



## JUDICIAL COUNCIL OF CALIFORNIA

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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on: March 23–24, 2017

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Title	Agenda Item Type
Jury Instructions: Additions and Revisions to Criminal Jury Instructions	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
<i>Judicial Council of California Criminal Jury Instructions (CALCRIM)</i>	March 24, 2017
Recommended by	Date of Report
Advisory Committee on Criminal Jury Instructions	February 3, 2017
Hon. Sandy R. Kriegler, Chair	Contact
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### Executive Summary

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

### Recommendation

The Advisory Committee on Criminal Jury Instructions recommends that the Judicial Council, effective March 24, 2017, approve for publication under rule 2.1050 of the California Rules of Court the criminal jury instructions prepared by the committee. Once approved, the revised instructions will be published in the next official edition of the *Judicial Council of California Criminal Jury Instructions*.

A table of contents and the proposed revisions to the criminal jury instructions are attached at pages 9–168.

## **Previous Council Action**

At its meeting on July 16, 2003, the Judicial Council adopted what is now rule 10.59 of the California Rules of Court, which established the advisory committee and its charge.<sup>1</sup> 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 additions and changes to *CALCRIM* to the council.

The council approved the last *CALCRIM* release at its August 2016 meeting.

## **Rationale for Recommendation**

The committee recommends proposed revisions to the following instructions: *CALCRIM* Nos. 252, 361, 370, 522, 523, 729, 801, 830, 850, 902, 904, 937, 947, 960, 1082, 1124, 1125, 1126, 1202, 1301, 1350, 1351, 1352, 1354, 1355, 1502, 1600, 1650, 2130, 2131, 2500, 2722, 2723, 3428, 3472, 3477.

The committee recommends deleting *CALCRIM* Nos. 852, 853, and 1191 and replacing them with new instructions: 852A, 852B, 853A, 853B, 1191A, 1191B.

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

Below is an overview of some of the proposed changes.

### **Additional admonitions about giving *CALCRIM* No. 370 on motive**

During the last *CALCRIM* revision cycle, the council approved revisions following the Court of Appeal opinion in *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165. In that case, the Court of Appeal reversed in part the conviction of a serial child molester because the court gave an unmodified version of *CALCRIM* No. 370, which states that the People need not prove motive. As a result, the committee supplemented (or made more prominent) admonitions in the bench notes of *CALCRIM* Nos. 1121–1126 about when not to give *CALCRIM* No. 370. All of those crimes have motive as an element.

During this revision cycle, the committee recommends adding similar admonitions to the hate crimes jury instructions for both substantive crimes and sentencing enhancements—*CALCRIM* Nos. 523, 729, 902, 904, 947, 1350, 1351, 1352, 1354, 1355—which also can have motive as an element. It also recommends revising *CALCRIM* No. 370 so that it can apply to both substantive crimes and sentencing enhancements.

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<sup>1</sup> Rule 10.59(a) states: “The committee regularly reviews case law and statutes affecting jury instructions and makes recommendations to the Judicial Council for updating, amending, and adding topics to the council’s criminal jury instructions.”

**CALCRIM Nos. 852A & B, 853A & B, and 1191A & B on Using Evidence of Uncharged Crimes: *People v. Cruz***

*People v. Cruz* (2016) 2 Cal.App.5th 1178, 1185–1186, held that CALJIC No. 2.50.01, Evidence of Other Sexual Offenses, improperly reduced the People’s burden of proof by suggesting that evidence of charged sexual offenses to show propensity could be proved by a preponderance of the evidence. *Cruz* expressly noted the CALCRIM analog, No. 1191, did not share the same flaw because it only refers to uncharged sexual offenses. CALCRIM Nos. 852 and 853 instruct on evidence of uncharged domestic violence and elder or dependent person abuse, respectively and could raise the same issues.

The committee decided that even though the CALCRIM instructions were correct as written, providing two distinct instructions for each of these evidentiary instructions could improve clarity and help prevent error. It therefore proposes two different versions of each of these evidentiary instructions: one for uncharged crimes and the other for charged crimes.

**CALCRIM No. 3428, Mental Impairment: Defense to Specific Intent or Mental State, *People v. Ocegueda*, *People v. McGehee***

*People v. Ocegueda* (2016) 247 Cal.App.4th 1393, 1407, held that it was error to insert “intent to kill” instead of “express malice” as the required intent in paragraph two of CALCRIM No. 3428. The instruction language includes a blank for users to insert the correct specific intent or mental state. To help prevent the user error identified in *Ocegueda*, the committee added the case cite along with a cautionary bench note.

*People v. McGehee* (2016) 246 Cal.App.4th 1190, 1205, found that giving CALCRIM No. 3428 together with CALCRIM No. 362, *Consciousness of Guilt: False Statements*, could require modification of the former to ensure it does not prevent the jury from considering evidence of a defendant’s mental illness or impairment for a purpose other than deciding whether that defendant had the required mental state for murder. The committee added another cautionary bench note to alert users to this potential problem.

**CALCRIM Nos. 2130 and 2131, Refusal Instructions**

Judge Ethan P. Schulman, Superior Court of San Francisco County, suggested adding language to these instructions to make clear that a motorist’s silence following the mandatory implied consent admonition about taking or completing a chemical test may be a “refusal.” The committee recommends adding the new, optional language to these instructions as well as an entry in the authority section of the bench notes to make clear that silence may constitute a refusal.

**Comments, Alternatives Considered, and Policy Implications**

The proposed additions and revisions to *CALCRIM* circulated for comment from November 22, 2016, through January 6, 2017. The committee received input from four different commentators:

the Orange County Bar Association, and three superior court judges. See the attached comment chart at pages 5–8.

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

### **Implementation Requirements, Costs, and Operational Impacts**

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

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

### **Attachments**

1. Comment chart, at pages 5–8
2. Full text of revised *CALCRIM* instructions, including table of contents, at pages 9–168

**Jury Instructions: Additions and Revisions to Criminal Jury Instructions  
New and Revised CALCRIM Instructions**

Instruction	Commentator	Comment	Response
252, 361, 370, 523, 729, 902, 904, 947, 1350, 1351, 1352, 1354, 1355, 604, 3428, 801, 830, 850, 852A&B, 853A&B, 1191A&B, 937, 960, 1082, 1124, 1125, 1126, 1301, 1502, 1650, 2130, 2131, 2500, 2722, 2723, 3472, 3477	Michael L. Baroni, President, Orange County Bar Association	Agree with all additions and proposed changes	No response necessary
522	Michael L. Baroni, President, Orange County Bar Association	The proposed amendment to CALCRIM 522 adds a citation to <i>People v. Rogers</i> (2006) 39 Cal.4th 826, 877-880, strikes the citation to <i>People v. Middleton</i> (1997) 52 Cal.App.4th 19, 31 and strikes the following language: “This is a pinpoint instruction, to be given upon request.” We agree with the addition of the citation to <i>Rogers</i> . We, however, see no harm in keeping the citation to <i>Middleton</i> . However, we disagree with the deletion of the quoted language. In <i>Rogers</i> , the court, citing <i>People v. Saille</i> (1991) 54 Cal.3d 1103, reaffirmed that that CALJIC 8.73, the analogue to CALCRIM 522 is a pinpoint instruction to which a defendant is entitled to upon request. ( <i>People v. Rogers, supra</i> , 39 Cal.4th 826, 878-879.)	The committee disagrees with this comment and believes that the citation to the Supreme Court case is sufficient, although it will retain the reference to this being a pinpoint instruction.

**Jury Instructions: Additions and Revisions to Criminal Jury Instructions  
New and Revised CALCRIM Instructions**

1600	Michael L. Baroni, President, Orange County Bar Association	Instructional element #6 deletes the words “to take the property.” While the striking of these words in the context of the instructional language does not change the legal definition of the offense, the omission of such language could potentially cause confusion to lay jurors and the deletion of this phrase does not really improve or clarify the instruction. The instruction is better with element #6 remaining as presently drafted.	The committee agrees with this comment. See response to Judge Hite’s comment on the same issue below.
1600	Hon. Kent Hamlin, Fresno County Superior Court Judge	<p>I have no problem with the idea that the phrase in element 6, “to take the property,” should be removed because the crime could be committed by using force to take the property or to prevent the victim from resisting. But if that phrase is removed, it is no longer satisfactory to use “it” to refer to the property in the balance of that element: “(he/she) intended (to deprive the owner of it permanently/ [or] to remove it from the owner’s possession...” What is “it” now that “property” has been removed from the preceding part of the instruction?</p> <p>Instead, element 6 should read as follows in the revised version:</p> <p>6. When the defendant used force or fear, (he/she) intended (to deprive the owner of <b>the property</b> permanently/ [or] to remove it from the owner’s possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property). (Emphasis added.)</p>	The committee agrees with this comment. See response to Judge Hite’s comment on the same issue below.

**Jury Instructions: Additions and Revisions to Criminal Jury Instructions  
New and Revised CALCRIM Instructions**

1600	Hon. Christopher C. Hite and Hon. Jeffrey S. Ross, San Francisco Superior Court	By removing “the property” from element 6, the “it” has no reference.  Propose the following change:  5. The defendant used force or fear to take the property or to prevent the person from resisting the taking of property; 6. When the defendant used force or fear to, (he/she) intended (to deprive the owner of <b>the property</b> permanently/ [or] to remove the property from the owner’s possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property).	The committee agrees with this comment, which identifies the same issue as the two comments above. The committee has made revisions in keeping with this commentator’s suggestion.
2130, 2131	Hon. Christopher C. Hite, San Francisco Superior Court	Suggested Revisions for CALCRIM 2130: <b>Body of the Instruction</b> [(A defendant's silence in response to an officer's request to submit to a chemical test! [or] (A/)a failure to complete a chemical test) may be a refusal. <b>If you conclude that the defendant refused to submit to such a test by his or her silence, it is up to you to decide the meaning and importance of the refusal. However, evidence that the defendant refused to submit to such a test cannot prove guilt by itself.]</b> <b>Authority</b> Silence in Response to Request <b>May</b> Constitute a Refusal. Garcia v. Department	The committee agrees with this comment, including the final note, and has revised these instructions accordingly, with a few further revisions for clarity.

**Jury Instructions: Additions and Revisions to Criminal Jury Instructions  
New and Revised CALCRIM Instructions**

		<p>of Motor Vehicles (2010) 185 Cal.App.4th 73, 82-84 [109 Cal.Rptr.3d 906].</p> <p>With reference to CALCRIM 2131 the suggested revision would be the following:</p> <p>Body of the Instruction <b>Body of the Instruction</b> [(A defendant's silence in response to an officer's request to submit to a chemical test! [or] (A/)a failure to complete a chemical test) may be a refusal. <b>If you conclude that the defendant was silence in response to an officer's request to submit to a chemical test/[or] (A/) a failure to complete a chemical test, it is up to you to decide if the silence constitutes a refusal.]</b></p> <p><b>Authority</b> Silence in Response to Request <b>May</b> Constitute a Refusal. Garcia v. Department of Motor Vehicles (2010) 185 Cal.App.4th 73, 82-84 [109 Cal.Rptr.3d 906].</p> <p>Note: It may be better to have the bracketed portion regarding silence at the end of the entire instruction just before the People's burden since it further defines the term "refused," and is not an element of the crime. That would be consistent with other instructions in which phrases were further explained or defined.</p>	
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# Table of Contents

## CALCRIM Proposed Changes

### March 2017

<b>Instruction Number</b>	<b>Instruction Title</b>
252	Union of Act and Intent: General and Specific Intent Together
361	Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.
370, 523, 729, 902, 904, 947, 1350, 1351, 1352, 1354, 1355	Motive, First Degree Murder: Hate Crime, and other instructions for both substantive crimes as well as sentencing enhancements in which “motive” must be proved
522	Provocation: Effect on Degree of Murder
801	Mayhem
830	Abuse of Elder or Dependent Adult Likely to Produce Great Bodily Harm or Death
850	Testimony on Intimate Partner Battery and Its Effects: Credibility of Complaining Witness
852A & B, 853A & B, 1191A & B	Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc., Evidence of Uncharged Domestic Violence, Evidence of Uncharged Elder or Dependent Person Abuse, Evidence of Uncharged Sex Offense
937	Sexual Battery: By Fraudulent Representation
960	Simple Battery
1082, 1124	Oral Copulation With Person Under 18, Contacting Minor With Intent to Commit Certain Felonies
1125, 1126	Arranging Meeting With Minor for Lewd Purpose, Going to Meeting With Minor for Lewd Purpose
1202	Kidnapping: For Ransom, Reward, or Extortion
1301	Stalking

<b>Instruction Number</b>	<b>Instruction Title</b>
1502	Arson: Inhabited Structure
1600	Robbery
1650	Carjacking
2130, 2131	Refusal—Consciousness of Guilt, Refusal—Enhancement
2500	Illegal Possession, etc., of Weapon
2722, 2723	Battery by Gassing, Battery by Prisoner by Non-Prisoner, Sexual Penetration by Force, Fear, or Threats
3428	Mental Impairment: Defense to Specific Intent or Mental State
3472	Right to Self-Defense: May Not Be Contrived
3477	Presumption That Resident Was Reasonably Afraid of Death or Great Bodily Injury

## 252. Union of Act and Intent: General and Specific Intent Together

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The crime[s] [(and/or) other allegation[s]] charged in Count[s] \_\_ require[s] proof of the union, or joint operation, of act and wrongful intent.

The following crime[s] [and allegation[s]] require[s] general criminal intent: \_\_\_\_\_ <insert name[s] of alleged offense[s] and enhancement[s] and count[s], e.g., battery, as charged in Count 1>. For you to find a person guilty of (this/these) crime[s] [or to find the allegation[s] true], that person must not only commit the prohibited act [or fail to do the required act], but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act [or fails to do a required act]; however, it is not required that he or she intend to break the law. The act required is explained in the instruction for that crime [or allegation].

The following crime[s] [and allegation[s]] require[s] a specific intent or mental state: \_\_\_\_\_ <insert name[s] of alleged offense[s] and count[s], e.g., burglary, as charged in Count 1> \_\_\_\_\_ <insert name[s] of enhancement[s]>]. For you to find a person guilty of (this/these) crimes [or to find the allegation[s] true], that person must not only intentionally commit the prohibited act [or intentionally fail to do the required act], but must do so with a specific (intent/ [and/or] mental state). The act and the specific (intent/ [and/or] mental state) required are explained in the instruction for that crime [or allegation].

<Repeat next paragraph as needed>

[The specific (intent/ [and/or] mental state) required for the crime of \_\_\_\_\_ <insert name[s] of alleged offense[s] e.g., burglary> is \_\_\_\_\_ <insert specific intent>.]

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New January 2006; Revised June 2007, April 2010, April 2011 [*insert date of council approval*]

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to instruct on the joint union of act and intent. (*People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365]; *People v. Ford* (1964) 60 Cal.2d 772, 792–793 [36 Cal.Rptr. 620, 388 P.2d 892];

*People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].) The court may give this instruction in cases involving both offenses requiring a specific intent or mental state and offenses that do not, rather than giving both CALCRIM No. 250 and CALCRIM No. 251.

**Do not** give this instruction if the case involves only offenses requiring a specific intent or mental state or involves only offenses that do not. (See CALCRIM No. 250, *Union of Act and Intent: General Intent*, and CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*.)

The court should specify for the jury which offenses require general criminal intent and which require a specific intent or mental state by inserting the names of the offenses where indicated in the instruction. (See *People v. Hill* (1967) 67 Cal.2d 105, 118 [60 Cal.Rptr. 234, 429 P.2d 586].) If the crime requires a specific mental state, such as knowledge or malice, the court **must** insert the name of the offense in the third paragraph, explaining the mental state requirement, even if the crime is classified as a general intent offense.

If the defendant is charged with aiding and abetting or conspiracy to commit a general-intent offense, the court **must** instruct on the specific intent required for aiding and abetting or conspiracy. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1117–1118 [108 Cal.Rptr.2d 188, 24 P.3d 1210]; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 586–587 [35 Cal.Rptr. 401].)

If the defendant is also charged with a criminal negligence or strict-liability offense, insert the name of the offense where indicated in the first sentence. The court may also give CALCRIM No. 253, *Union of Act and Intent: Criminal Negligence*, or CALCRIM No. 254, *Union of Act and Intent: Strict-Liability Crime*.

### ***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]; see *Defenses and Insanity*, CALCRIM No. 3400 et seq.)

## **AUTHORITY**

- Statutory Authority ► Pen. Code, § 20; see also Evid. Code, §§ 665, 668.

- Instructional Requirements ▶ *People v. Hill* (1967) 67 Cal.2d 105, 117 [60 Cal.Rptr. 234, 429 P.2d 586]; *People v. Ford* (1964) 60 Cal.2d 772, 792–793 [36 Cal.Rptr. 620, 388 P.2d 892]; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].
- History of General-Intent Requirement ▶ *Morissette v. United States* (1952) 342 U.S. 246 [72 S.Ct. 240, 96 L.Ed. 288]; see also *People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590].
- This Instruction Upheld ▶ *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1189 [67 Cal.Rptr.3d 871].
- Instruction on Both General and Specific Intent May Be Necessary for Voluntary Manslaughter ▶ *People v. Martinez* (2007) 154 Cal.App.4th 314, 334-336 [64 Cal.Rptr.3d 580].

### ***Secondary Sources***

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 1–6.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02[1]–[3] (Matthew Bender).

## **RELATED ISSUES**

See the Bench Notes and Related Issues sections of CALCRIM No. 250, *Union of Act and Intent: General Intent*, and CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*.

### 361. Failure to Explain or Deny Adverse Testimony

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

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

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*New January 2006; Revised April 2010, February 2016 [insert date of council approval]*

#### BENCH NOTES

##### ***Instructional Duty***

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

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

Contradiction of the state's evidence is not by itself a failure to deny or explain. (*People v. Marks* (1988) 45 Cal.3d 1335, 1346 [248 Cal.Rptr. 874, 756 P.2d 260]; *People v. Peters* (1982) 128 Cal.App.3d 75, 86 [180 Cal.Rptr. 76].) Failure to

recall is not an appropriate basis for this instruction. (*People v. De Larco* (1983) 142 Cal.App.3d 294, 309 [190 Cal.Rptr.757].)

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

Give this instruction only when a testifying defendant completely fails to explain or deny incriminating evidence, or claims to lack knowledge although it appears from the evidence that defendant could reasonably be expected to have that knowledge. (*People v. Cortez* (2016) 63 Cal.4th 101, 117–118 [201 Cal.Rptr.3d 846, 369 P.3d 521].)

## AUTHORITY

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

## Secondary Sources

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, § 102.

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

## RELATED ISSUES

### *Bizarre or Implausible Answers*

If the defendant's denial or explanation is bizarre or implausible, several courts have held that the question whether his or her response is reasonable should be given to the jury with an instruction regarding adverse inferences. (*People v. Mask* (1986) 188 Cal.App.3d 450, 455 [233 Cal.Rptr.181]; *People v. Roehler* (1985) 167 Cal.App.3d 353, 392–393 [213 Cal.Rptr. 353].) However, in *People v. Kondor* (1988) 200 Cal.App.3d 52, 57 [245 Cal.Rptr. 750], the court stated, “the test for

giving the instruction [on failure to deny or explain] is not whether the defendant's testimony is believable. [The instruction] is unwarranted when a defendant explains or denies matters within his or her knowledge, no matter how improbable that explanation may appear."

***Facts Beyond the Scope of Examination***

If the defendant has limited his or her testimony to a specific factual issue, it is error for the prosecutor to comment, or the trial court to instruct, on his or her failure to explain or deny other evidence against him or her that is beyond the scope of this testimony. (*People v. Tealer* (1975) 48 Cal.App.3d 598, 604–607 [122 Cal.Rptr. 144].)



### 370. Motive

The People are not required to prove that the defendant had a motive to (commit (any of the crimes/the crime) charged/ [or] \_\_\_\_\_ <insert conduct alleged in support of sentencing enhancement or special circumstance>). In reaching your verdict you may, however, consider whether the defendant had a motive.

Having a motive may be a factor tending to show (that the defendant is guilty/ [or] that an (allegation/ [or] special circumstance) is true). Not having a motive may be a factor tending to show the defendant is not guilty/ [or] that an (allegation/ [or] special circumstance) is not true).

New January 2006 [insert date of council approval]

### BENCH NOTES

#### *Instructional Duty*

The court does not have a sua sponte duty to instruct on motive. (*People v. Romo* (1975) 14 Cal.3d 189, 196 [121 Cal.Rptr. 111, 534 P.2d 1015] [not error to refuse instruction on motive].)

**Do not** give this instruction if motive is an element of ~~the~~ all of the crimes charged. (See, e.g., CALCRIM No. 1122, *Annoying or Molesting a Child*.)

