, CALCRIM No. 226, *Witnesses*, CALCRIM No. 3550, *Pre-Deliberation Instructions* and any other relevant post-trial instructions. These instructions may need to be modified.

Give the bracketed language in the sentence beginning with "To prove this allegation" and use the past tense for an on-parole recommitment pursuant to Penal Code section

2966. For a recommitment after the parole period pursuant to Penal Code sections 2970 and 2972, omit the bracketed phrase and use the present tense.

Case law provides no direct guidance about whether a finding of an enumerated act is necessary to show that the disorder cannot be kept in remission without treatment or whether some alternative showing, such as medical opinion or non-enumerated conduct evidencing lack of remission, would suffice. One published case has said in dictum that "the option of 'cannot be kept in remission without treatment' requires a further showing that the prisoner, within the preceding year, has engaged in violent or threatening conduct or has not voluntarily followed the treatment plan." (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1161, fn. 4 [88 Cal.Rptr.2d 696]). The *Buffington* case involved a sexually violent predator.

The committee found no case law addressing the issue of whether or not instruction about an affirmative obligation to provide treatment exists.

## AUTHORITY

- Elements and Definitions ▸ Pen. Code, §§ 2966, 2970, 2972; *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2 [54 Cal.Rptr.3d 834].
- Unanimous Verdict, Burden of Proof ▸ Pen. Code, § 2972(a); *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Treatment Must Be for Serious Mental Disorder Only ▸ *People v. Sheek* (2004) 122 Cal.App.4th 1606, 1611 [19 Cal.Rptr.3d 737].
- Definition of Remission ▸ Pen. Code, § 2962(a).
- Recommitment Must Be for the Same Disorder ~~As~~ That ~~for Which the Offender Received Treatment~~Was Basis For Initial Commitment. ▸ *People v. Torfason* (2019) 38 Cal.App.5th 1062, 1067-68 [252 Cal.Rptr.3d 11]; *People v. Garcia* (2005) 127 Cal.App.4th 558, 565 [25 Cal.Rptr.3d 660].
- Proof of Recent Overt Act Not Required. ▸ Pen. Code, § 2962(g).
- Redesignation of MDO-Qualifying Conviction to Misdemeanor Under Penal Code Section 1170.18 Does Not Bar Recommitment. ▸ *People v. Foster* (2019) 7 Cal.5th 1202, 1211 [251 Cal.Rptr.3d 312, 447 P.3d 228].

## SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 767.

## 3477. Presumption That Resident Was Reasonably Afraid of Death or Great Bodily Injury (Pen. Code, § 198.5)

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**The law presumes that the defendant reasonably feared imminent death or great bodily injury to (himself/herself)[, or to a member of (his/her) family or household,] if:**

1. **An intruder unlawfully and forcibly (entered/ [or] was entering) the defendant's home;**

2. **The defendant knew [or reasonably believed] that an intruder unlawfully and forcibly (entered/ [or] was entering) the defendant's home;**

3. **The intruder was not a member of the defendant's household or family;**

**AND**

4. **The defendant used force intended to or likely to cause death or great bodily injury to the intruder inside the home.**

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

**The People have the burden of overcoming this presumption. This means that the People must prove that the defendant did not have a reasonable fear of imminent death or injury to (himself/herself)[, or to a member of his or her family or household,] when (he/she) used force against the intruder. If the People have not met this burden, you must find the defendant reasonably feared death or injury to (himself/herself)[, or to a member of his or her family or household].**

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*New January 2006; Revised March 2017, September 2020*

## BENCH NOTES

***Instructional Duty***

The court has a **sua sponte** duty to instruct on presumptions relevant to the issues of the case. (See *People v. Hood* (1969) 1 Cal.3d 444, 449 [82 Cal.Rptr. 618, 462 P.2d 370]; but see *People v. Silvey* (1997) 58 Cal.App.4th 1320, 1327 [68

Cal.Rptr.2d 681] [presumption not relevant because defendant was not a resident]; *People v. Owen* (1991) 226 Cal.App.3d 996, 1005 [277 Cal.Rptr. 341] [jury was otherwise adequately instructed on pertinent law].)

Give this instruction when there is evidence that a resident had a reasonable expectation of protection against unwanted intruders. *People v. Grays* (2016) 246 Cal.App.4th 679, 687-688 [202 Cal.Rptr.3d 288].

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

## AUTHORITY

- Instructional Requirements ▸ Pen. Code, § 198.5; *People v. Brown* (1992) 6 Cal.App.4th 1489, 1494–1495 [8 Cal.Rptr.2d 513].
- Rebuttable Presumptions Affecting Burden of Proof ▸ Evid. Code, §§ 601, 604, 606.
- Definition of Residence ▸ *People v. Grays* (2016) 246 Cal.App.4th 679, 687-688 [202 Cal.Rptr.3d 288].

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, § 76.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.11[1], 73.13 (Matthew Bender).

## 3478–3499. Reserved for Future Use

# D. FELONY MURDER

## Introduction to Felony-Murder Series

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 three separate instructions for felony murder 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 CALCRIM No. 540A. This 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, the court must use CALCRIM No. 540B. This 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 and CALCRIM No. 540B.

In addition, the committee has provided CALCRIM No. 540C 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.) This instruction is

the most complicated of the three instructions. Thus, although CALCRIM No. 540C is broad enough to cover most felony-murder scenarios, the committee recommends using 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.)