Modify this instruction as needed if motive is an element of some, but not all, of the crimes or special circumstances charged or enhancements alleged. (See *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165 [197 Cal.Rptr.3d 317].)

### AUTHORITY

- Instructional Requirements ▶ *People v. Romo* (1975) 14 Cal.3d 189, 195–196 [121 Cal.Rptr. 111, 534 P.2d 1015]; *People v. Young* (1970) 9 Cal.App.3d 106, 110 [87 Cal.Rptr. 767].
- Jury May Consider Motive ▶ *People v. Brown* (1900) 130 Cal. 591, 594 [62 P. 1072]; *People v. Gonzales* (1948) 87 Cal.App.2d 867, 877–878 [198 P.2d 81].
- Proof of Presence or Absence of Motive Not Required ▶ *People v. Daly* (1992) 8 Cal.App.4th 47, 59 [10 Cal.Rptr.2d 21]; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1017–1018 [80 Cal.Rptr.2d 676].

- This Instruction Upheld ► *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1192–1193 [67 Cal.Rptr.3d 871].

### ***Secondary Sources***

- 1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, § 4.
- 1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 249.
- 1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, § 119.
- 4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][c] (Matthew Bender).

## **RELATED ISSUES**

### ***Entrapment Defense***

The court should not instruct on motive if the defendant admits his guilt for the substantive crime and presents an entrapment defense, because in that instance his or her commission of the crime would not be an issue and motive would be irrelevant. (See *People v. Martinez* (1984) 157 Cal.App.3d 660, 669 [203 Cal.Rptr. 833]; *People v. Lee* (1990) 219 Cal.App.3d 829, 841 [268 Cal.Rptr. 595].)

### ***No Conflict With Other Instructions***

Motive, intent, and malice are separate and distinct mental states. Giving a motive instruction does not conflict with intent and malice instructions. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503–504 [117 Cal.Rptr.2d 45, 40 P.3d 754] [motive describes the reason a person chooses to commit a crime]; *People v. Snead* (1993) 20 Cal.App.4th 1088, 1098 [24 Cal.Rptr.2d 922].) Similarly, a motive instruction that focuses on guilt does not conflict with a special circumstance instruction, which the jury is directed to find true or not true. (*People v. Heishman* (1988) 45 Cal.3d 147, 178 [246 Cal.Rptr. 673, 753 P.2d 629] [defendant argued motive to prevent victim from testifying was at core of special circumstance].) A torture murder instruction that requires an intent to cause cruel pain or suffering for the purpose of revenge, extortion, or any sadistic purpose also does not conflict with the motive instruction. The torture murder instruction does not elevate motive to the status of an element of the crime. It simply makes explicit the treatment of motive as an element of proof in torture murder cases. (*People v. Lynn* (1984) 159 Cal.App.3d 715, 727–728 [206 Cal.Rptr. 181].)

### **523. First Degree Murder: Hate Crime (Pen. Code, § 190.03)**

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If you find the defendant guilty of first degree murder [as charged in Count \_\_\_\_], you must then decide whether the People have proved the additional allegation that the murder was a hate crime.

To prove this allegation the People must prove that the defendant committed the murder, in whole or in part, because of the deceased person's actual or perceived (disability[,]/[or] gender[,]/[or] nationality[,]/[or] race or ethnicity[,]/[or] religion[,]/[or] sexual orientation[,]/ [or] association with a person or group with (this/one or more of these) actual or perceived characteristic[s]).

The defendant acted, *in whole or in part, because of* the actual or perceived characteristic[s] of the deceased person if:

1. The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);

**AND**

2. The bias motivation caused the defendant to commit the alleged murder.

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

[The term *disability* is explained in Instruction 1353, to which you should refer.]

[*Gender*, as used here, means sex and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]

[*Nationality* includes citizenship, country of origin, and national origin.]

[*Race or ethnicity* includes ancestry, color, and ethnic background.]

[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]

[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]

[*Association with a person or group with (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ group[,]/ family[,]/ community center[,]/ educational facility[,]/ office[,]/ meeting hall[,]/ place of worship[,]/ private institution[,]/ public agency[,]/ library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]

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

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

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (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].)

This statute was substantially revised, effective January 1, 2005. Prior to that time, the statute was limited to murder committed because of the decedent’s disability, gender, or sexual orientation.

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

Give all relevant bracketed definitions. If the term “disability” is used, give CALCRIM No. 1353, *Hate Crime: Disability Defined*.

## AUTHORITY

- Murder That is a Hate Crime ▶ Pen. Code, § 190.03(a).
- Hate Crime Defined ▶ Pen. Code, § 422.55.
- “In Whole or in Part Because of” Defined ▶ Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].
- Disability Defined ▶ Pen. Code, § 422.56(b); Gov. Code, §12926(i)–(l).
- Gender Defined ▶ Pen. Code, §§ 422.56(c) & 422.57.
- Nationality Defined ▶ Pen. Code, § 422.56(e).
- Race or Ethnicity Defined ▶ Pen. Code, § 422.56(f).
- Religion Defined ▶ Pen. Code, § 422.56(g).
- Sexual Orientation Defined ▶ Pen. Code, § 422.56(h).
- Association With Defined ▶ Pen. Code, § 422.56(a).

### ***Secondary Sources***

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 459.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.44 (Matthew Bender).

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

## 729. Special Circumstances: Murder Because of Race, Religion, or Nationality (Pen. Code, § 190.2(a)(16))

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The defendant is charged with the special circumstance of murder committed because of the deceased's (race[,]/ color[,]/ religion[,]/ nationality[,]/ [or] country of origin) [in violation of Penal Code section 190.2(a)(16)].

To prove that this special circumstance is true, the People must prove that the defendant intended to kill because of the deceased person's (race[,]/ color[,]/ religion[,]/ nationality[,]/ [or] country of origin).

[If the defendant had more than one reason to (commit[,]/ participate in[,]/ [or] aid and abet) the murder, the deceased person's (race[,]/ color[,]/ religion[,]/ nationality[,]/ [or] country of origin) must have been a substantial factor motivating the defendant's conduct. A *substantial factor* is more than a trivial or remote factor, but it does not need to be the only factor that motivated the defendant.]

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New January 2006 *insert date of council approval*

### BENCH NOTES

#### *Instructional Duty*

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

Give the bracketed paragraph if there is evidence that the defendant had more than one reason to commit the murder. (*In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365].)

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

### AUTHORITY

- Special Circumstance ▶ Pen. Code, § 190.2(a)(16).

- Special Circumstance Constitutional ▶ *People v. Sassounian* (1986) 182 Cal.App.3d 361, 413 [226 Cal.Rptr. 880]; *People v. Talamantez* (1985) 169 Cal.App.3d 443, 469 [215 Cal.Rptr. 542].
- “Because of” Defined ▶ Pen. Code, § 190.03(c); *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387]; *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365].

### ***Secondary Sources***

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 449.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty*, §§ 87.13[16], 87.14 (Matthew Bender).

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

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

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

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

- 1. The defendant did an act that by its nature would directly and probably result in the application of force to a person;**
- 2. The defendant did that act willfully;**
- 3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act would directly, naturally, and probably result in the application of force to someone;**
- 4. When the defendant acted, (he/she) had the present ability to apply force to a person;**
- 5. The person assaulted was a member of the United States Armed Forces at the time of the assault;**

**[AND]**

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

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

**[AND]**

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

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



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

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

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

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

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

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

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

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

AND

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

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

[Voluntary intoxication is not a defense to assault.]

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New January 2006 *insert date of council approval*

## BENCH NOTES

### *Instructional Duty*

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

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

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

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

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

## AUTHORITY

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

### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 65.

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

### **LESSER INCLUDED OFFENSES**

- Simple Assault ► Pen. Code, § 240.

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

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

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

- 1. The defendant did an act that by its nature would directly and probably result in the application of force to a person;**
- 2. The defendant did that act willfully;**
- 3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;**
- 4. When the defendant acted, (he/she) had the present ability to apply force to a person;**
- 5. When the defendant acted, (he/she) knew, or reasonably should have known, that the person assaulted was a school employee [and that (he/she) was performing (his/her) duties as a school employee];**

**[AND]**

- 6. (When the defendant acted, the person assaulted was performing (his/her) duties[,]/ [or] (The/the) defendant acted in retaliation for something the school employee had done in the course of (his/her) duties)(;/. )**

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

**[AND]**

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

A *school employee* is any person employed as a permanent or probationary certificated or classified employee of a school district on a part-time or full-time basis, including a substitute teacher, student teacher, or school board member.

[It is not a defense that an assault took place off campus or outside of school hours.]

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*New January 2006*

## 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.)

If the sole motivation alleged for the assault is retaliation, **do not** give CALCRIM No. 370, *Motive*, do not give the bracketed clause in element 5, and give only the second option in element 6. (See *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165 [197 Cal.Rptr.3d 317]; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1127 [38 Cal.Rptr.2d 335].)

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

### **AUTHORITY**

- Elements ▶ Pen. Code, §§ 240, 241.6.
- Willful Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

### ***Secondary Sources***

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, §§ 20, 73.

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

**947. Simple Battery on Military Personnel (Pen. Code, §§ 242, 243.10)**

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**The defendant is charged [in Count \_\_] with battery against a member of the United States Armed Forces [in violation of Penal Code section 243.10].**

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

- 1. The defendant willfully [and unlawfully] touched \_\_\_\_\_  
<insert name of complaining witness> in a harmful or offensive manner;**
- 2. \_\_\_\_\_ <insert name of complaining witness> was a member of the United States Armed Forces at the time of the touching;**

**[AND]**

- 3. The defendant knew \_\_\_\_\_ <insert name of complaining witness> was a member of the United States Armed Forces and touched \_\_\_\_\_ <insert name of complaining witness> in a harmful or offensive manner because of \_\_\_\_\_ <insert name of complaining witness>'s service(;/.)**

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

**[AND]**

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

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

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

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

A \_\_\_\_\_ <insert description, e.g., “private in the United States Army”> is a member of the United States Armed Forces.

A person commits a battery *because of someone’s service in the armed forces* if:

1. He or she is biased against the person battered based on that person’s military service;

AND

2. That bias caused him or her to commit the alleged battery.

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

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

## BENCH NOTES

### *Instructional Duty*

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

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

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

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

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



## **AUTHORITY**

- Elements ▶ Pen. Code, §§ 242, 243.10.
- Willfully Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

### ***Secondary Sources***

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

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

## **LESSER INCLUDED OFFENSES**

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

## **RELATED ISSUES**

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

**1350. Hate Crime: Misdemeanor Interference With Civil Rights by Force (Pen. Code, § 422.6(a))**

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The defendant is charged [in Count \_\_] with interfering with another person's civil rights by the use of force [in violation of Penal Code section 422.6(a)].

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

1. The defendant used force to willfully interfere with[, or injure, intimidate, or oppress,] another person's free exercise or enjoyment of the right [or privilege] to \_\_\_\_\_ *<describe the right allegedly infringed, e.g., "be free from violence or bodily harm">*, established by the law or Constitution of California or the United States;
2. The defendant did so in whole or in part because of the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);

**AND**

3. The defendant intended to interfere with the other person's legally protected right [or privilege].

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

The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the other person if:

1. The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);

**AND**

2. The bias motivation caused the defendant to commit the alleged acts.

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

[The term *disability* is explained in Instruction 1353, to which you should refer.]

[*Gender*, as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]

[*Nationality* includes citizenship, country of origin, and national origin.]

[*Race or ethnicity* includes ancestry, color, and ethnic background.]

[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]

[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]

[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ [or] identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ [or] group[,]/ [or] family[,]/ [or] community center[,]/ [or] educational facility[,]/ [or] office[,]/ [or] meeting hall[,]/ [or] place of worship[,]/ [or] private institution[,]/ [or] public agency[,]/ [or] library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]

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New January 2006 *insert date of council approval*

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. This statute was substantially revised, effective January 1, 2005.

If the prosecution is based on the defendant's speech alone, do not give this instruction. (Pen. Code, § 422.6(c); *In re M.S.* (1995) 10 Cal.4th 698, 711–716 [42

Cal.Rptr.2d 355, 896 P.2d 1365].) Give CALCRIM No. 1351, *Hate Crime: Misdemeanor Interference With Civil Rights by Threat*.

In element 1, insert a description of the specific right or rights allegedly infringed, for example, the right to be free from violence or the threat of violence or the right to be protected from bodily harm. (See Civil Code, §§ 43, 51.7; *People v. Lashley* (1991) 1 Cal.App.4th 938, 950–951 [2 Cal.Rptr.2d 629]; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].)

Give all relevant bracketed definitions. If the term “disability” is used, give CALCRIM No. 1353, *Hate Crime: Disability Defined*.

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

## AUTHORITY

- Elements ▶ Pen. Code, § 422.6(a).
- Willfully Defined ▶ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Hate Crime Defined ▶ Pen. Code, § 422.55.
- “In Whole or in Part Because of” Defined ▶ Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].
- Disability Defined ▶ Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(l).
- Gender Defined ▶ Pen. Code, §§ 422.56(c), 422.57.
- Nationality Defined ▶ Pen. Code, § 422.56(e).
- Race or Ethnicity Defined ▶ Pen. Code, § 422.56(f).
- Religion Defined ▶ Pen. Code, § 422.56(g).
- Sexual Orientation Defined ▶ Pen. Code, § 422.56(h).
- Association With Defined ▶ Pen. Code, § 422.56(a).
- Specific Intent to Deprive Individual of Protected Right Required ▶ *In re M.S.* (1995) 10 Cal.4th 698, 713 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Lashley* (1991) 1 Cal.App.4th 938, 947–949 [2 Cal.Rptr.2d 629].

- Not Limited to “Significant Constitutional Rights.” ▶ *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].
- Statute Constitutional ▶ *In re M.S.* (1995) 10 Cal.4th 698, 715–717, 724 [42 Cal.Rptr.2d 355, 896 P.2d 1365].

### ***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 410, 411.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.44 (Matthew Bender).

## **RELATED ISSUES**

### ***Defendant Need Not Know He or She Is Violating the Law***

“ ‘[S]pecific intent’ under the statute does not require an actual awareness on the part of the defendant that he is violating another’s constitutional rights. It is enough that he engages in activity that interferes with rights clearly and specifically protected by the laws of the United States.” (*People v. Lashley* (1991) 1 Cal.App.4th 938, 948 [2 Cal.Rptr.2d 629].) “It is sufficient if the right is clearly defined and that the defendant intended to invade interests protected by constitutional or statutory authority.” (*Id.* at p. 949.)

### ***Penal Code Section 654***

In *In re M.S.* (1995) 10 Cal.4th 698, 727 [42 Cal.Rptr.2d 355, 896 P.2d 1365], the court rejected the argument that Penal Code section 654 does not apply to convictions under Penal Code section 422.6. In 2004, the Legislature amended the statute to add subdivision (d), which specifically states that Penal Code section 654 applies to convictions under Penal Code section 422.6.

**1351. Hate Crime: Misdemeanor Interference With Civil Rights by Threat (Pen. Code, § 422.6(a) & (c))**

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The defendant is charged [in Count \_\_\_\_] with interfering with another person's civil rights by threatening violence [in violation of Penal Code section 422.6].

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

1. The defendant threatened physical violence against a specific person [or a specific group of people];
2. The threat would have caused a reasonable person to be afraid because the defendant appeared able to carry out the threat;
3. The defendant used the threat to willfully interfere with[, or injure, intimidate, or oppress,] another person's free exercise or enjoyment of the right [or privilege] to \_\_\_\_\_ *<describe the right allegedly infringed, e.g., "be free from violence or bodily harm">*, established by the law or Constitution of California or the United States;
4. The defendant did so in whole or in part because of the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);

**AND**

5. The defendant intended to interfere with the other person's legally protected right [or privilege].

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

The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the other person if:

1. The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or]

**nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);**

**AND**

- 2. The bias motivation caused the defendant to commit the alleged acts.**

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

**[The term *disability* is explained in Instruction 1353, to which you should refer.]**

**[*Gender*, as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]**

**[*Nationality* includes citizenship, country of origin, and national origin.]**

**[*Race or ethnicity* includes ancestry, color, and ethnic background.]**

**[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]**

**[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]**

**[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ [or] identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ [or] group[,]/ [or] family[,]/ [or] community center[,]/ [or] educational facility[,]/ [or] office[,]/ [or] meeting hall[,]/ [or] place of worship[,]/ [or] private institution[,]/ [or] public agency[,]/ [or] library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]**

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

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. This statute was substantially revised, effective January 1, 2005.

Give this instruction if the prosecution is based on the defendant's speech alone. (Pen. Code, § 422.6(c); *In re M.S.* (1995) 10 Cal.4th 698, 711–716 [42 Cal.Rptr.2d 355, 896 P.2d 1365].)

In element 3, insert a description of the specific right or rights allegedly infringed, for example, the right to be free from violence or the threat of violence or the right to be protected from bodily harm. (See Civil Code, §§ 43, 51.7; *People v. Lashley* (1991) 1 Cal.App.4th 938, 950–951 [2 Cal.Rptr.2d 629]; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].)

Give all relevant bracketed definitions. If the term “disability” is used, give CALCRIM No. 1353, *Hate Crime: Disability Defined*.

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

## AUTHORITY

- Elements ▶ Pen. Code, § 422.6(a) & (c).
- Willfully Defined ▶ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Hate Crime Defined ▶ Pen. Code, § 422.55.
- “In Whole or in Part Because of” Defined ▶ Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].
- Disability Defined ▶ Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(l).
- Gender Defined ▶ Pen. Code, §§ 422.56(c), 422.57.
- Nationality Defined ▶ Pen. Code, § 422.56(e).
- Race or Ethnicity Defined ▶ Pen. Code, § 422.56(f).
- Religion Defined ▶ Pen. Code, § 422.56(g).



- Sexual Orientation Defined ▶ Pen. Code, § 422.56(h).
- Association With Defined ▶ Pen. Code, § 422.56(a).
- Specific Intent to Deprive Individual of Protected Right Required ▶ *In re M.S.* (1995) 10 Cal.4th 698, 713 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Lashley* (1991) 1 Cal.App.4th 938, 947–949 [2 Cal.Rptr.2d 629].
- Requirements for Threat of Violence ▶ Pen. Code, § 422.6(c); *In re M.S.* (1995) 10 Cal.4th 698, 711–716 [42 Cal.Rptr.2d 355, 896 P.2d 1365].
- Not Limited to “Significant Constitutional Rights.” ▶ *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].
- Statute Constitutional ▶ *In re M.S.* (1995) 10 Cal.4th 698, 715–717, 724 [42 Cal.Rptr.2d 355, 896 P.2d 1365].

### ***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 410, 411.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.44 (Matthew Bender).

## **RELATED ISSUES**

See the Related Issues section of CALCRIM No. 1350, *Hate Crime: Misdemeanor Interference With Civil Rights by Force*.

**1352. Hate Crime: Misdemeanor Interference With Civil Rights by Damaging Property (Pen. Code, § 422.6(b))**

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The defendant is charged [in Count \_\_\_\_] with interfering with another person's civil rights by damaging property [in violation of Penal Code section 422.6(b)].

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

1. The defendant (defaced[,]/ [or] damaged[,]/ [or] destroyed) (real/ [or] personal) property (owned[,]/ [or] used[,]/ [or] possessed[,]/ [or] occupied) by another person;
2. The defendant knew that (he/she) was (defacing[,]/ [or] damaging[,]/ [or] destroying) property that was (owned[,]/ [or] used[,]/ [or] possessed[,]/ [or] occupied) by that person;
3. The defendant did so for the purpose of interfering with [or intimidating] that person's free exercise or enjoyment of the right [or privilege] to \_\_\_\_\_ <describe the right allegedly infringed, e.g., "be free from violence or bodily harm">, established by the law or Constitution of California or the United States;
4. The defendant did so in whole or in part because of the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);

**AND**

5. The defendant intended to interfere with the other person's legally protected right [or privilege].

The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the other person if:

1. The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual

orientation[,]/ [or] association with a person or group having  
(this/one or more of these) actual or perceived characteristic[s]);

AND

2. The bias motivation caused the defendant to commit the alleged acts.

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

[The term *disability* is explained in Instruction 1353, to which you should refer.]

[*Gender*, as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]

[*Nationality* includes citizenship, country of origin, and national origin.]

[*Race or ethnicity* includes ancestry, color, and ethnic background.]

[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]

[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]

[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ [or] identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ [or] group[,]/ [or] family[,]/ [or] community center[,]/ [or] educational facility[,]/ [or] office[,]/ [or] meeting hall[,]/ [or] place of worship[,]/ [or] private institution[,]/ [or] public agency[,]/ [or] library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]

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New January 2006 [\*\[insert date of council approval\]\*](#)

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. This statute was substantially revised, effective January 1, 2005.

In element 3, insert a description of the specific right or rights allegedly infringed, for example, the right to be free from violence or the threat of violence or the right to be protected from bodily harm. (See Civil Code, §§ 43, 51.7; *People v. Lashley* (1991) 1 Cal.App.4th 938, 950–951 [2 Cal.Rptr.2d 629]; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].)

Give all relevant bracketed definitions. If the term “disability” is used, give CALCRIM No. 1353, *Hate Crime: Disability Defined*.

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

## AUTHORITY

- Elements ▶ Pen. Code, § 422.6(b).
- Hate Crime Defined ▶ Pen. Code, § 422.55.
- “In Whole or in Part Because of” Defined ▶ Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].
- Disability Defined ▶ Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(l).
- Gender Defined ▶ Pen. Code, §§ 422.56(c), 422.57.
- Nationality Defined ▶ Pen. Code, § 422.56(e).
- Race or Ethnicity Defined ▶ Pen. Code, § 422.56(f).
- Religion Defined ▶ Pen. Code, § 422.56(g).
- Sexual Orientation Defined ▶ Pen. Code, § 422.56(h).
- Association With Defined ▶ Pen. Code, § 422.56(a).
- Specific Intent to Deprive Individual of Protected Right Required ▶ *In re M.S.* (1995) 10 Cal.4th 698, 713 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Lashley* (1991) 1 Cal.App.4th 938, 947–949 [2 Cal.Rptr.2d 629].

- Not Limited to “Significant Constitutional Rights” ▶ *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].
- Statute Constitutional ▶ *In re M.S.* (1995) 10 Cal.4th 698, 715–717, 724 [42 Cal.Rptr.2d 355, 896 P.2d 1365].
- Victim Need Not Own Property ▶ *In re Michael M.* (2001) 86 Cal.App.4th 718, 724–726 [104 Cal.Rptr.2d 10].

### ***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 410, 411.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.44 (Matthew Bender).

## **RELATED ISSUES**

### ***Target of Intimidation Need Not Own Property***

“[T]he phrase ‘property of any other person’ in section 422.6, subdivision (b) does not require that the victim own the property. As long as the property is regularly and openly used, possessed, or occupied by the victim so that it is readily identifiable with him or her, it falls within the statutory scope.” (*In re Michael M.* (2001) 86 Cal.App.4th 718, 724–726 [104 Cal.Rptr.2d 10] [classroom was the “property of” the students whose class met there].)

See the Related Issues section of CALCRIM No. 1350, *Hate Crime: Misdemeanor Interference With Civil Rights by Force*.

### **1354. Hate Crime Allegation: Felony (Pen. Code, § 422.75(a)–(c))**

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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 crime[s] committed by the defendant (was a/were) hate crime[s]. [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 [for each crime] the People must prove that the defendant committed that crime in whole or in part because of the alleged victim’s actual or perceived (disability[,]/ gender[,]/ nationality[,]/ race or ethnicity[,]/ religion[,]/ sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]).**

**As used here, *victim* includes, but is not limited to, a (person[,]/ [or] individual[,]/ [or] family[,]/ [or] group[,]/ [or] community center[,]/ [or] educational facility[,]/ [or] entity[,]/ [or] office[,]/ [or] meeting hall[,]/ [or] place of worship[,]/ [or] private institution[,]/ [or] public agency[,]/ [or] library[,]/ [or] other victim or intended victim of the crime).**

**The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the victim if:**

- 1. The defendant was biased against the victim based on the victim’s actual or perceived (disability[,]/ gender[,]/ nationality[,]/ race or ethnicity[,]/ religion[,]/ sexual orientation[,]/ [or] association with a person or group with (this/one or more of these) actual or perceived characteristic[s]);**

**AND**

- 2. The bias motivation caused the defendant to commit the alleged acts.**

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

**[The term *disability* is explained in Instruction 1353, to which you should refer.]**

**[*Gender*, as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]**

**[*Nationality* includes citizenship, country of origin, and national origin.]**

**[*Race or ethnicity* includes ancestry, color, and ethnic background.]**

**[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]**

**[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]**

**[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ group[,]/ family[,]/ community center[,]/ educational facility[,]/ office[,]/ meeting hall[,]/ place of worship[,]/ private institution[,]/ public agency[,]/ library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]**

**[If you conclude that the People have proved that the crime[s] committed by the defendant (was a/were) hate crime[s], you must also decide whether the defendant voluntarily acted together with another person by either personally committing the crime or by aiding and abetting another person in committing the crime.]**

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

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

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].) This statute was substantially revised, effective January 1, 2005.

Give all relevant bracketed definitions. If the term “disability” is used, give CALCRIM No. 1353, *Hate Crimes: Disability Defined*.

If the prosecution alleges that the defendant acted in concert with another, pursuant to Penal Code section 422.75(b), give the bracketed sentence that begins with “If you conclude that the People have proved.” Give all relevant instructions on aiding and abetting. The jury must be provided with a verdict form on which it may indicate whether this factor has also been proved.

If the prosecution alleges that the defendant has a qualifying prior conviction under Penal Code section 422.75(d), then, in addition to this instruction, also give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant has stipulated to the truth of the prior conviction.

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

### *Related Instructions*

CALCRIM No. 1350, *Hate Crime: Misdemeanor Interference With Civil Rights by Force*.

CALCRIM No. 1351, *Hate Crime: Misdemeanor Interference With Civil Rights by Threat*.

CALCRIM No. 1352, *Hate Crime: Misdemeanor Interference With Civil Rights by Damage to Property*.

CALCRIM No. 1355, *Hate Crime Allegation: Misdemeanor*.

## AUTHORITY

- Enhancement ▶ Pen. Code, § 422.75(a)–(c).
- Hate Crime Defined ▶ Pen. Code, § 422.55.



- “In Whole or in Part Because of” Defined ▶ Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].
- Victim Defined ▶ Pen. Code, § 422.56(i).
- Disability Defined ▶ Pen. Code, § 422.56(b); Gov. Code, §12926(i)–(l).
- Gender Defined ▶ Pen. Code, §§ 422.56(c) & 422.57.
- Nationality Defined ▶ Pen. Code, § 422.56(e).
- Race or Ethnicity Defined ▶ Pen. Code, § 422.56(f).
- Religion Defined ▶ Pen. Code, § 422.56(g).
- Sexual Orientation Defined ▶ Pen. Code, § 422.56(h).
- Association With Defined ▶ Pen. Code, § 422.56(a).
- Enhancement, Not Substantive Offense ▶ See *People v. Wallace* (2003) 109 Cal.App.4th 1699, 1702 [1 Cal.Rptr.3d 324].
- Aiding and Abetting ▶ *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].
- Acting in Concert ▶ See *People v. Calimee* (1975) 49 Cal.App.3d 337, 341 [122 Cal.Rptr. 658] [construing sodomy-in-concert statute]; *People v. Lopez* (1981) 116 Cal.App.3d 882, 886 [172 Cal.Rptr. 374] [construing rape-in-concert statute].
- No Specific Intent Required ▶ *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 740–741 [42 Cal.Rptr.2d 377, 896 P.2d 1387].

### ***Secondary Sources***

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 305.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, Sentencing, § 91.44 (Matthew Bender).

### **1355. Hate Crime Allegation: Misdemeanor (Pen. Code, § 422.7)**

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**If you find the defendant guilty of \_\_\_\_\_ *<insert offense[s]>* [as charged in Count[s] \_\_\_\_], you must then decide whether the People have proved the additional allegation that the crime[s] committed by the defendant (was a/were) hate crime[s]. [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 [for each crime], the People must prove that:**

- 1. When committing that crime, the defendant intended to interfere with [or intimidate] another person's free exercise or enjoyment of the right [or privilege] to \_\_\_\_\_ *<describe the right raised by the evidence>*, established by the law or Constitution of California or the United States;**

**[AND]**

- 2. The defendant acted in whole or in part because of the other person's actual or perceived (disability[,]/ gender[,]/ nationality[,]/ race or ethnicity[,]/ religion[,]/ sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s])(;/.)**

**[AND]**

*<Alternative 3A—caused physical injury>*

- [3. When committing that crime, the defendant caused an actual physical injury or had the ability at that time to cause a violent injury.]**

*<Alternative 3B—caused property damage>*

- [3. The defendant caused property damage in excess of \$950.]]**

**The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the other person if:**

- 1. The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);**

**AND**

- 2. The bias motivation caused the defendant to commit the alleged acts.**

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

**[The term *disability* is explained in Instruction 1353, to which you should refer.]**

**[*Gender*, as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]**

**[*Nationality* includes citizenship, country of origin, and national origin.]**

**[*Race or ethnicity* includes ancestry, color, and ethnic background.]**

**[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]**

**[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]**

**[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ group[,]/ family[,]/ community center[,]/ educational facility[,]/ office[,]/ meeting hall[,]/ place of worship[,]/ private institution[,]/ public agency[,]/ library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]**

**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 this allegation has not been proved.**

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

## BENCH NOTES

### ***Instructional Duty***

The court has a **sua sponte** duty to give an instruction defining the elements of the enhancement. (*People v. Wallace* (2003) 109 Cal.App.4th 1699, 1702 [1 Cal.Rptr.3d 324] [statute defines enhancement, not separate offense].) This enhancement makes a crime “committed against the person or property of another” that would otherwise be a misdemeanor into a misdemeanor-felony “wobbler.” (Pen. Code, § 422.7.) This statute was substantially revised, effective January 1, 2005.

In element 1, insert a description of the specific right or rights allegedly infringed, for example, the right to be free from violence or the threat of violence or the right to be protected from bodily harm. (See Civil Code, §§ 43 & 51.7; *People v. Lashley* (1991) 1 Cal.App.4th 938, 950–951 [2 Cal.Rptr.2d 629]; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [40 Cal.Rptr.2d 793].)

Give element 3A if the prosecution alleges that the crime was committed “against a person” and caused injury or included “the present ability to commit a violent injury.” (Pen. Code, § 422.7(a)). Give element 3B if the prosecution alleges property damage exceeding \$950. (Pen. Code, § 422.7(b).) If the prosecution alleges that the defendant has a qualifying prior conviction under Penal Code section 422.7(c), then, in addition to this instruction, also give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, 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. If the term “disability” is used, give CALCRIM No. 1353, *Hate Crimes: Disability Defined*.

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

### ***Related Instructions***

CALCRIM No. 1350, *Hate Crime: Misdemeanor Interference With Civil Rights by Force*.

CALCRIM No. 1351, *Hate Crime: Misdemeanor Interference With Civil Rights by Threat*.

CALCRIM No. 1352, *Hate Crime: Misdemeanor Interference With Civil Rights by Damaging Property*.

CALCRIM No. 1354, *Hate Crime Allegation: Felony*.

## AUTHORITY

- Enhancement ▶ Pen. Code, § 422.7.
- Hate Crime Defined ▶ Pen. Code, § 422.55.
- “In Whole or in Part Because of” Defined ▶ Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741 [896 P.2d 1387].
- Disability Defined ▶ Pen. Code, § 422.56(b); Gov. Code, §12926(i)–(l).
- Gender Defined ▶ Pen. Code, §§ 422.56(c) & 422.57.
- Nationality Defined ▶ Pen. Code, § 422.56(e).
- Race or Ethnicity Defined ▶ Pen. Code, § 422.56(f).
- Religion Defined ▶ Pen. Code, § 422.56(g).
- Sexual Orientation Defined ▶ Pen. Code, § 422.56(h).
- Association With Defined ▶ Pen. Code, § 422.56(a).
- Enhancement, Not Substantive Offense ▶ *People v. Wallace* (2003) 109 Cal.App.4th 1699, 1702 [1 Cal.Rptr.3d 324].
- Intent to Deprive Individual of Protected Rights ▶ *In re M.S.* (1995) 10 Cal.4th 698, 713 [42 Cal.Rptr.2d 355, 896 P.2d 1365]; *People v. Lashley* (1991) 1 Cal.App.4th 938, 947–949 [2 Cal.Rptr.2d 629]; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1268 [40 Cal.Rptr.2d 793]; *In re Joshua H.* (1993) 13 Cal.App.4th 1734, 1742 [17 Cal.Rptr.2d 291].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 410, 411.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.44 (Matthew Bender).

## LESSER INCLUDED OFFENSES

The underlying misdemeanor, and the attempt of the underlying misdemeanor (see Pen. Code, § 664), are lesser included offenses of a violation of Penal Code section 422.7.

**1356–1399. Reserved for Future Use**

## 522. Provocation: Effect on Degree of Murder

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**Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide.**

**If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.]**

**[Provocation does not apply to a prosecution under a theory of felony murder.]**

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*New January 2006; Revised April 2011 [insert date of council approval]*

### BENCH NOTES

#### ***Instructional Duty***

Provocation may reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [156 P.2d 7] [provocation raised reasonable doubt about premeditation or deliberation, “leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation”]; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1211–1212 [17 Cal.Rptr.3d 532, 95 P.3d 811] [court adequately instructed on relevance of provocation to whether defendant acted with intent to torture for torture murder].) There is, however, no sua sponte duty to instruct the jury on this issue. (*People v. Rogers* (2006) 39 Cal.4th 826, 877-880 [48 Cal.Rptr.3d 1, 141 P.3d 135].) ~~*People v. Middleton* (1997) 52 Cal.App.4th 19, 31–33 [60 Cal.Rptr.2d 366], disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752 [3 Cal.Rptr.3d 676, 74 P.3d 771].~~) This is a pinpoint instruction, to be given on request.

This instruction may be given after CALCRIM No. 521, *First Degree Murder*.

If the court will be instructing on voluntary manslaughter, give both bracketed portions on manslaughter.

If the court will be instructing on felony murder, give the bracketed sentence stating that provocation does not apply to felony murder.



## AUTHORITY

- Provocation Reduces From First to Second Degree. *People v. Thomas* (1945) 25 Cal.2d 880, 903 [156 P.2d 7]; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1211–1212 [17 Cal.Rptr.3d 532, 95 P.3d 811].
- Pinpoint Instruction. *People v. Rogers* (2006) 39 Cal.4th 826, 877–878].
- This Instruction Upheld. *People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1333-1335 [107 Cal.Rptr.3d 915].

### *Secondary Sources*

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, 142.02 (Matthew Bender).

### 801. Mayhem (Pen. Code, § 203)

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The defendant is charged [in Count \_\_\_\_] with mayhem [in violation of Penal Code section 203].

To prove that the defendant is guilty of mayhem, the People must prove that the defendant unlawfully and maliciously:

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

[OR]

[2. Disabled or made useless a part of someone's body and the disability was more than slight or temporary(;/.)]

[OR]

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

[OR]

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

[OR]

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

[OR]

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

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.

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

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

## BENCH NOTES

### *Instructional Duty*

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

Whether the complaining witness suffered a serious bodily injury is a question for the jury to determine. If the defendant disputes that the injury suffered was a serious bodily injury, use the first bracketed paragraph. If the parties stipulate that the injury suffered was a serious bodily injury, use the second bracketed paragraph.

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

## AUTHORITY

- Elements ▶ Pen. Code, § 203.
- Malicious Defined ▶ Pen. Code, § 7, subd. 4; *People v. Lopez* (1986) 176 Cal.App.3d 545, 550 [222 Cal.Rptr. 101].
- No Serious Bodily Injury Requirement ▶ *People v. Santana* (2013) 56 Cal.4th 999, 1010 [157 Cal.Rptr.3d 547, 301 P.3d 1157].
- Disabled ▶ See, e.g., *People v. Thomas* (1979) 96 Cal.App.3d 507, 512 [158 Cal.Rptr. 120] [serious ankle injury lasting over six months], overruled on other grounds in *People v. Kimble* (1988) 44 Cal.3d 480, 498 [244 Cal.Rptr. 148, 749 P.2d 803].
- General Intent Crime ▶ *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1226 [113 Cal.Rptr.2d 1]; *People v. Sekona* (1994) 27 Cal.App.4th 443, 453 [32 Cal.Rptr.2d 606].
- Permanent Disfigurement ▶ *People v. Hill* (1994) 23 Cal.App.4th 1566, 1571 [28 Cal.Rptr.2d 783]; *Goodman v. Superior Court* (1978) 84 Cal.App.3d 621, 624 [148 Cal.Rptr. 799]; see also *People v. Newble* (1981) 120 Cal.App.3d 444, 451 [174 Cal.Rptr. 637] [head is member of body for purposes of disfigurement].
- Put Out Eye ▶ *People v. Dennis* (1985) 169 Cal.App.3d 1135, 1138 [215 Cal.Rptr. 750]; *People v. Green* (1976) 59 Cal.App.3d 1, 3–4 [130 Cal.Rptr.

318] [addressing corrective lenses]; *People v. Nunes* (1920) 47 Cal.App. 346, 350 [190 P. 486].

- Slit Lip ▶ *People v. Caldwell* (1984) 153 Cal.App.3d 947, 952 [200 Cal.Rptr. 508] [defendant bit through victim's lower lip].

### ***Secondary Sources***

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 84–86.

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

## **LESSER INCLUDED OFFENSES**

- Attempted Mayhem ▶ Pen. Code, §§ 203, 663.
- Assault ▶ Pen. Code, § 240; see *People v. De Angelis* (1979) 97 Cal.App.3d 837, 841 [159 Cal.Rptr. 111] [mayhem occurred during continuing assault].
- Battery ▶ Pen. Code, § 242.

Assault with force likely to produce great bodily injury (Pen. Code, § 245(a)(1)) is not a lesser included offense to mayhem. (*People v. Ausbie* (2004) 123 Cal.App.4th 855, 862–863 [20 Cal.Rptr.3d 371].)

Battery with serious bodily injury is not a lesser included offense of mayhem under the statutory elements test. *People v. Poisson* (2016) 246 Cal.App.4th 121, 123-125 [200 Cal.Rptr.3d 542].

## **RELATED ISSUES**

### ***Disfigurement***

Disfigurement constitutes mayhem “only when the injury is permanent.” (*Goodman v. Superior Court* (1978) 84 Cal.App.3d 621, 624 [148 Cal.Rptr. 799]; *People v. Hill* (1994) 23 Cal.App.4th 1566, 1571 [28 Cal.Rptr.2d 783].) However, the “possibility that a victim’s disfigurement might be alleviated through reconstructive surgery is no bar to a finding of ‘permanent’ injury.” (*People v. Williams* (1996) 46 Cal.App.4th 1767, 1774 [54 Cal.Rptr.2d 521].) “We . . . reject [the] contention that evidence of medical alleviation may be used in a mayhem trial to prove an injury, permanent by its nature, may be corrected by medical procedures.” (*People v. Hill, supra*, 23 Cal.App.4th at p. 1574.) In addition, “[t]he

fact that [disfiguring injuries] are on a normally unexposed portion of [a] body does not render them any less significant.” (*People v. Keenan* (1991) 227 Cal.App.3d 26, 36 [277 Cal.Rptr. 687] [burns inflicted on victim’s breasts by a cigarette].)

***Imperfect Self-Defense Not Available***

“[A]part from the *McKelvy* lead opinion, there is no authority to support [the] claim that the mere use of the term ‘malicious’ in section 203 requires a court to instruct a jury that an actual but unreasonable belief will negate the malice required to convict for mayhem . . . [Mayhem] involves a different requisite mental state and has no statutory history recognizing a malice aforethought element or the availability of the *Flannel* defense.” (*People v. Sekona* (1994) 27 Cal.App.4th 443, 457 [32 Cal.Rptr.2d 606]; contra, *People v. McKelvy* (1987) 194 Cal.App.3d 694, 702–704 [239 Cal.Rptr. 782] (lead opn. of Kline, P.J.).)

***Victim Must Be Alive***

A victim of mayhem must be alive at the time of the act. (*People v. Kraft* (2000) 23 Cal.4th 978, 1058 [99 Cal.Rptr.2d 1, 5 P.3d 68]; see *People v. Jentry* (1977) 69 Cal.App.3d 615, 629 [138 Cal.Rptr. 250].)

**802–809. Reserved for Future Use**

**830. Abuse of Elder or Dependent Adult Likely to Produce Great Bodily Harm or Death (Pen. Code, § 368(b)(1))**

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The defendant is charged [in Count \_\_] with (elder/dependent adult) abuse likely to produce great bodily harm or death [in violation of Penal Code section 368(b)(1)].

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

*<Alternative A—inflicted pain>*

**[1. The defendant willfully inflicted unjustifiable physical pain or mental suffering on \_\_\_\_\_ *<insert name or description of elder or dependent adult>;***

*<Alternative B—caused or permitted to suffer pain>*

**[1. The defendant willfully caused or permitted \_\_\_\_\_ *<insert name or description of elder or dependent adult>* to suffer unjustifiable physical pain or mental suffering;**

*<Alternative C—while having custody, caused or permitted to be injured>*

**[1. The defendant, while having care or custody of \_\_\_\_\_ *<insert name or description of elder or dependent adult>* willfully caused or permitted (his/her) person or health to be injured;**

*<Alternative D—while having custody, caused or permitted to be placed in danger>*

**[1. The defendant, while having care or custody of \_\_\_\_\_ *<insert name or description of elder or dependent adult>* willfully caused or permitted (him/her) to be placed in a situation where (his/her) person or health was endangered;**

**2. The defendant (inflicted suffering on \_\_\_\_\_ *<insert name or description of elder or dependent adult>*/ [or] caused or permitted \_\_\_\_\_ *<insert name of elder or dependent adult>* to (suffer/ [or] be injured/ [or] be endangered)) under circumstances or conditions likely to produce great bodily harm or death;**

3. \_\_\_\_\_ <insert name or description of elder or dependent adult>  
(is/was) (an elder/a dependent adult)(;/.)

[AND]

4. When the defendant acted, (he/she) knew or reasonably should have known that \_\_\_\_\_ <insert name or description of elder or dependent adult> was (an elder/a dependent adult)(;/.)

<Give element 5 when giving alternative 1B and it is alleged the defendant permitted the suffering.>

[AND]

- [5. The defendant had a legal duty to supervise and control the conduct of the person[s] who caused or inflicted unjustifiable physical pain or mental suffering on \_\_\_\_\_ <insert name or description of elder or dependent adult>, but failed to supervise or control that conduct(;/.)]

<Give element 6 when giving alternative 1B, 1C, or 1D.>

[AND]

6. The defendant was criminally negligent when (he/she) caused or permitted \_\_\_\_\_ <insert name or description of elder or dependent adult> to (suffer/ [or] be injured/ [or] be endangered).]

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

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

[An *elder* is someone who is at least 65 years old.]

[A *dependent adult* is someone who is between 18 and 64 years old and has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights. [This definition includes an adult who has physical or developmental disabilities or whose physical or mental abilities have decreased because of age.] [A *dependent adult* is also someone between 18 and 64 years old who is an inpatient in a (health facility/psychiatric health facility/ [or] chemical dependency recovery hospital).]

[*Unjustifiable* physical pain or mental suffering is pain or suffering that is not reasonably necessary or is excessive under the circumstances.]

[A person who does not have care or custody of (an elder/a dependent adult) may still have a *legal duty to supervise and control the conduct of a third person* who can inflict abuse on the (elder/dependent adult) if the person has a special relationship with the third person. A special relationship is created, for example, when (1) a person takes charge of a third person whom (he/she) knows or should know is likely to cause bodily harm to others if not controlled, and (2) the person has the ability to control the third person's conduct.]

[*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 harm;

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 elder/A dependent adult) does not need to actually suffer great bodily harm. But if (an elder/a dependent adult) does suffer great bodily harm, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed the offense.]

[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 *[\[insert date of council approval\]](#)*

## BENCH NOTES

### *Instructional Duty*

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



Give element 1A if it is alleged that the defendant directly inflicted unjustifiable physical pain or mental suffering. Give element 1B if it is alleged that the defendant caused or permitted an elder or dependent adult to suffer. If it is alleged that the defendant had care or custody of an elder or dependent adult and that the defendant caused or permitted the elder's or dependent adult's person or health to be injured, give element 1C. Finally, give element 1D if it is alleged that the defendant had care or custody of an elder or dependent adult and that the defendant endangered the elder's or dependent adult's person or health. (See Pen. Code, § 368(b)(1).)

Give bracketed element 5 if it is alleged under element 1B that the defendant *permitted* an elder or dependent adult to suffer unjustifiable pain or mental suffering. (See *People v. Heitzman* (1994) 9 Cal.4th 189, 212 [37 Cal.Rptr.2d 236, 886 P.2d 1229].) If element 5 is given, also give the bracketed paragraph defining who has a “legal duty to control the conduct of a third person.”

Give bracketed element 6 regarding criminal negligence, and the bracketed definition of “criminally negligent,” if element 1B, 1C, or 1D is given alleging that the defendant committed any indirect act. (*People v. Manis* (1992) 10 Cal.App.4th 110, 114 [12 Cal.Rptr.2d 619], disapproved on other grounds by *People v. Heitzman* (1994) 9 Cal.4th 189, 212 [37 Cal.Rptr.2d 236, 886 P.2d 1229]; *People v. Superior Court (Holvey)* (1988) 205 Cal.App.3d 51, 60 [252 Cal.Rptr. 335], disapproved on other grounds by *People v. Heitzman* (1994) 9 Cal.4th 189, 212 [37 Cal.Rptr.2d 236, 886 P.2d 1229]; see *People v. Valdez* (2002) 27 Cal.4th 778, 788, 789 [118 Cal.Rptr.2d 3, 42 P.3d 511]; *People v. Peabody* (1975) 46 Cal.App.3d 43, 48–49 [119 Cal.Rptr. 780] [latter two cases in context of parallel child abuse statute].)

Give the bracketed definition of “elder” or “dependent adult” depending on the status of the alleged victim. (See Pen. Code, § 368(g) & (h).)

Give on request the bracketed definition of “unjustifiable” physical pain or mental suffering if there is a question about the necessity for or the degree of pain or suffering. (See *People v. Curtiss* (1931) 116 Cal.App. Supp. 771, 779–780 [300 P. 801].)

If there is a question whether an elder or dependent adult suffered great bodily harm, give on request the bracketed paragraph stating that a person “does not need to actually suffer great bodily harm.” (See *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519]; *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 835 [159 Cal.Rptr. 771] [in context of parallel child abuse statute].)

If a victim actually suffers great bodily injury or dies, the defendant's sentence may be enhanced based on the victim's age. (See Pen. Code, § 368(b)(2) & (3); see *People v. Adams* (2001) 93 Cal.App.4th 1192, 1198 [113 Cal.Rptr.2d 722].) Give CALCRIM No. 3162, *Great Bodily Injury: Age of Victim*, or any other appropriate instructions on enhancements. (See series 3100-3399.)

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, § 368(b)(1).
- Great Bodily Harm or Injury Defined ▶ Pen. Code, §§ 368(b)(2), 12022.7(f); see *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519] [in context of parallel child abuse statute].
- Sentence Enhancements ▶ Pen. Code, § 368(b)(2) & (3); see *People v. Adams* (2001) 93 Cal.App.4th 1192, 1198 [113 Cal.Rptr.2d 722].
- Willful Defined ▶ Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402]; *People v. Vargas* (1988) 204 Cal.App.3d 1455, 1462, 1468–1469 [251 Cal.Rptr. 904].
- Criminal Negligence Required for Indirect Conduct ▶ *People v. Manis* (1992) 10 Cal.App.4th 110, 114 [12 Cal.Rptr.2d 619]; *People v. Superior Court (Holvey)* (1988) 205 Cal.App.3d 51, 60 [252 Cal.Rptr. 335]; see *People v. Valdez* (2002) 27 Cal.4th 778, 788, 789 [118 Cal.Rptr.2d 3, 42 P.3d 511]; *People v. Peabody* (1975) 46 Cal.App.3d 43, 47, 48–49 [119 Cal.Rptr. 780] [in context of parallel child abuse statute].
- Duty to Control Conduct of Person Inflicting Abuse ▶ *People v. Heitzman* (1994) 9 Cal.4th 189, 212 [37 Cal.Rptr.2d 236, 886 P.2d 1229].
- General Criminal Intent Required for Direct Infliction of Pain or Suffering ▶ See *People v. Sargent* (1999) 19 Cal.4th 1206, 1224 [81 Cal.Rptr.2d 835, 970 P.2d 409] [in context of parallel child abuse statute].

## Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 168–170.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.11[1][f], 142.13[5] (Matthew Bender).

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

## COMMENTARY

Any violation of Penal Code section 368(b)(1) must be willful. (See *People v. Smith* (1984) 35 Cal.3d 798, 806 [201 Cal.Rptr. 311, 678 P.2d 886]; *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519] [both in context of parallel child abuse statute]; but see *People v. Valdez* (2002) 27 Cal.4th 778, 789 [118 Cal.Rptr.2d 3, 42 P.3d 511] [the prong punishing a *direct infliction* of unjustifiable physical pain or mental suffering does not expressly require that the conduct be willful].) Following *Smith* and *Cortes*, the committee has included “willfully” in element 1A regarding direct infliction of abuse until there is further guidance from the courts.

## LESSER INCLUDED OFFENSES

- Attempted Abuse of Elder or Dependent Adult ▶ Pen. Code, §§ 664, 368(b)(1).
- Misdemeanor Abuse of Elder or Dependent Adult ▶ Pen. Code, § 368(c).

## 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.” (See *People v. Toney* (1999) 76 Cal.App.4th 618, 621–622 [90 Cal.Rptr.2d 578] [quoting *People v. Cochran* (1998) 62 Cal.App.4th 826, 832 [73 Cal.Rptr.2d 257]; both in context of parallel child abuse statute].)

### *Unanimity*

The court has a **sua sponte** duty to instruct on unanimity when the prosecution has presented evidence of multiple acts to prove a single count. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 [108 Cal.Rptr.2d 436, 25 P.3d 641].) However, the court does not have to instruct on unanimity if the offense constitutes a “continuous course of conduct.” (*People v. Napoles* (2002) 104 Cal.App.4th 108, 115–116 [127 Cal.Rptr.2d 777].) Elder abuse may be a continuous course of conduct or a single, isolated incident. (*People v. Rae* (2002) 102 Cal.App.4th 116, 123 [125 Cal.Rptr.2d 312].) The court should carefully examine the statute charged, the pleadings, and the evidence presented to determine whether the offense constitutes a continuous course of conduct. (*People v. Napoles, supra*, 104 Cal.App.4th at pp. 115–116.) See generally CALCRIM No. 3500, *Unanimity*.

## 850. Testimony on Intimate Partner Battering and Its Effects: Credibility of Complaining Witness

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You have heard testimony from \_\_\_\_\_ <insert name of expert>  
regarding the effect of (battered women's syndrome/intimate partner  
battering/\_\_\_\_\_ <insert other description used by expert for syndrome>).

\_\_\_\_\_ 's <insert name of expert> testimony about (battered women's  
syndrome/intimate partner battering/\_\_\_\_\_ <insert other description  
used by expert for syndrome>) is not evidence that the defendant committed  
any of the crimes charged against (him/her).

You may consider this evidence only in deciding whether or not \_\_\_\_\_ 's  
<insert name of alleged victim of abuse> conduct was not inconsistent with the  
conduct of someone who has been abused, and in evaluating the believability  
of (his/her) testimony.

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New January 2006

### BENCH NOTES

#### *Instructional Duty*

The court has a ~~sua sponte~~ duty to give this instruction if an expert testifies on intimate partner battering and its effects, previously referred to as battered women's syndrome. (See *People v. Housley* (1992) 6 Cal.App.4th 947, 958-959 [8 Cal.Rptr.2d 431] [sua sponte duty in context of child sexual abuse accommodation syndrome]; *People v. Bledsoe* (1984) 36 Cal.3d 236, 250 [203 Cal.Rptr. 450, 681 P.2d 291] [rape trauma syndrome not admissible to prove rape occurred].) Several courts of review have concluded there is no sua sponte duty to give a similar limiting instruction (see CALCRIM No. 1193, *Testimony on Child Sexual Abuse Accommodation Syndrome*) when an expert testifies on child sexual abuse accommodation syndrome. (*People v. Mateo* (2016) 243 Cal.App.4th 1063, 1073-1074 [197 Cal.Rptr.3d 248]; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 736 [256 Cal.Rptr. 446] and *People v. Stark* (1989) 213 Cal.App.3d 107, 116 [261 Cal.Rptr. 479] [instruction required only on request].) See also *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088, fn. 5, 1090-1091, 1100 [56 Cal.Rptr.2d 142, 92 P.2d 1], which concludes that a limiting instruction on battered woman syndrome is required only on request. But see *People v. Housley* (1992) 6 Cal.App.4th 947, 958-959 [9 Cal.Rptr.2d 431], which did find a sua sponte duty to give CALCRIM No. 1193.

In *People v. Brown* (2004) 33 Cal.4th 892, 906–908 [16 Cal.Rptr.3d 447, 94 P.3d 574], the Supreme Court held that testimony from an expert in battered women’s syndrome could be admitted under Evidence Code section 801 even though there was no evidence of prior incidents of violence between the defendant and the alleged victim. The court held that the expert could testify generally about the “cycle of violence” and the frequency of recantation by victims of domestic abuse, without testifying specifically about “battered women’s syndrome”. (*Ibid.*) It is unclear if the court is required to give a cautionary admonition sua sponte when such evidence is admitted.

### ***Related Instructions***

If this instruction is given, also give CALCRIM No. 303, *Limited Purpose Evidence in General*, and CALCRIM No. 332, *Expert Witness Testimony*.

See also CALCRIM No. 851, *Testimony on Intimate Partner Battering and Its Effects: Offered by the Defense*.

### **AUTHORITY**

- Instructional Requirements ▶ See Evid. Code, § 1107(a); *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088, fn. 5 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Abuse Defined ▶ Evid. Code, § 1107(c); Fam. Code, § 6203.
- Domestic Violence Defined ▶ Evid. Code, § 1107(c); Fam. Code, § 6211.
- Relevant After Single Incident of Abuse ▶ See *People v. Brown* (2004) 33 Cal.4th 892, 906–908 [16 Cal.Rptr.3d 447, 94 P.3d 574]; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1129 [93 Cal.Rptr.2d 356].
- Relevant to Rehabilitate Victim’s Credibility ▶ *People v. Gadlin* (2000) 78 Cal.App.4th 587, 594–595 [92 Cal.Rptr.2d 890] [victim recanted incident and reunited with abuser]; *People v. Morgan* (1997) 58 Cal.App.4th 1210, 1215–1217 [68 Cal.Rptr.2d 772] [victim recanted].

### ***Secondary Sources***

1 Witkin, California Evidence (4th ed. 2000) Opinion Evidence, §§ 48–51.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 71, *Scientific and Expert Evidence*, § 71.04[1][d][v][C] (Matthew Bender).

### **RELATED ISSUES**

### ***Assumptions Underlying Expert Testimony***

It is unnecessary, and potentially misleading, to instruct that the expert testimony assumes that physical or mental abuse has in fact occurred. (See *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1387 [7 Cal.Rptr.2d 660] [in context of child sexual abuse accommodation syndrome].)

### ***Definition and Preferred Name***

In 2004, the Legislature amended Evidence Code section 1107(d), changing all references from “battered women’s syndrome” to “intimate partner battering and its effects.” Previous decisional law continues to apply. (Evid. Code, § 1107(f).) Battered women’s syndrome has been defined as “a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives.” (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1083–1084 [56 Cal.Rptr.2d 142, 921 P.2d 1].) The Supreme Court had previously noted that experts prefer to call the syndrome “expert testimony on battered women’s experiences.” (See *People v. Humphrey, supra*, 13 Cal.4th at pp. 1083–1084, fn. 3.)

### ***No Testimony on Actual State of Mind***

While evidence is admissible “to explain how [a] defendant’s asserted subjective perception of a need to defend herself ‘would reasonably follow from the defendant’s experience as a battered woman,’ ” an expert may not give an opinion “that the defendant *actually perceived* that she was in danger and needed to defend herself.” (*People v. Erickson* (1997) 57 Cal.App.4th 1391, 1400, 1401 [67 Cal.Rptr.2d 740] [§ 1107(a) codifies existing rules regarding battered women’s syndrome testimony; original italics].) Section 1107 “does not create an exception to Penal Code section 29,” which prohibits an expert who is testifying about a mental defect from testifying about whether a defendant had a required mental state. (*People v. Erickson, supra*, 57 Cal.App.4th at pp. 1401–1402 [syndrome was characterized as mental defect].)

## 852A. Evidence of Uncharged Domestic Violence

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The People presented evidence that the defendant committed domestic violence that was not charged in this case[, specifically: \_\_\_\_\_ <insert other domestic violence alleged>.]

<Alternative A—As defined in Pen. Code, § 13700>

[*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 who dated or is dating the defendant[,]/ [or] person who was or is engaged to the defendant).]

<Alternative B—As defined in Fam. Code, § 6211>

[*Domestic violence* means abuse committed against a (child/grandchild/parent/grandparent/brother/sister) of 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.

[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.]

[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, (5) the parties' registering as domestic partners, (6) the continuity of the relationship, and (7) the length of the relationship.]

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

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

**If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit [and did commit] \_\_\_\_\_ <insert charged offense[s] involving domestic violence>, as charged here. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of \_\_\_\_\_ <insert charged offense[s] involving domestic violence>. The People must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt.**

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

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

## **BENCH NOTES**

### ***Instructional Duty***

The court must give this instruction on request when evidence of other domestic violence has been introduced. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [error to refuse limiting instruction on request]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1317–1318 [97 Cal.Rptr.2d 727]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1067 [210 Cal.Rptr. 880] [general limiting instructions should be given when evidence of past offenses would be highly prejudicial without them].)

If the court has admitted evidence that the defendant was convicted of a felony or committed a misdemeanor for the purpose of impeachment in addition to evidence admitted under Evidence Code section 1109, then the court must specify for the jury what evidence it may consider under section 1109. (*People v. Rollo* (1977) 20 Cal.3d 109, 123, fn. 6 [141 Cal.Rptr. 177, 569 P.2d 771] [discussing section 1101(b); superseded in part on other grounds as recognized in *People v. Olmedo* (1985) 167 Cal.App.3d 1085, 1096 [213 Cal.Rptr. 742]].) In the first sentence, insert a description of the uncharged offense allegedly shown by the section 1109 evidence. If the court has not admitted any felony convictions or misdemeanor



conduct for impeachment, then, in the first sentence, the court is not required to insert a description of the conduct alleged.

The definition of “domestic violence” contained in Evidence Code section 1109(d) was amended, effective January 1, 2006. The definition is now in subd. (d)(3), which states that, as used in section 1109:

‘Domestic violence’ has the meaning set forth in Section 13700 of the Penal Code. Subject to a hearing conducted pursuant to section 352, which shall include consideration of any corroboration and remoteness in time, ‘domestic violence’ has the further meaning as set forth in section 6211 of the Family Code, if the act occurred no more than five years before the charged offense.

If the court determines that the evidence is admissible pursuant to the definition of domestic violence contained in Penal Code section 13700, give the definition of domestic violence labeled alternative A. If the court determines that the evidence is admissible pursuant to the definition contained in Family Code section 6211, give the definition labeled alternative B.

Depending on the evidence, give on request the bracketed paragraphs defining “emancipated minor” (see Fam. Code, § 7000 et seq.) and “cohabitant” (see Pen. Code, § 13700(b)).

In the paragraph that begins with “If you decide that the defendant committed,” the committee has placed the phrase “and did commit” in brackets. One appellate court has criticized instructing the jury that it may draw an inference about disposition. (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823].) The court should review the Commentary section below and give the bracketed phrase at its discretion.

Give the final sentence that begins with “Do not consider” on request.

### ***Related Instructions***

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

CALCRIM No. 1191A, *Evidence of Uncharged Sex Offense.*

CALCRIM No. 1191B, *Evidence of ~~C~~Uncharged Sex Offense.*

CALCRIM No. 852B, *Evidence of Charged Domestic Violence.*

CALCRIM No. 853A, *Evidence of Uncharged Abuse of Elder or Dependent Person.*

CALCRIM No. 853B, *Evidence of Charged Abuse of Elder or Dependent Person.*

## AUTHORITY

- Instructional Requirement ▶ Evid. Code, § 1109(a)(1); see *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1016 [130 Cal.Rptr.2d 254, 62 P.3d 601]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 37 [107 Cal.Rptr.2d 100]; *People v. Falsetta* (1999) 21 Cal.4th 903, 923–924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [dictum].
- Abuse Defined ▶ Pen. Code, § 13700(a).
- Cohabitant Defined ▶ Pen. Code, § 13700(b).
- Domestic Violence Defined ▶ Evid. Code, § 1109(d)(3); Pen. Code, § 13700(b); Fam. Code, § 6211; see *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1139 [83 Cal.Rptr.2d 320] [spousal rape is higher level of domestic violence].
- Emancipation of Minors Law ▶ Fam. Code, § 7000 et seq.
- Other Crimes Proved by Preponderance of Evidence ▶ *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. James* (2000) 81 Cal.App.4th 1343, 1359 [96 Cal.Rptr.2d 823].
- Propensity Evidence Alone Is Not Sufficient to Support Conviction Beyond a Reasonable Doubt ▶ *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [101 Cal.Rptr.2d 624]; *People v. James* (2000) 81 Cal.App.4th 1343, 1357–1358, fn. 8 [96 Cal.Rptr.2d 823]; see *People v. Hill* (2001) 86 Cal.App.4th 273, 277–278 [103 Cal.Rptr.2d 127] [in context of prior sexual offenses].
- Charged Sex 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 Previous Version of This Instruction Upheld ▶ *People v. Johnson* (2008) 164 Cal.App.4th 731, 738 [79 Cal.Rptr.3d 568].
- No Sua Sponte Duty to Give Similar Instruction ▶ *People v. Cottone* (2013) 57 Cal.4th 269, 293, fn. 15 [159 Cal.Rptr.3d 385, 303 P.3d 1163].

## Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Trial, § 640.

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, § 98.

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

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

## COMMENTARY

The paragraph that begins with “If you decide that the defendant committed” tells the jury that they may draw an inference of disposition. (See *People v. Hill* (2001) 86 Cal.App.4th 273, 275–279 [103 Cal.Rptr.2d 127]; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334–1335 [92 Cal.Rptr.2d 433].) One appellate court, however, suggests using more general terms to instruct the jury how they may use evidence of other domestic violence offenses, “leaving particular inferences for the argument of counsel and the jury’s common sense.” (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823] [includes suggested instruction].) If the trial court adopts this approach, the paragraph that begins with “If you decide that the defendant committed the uncharged domestic violence” may be replaced with the following:

If you decide that the defendant committed the uncharged domestic violence, you may consider that evidence and weigh it together with all the other evidence received during the trial to help you determine whether the defendant committed \_\_\_\_\_ <insert charged offense involving domestic violence>. Remember, however, that evidence of uncharged domestic violence is not sufficient alone to find the defendant guilty of \_\_\_\_\_ <insert charged offense involving domestic violence>. The People must still prove (the/each) (charge/ [and] allegation) of \_\_\_\_\_ <insert charged offense involving domestic violence> beyond a reasonable doubt.

## RELATED ISSUES

### ***Constitutional Challenges***

Evidence Code section 1109 does not violate a defendant’s rights to due process (*People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095–1096 [98 Cal.Rptr.2d 696]; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1028–1029 [92 Cal.Rptr.2d 208]; *People v. Johnson* (2000) 77 Cal.App.4th 410, 420 [91 Cal.Rptr.2d 596]; see *People v. Falsetta* (1999) 21 Cal.4th 903, 915–922 [89 Cal.Rptr.2d 847, 986 P.2d 182] (construing Evid. Code, § 1108, a parallel statute to Evid. Code, § 1109); *People v. Branch* (2001) 91 Cal.App.4th 274, 281 [109 Cal.Rptr.2d 870]

(construing Evid. Code, § 1108) or equal protection (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310–1313 [97 Cal.Rptr.2d 727]; see *People v. Fitch* (1997) 55 Cal.App.4th 172, 184–185 [63 Cal.Rptr.2d 753] (construing Evid. Code, § 1108).

### ***Exceptions***

Evidence of domestic violence occurring more than 10 years before the charged offense is inadmissible under section 1109 of the Evidence Code, unless the court determines that the admission of this evidence is in the interest of justice. (Evid. Code, § 1109(e).) Evidence of the findings and determinations of administrative agencies regulating health facilities is also inadmissible under section 1109. (Evid. Code, § 1109(f).)

See the Related Issues sections of CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*, and CALCRIM No. 1191, *Evidence of Uncharged Sex Offense*.

## 852B. Evidence of Charged Domestic Violence

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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 domestic violence 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 domestic violence offenses, and based on that decision, also conclude that the defendant was likely to commit [and did commit] the other domestic violence offenses 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 [insert date of council approval]*

## 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 § 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. 1191B, *Evidence of Charged Sex Offense.*

CALCRIM No. 852A, *Evidence of Uncharged 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].

## **853A. Evidence of Uncharged Abuse of Elder or Dependent Person**

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The People presented evidence that the defendant committed abuse of (an elder/a dependent person) that was not charged in this case[, specifically: \_\_\_\_\_ *<insert other abuse alleged>.*] *Abuse of (an elder/a dependent person)* means (physical abuse[,]/ [or] sexual abuse[,]/ [or] neglect[,]/ [or] financial abuse[,]/ [or] abandonment[,]/ [or] isolation[,]/ [or] abduction[,]/[or] the act by a care custodian of not providing goods or services that are necessary to avoid physical harm or mental suffering[,]/ [or] [other] treatment that results in physical harm or pain or mental suffering).

[An *elder* is a person residing in California who is age 65 or older.]

[A *dependent person* is a person who has physical or mental impairments that substantially restrict his or her ability to carry out normal activities or to protect his or her rights. This definition includes, but is not limited to, those who have developmental disabilities or whose physical or mental abilities have significantly diminished because of age.]

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged abuse of (an elder/a dependent person). Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

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

If you decide that the defendant committed the uncharged abuse of (an elder/a dependent person), you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit abuse of (an elder/a dependent person), and based on that decision, also conclude that the defendant was likely to commit [and did commit] \_\_\_\_\_ *<insert charged offense[s] involving abuse of elder or dependent person>*, as charged here. If you conclude that the defendant committed the uncharged abuse of (an elder/a dependent person), that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of \_\_\_\_\_ *<insert charged offense[s] involving abuse of elder or dependent person>*. The People must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt.

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

New January 2006; Revised April 2008, February 2014 insert date of council approval

## BENCH NOTES

### *Instructional Duty*

The court must give this instruction on request when evidence of other abuse of an elder or dependent person has been introduced. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [error to refuse limiting instruction on request]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1317–1318 [97 Cal.Rptr.2d 727]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1067 [210 Cal.Rptr. 880] [general limiting instructions should be given when evidence of past offenses would be highly prejudicial without them].)

If the court has admitted evidence that the defendant was convicted of a felony or committed a misdemeanor for the purpose of impeachment in addition to evidence admitted under Evidence Code section 1109, then the court must specify for the jury what evidence it may consider under section 1109. (*People v. Rollo* (1977) 20 Cal.3d 109, 123, fn. 6 [141 Cal.Rptr. 177, 569 P.2d 771] [discussing section 1101(b); superseded in part on other grounds as recognized in *People v. Olmedo* (1985) 167 Cal.App.3d 1085, 1096 [213 Cal.Rptr. 742]].) In the first sentence, insert a description of the uncharged offense allegedly shown by the section 1109 evidence. If the court has not admitted any felony convictions or misdemeanor conduct for impeachment, then, in the first sentence, the court is not required to insert a description of the conduct alleged.

Depending on the evidence, give on request the bracketed definition of an elder or dependent person. (See Welf. & Inst. Code, §§ 15610.23 [dependent adult], 15610.27 [elder].) Other terms may be defined on request depending on the evidence. See the Authority section below for references to selected definitions from the Elder Abuse and Dependent Adult Civil Protection Act. (See Welf. & Inst. Code, § 15600 et seq.)

In the paragraph that begins with “If you decide that the defendant committed,” the committee has placed the phrase “and did commit” in brackets. One appellate court has criticized instructing the jury that it may draw an inference about disposition. (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823].) The court should review the Commentary section below and give the bracketed phrase at its discretion.



Give the bracketed sentence that begins with “Do not consider” on request.

***Related Instructions***

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

CALCRIM No. 852A, *Evidence of Uncharged Domestic Violence.*

CALCRIM No. 852B, *Evidence of Charged Domestic Violence.*

CALCRIM No. 853B, *Evidence of Charged Abuse of Elder or Dependent Person.*

CALCRIM No. 1191A, *Evidence of Uncharged Sex Offense.*

CALCRIM No. 1191B, *Evidence of Charged Sex Offense.*

**AUTHORITY**

- Instructional Requirement ▶ Evid. Code, § 1109(a)(2).
- Abandonment Defined ▶ Welf. & Inst. Code, § 15610.05.
- Abduction Defined ▶ Welf. & Inst. Code, § 15610.06.
- Abuse of Elder or Dependent Person Defined ▶ Evid. Code, § 1109(d)(1).
- Care Custodian Defined ▶ Welf. & Inst. Code, § 15610.17.
- Dependent Person Defined ▶ Evid. Code, § 177.
- Elder Defined ▶ Welf. & Inst. Code, § 15610.27.
- Financial Abuse Defined ▶ Welf. & Inst. Code, § 15610.30.
- Goods and Services Defined ▶ Welf. & Inst. Code, § 15610.35.
- Isolation Defined ▶ Welf. & Inst. Code, § 15610.43.
- Mental Suffering Defined ▶ Welf. & Inst. Code, § 15610.53.
- Neglect Defined ▶ Welf. & Inst. Code, § 15610.57.
- Physical Abuse Defined ▶ Welf. & Inst. Code, § 15610.63.
- Other Crimes Proved by Preponderance of Evidence ▶ *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. James* (2000) 81 Cal.App.4th 1343, 1359 [96 Cal.Rptr.2d 823].
- Propensity Evidence Alone Is Not Sufficient to Support Conviction Beyond a Reasonable Doubt ▶ *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [101 Cal.Rptr.2d 624]; *People v. James, supra*, 81 Cal.App.4th at pp. 1357–1358, fn. 8 [96 Cal.Rptr.2d 823] [in context of prior domestic violence offenses]; see *People v. Hill* (2001) 86 Cal.App.4th 273, 277–278 [103 Cal.Rptr.2d 127] [in context of prior sexual offenses].

- Charged Sex 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].
- No Sua Sponte Duty To Give Similar Instruction ▶ *People v. Cottone* (2013) 57 Cal.4th 269, 293, fn. 15 [159 Cal.Rptr.3d 385, 303 P.3d 1163].

### ***Secondary Sources***

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, § 98.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.13[5] (Matthew Bender).

## **COMMENTARY**

The paragraph that begins with “If you decide that the defendant committed” tells the jury that they may draw an inference of disposition. (See *People v. Hill*, *supra*, 86 Cal.App.4th at pp. 275–279; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334–1335 [92 Cal.Rptr.2d 433].) One appellate court, however, suggests using more general terms to instruct the jury how they may use evidence of other domestic violence offenses, “leaving particular inferences for the argument of counsel and the jury’s common sense.” (*People v. James*, *supra*, 81 Cal.App.4th at p. 1357, fn. 8 [96 Cal.Rptr.2d 823] [includes suggested instruction].) If the trial court adopts this approach, the paragraph that begins with “If you decide that the defendant committed the uncharged abuse of (an elder/a dependent person)” may be replaced with the following:

If you decide that the defendant committed the uncharged abuse of (an elder/a dependent person), you may consider that evidence and weigh it together with all the other evidence received during the trial to help you determine whether the defendant committed \_\_\_\_\_ <insert charged offense involving abuse of elder or dependent person>. Remember, however, that evidence of uncharged abuse of (an elder/a dependent person) is not sufficient alone to find the defendant guilty of \_\_\_\_\_ <insert charged offense involving abuse of elder or dependent person>. The People must still prove (the/each) (charge/ [and] allegation) of \_\_\_\_\_ <insert charged offense involving abuse of elder or dependent person> beyond a reasonable doubt.

## RELATED ISSUES

### *Exceptions*

Evidence of abuse of an elder or dependent person occurring more than 10 years before the charged offense is inadmissible under Evidence Code section 1109, unless the court determines that the admission of this evidence is in the interest of justice. (Evid. Code, § 1109(e).) Evidence of the findings and determinations of administrative agencies regulating health facilities is also inadmissible under section 1109. (Evid. Code, § 1109(f).)

See the Related Issues sections of CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*, CALCRIM No. 852, *Evidence of Uncharged Domestic Violence*, and CALCRIM No. 1191, *Evidence of Uncharged Sex Offense*.

**~~854–859. Reserved for Future Use~~**

### **853B. Evidence of Charged Abuse of Elder or Dependent Person**

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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 elder or dependent person abuse 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 abuse of (elders/ [or] dependent persons), and based on that decision, also conclude that the defendant was likely to commit [and did commit] the other (elder/ [or] dependent person) abuse 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 [insert date of council approval]*

### **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 § 355.)

#### ***Related Instructions***

CALCRIM No. 1191A, *Evidence of Uncharged Sex Offense*.

CALCRIM No. 1191B, *Evidence of Charged Sex Offense*.

CALCRIM No. 852A, *Evidence of Domestic Violence*.

CALCRIM No. 852B, *Evidence of Domestic Violence*.

CALCRIM No. 853A, *Evidence of Elder or Dependent Person Abuse*.

### **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].

**854–859. Reserved for Future Use**

## 1191A. Evidence of Uncharged Sex Offense

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The People presented evidence that the defendant committed the crime[s] of \_\_\_\_\_ *<insert description of offense[s]>* that (was/were) not charged in this case. (This/These) crime[s] (is/are) defined for you in these instructions.

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

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

If you decide that the defendant committed the uncharged offense[s], you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit [and did commit] \_\_\_\_\_ *<insert charged sex offense[s]>*, as charged here. If you conclude that the defendant committed the uncharged offense[s], that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of \_\_\_\_\_ *<insert charged sex offense[s]>*. The People must still prove (the/each) \_\_\_\_\_ (charge/ [and] allegation) beyond a reasonable doubt.

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

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*New January 2006; Revised April 2008, February 2013, February 2014* *[insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

Although there is ordinarily no sua sponte duty (*People v. Cottone* (2013) 57 Cal.4th 269, 293, fn. 15 [159 Cal.Rptr.3d 385, 303 P.3d 1163]), the court must give this instruction on request when evidence of other sexual offenses has been introduced. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924 [89 Cal.Rptr.2d

847, 986 P.2d 182] [error to refuse limiting instruction on request]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1317–1318 [97 Cal.Rptr.2d 727] [in context of prior acts of domestic violence].)

Evidence Code section 1108(a) provides that “evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Section 1101.” Subdivision (d)(1) defines “sexual offense” as “a crime under the law of a state or of the United States that involved any of the following[,]” listing specific sections of the Penal Code as well as specified sexual conduct. In the first sentence, the court must insert the name of the offense or offenses allegedly shown by the evidence. The court **must** also instruct the jury on elements of the offense or offenses.

In the fourth paragraph, the committee has placed the phrase “and did commit” in brackets. One appellate court has criticized instructing the jury that it may draw an inference about disposition. (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96 Cal.Rptr.2d 823].) The court should review the Commentary section below and give the bracketed phrase at its discretion.

Give the bracketed sentence that begins with “Do not consider” on request.

### ***Related Instructions***

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

CALCRIM No. 1191B, *Evidence of Charged Sex Offense.*

CALCRIM No. 852A, *Evidence of Uncharged Domestic Violence.*

CALCRIM No. 852B, *Evidence of Charged Domestic Violence.*

CALCRIM No. 853A, *Evidence of Uncharged Abuse of Elder or Dependent Person.*

CALCRIM No. 853B, *Evidence of Charged Abuse of Elder or Dependent Person.*

## **AUTHORITY**

- Instructional Requirement ▶ Evid. Code, § 1108(a); see *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1016 [130 Cal.Rptr.2d 254, 62 P.3d 601]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 37 [107 Cal.Rptr.2d 100]; *People v. Falsetta*, *supra*, 21 Cal.4th at pp. 923–924 [dictum].

- [Previous Version of](#) CALCRIM No. 1191 Upheld ▶ *People v. Schnabel* (2007) 150 Cal.App.4th 83, 87 [57 Cal.Rptr.3d 922]; *People v. Cromp* (2007) 153 Cal.App.4th 476, 480 [62 Cal.Rptr.3d 848].
- Sexual Offense Defined ▶ Evid. Code, § 1108(d)(1).
- Other Crimes Proved by Preponderance of Evidence ▶ *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. James, supra*, 81 Cal.App.4th at p. 1359; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 146 [89 Cal.Rptr.2d 28].
- Propensity Evidence Alone Is Not Sufficient to Support Conviction Beyond a Reasonable Doubt ▶ *People v. Hill* (2001) 86 Cal.App.4th 273, 277–278 [103 Cal.Rptr.2d 127]; see *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [101 Cal.Rptr.2d 624] [in context of prior acts of domestic violence]; *People v. James, supra*, 81 Cal.App.4th at pp. 1357–1358, fn. 8 [same].
- Charged Offenses Proved Beyond a Reasonable Doubt May Be Evidence of Propensity ▶ [\*People v. Cruz\* \(2016\) 2 Cal.App.5th 1178, 1186-1186 \[206 Cal.Rptr.3d 835\];](#) *People v. Villatoro* (2012) 54 Cal.4th 1152, 1161 [144 Cal.Rptr.3d 401, 281 P.3d 390].

### *Secondary Sources*

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, §§ 96–97.

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).



## COMMENTARY

The fourth paragraph of this instruction tells the jury that they may draw an inference of disposition. (See *People v. Hill* (2001) 86 Cal.App.4th 273, 275–279 [103 Cal.Rptr.2d 127]; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334–1335 [92 Cal.Rptr.2d 433] [in context of prior acts of domestic violence].) One appellate court, however, suggests using more general terms to instruct the jury how they may use evidence of other sexual offenses, “leaving particular inferences for the argument of counsel and the jury’s common sense.” (*People v. James, supra*, 81 Cal.App.4th at p. 1357, fn. 8 [includes suggested instruction].) If the trial court adopts this approach, the fourth paragraph may be replaced with the following:

If you decide that the defendant committed the other sexual offense[s], you may consider that evidence and weigh it together with all the other evidence received during the trial to help you determine whether the defendant committed \_\_\_\_\_ <insert charged sex offense>. Remember, however, that evidence of another sexual offense is not sufficient alone to find the defendant guilty of \_\_\_\_\_ <insert charged sex offense>. The People must still prove (the/each) \_\_\_\_\_ (charge/ [and] allegation) of \_\_\_\_\_ <insert charged sex offense> beyond a reasonable doubt.

## RELATED ISSUES

### ***Constitutional Challenges***

Evidence Code section 1108 does not violate a defendant’s rights to due process (*People v. Falsetta* (1999) 21 Cal.4th 903, 915–922 [89 Cal.Rptr.2d 847, 986 P.2d 182]; *People v. Branch* (2001) 91 Cal.App.4th 274, 281 [109 Cal.Rptr.2d 870]; *People v. Fitch* (1997) 55 Cal.App.4th 172, 184 [63 Cal.Rptr.2d 753]) or equal protection (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310–1313 [97 Cal.Rptr.2d 727]; *People v. Fitch, supra*, 55 Cal.App.4th at pp. 184–185).

### ***Expert Testimony***

Evidence Code section 1108 does not authorize expert opinion evidence of sexual propensity during the prosecution’s case-in-chief. (*People v. McFarland* (2000) 78 Cal.App.4th 489, 495–496 [92 Cal.Rptr.2d 884] [expert testified on ultimate issue of abnormal sexual interest in child].)

### ***Rebuttal Evidence***

When the prosecution has introduced evidence of other sexual offenses under Evidence Code section 1108(a), the defendant may introduce rebuttal character evidence in the form of opinion evidence, reputation evidence, and evidence of

specific incidents of conduct under similar circumstances. (*People v. Callahan* (1999) 74 Cal.App.4th 356, 378–379 [87 Cal.Rptr.2d 838].)

***Subsequent Offenses Admissible***

“[E]vidence of subsequently committed sexual offenses may be admitted pursuant to Evidence Code section 1108.” (*People v. Medina* (2003) 114 Cal.App.4th 897, 903 [8 Cal.Rptr.3d 158].)

***Evidence of Acquittal***

If the court admits evidence that the defendant committed a sexual offense that the defendant was previously acquitted of, the court must also admit evidence of the acquittal. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 663 [14 Cal.Rptr.3d 534].)

See also the Related Issues section of CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*

## 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 [insert date of council approval]*

## 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].

**937. Sexual Battery: By Fraudulent Representation (Pen. Code, §§ 242, 243.4(c))**

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**The defendant is charged [in Count \_\_\_\_] with sexual battery by fraudulent representation [in violation of Penal Code section 243.4(c)].**

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

- 1. The defendant touched an intimate part of \_\_\_\_\_'s *<insert name of complaining witness>* body;**
- 2. The touching was done for the specific purpose of sexual arousal, sexual gratification, or sexual abuse;**
- 3. The defendant fraudulently represented that the touching served a professional purpose;**

**AND**

- 4. The person touched was not conscious of the sexual nature of the act because of the fraudulent representation.**

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

**Contact must have been made with \_\_\_\_\_'s *<insert name of complaining witness>* bare skin. This means that the defendant must have touched the bare skin of \_\_\_\_\_'s *<insert name of complaining witness>* intimate part either directly or through the defendant's clothing.**

**A person is *not conscious of the sexual nature of the act* if he or she is not aware of the essential characteristics of the act because the perpetrator fraudulently represented that the touching served a professional purpose when it did not.**

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

## BENCH NOTES

### *Instructional Duty*

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

## AUTHORITY

- Elements ▶ Pen. Code, §§ 242, 243.4(c).
- Intimate Part Defined ▶ Pen. Code, § 243.4(g)(1).
- Touches Defined ▶ Pen. Code, § 243.4(f).
- Unconscious of Nature of Act Defined ▶ See Pen. Code, § 261(a)(4)(D) [in context of rape].
- Sexual Abuse Defined ▶ *People v. White* (1986) 179 Cal.App.3d 193, 205 [224 Cal.Rptr. 467].

### *Secondary Sources*

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

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

## LESSER INCLUDED OFFENSES

- Assault ▶ Pen. Code, § 240.
- ~~Neither sexual battery nor attempted sexual battery is a lesser included offense of sexual battery by fraudulent representation. *People v. Babaali* (2009) 171 Cal.App.4th 982, 1000 [90 Cal.Rptr.3d 278].~~ Misdemeanor sexual battery is not a lesser included offense of sexual battery by misrepresentation of professional purpose under the statutory elements test. *People v. Robinson* (2016) 63 Cal.4th 200, 210-213 [202 Cal.Rptr.3d 485, 370 P.3d 1043].
- Attempted sexual battery is not a lesser included offense of sexual battery by fraudulent representation. *People v. Babaali* (2009) 171 Cal.App.4th 982, 1000 [90 Cal.Rptr.3d 278].

## COMMENTARY

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

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

## RELATED ISSUES

### ***Consent Obtained by Fraudulent Representation***

A person may induce someone else to consent to engage in a sexual act by a false or fraudulent representation made with an intent to create fear, and which does induce fear and would cause a reasonable person to act contrary to his or her free will. (Pen. Code, § 266c.) While section 266c requires coercion and fear to obtain consent, it does not involve physical force or violence. (See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937–938 [26 Cal.Rptr.2d 567].)

## 960. Simple Battery (Pen. Code, § 242)

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The defendant is charged with battery [in violation of Penal Code section 242].

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

1. The defendant willfully [and unlawfully] touched \_\_\_\_\_ <insert name> in a harmful or offensive manner(;/.)

<Give element 2 when instructing on self-defense, defense of another, or reasonable discipline.>

[AND

2. The defendant did not act (in self-defense/ [or] in defense of someone else/ [or] while reasonably disciplining a child).]

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

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

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

~~[Words alone, no matter how offensive or exasperating, are not an excuse for this crime.]~~

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New January 2006; Revised August 2013, February 2014 [insert date of council approval]

## BENCH NOTES

### *Instructional Duty*

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



If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 2, the bracketed words “and unlawfully” in element 1, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

If there is sufficient evidence of reasonable parental discipline, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 2, the bracketed words “and unlawfully” in element 1, and CALCRIM No. 3405, *Parental Right to Punish a Child*.

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

### **AUTHORITY**

- Elements ▶ Pen. Code, § 242; see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- Willful Defined ▶ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Defense of Parental Discipline ▶ *People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1051 [12 Cal.Rptr.2d 33].

### ***Secondary Sources***

1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against the Person, §§ 12-16.

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

### **LESSER INCLUDED OFFENSES**

- Assault ▶ Pen. Code, § 240.

## RELATED ISSUES

### ***Touching of Something Attached to or Closely Connected with Person***

The committee could not locate any authority on whether it is sufficient to commit a battery if the defendant touches something attached to or closely connected with the person. Thus, the committee has not included this principle in the instruction.

### ***Battery Against Elder or Dependent Adult***

When a battery is committed against an elder or dependent adult as defined in Penal Code section 368, with knowledge that the victim is an elder or a dependent adult, special punishments apply. (Pen. Code, § 243.25.)

## **RELATED INSTRUCTION**

*CALCRIM No. 917, Insulting Words Are Not a Defense.*

**961–964. Reserved for Future Use**

## 1082. Oral Copulation With Person Under 18 (Pen. Code, § 288a(b)(1))

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The defendant is charged [in Count \_\_\_\_] with oral copulation with a person who was under the age of 18 [in violation of Penal Code section 288a(b)(1)].

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

1. The defendant participated in an act of oral copulation with another person;

AND

2. The other person was under the age of 18 when the act was committed.

*Oral copulation* is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.

[It is not a defense that the other person may have consented to the act.]

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

*<Defense: Good Faith Belief 18 or Over>*

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the other person was age 18 or older. The People must prove beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person was at least 18 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]

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

### BENCH NOTES

#### *Instructional Duty*

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

Give the bracketed paragraph that begins with “It is not a defense that” on request, if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502].)

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

### ***Defenses—Instructional Duty***

If there is sufficient evidence that the defendant reasonably and actually believed that the minor was age 18 or older, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673]; *People v. Winters* (1966) 242 Cal.App.2d 711, 716 [51 Cal.Rptr. 735].)

## **AUTHORITY**

- Elements ▶ Pen. Code, § 288a(b)(1).
- Oral Copulation Defined ▶ Pen. Code, § 288a(a); *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884] [in context of lewd acts with children].
- Minor’s Consent Not a Defense ▶ See *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P.2d 502] [in context of statutory rape].
- Mistake of Fact Regarding Age ▶ *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673] [in context of statutory rape]; *People v. Peterson* (1981) 126 Cal.App.3d 396, 397 [178 Cal.Rptr. 734].

### ***Secondary Sources***

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 46.

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 31–33.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.20[1][c], [3][b], 142.23[2] (Matthew Bender).

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

## **LESSER INCLUDED OFFENSES**

~~Attempted Oral Copulation With Minor ▶ Pen. Code, §§ 664, 288a(b)(1).~~

A violation of Penal Code section 288.3 is not a lesser included offense of attempted oral copulation, because attempt can be committed without contacting or communicating with the victim under the statutory elements test. (*People v. Medelez* (2016) 2 Cal.App.5th 659, 663 [206 Cal.Rptr.3d 402].)

## RELATED ISSUES

### ***Minor Perpetrator***

A minor under age 14 may be adjudged responsible for violating Penal Code section 288a(b)(1) upon clear proof of the minor's knowledge of wrongfulness. (Pen. Code, § 26; *In re Paul C.* (1990) 221 Cal.App.3d 43, 49 [270 Cal.Rptr. 369].)

See the Related Issues section under CALCRIM No. 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older*.

**1083–1089. Reserved for Future Use**

## **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 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.

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].

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New August 2009 *[insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

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

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 273, 855 P.2d 391].

## 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 (3d ed. 2008 supp.) Sex Offenses and Crimes Against Decency, § 54B.

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 §§ 12:16, 12:17 (The Rutter Group).





**1125. Arranging Meeting With Minor for Lewd Purpose (Pen. Code, § 288.4(a)(1))**

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**The defendant is charged [in Count \_\_\_\_] with arranging a meeting with a minor for a lewd purpose [while having a prior conviction] [in violation of Penal Code section 288.4(a)(1)].**

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

- 1. The defendant arranged a meeting with (a minor / [or] a person (he/she) believed to be a minor);**
- 2. When the defendant did so, (he/she) was motivated by an unnatural or abnormal sexual interest in children;**

**[AND]**

- 3. At that meeting, the defendant intended to (expose (his/her) genitals or pubic or rectal area/ [or] have the minor expose (his/her) genitals or pubic or rectal area/ [or] engage in lewd or lascivious behavior).**

**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.]**

**[*Lewd and lascivious behavior* includes any touching of a person with the intent to sexually arouse the perpetrator or the other person. *Lewd or lascivious behavior* includes touching any part of the person's body, either on the bare skin or through the clothes the person is wearing. [A *lewd or lascivious act* includes causing someone to touch his or her own body or someone else's body at the instigation of the perpetrator who has the required intent.]]**

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*New August 2009; Revised April 2010, February 2013, August 2016 [insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

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

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, § 288.4(a)(1), 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*.

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

Whether the defendant suffered a prior conviction for an offense listed in subsection (c) of section 290 is not an element of the offense and is subject to a severed jury trial. (Pen. Code, § 288.4(a)(2).) See CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

There is no sua sponte duty to instruct that the “motivated by” element of the offense must have been a substantial factor in its commission. (*People v. Fromuth* (2016) 2 Cal.App.5th 91, 106-109 [206 Cal.Rptr.3d 83].)

## AUTHORITY

- Elements and Enumerated Offenses ▶ Pen. Code, § 288.4.
- Lewd Defined ▶ See *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256-257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].
- Calculating Age ▶ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849-850 [21 Cal.Rptr.2d 373, 855 P.2d 391].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 66, 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 §§ 12:16, 12:17 (The Rutter Group).

**1126. Going to Meeting With Minor for Lewd Purpose (Pen. Code, § 288.4(b))**

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The defendant is charged [in Count \_\_\_\_] with going to a meeting with a minor for a lewd purpose [in violation of Penal Code section 288.4(b)].

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

1. The defendant arranged a meeting with (a minor/ [or] a person (he/she) believed to be a minor);
2. When the defendant did so, (he/she) was motivated by an unnatural or abnormal sexual interest in children;
3. At that meeting, the defendant intended to (expose (his/her) genitals or pubic or rectal area/ [or] have the minor expose (his/her) genitals or pubic or rectal area/ [or] engage in lewd or lascivious behavior);

**AND**

4. The defendant went to the arranged meeting place at or about the arranged time.

*<Give the bracketed language at the beginning of the following sentence if instructing on other offenses mentioning children for which the definition given here does not apply.>*

**[For the purposes of this instruction,] (A/a) *child* or *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.]**

**[*Lewd and lascivious behavior* includes any touching of a person with the intent to sexually arouse the perpetrator or the other person. *Lewd or lascivious behavior* includes touching any part of the person's body, either on the bare skin or through the clothes the person is wearing. [A *lewd or lascivious act* includes causing someone to touch his or her own body or someone else's body at the instigation of the perpetrator who has the required intent.]]**

## BENCH NOTES

### *Instructional Duty*

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

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

It is unclear how violations of Pen. Code, § 288.4(b), which involve actually going to an arranged meeting, correlate to violations of Pen. Code, § 288.4(a) (cf. CALCRIM No. 1125, *Arranging Meeting With Minor for Lewd Purpose*). Violations of section 288.4(a) may be lesser included offenses of violations of section 288.4(b). In the alternative, a violation of section 288.4(b) could be characterized as sentence enhancement of a violation of section 288.4(a). This matter must be left to the trial court’s discretion until courts of review provide guidance.

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, § 288.4(b), 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*.

There is no sua sponte duty to instruct that the “motivated by” element of the offense must have been a substantial factor in its commission. (*People v. Fromuth* (2016) 2 Cal.App.5th 91, 106-109 [206 Cal.Rptr.3d 83].)

## AUTHORITY

- Elements and Enumerated Offenses ► Pen. Code, § 288.4.

- Lewd Defined ▶ See *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256-257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].
- Calculating Age ▶ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849-850 [21 Cal.Rptr.2d 373, 855 P.2d 391].
- Meaning of Child and Minor ▶ *People v. Yuksel* (2012) 207 Cal.App.4th 850, 854855 [143 Cal.Rptr.3d 823].

### ***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 66, 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 §§ 12:16, 12:17 (The Rutter Group).

**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) another person;

*<Alternative 2A—held or detained>*

2. The defendant held or detained the other person;]

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

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

3. The defendant did so (for ransom[,]/ [or] for reward[,]/ [or] to commit extortion[,]/ [or] to get 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 **risk-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*

## **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].

### ***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).

## 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].)

### 1301. Stalking (Pen. Code, § 646.9(a), (e)–(h))

The defendant is charged [in Count \_\_\_\_] with stalking [in violation of Penal Code section 646.9].

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

1. The defendant willfully and maliciously harassed or willfully, maliciously, and repeatedly followed another person;

[AND]

2. The defendant made a credible threat with the intent to place the other person in reasonable fear for (his/her) safety [or for the safety of (his/her) immediate family](;/.)

*<Give element 3 if the defendant is charged with stalking in violation of a court order, Pen. Code, § 646.9(b).>*

[AND]

**[3. A/An (temporary restraining order/injunction/\_\_\_\_\_ <describe other court order>) prohibiting the defendant from engaging in this conduct against the threatened person was in effect at the time of the conduct.]**

*<If a court order prohibiting defendant's contact with the threatened person was in effect at the time of the charged conduct, give the following two paragraphs>*  
**[If you find the defendant guilty of stalking [in Count[s] ], you must then decide whether the People have proved that a/an (temporary restraining order/injunction/\_\_\_\_\_ <describe other court order>) prohibiting the defendant from engaging in this conduct against the threatened person was in effect at the time of the conduct.]**

**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.]**

**A *credible threat* is one that causes the target of the threat to reasonably fear for his or her safety [or for the safety of his or her immediate family] and one that the maker of the threat appears to be able to carry out.**

**A *credible threat* may be made orally, in writing, or electronically or may be implied by a pattern of conduct or a combination of statements and conduct.**

***Harassing* means engaging in a knowing and willful *course of conduct* directed at a specific person that seriously annoys, alarms, torments, or terrorizes the person and that serves no legitimate purpose.**

**A *course of conduct* means two or more acts occurring over a period of time, however short, demonstrating a continuous purpose.**

**[A person is not guilty of stalking if (his/her) conduct is constitutionally protected activity. \_\_\_\_\_ <Describe type of activity; see Bench Notes below> is constitutionally protected activity. ]**

**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 disturb, annoy, or injure someone else.**

**[*Repeatedly* means more than once.]**

**[The People do not have to prove that a person who makes a threat intends to actually carry it out.]**

**[Someone who makes a threat while in prison or jail may still be guilty of stalking.]**

**[A threat may be made electronically by using a telephone, cellular telephone, pager, computer, video recorder, fax machine, or other similar electronic communication device.]**

**[*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].]**

**[The terms and conditions of (a/an) (restraining order/injunction/\_\_\_\_\_ <describe other court order>) remain enforceable despite the parties' actions, and may only be changed by court order.]**

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*New January 2006; Revised April 2010*

## **BENCH NOTES**

### ***Instructional Duty***

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

Give element 3 if the defendant is charged with stalking in violation of a temporary restraining order, injunction, or any other court order. (See Pen. Code, § 646.9(b).)

If there is substantial evidence that any of the defendant's conduct was constitutionally protected, instruct on the type of constitutionally protected activity involved. (See the optional bracketed paragraph regarding constitutionally protected activity.) Examples of constitutionally protected activity include speech, protest, and assembly. (See Civ. Code, § 1708.7(f) [civil stalking statute].)

The bracketed sentence that begins with "The People do not have to prove that" may be given on request. (See Pen. Code, § 646.9(g).)

The bracketed sentence about the defendant's incarceration may be given on request if the defendant was in prison or jail when the threat was made. (See Pen. Code, § 646.9(g).)

Give the bracketed definition of "electronic communication" on request. (See 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, give the bracketed paragraph defining "immediate family" on request. (See Pen. Code, § 646.9(l); see Fam. Code, § 6205; Prob. Code, §§ 6401, 6402.)

If the defendant argues that the alleged victim acquiesced to contact with the defendant contrary to a court order, the court may, on request, give the last bracketed paragraph stating that such orders may only be changed by the court. (See Pen. Code, § 13710(b); *People v. Gams* (1996) 52 Cal.App.4th 147, 151–152, 154–155 [60 Cal.Rptr.2d 423].)



## AUTHORITY

- Elements ▶ Pen. Code, § 646.9(a), (e)–(h); *People v. Ewing* (1999) 76 Cal.App.4th 199, 210 [90 Cal.Rptr.2d 177]; *People v. Norman* (1999) 75 Cal.App.4th 1234, 1239 [89 Cal.Rptr.2d 806].
- Intent to Cause Victim Fear ▶ *People v. Falck* (1997) 52 Cal.App.4th 287, 295, 297–298 [60 Cal.Rptr.2d 624]; *People v. Carron* (1995) 37 Cal.App.4th 1230, 1236, 1238–1240 [44 Cal.Rptr.2d 328]; see *People v. McCray* (1997) 58 Cal.App.4th 159, 171–173 [67 Cal.Rptr.2d 872] [evidence of past violence toward victim].
- Repeatedly Defined ▶ *People v. Heilman* (1994) 25 Cal.App.4th 391, 399, 400 [30 Cal.Rptr.2d 422].
- Safety Defined ▶ *People v. Borrelli* (2000) 77 Cal.App.4th 703, 719–720 [91 Cal.Rptr.2d 851]; see *People v. Falck* (1997) 52 Cal.App.4th 287, 294–295 [60 Cal.Rptr.2d 624].
- Substantial Emotional Distress Defined ▶ *People v. Ewing* (1999) 76 Cal.App.4th 199, 210 [90 Cal.Rptr.2d 177]; see *People v. Carron* (1995) 37 Cal.App.4th 1230, 1240–1241 [44 Cal.Rptr.2d 328].
- Victim’s Fear Not Contemporaneous With Stalker’s Threats ▶ *People v. Norman* (1999) 75 Cal.App.4th 1234, 1239–1241 [89 Cal.Rptr.2d 806].
- Subsections (b) & (c) of Pen. Code, § 646.9 are Alternate Penalty Provisions ▶ *People v. Muhammad* (2007) 157 Cal.App.4<sup>th</sup> 484, 494 [68 Cal.Rptr.3d 695].
- This Instruction Upheld ▶ *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1195–1197 [67 Cal.Rptr.3d 871].

### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 294–297.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11A[2] (Matthew Bender).

## LESSER INCLUDED OFFENSES

- Attempted Stalking ▶ Pen. Code, §§ 664, 646.9.

## RELATED ISSUES

### ***Harassment Not Contemporaneous With Fear***

The harassment need not be contemporaneous with the fear caused. (See *People v. Norman* (1999) 75 Cal.App.4th 1234, 1239–1241 [89 Cal.Rptr.2d 806].)

### ***Constitutionality of Terms***

The term “credible threat” is not unconstitutionally vague. (*People v. Halgren* (1996) 52 Cal.App.4th 1223, 1230 [61 Cal.Rptr.2d 176].) The element that the objectionable conduct “serve[] no legitimate purpose” (Pen. Code, § 646.9(e) is also not unconstitutionally vague; “an ordinary person can reasonably understand what conduct is expressly prohibited.” (*People v. Tran* (1996) 47 Cal.App.4th 253, 260 [54 Cal.Rptr.2d 650].)

### ***Labor Picketing***

Section 646.9 does not apply to conduct that occurs during labor picketing. (Pen. Code, § 646.9(i).)

## 1502. Arson: Inhabited Structure or Property (Pen. Code, § 451(b))

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The defendant is charged [in Count \_\_\_\_] with arson that burned an inhabited structure or inhabited property [in violation of Penal Code section 451(b)].

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

1. The defendant set fire to or burned [or (counseled[,]/ [or] helped[,]/ [or] caused) the burning of] (a structure/[or] property);
2. (He/She) acted willfully and maliciously;

AND

3. The fire burned an inhabited structure or inhabited property.

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

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

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

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

A structure or property is *inhabited* if someone lives there and either is present or has left but intends to return. An inhabited structure or property does not include the land on which it is located.

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

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New January 2006; Revised February 2013, August 2016 *insert date of council approval*

## BENCH NOTES

### *Instructional Duty*

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

### *Related Instructions*

If attempted arson is charged, do not instruct generally on attempts but give CALCRIM No. 1520, *Attempted Arson*. (Pen. Code, § 455.)

## AUTHORITY

- Elements ▶ Pen. Code, § 451(b).
- Inhabited Defined ▶ Pen. Code, § 450; *People v. Jones* (1988) 199 Cal.App.3d 543 [245 Cal.Rptr. 85].
- Inhabitant Must Be Alive at Time of Arson ▶ *People v. Vang* (2016) 1 Cal.App.5th 377, 382-387 [204 Cal.Rptr.3d 455]. [
- Structure and Maliciously Defined ▶ Pen. Code, § 450.
- To Burn Defined ▶ *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–167 [270 Cal.Rptr. 389].

### *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).

## LESSER INCLUDED OFFENSES

- Arson ▶ Pen. Code, § 451.
- Attempted Arson ▶ Pen. Code, § 455.
- Unlawfully Causing a Fire ▶ *People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [226 Cal.Rptr. 810], disapproved of in *People v. Barton* (1995) 12

Cal.4th 186 [47 Cal.Rptr.2d 569, 906 P.2d 531] on its holding that failure to instruct on this crime as a lesser included offense of arson was invited error because defense counsel objected to such instruction; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324 [3 Cal.Rptr.2d 816].

## **RELATED ISSUES**

### ***Inhabited Apartment***

Defendant's conviction for arson of an inhabited structure was proper where he set fire to his estranged wife's apartment several days after she had vacated it. Although his wife's apartment was not occupied, it was in a large apartment building where many people lived; it was, therefore, occupied for purposes of the arson statute. (*People v. Green* (1983) 146 Cal.App.3d 369, 378–379 [194 Cal.Rptr. 128].)

**1503–1514. Reserved for Future Use**

## 1600. Robbery (Pen. Code, § 211)

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The defendant is charged [in Count \_\_\_\_\_] with robbery [in violation of Penal Code section 211].

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

1. The defendant took property that was not (his/her) own;
2. The property was in the possession of another person;
3. The property was taken from the other person or (his/her) immediate presence;
4. The property was taken against that person's will;
5. The defendant used force or fear to take the property or to prevent the person from resisting;

AND

6. When the defendant used force or fear ~~to take the property~~, (he/she) intended (to deprive the owner of ~~it~~ the property permanently/ [or] to remove ~~it~~ the property from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property).

The defendant's intent to take the property must have been formed before or during the time (he/she) used force or fear. If the defendant did not form this required intent until after using the force or fear, then (he/she) did not commit robbery.

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

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

[A person *takes* something when he or she gains possession of it and moves it some distance. The distance moved may be short.]

[The property taken can be of any value, however slight.] [Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[A (store/ [or] business) (employee/ \_\_\_\_\_ <insert description>) who is on duty has possession of the (store/ [or] business) owner's property.]

[*Fear*, as used here, means fear of (injury to the person himself or herself[,]/ [or] injury to the person's family or property[,]/ [or] immediate injury to someone else present during the incident or to that person's property).]

[Property is within a person's *immediate presence* if it is sufficiently within his or her physical control that he or she could keep possession of it if not prevented by force or fear.]

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

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*New January 2006; Revised August 2009, October 2010, April 2011, August 2013, August 2014*

## BENCH NOTES

### ***Instructional Duty***

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

To have the requisite intent for theft, the defendant must either intend to deprive the owner permanently or to deprive the owner of a major portion of the property's value or enjoyment. (See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1].) Select the appropriate language in element 5.

There is no sua sponte duty to define the terms “possession,” “fear,” and “immediate presence.” (*People v. Anderson* (1966) 64 Cal.2d 633, 639 [51 Cal.Rptr. 238, 414 P.2d 366] [fear]; *People v. Mungia* (1991) 234 Cal.App.3d

1703, 1708 [286 Cal.Rptr. 394] [fear].) These definitions are discussed in the Commentary below.

If second degree robbery is the only possible degree of robbery that the jury may return as their verdict, do not give CALCRIM No. 1602, *Robbery: Degrees*.

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

If there is an issue as to whether the defendant used force or fear during the commission of the robbery, the court may need to instruct on this point. (See *People v. Estes* (1983) 147 Cal.App.3d 23, 28 [194 Cal.Rptr. 909].) See CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule*.

## AUTHORITY

- Elements. ▶ Pen. Code, § 211.
- Fear Defined. ▶ Pen. Code, § 212; see *People v. Cuevas* (2001) 89 Cal.App.4th 689, 698 [107 Cal.Rptr.2d 529] [victim must actually be afraid].
- Immediate Presence Defined. ▶ *People v. Hayes* (1990) 52 Cal.3d 577, 626–627 [276 Cal.Rptr. 874, 802 P.2d 376].
- Intent. ▶ *People v. Green* (1980) 27 Cal.3d 1, 52–53 [164 Cal.Rptr. 1, 609 P.2d 468], overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99]; see *Rodriguez v. Superior Court* (1984) 159 Cal.App.3d 821, 826 [205 Cal.Rptr. 750] [same intent as theft].
- Intent to Deprive Owner of Main Value. ▶ See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1] [in context of theft]; *People v. Zangari* (2001) 89 Cal.App.4th 1436, 1447 [108 Cal.Rptr.2d 250] [same].
- Possession Defined. ▶ *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618].
- Constructive Possession by Employee. ▶ *People v. Scott* (2009) 45 Cal.4th 743, 751 [89 Cal.Rptr.3d 213, 200 P.3d 837].
- Constructive Possession by Subcontractor/Janitor. ▶ *People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 523 [3 Cal.Rptr.3d 835].
- Constructive Possession by Person With Special Relationship. ▶ *People v. Weddles* (2010) 184 Cal.App.4th 1365, 1369–1370 [109 Cal.Rptr.3d 479].



- Felonious Taking Not Satisfied by Theft by False Pretense. ▶ *People v. Williams* (2013) 57 Cal.4th 776, 784-789 [161 Cal.Rptr.3d 81, 305 P.3d 1241].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, § 85.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.10 (Matthew Bender).

## **COMMENTARY**

The instruction includes definitions of “possession,” “fear,” and “immediate presence” because those terms have meanings in the context of robbery that are technical and may not be readily apparent to jurors. (See *People v. McElheny* (1982) 137 Cal.App.3d 396, 403 [187 Cal.Rptr. 39]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221].)

Possession was defined in the instruction because either actual or constructive possession of property will satisfy this element, and this definition may not be readily apparent to jurors. (*People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797] [defining possession], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618]; see also *People v. Nguyen* (2000) 24 Cal.4th 756, 761, 763 [102 Cal.Rptr.2d 548, 14 P.3d 221] [robbery victim must have actual or constructive possession of property taken; disapproving *People v. Mai* (1994) 22 Cal.App.4th 117, 129 [27 Cal.Rptr.2d 141]].)

Fear was defined in the instruction because the statutory definition includes fear of injury to third parties, and this concept is not encompassed within the common understanding of fear. Force was not defined because its definition in the context of robbery is commonly understood. (See *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1709 [286 Cal.Rptr. 394] [“force is a factual question to be determined by the jury using its own common sense”].)

Immediate presence was defined in the instruction because its definition is related to the use of force and fear and to the victim’s ability to control the property. This definition may not be readily apparent to jurors.

## LESSER INCLUDED OFFENSES

- Attempted Robbery. ▶ Pen. Code, §§ 664, 211; *People v. Webster* (1991) 54 Cal.3d 411, 443 [285 Cal.Rptr. 31, 814 P.2d 1273].
- Grand Theft. ▶ Pen. Code, §§ 484, 487g; *People v. Webster, supra*, at p. 443; *People v. Ortega* (1998) 19 Cal.4th 686, 694, 699 [80 Cal.Rptr.2d 489, 968 P.2d 48]; see *People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1411–1413 [116 Cal.Rptr.2d 1] [insufficient evidence to require instruction].
- Grand Theft Automobile. ▶ Pen. Code, § 487(d); *People v. Gamble* (1994) 22 Cal.App.4th 446, 450 [27 Cal.Rptr.2d 451] [construing former Pen. Code, § 487h]; *People v. Escobar* (1996) 45 Cal.App.4th 477, 482 [53 Cal.Rptr.2d 9] [same].
- Petty Theft. ▶ Pen. Code, §§ 484, 488; *People v. Covington* (1934) 1 Cal.2d 316, 320 [34 P.2d 1019].
- Petty Theft With Prior. ▶ Pen. Code, § 666; *People v. Villa* (2007) 157 Cal.App.4th 1429, 1433–1434 [69 Cal.Rptr.3d 282].

When there is evidence that the defendant formed the intent to steal after the application of force or fear, the court has a **sua sponte** duty to instruct on any relevant lesser included offenses. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055–1057 [60 Cal.Rptr.2d 225, 929 P.2d 544] [error not to instruct on lesser included offense of theft]); *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 350–352 [216 Cal.Rptr. 455, 702 P.2d 613] [same].)

On occasion, robbery and false imprisonment may share some elements (e.g., the use of force or fear of harm to commit the offense). Nevertheless, false imprisonment is not a lesser included offense, and thus the same conduct can result in convictions for both offenses. (*People v. Reed* (2000) 78 Cal.App.4th 274, 281–282 [92 Cal.Rptr.2d 781].)

## RELATED ISSUES

### ***Asportation—Felonious Taking***

To constitute a taking, the property need only be moved a small distance. It does not have to be under the robber's actual physical control. If a person acting under the robber's direction, including the victim, moves the property, the element of taking is satisfied. (*People v. Martinez* (1969) 274 Cal.App.2d 170, 174 [79 Cal.Rptr. 18]; *People v. Price* (1972) 25 Cal.App.3d 576, 578 [102 Cal.Rptr. 71].)

### ***Claim of Right***

If a person honestly believes that he or she has a right to the property even if that

belief is mistaken or unreasonable, such belief is a defense to robbery. (*People v. Butler* (1967) 65 Cal.2d 569, 573 [55 Cal.Rptr. 511, 421 P.2d 703]; *People v. Romo* (1990) 220 Cal.App.3d 514, 518 [269 Cal.Rptr. 440] [discussing defense in context of theft]; see CALCRIM No. 1863, *Defense to Theft or Robbery: Claim of Right*.) This defense is only available for robberies when a specific piece of property is reclaimed; it is not a defense to robberies perpetrated to settle a debt, liquidated or unliquidated. (*People v. Tufunga* (1999) 21 Cal.4th 935, 945–950 [90 Cal.Rptr.2d 143, 987 P.2d 168].)

### ***Fear***

A victim's fear may be shown by circumstantial evidence. (*People v. Davison* (1995) 32 Cal.App.4th 206, 212 [38 Cal.Rptr.2d 438].) Even when the victim testifies that he or she is not afraid, circumstantial evidence may satisfy the element of fear. (*People v. Renteria* (1964) 61 Cal.2d 497, 498–499 [39 Cal.Rptr. 213, 393 P.2d 413].)

### ***Force—Amount***

The force required for robbery must be more than the incidental touching necessary to take the property. (*People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246 [53 Cal.Rptr.2d 256] [noting that force employed by pickpocket would be insufficient], disapproved on other grounds in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fns. 2, 3 [15 Cal.Rptr.3d 262, 92 P.3d 841].) Administering an intoxicating substance or poison to the victim in order to take property constitutes force. (*People v. Dreas* (1984) 153 Cal.App.3d 623, 628–629 [200 Cal.Rptr. 586]; see also *People v. Wright* (1996) 52 Cal.App.4th 203, 209–210 [59 Cal.Rptr.2d 316] [explaining force for purposes of robbery and contrasting it with force required for assault].)

### ***Force—When Applied***

The application of force or fear may be used when taking the property or when carrying it away. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8 [282 Cal.Rptr. 450, 811 P.2d 742]; *People v. Pham* (1993) 15 Cal.App.4th 61, 65–67 [18 Cal.Rptr.2d 636]; *People v. Estes* (1983) 147 Cal.App.3d 23, 27–28 [194 Cal.Rptr. 909].)

### ***Immediate Presence***

Property that is 80 feet away or around the corner of the same block from a forcibly held victim is not too far away, as a matter of law, to be outside the victim's immediate presence. (*People v. Harris* (1994) 9 Cal.4th 407, 415–419 [37 Cal.Rptr.2d 200, 886 P.2d 1193]; see also *People v. Prieto* (1993) 15 Cal.App.4th 210, 214 [18 Cal.Rptr.2d 761] [reviewing cases where victim is distance away from property taken].) Property has been found to be within a person's immediate presence when the victim is lured away from his or her property and force is

subsequently used to accomplish the theft or escape (*People v. Webster* (1991) 54 Cal.3d 411, 440–442 [285 Cal.Rptr. 31, 814 P.2d 1273]) or when the victim abandons the property out of fear (*People v. Dominguez* (1992) 11 Cal.App.4th 1342, 1348–1349 [15 Cal.Rptr.2d 46].)

### ***Multiple Victims***

Multiple counts of robbery are permissible when there are multiple victims even if only one taking occurred. (*People v. Ramos* (1982) 30 Cal.3d 553, 589 [180 Cal.Rptr. 266, 639 P.2d 908], reversed on other grounds *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446, 77 L.Ed.2d 1171]; *People v. Miles* (1996) 43 Cal.App.4th 364, 369, fn. 5 [51 Cal.Rptr.2d 87] [multiple punishment permitted].) Conversely, a defendant commits only one robbery, no matter how many items are taken from a single victim pursuant to a single plan. (*People v. Brito* (1991) 232 Cal.App.3d 316, 325–326, fn. 8 [283 Cal.Rptr. 441].)

### ***Value***

The property taken can be of small or minimal value. (*People v. Simmons* (1946) 28 Cal.2d 699, 705 [172 P.2d 18]; *People v. Thomas* (1941) 45 Cal.App.2d 128, 134–135 [113 P.2d 706].) The property does not have to be taken for material gain. All that is necessary is that the defendant intended to permanently deprive the person of the property. (*People v. Green* (1980) 27 Cal.3d 1, 57 [164 Cal.Rptr. 1, 609 P.2d 468], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99].)

## 1650. Carjacking (Pen. Code, § 215)

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The defendant is charged [in Count \_\_\_\_] with carjacking [in violation of Penal Code section 215].

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

1. The defendant took a motor vehicle that was not (his/her) own;
2. The vehicle was taken from the immediate presence of a person who possessed the vehicle or was its passenger;
3. The vehicle was taken against that person's will;
4. The defendant used force or fear to take the vehicle or to prevent that person from resisting;

AND

5. When the defendant used force or fear to take the vehicle, (he/she) intended to deprive the other person of possession of the vehicle either temporarily or permanently.

The defendant's intent to take the vehicle must have been formed before or during the time (he/she) used force or fear. If the defendant did not form this required intent until after using the force or fear, then (he/she) did not commit carjacking.

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

[The term motor vehicle is defined in another instruction to which you should refer.]

A person *takes* something when he or she gains possession of it and moves it some distance. The distance moved may be short.

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

[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.]

[*Fear*, as used here, means fear of (injury to the person himself or herself[,]/ [or] injury to the person's family or property[,]/ [or] immediate injury to someone else present during the incident or to that person's property).]

[A vehicle is within a person's *immediate presence* if it is sufficiently within his or her control so that he or she could keep possession of it if not prevented by force or fear.]

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*New January 2006*

## BENCH NOTES

### *Instructional Duty*

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

There is no sua sponte duty to define the terms “possession,” “fear,” and “immediate presence.” (*People v. Anderson* (1966) 64 Cal.2d 633, 639 [414 P.2d 366, 51 Cal.Rptr. 238] [fear]; *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708 [286 Cal.Rptr. 394] [fear].) These definitions are discussed in the Commentary to CALCRIM No. 1600, *Robbery*.

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

## AUTHORITY

- Elements ▶ Pen. Code, § 215.
- Fear Defined ▶ Pen. Code, § 212.
- Motor Vehicle Defined ▶ Veh. Code, § 415.

- Immediate Presence Defined ▶ *People v. Hayes* (1990) 52 Cal.3d 577, 626–627 [276 Cal.Rptr. 874, 802 P.2d 376]; *People v. Medina* (1995) 39 Cal.App.4th 643, 650 [46 Cal.Rptr.2d 112].
- Possession Defined ▶ *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618]; see *People v. Hamilton* (1995) 40 Cal.App.4th 1137, 1143–1144 [47 Cal.Rptr.2d 343].
- Carjacking Crime Against Possession, not Ownership, of Vehicle ▶ *People v. Cabrera* (2007) 152 Cal.App.4th 695, 701–702 [61 Cal.Rptr.3d 373].

### ***Secondary Sources***

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 101.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.10[2][b], 142.10A (Matthew Bender).

## **LESSER INCLUDED OFFENSES**

- Attempted Carjacking ▶ Pen. Code, §§ 663, 215; see *People v. Jones* (1999) 75 Cal.App.4th 616, 628 [89 Cal.Rptr.2d 485].

Neither theft or robbery is a necessarily included offense of carjacking. (*People v. Ortega* (1998) 19 Cal.4th 686, 693 [80 Cal.Rptr.2d 489, 968 P.2d 48] [theft]; *People v. Dominguez* (1995) 38 Cal.App.4th 410, 419 [45 Cal.Rptr.2d 153] [robbery].) Vehicle theft (Veh. Code, § 10851(a)) is not a lesser included offense of carjacking. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1035 [16 Cal.Rptr.3d 902, 94 P.3d 1098].)

Attempted grand theft auto is not a lesser included offense of attempted carjacking. *People v. Marquez* (2007) 152 Cal.App.4th 1064, 1066 [62 Cal.Rptr.3d 31].

## **RELATED ISSUES**

### ***Force—Timing***

Force or fear must be used against the victim to gain possession of the vehicle. The timing, however, “in no way depends on whether the confrontation and use of

force or fear occurs before, while, or after the defendant initially takes possession of the vehicle.” (*People v. O’Neil* (1997) 56 Cal.App.4th 1126, 1133 [66 Cal.Rptr.2d 72].)

### ***Asportation—Felonious Taking***

“Felonious taking” has the same meaning in carjacking as in robbery. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1062 [6 Cal.Rptr.3d 432, 79 P.3d 548]) “To satisfy the asportation requirement for robbery, no great movement is required, and it is not necessary that the property be taken out of the physical presence of the victim. [S]light movement is enough to satisfy the asportation requirement. (*Id.* at p. 1061 [internal quotation marks and citations omitted].) The taking can occur whether or not the victim remains with the car. (*People v. Duran* (2001) 88 Cal.App.4th 1371, 1375–1377 [106 Cal.Rptr.2d 812].) Carjacking can also occur when a defendant forcibly takes a victim’s car keys, not just when a defendant takes a car from the victim’s presence. (*People v. Hoard* (2002) 103 Cal.App.4th 599, 608–609 [126 Cal.Rptr.2d 855] [although victim was not physically present in the parking lot when defendant drove the car away, she had been forced to relinquish her car keys].)

**1651–1699. Reserved for Future Use**



## 2130. Refusal—Consciousness of Guilt (Veh. Code, § 23612)

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The law requires that any driver who has been [lawfully] arrested submit to a chemical test at the request of a peace officer who has reasonable cause to believe that the person arrested was driving under the influence.

*<Give for refusal by words or conduct>*

[If the defendant refused to submit after a peace officer asked (him/her) to do so and explained the test's nature to the defendant, then the defendant's conduct may show that (he/she) was aware of (his/her) guilt. If you conclude that the defendant refused to submit to such a test, it is up to you to decide the meaning and importance of the refusal. However, evidence that the defendant refused to submit to ~~such a~~ **chemical** test cannot prove guilt by itself.]

*<Give for refusal by silence>*

[A defendant's silence in response to an officer's request to (submit to a chemical test/ [or] complete a chemical test) may be a refusal. If you conclude that the defendant's silence was a refusal, it is up to you to decide its meaning and importance. However, evidence that the defendant refused to submit to a chemical test cannot prove guilt by itself.]

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New January 2006; Revised August 2009 *[insert date of council approval]*

### BENCH NOTES

#### *Instructional Duty*

The court may instruct the jury that refusal to submit to a chemical analysis for blood alcohol content may demonstrate consciousness of guilt. (*People v. Sudduth* (1966) 65 Cal.2d 543, 547 [55 Cal.Rptr. 393, 421 P.2d 401].) There is no sua sponte duty to give this instruction.

Do not give this instruction if the defendant is exempted from the implied consent law because the defendant has hemophilia or is taking anticoagulants. (See Veh. Code, § 23612(b) & (c).)

The implied consent statute states that “[t]he testing shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe the person was driving a motor vehicle in violation of Section 23140, 23152, or 23153.” (Veh. Code, § 23612(a)(1)(C).) If there is a factual issue as to whether the defendant was lawfully arrested or whether the officer had reasonable cause to believe the defendant was under the influence, the court should consider

whether this entire instruction, or the bracketed word “lawfully” is appropriate and/or whether the jury should be instructed on these additional issues. For an instruction on lawful arrest and reasonable cause, see CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

## AUTHORITY

- Implied Consent Statute ▶ Veh. Code, § 23612.
- Instruction Constitutional ▶ *People v. Sudduth* (1966) 65 Cal.2d 543, 547 [55 Cal.Rptr. 393, 421 P.2d 401].
- [Silence in Response to Request May Constitute Refusal ▶ \*Garcia v. Department of Motor Vehicles\* \(2010\) 185 Cal.App.4<sup>th</sup> 73, 82-84 \[109 Cal.Rptr.3d 906\].](#)

## Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 226–235.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[2][f] (Matthew Bender).

## RELATED ISSUES

### *Silence*

Silence in response to repeated requests to submit to a chemical analysis constitutes a refusal. (*Lampman v. Dept. of Motor Vehicles* (1972) 28 Cal.App.3d 922, 926 [105 Cal.Rptr. 101].)

### *Inability to Complete Chosen Test*

If the defendant selects one test but is physically unable to complete that test, the defendant’s refusal to submit to an alternative test constitutes a refusal. (*Cahall v. Dept. of Motor Vehicles* (1971) 16 Cal.App.3d 491, 496 [94 Cal.Rptr. 182]; *Kessler v. Dept. of Motor Vehicles* (1992) 9 Cal.App.4th 1134, 1139 [12 Cal.Rptr.2d 46].)

### *Conditions Placed on Test by Defendant*

“It is established that a *conditional* consent to a test constitutes a refusal to submit to a test within the meaning of section 13353.” (*Webb v. Miller* (1986) 187

Cal.App.3d 619, 626 [232 Cal.Rptr. 50] [request by defendant to see chart in wallet constituted refusal, italics in original]; *Covington v. Dept. of Motor Vehicles* (1980) 102 Cal.App.3d 54, 57 [162 Cal.Rptr. 150] [defendant's response that he would only take test with attorney present constituted refusal].) However, in *Ross v. Dept. of Motor Vehicles* (1990) 219 Cal.App.3d 398, 402–403 [268 Cal.Rptr. 102], the court held that the defendant was entitled under the implied consent statute to request to see the identification of the person drawing his blood. The court found the request reasonable in light of the risks of HIV infection from improper needle use. (*Id.* at p. 403.) Thus, the defendant could not be penalized for refusing to submit to the test when the technician declined to produce identification. (*Ibid.*)

#### ***Defendant Consents After Initial Refusal***

“Once the driver refuses to take any one of the three chemical tests, the law does not require that he later be given one when he decides, for whatever reason, that he is ready to submit. [Citations.] [¶] . . . Simply stated, one offer plus one rejection equals one refusal; and, one suspension.” (*Dunlap v. Dept. of Motor Vehicles* (1984) 156 Cal.App.3d 279, 283 [202 Cal.Rptr. 729].)

#### ***Defendant Refuses Request for Urine Sample Following Breath Test***

In *People v. Roach* (1980) 108 Cal.App.3d 891, 893 [166 Cal.Rptr. 801], the defendant submitted to a breath test revealing a blood alcohol level of 0.08 percent. The officer then asked the defendant to submit to a urine test in order to detect the presence of drugs, but the defendant refused. (*Ibid.*) The court held that this was a refusal under the implied consent statute. (*Ibid.*)

#### ***Sample Taken by Force After Refusal***

“[T]here was no voluntary submission on the part of respondent to any of the blood alcohol tests offered by the arresting officer. The fact that a blood sample ultimately was obtained and the test completed is of no significance.” (*Cole v. Dept. of Motor Vehicles* (1983) 139 Cal.App.3d 870, 875 [189 Cal.Rptr. 249].)

#### ***Refusal Admissible Even If Faulty Admonition***

Vehicle Code section 23612 requires a specific admonition to the defendant regarding the consequences of refusal to submit to a chemical test. If the officer fails to properly advise the defendant in the terms required by statute, the defendant may not be subject to the mandatory license suspension or the enhancement for willful refusal to complete a test. (See *People v. Brannon* (1973) 32 Cal.App.3d 971, 978 [108 Cal.Rptr. 620]; *People v. Municipal Court (Gonzales)* (1982) 137 Cal.App.3d 114, 118 [186 Cal.Rptr. 716].) However, the refusal is still admissible in criminal proceedings for driving under the influence. (*People v. Municipal Court (Gonzales)*, *supra*, 137 Cal.App.3d at p. 118.) Thus, the court in *People v. Municipal Court (Gonzales)*, *supra*, 137 Cal.App.3d at p.

118, held that the defendant's refusal was admissible despite the officer's failure to advise the defendant that refusal would be used against him in a court of law, an advisement specifically required by the statute. (See Veh. Code, § 23612(a)(4).)

### **2131. Refusal—Enhancement (Veh. Code, §§ 23577, 23612)**

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**If you find the defendant guilty of (causing injury while driving under the influence/ [or] [the lesser offense of] driving under the influence), you must then decide whether the People have proved the additional allegation that the defendant willfully refused to (submit to/ [or] complete) a chemical test to determine ((his/her) blood alcohol content/ [or] whether (he/she) had consumed a drug).**

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

- 1. A peace officer asked the defendant to submit to a chemical test to determine ((his/her) blood alcohol content/ [or] whether (he/she) had consumed a drug);**
- 2. The peace officer fully advised the defendant of the requirement to submit to a test and the consequences of not submitting to a test;**

**[AND]**

- 3. The defendant willfully refused to (submit to a test/ [or] to complete the test)(./;)**

**[AND]**

- 4. The peace officer lawfully arrested the defendant and had reasonable cause to believe that defendant was driving a motor vehicle in violation of Vehicle Code section 23140, 23152, or 23153.]**

**To have *fully advised the defendant*, the peace officer must have told (him/her) all of the following information:**

- 1. (He/She) may choose a blood(./ or) breath[, or urine] test; [if (he/she) completes a breath test, (he/she) may also be required to submit to a blood [or urine] test to determine if (he/she) had consumed a drug;] [if only one test is available, (he/she) must complete the test available;] [if (he/she) is not able to complete the test chosen, (he/she) must submit to (the other/another) test;]**

2. **(He/She) does not have the right to have an attorney present before saying whether (he/she) will submit to a test, before deciding which test to take, or during administration of a test;**
3. **If (he/she) refuses to submit to a test, the refusal may be used against (him/her) in court;**
4. **Failure to submit to or complete a test will result in a fine and mandatory imprisonment if (he/she) is convicted of driving under the influence or with a blood alcohol level of 0.08 percent or more;**

**AND**

5. **Failure to submit to or complete a test will result in suspension of (his/her) driving privilege for one year or revocation of (his/her) driving privilege for two or three years.**

*<Short Alternative; see Bench Notes>*

**[(His/Her) driving privilege will be revoked for two or three years if (he/she) has previously been convicted of one or more specific offenses related to driving under the influence or if (his/her) driving privilege has previously been suspended or revoked.]**

*<Long Alternative; see Bench Notes>*

**[A. (His/Her) driving privilege will be revoked for two years if (he/she) has been convicted within the previous (seven/ten) years of a separate violation of Vehicle Code section 23140, 23152, 23153, or 23103 as specified in section 23103.5, or of Penal Code section 191.5 or 192(c)(3). (His/Her) driving privilege will also be revoked for two years if (his/her) driving privilege has been suspended or revoked under Vehicle Code section 13353, 13353.1, or 13353.2 for an offense that occurred on a separate occasion within the previous (seven/ten) years;**

**AND**

**B. (His/Her) driving privilege will be revoked for three years if (he/she) has been convicted within the previous (seven/ten) years of two or more of the offenses just listed. (His/Her) driving privilege will also be revoked for three years if (his/her) driving privilege was previously suspended or revoked on two occasions, or if (he/she) has had any combination of two convictions,**

suspensions, or revocations, on separate occasions, within the previous (seven/ten) years.]

[Vehicle Code section 23140 prohibits a person under the age of 21 from driving with a blood alcohol content of 0.05 percent or more. Vehicle Code section 23152 prohibits driving under the influence of alcohol or drugs or driving with a blood alcohol level of 0.08 percent or more. Vehicle Code section 23153 prohibits causing injury while driving under the influence of alcohol or drugs or causing injury while driving with a blood alcohol level of 0.08 percent or more. Vehicle Code section 23103 as specified in section 23103.5 prohibits reckless driving involving alcohol. Penal Code section 191.5 prohibits gross vehicular manslaughter while intoxicated, and Penal Code section 192(c)(3) prohibits vehicular manslaughter while intoxicated.]

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

[A person 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 defendant’s silence in response to an officer’s request to (submit to a chemical test/ [or] complete a chemical test) may be a refusal. If you conclude that the defendant was silent in response to an officer’s request to (submit to a chemical test/[or] complete a chemical test), you must decide whether that conduct was a refusal.]

The People have the burden of proving beyond a reasonable doubt that the defendant willfully refused to (submit to/ [or] complete) a chemical test to determine ((his/her) blood alcohol content/ [or] whether (he/she) had consumed a drug). If the People have not met this burden, you must find this allegation has not been proved.

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New January 2006; Revised August 2009[*insert date of council approval*]

## BENCH NOTES

### *Instructional Duty*

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

Do not give this instruction if the defendant is exempted from the implied consent law because the defendant has hemophilia or is taking anticoagulants. (See Veh. Code, § 23612(b), (c).)

The implied consent statute states that “[t]he testing shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe the person was driving a motor vehicle in violation of Section 23140, 23152, or 23153.” (Veh. Code, § 23612(a)(1)(C).) If there is a factual issue whether the defendant was lawfully arrested or whether the officer had reasonable cause to believe the defendant was under the influence, the court should consider whether giving bracketed element 4 is appropriate and whether the jury should be instructed on these additional issues. For an instruction on lawful arrest and reasonable cause, see CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

No reported case has established the degree of detail with which the jury must be instructed regarding the refusal admonition mandated by statute. The committee has provided several different options. The first sentence of element 5 under the definition of “fully advised” **must** be given. The court then may add either the short alternative or the long alternative or neither. If there is no issue regarding the two- and three-year revocations in the case and both parties agree, the court may choose to use the short alternative or to give just the first sentence of element 5. The court may choose to use the long alternative if there is an objection to the short version or the court determines that the longer version is more appropriate. The court may also choose to give the bracketed paragraph defining the Vehicle and Penal Code sections discussed in the long alternative at its discretion.

When giving the long version, give the option of “ten years” for the time period in which the prior conviction may be used, unless the court determines that the law prior to January 1, 2005 is applicable. In such case, the court must select the “seven-year” time period.

The jury must determine whether the witness 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 witness was a peace officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*) If the witness is a police officer, give the bracketed



sentence that begins with “A person employed as a police officer.” If the witness is another type of peace officer, give the bracketed sentence that begins with “A person employed by.”

## AUTHORITY

- Enhancements ▶ Veh. Code, §§ 23577 & 23612.
- Statute Constitutional ▶ *Quintana v. Municipal Court* (1987) 192 Cal.App.3d 361, 366–369 [237 Cal.Rptr. 397].
- Statutory Admonitions Not Inherently Confusing or Misleading ▶ *Blitzstein v. Dept. of Motor Vehicles* (1988) 199 Cal.App.3d 138, 142 [244 Cal.Rptr. 624].
- Silence in Response to Request May Constitute Refusal ▶ *Garcia v. Department of Motor Vehicles* (2010) 185 Cal.App.4<sup>th</sup> 73, 82-84 [109 Cal.Rptr.3d 906].

## Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 226–235.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[4][a], [b] (Matthew Bender).

## RELATED ISSUES

### ***Admonition Must Convey Strong Likelihood of Suspension***

It is insufficient for the officer to advise the defendant that his or her license “could” be suspended. (*Decker v. Dept. of Motor Vehicles* (1972) 6 Cal.3d 903, 905–906 [101 Cal.Rptr. 387, 495 P.2d 1307]; *Giomi v. Dept. of Motor Vehicles* (1971) 15 Cal.App.3d 905, 907 [93 Cal.Rptr. 613].) The officer must convey to the defendant that there is a strong likelihood that his or her license will be suspended. (*Decker, supra*, 6 Cal.3d at p. 906; *Giomi, supra*, 15 Cal.App.3d at p. 907.)

### ***Admonition Must Be Clearly Conveyed***

“[T]he burden is properly placed on the officer to give the warning required by section 13353 in a manner comprehensible to the driver.” (*Thompson v. Dept. of Motor Vehicles* (1980) 107 Cal.App.3d 354, 363 [165 Cal.Rptr. 626].) Thus, in *Thompson, supra*, 107 Cal.App.3d at p. 363, the court set aside the defendant’s license suspension because radio traffic prevented the defendant from hearing the admonition. However, where the defendant’s own “obstreperous conduct . . .

prevented the officer from completing the admonition,” or where the defendant’s own intoxication prevented him or her from understanding the admonition, the defendant may be held responsible for refusing to submit to a chemical test. (*Morphew v. Dept. of Motor Vehicles* (1982) 137 Cal.App.3d 738, 743–744 [188 Cal.Rptr. 126]; *Bush v. Bright* (1968) 264 Cal.App.2d 788, 792 [71 Cal.Rptr. 123].)

***Defendant Incapable of Understanding Due to Injury or Illness***

When the defendant, through no fault of his or her own, is incapable of understanding the admonition or of submitting to the test, the defendant cannot be penalized for refusing. (*Hughey v. Dept. of Motor Vehicles* (1991) 235 Cal.App.3d 752, 760 [1 Cal.Rptr.2d 115].) Thus, in *Hughey, supra*, 235 Cal.App.3d at p. 760, the court held that the defendant was rendered incapable of refusing due to a head trauma. However, in *McDonnell v. Dept. of Motor Vehicles* (1975) 45 Cal.App.3d 653, 662 [119 Cal.Rptr. 804], the court upheld the license suspension when defendant’s use of alcohol triggered a hypoglycemic attack. The court held that because voluntary alcohol use aggravated the defendant’s illness, the defendant could be held responsible for his subsequent refusal, even if the illness prevented the defendant from understanding the admonition. (*Ibid.*)

See the Related Issues section in CALCRIM No. 2130, *Refusal—Consciousness of Guilt*.

**2132–2139. Reserved for Future Use**

## 2500. Illegal Possession, etc., of Weapon

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The defendant is charged [in Count \_\_] with unlawfully (possessing/manufacturing/causing to be manufactured/importing/keeping for sale/offering or exposing for sale/giving/lending/buying/receiving) a weapon, specifically (a/an) \_\_\_\_\_ *<insert type of weapon >* [in violation of Penal Code section[s] \_\_\_\_\_ *<insert appropriate code section[s]>*].

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

1. The defendant (possessed/manufactured/caused to be manufactured/imported into California/kept for sale/offered or exposed for sale/gave/lent/bought/received) (a/an) \_\_\_\_\_ *<insert type of weapon>*;
2. The defendant knew that (he/she) (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the \_\_\_\_\_ *<insert type of weapon>*;

[AND]

*<Alternative 3A—object capable of innocent uses>*

- [3. The defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the object as a weapon. ~~When deciding whether the defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the object as a weapon, consider all the surrounding circumstances relating to that question, including when and where the object was (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received)[,] [and] [where the defendant 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.(;/.)]~~

*<Alternative 3B—object designed solely for use as weapon>*

**[3. The defendant knew that the object (was (a/an) \_\_\_\_\_**  
*<insert characteristics of weapon, e.g., “unusually short shotgun, penknife containing stabbing instrument”>/could be used \_\_\_\_\_ <insert description of weapon, e.g., “as a stabbing weapon,” or “for purposes of offense or defense”>).*

*<Give element 4 only if defendant is charged with offering or exposing for sale.>*

**[AND**

**4. \_\_\_\_\_ The defendant intended to sell it.]**

*<Give only if alternative 3A is given.>*

**[When deciding whether the defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the object as a weapon, consider all the surrounding circumstances relating to that question, including when and where the object was (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received)[,] [and] [where the defendant 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.]**

*<Give only if alternative 3B is given.>*

**[The People do not have to prove that the defendant intended to use the object as a weapon.]**

**(A/An) \_\_\_\_\_ <insert type of weapon> means \_\_\_\_\_ <insert appropriate definition>.**

*<Give only if the weapon used has specific characteristics of which the defendant must have been aware.>*

**[A \_\_\_\_\_ <insert type of weapon specified in element 3B> is \_\_\_\_\_ <insert defining characteristics of weapon>.**

**[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/visible)).]**

**[(A/An) \_\_\_\_\_ <insert prohibited firearm> does not need to be in working order if it was designed to shoot and appears capable of shooting.]**

**[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/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) 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/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) at least one of these weapons and you all agree on which weapon (he/she) (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received).]

*<Defense: Statutory Exemptions>*

[The defendant did not unlawfully (possess/manufacture/cause to be manufactured/import/keep for sale/offer or expose for sale/give/lend/buy/receive) (a/an) \_\_\_\_\_ *<insert type of weapon>* if \_\_\_\_\_ *<insert exception>*. The People have the burden of proving beyond a reasonable doubt that the defendant unlawfully (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) (a/an) \_\_\_\_\_ *<insert type of weapon>*. 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 August 2006, April 2008, February 2012, February 2015 *[insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

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

Penal Code section 12020 has been repealed. In its place, the legislature enacted numerous -new statutes that became effective January 1, 2012. Whenever a blank in the instruction calls for inserting a type of weapon, an exception, or a definition, refer to the appropriate new Penal Code section.

Element 3 contains the requirement that the defendant know that the object is a weapon. A more complete discussion of this issue is provided in the Commentary section below. Select alternative 3A if the object is capable of innocent uses. In such cases, the court has a **sua sponte** duty to instruct on when an object is possessed “as a weapon.” (*People v. Fannin, supra*, 91 Cal.App.4th at p. 1404; *People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. 9 [47 Cal.Rptr. 772, 408 P.2d 100].)

Select alternative 3B if the object “has no conceivable innocent function” (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1405 [111 Cal.Rptr.2d 496]), or when the item is specifically designed to be one of the weapons defined in the Penal Code (see *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885]).

Give element 4 only if the defendant is charged with offering or exposing for sale. (See *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].)

For any of the weapons not defined in the Penal Code, use an appropriate definition from the case law, where available.

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. Also make the appropriate adjustments to the language of the instruction to refer to multiple weapons or objects.

### ***Defenses—Instructional Duty***

If there is sufficient evidence to raise a reasonable doubt about the existence of one of the statutory exemptions, the court has a **sua sponte** duty to give the bracketed instruction on that defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph beginning, “The defendant did not unlawfully . . . .”

## **AUTHORITY**

Elements ▶ Pen. Code, §§ 19200, 20310, 20410, 20510, 20610, 20710, 20910, 21110, 21810, 22010, 22210, 24310, 24410, 24510, 24610, 24710, 30210, 31500, 32310, 32311, 32900, 33215, 33600.

- Need Not Prove Intent to Use ▶ *People v. Rubalcava* (2000) 23 Cal.4th 322, 328 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. 9 [47 Cal.Rptr. 772, 408 P.2d 100].
- Knowledge Required ▶ *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].
- Specific Intent Required for Offer to Sell ▶ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Specific Intent Includes Knowledge of Forbidden Characteristics of Weapon ▶ *People v. King* (2006) 38 Cal.4th 617, 627–628 [42 Cal.Rptr.3d 743, 133 P.3d 636].
- Innocent Object—Must Prove Possessed as Weapon ▶ *People v. Grubb* (1965) 63 Cal.2d 614, 620–621 [47 Cal.Rptr. 772, 408 P.2d 100]; *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404 [111 Cal.Rptr.2d 496].
- Definition of Blackjack, etc. ▶ *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].
- Firearm Need Not Be Operable ▶ *People v. Favalora* (1974) 42 Cal.App.3d 988, 991 [117 Cal.Rptr. 291].
- Measurement of Sawed-Off Shotgun ▶ *People v. Rooney* (1993) 17 Cal.App.4th 1207, 1211–1213 [21 Cal.Rptr.2d 900]; *People v. Stinson* (1970) 8 Cal.App.3d 497, 500 [87 Cal.Rptr. 537].
- Measurement of Fléchette Dart ▶ *People v. Olmsted* (2000) 84 Cal.App.4th 270, 275 [100 Cal.Rptr.2d 755].
- Constructive vs. Actual Possession ▶ *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Knowledge of Specific Characteristics of Weapon ▶ *People v. King* (2006) 38 Cal.4th 617, 628 [42 Cal.Rptr.3d 743, 133 P.3d 636].

### ***Secondary Sources***

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 211-212.

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).

## COMMENTARY

### *Element 3—Knowledge*

“Intent to use a weapon is not an element of the crime of weapon possession.” (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404 [111 Cal.Rptr.2d 496].) However, interpreting now-repealed Penal Code section 12020(a)(4), possession of a concealed dirk or dagger, the Supreme Court stated that “[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 . . . not guilty of violating section 12020.” (*People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52].) Applying this holding to possession of other weapons prohibited under now-repealed Penal Code section 12020(a), the courts have concluded that the defendant must know that the object is a weapon or may be used as a weapon, or must possess the object “as a weapon.” (*People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885]; *People v. Taylor* (2001) 93 Cal.App.4th 933, 941 [114 Cal.Rptr.2d 23]; *People v. Fannin*, *supra*, 91 Cal.App.4th at p. 1404.)

In *People v. Gaitan*, *supra*, 92 Cal.App.4th at p. 547, for example, the court considered the possession of “metal knuckles,” defined in now-repealed Penal Code section 12020(c)(7) as an object “worn for purposes of offense or defense.” The court held that the prosecution does not have to prove that the defendant *intended* to use the object for offense or defense but must prove that the defendant *knew* that “the instrument may be used for purposes of offense or defense.” (*Id.* at p. 547.)

Similarly, in *People v. Taylor*, *supra*, 93 Cal.App.4th at p. 941, involving possession of a cane sword, the court held that “[i]n order to protect against the significant possibility of punishing innocent possession by one who believes he or she simply has an ordinary cane, we infer the Legislature intended a scienter requirement of actual knowledge that the cane conceals a sword.”

Finally, *People v. Fannin*, *supra*, 91 Cal.App.4th at p. 1404, considered whether a bicycle chain with a lock at the end met the definition of a “slungshot.” The court held that “if the object is not a weapon per se, but an instrument with ordinary innocent uses, the prosecution must prove that the object was possessed *as a weapon*.” (*Ibid.* [emphasis in original]; see also *People v. Grubb* (1965) 63 Cal.2d 614, 620–621 [47 Cal.Rptr. 772, 408 P.2d 100] [possession of modified baseball bat].)



In element 3 of the instruction, the court should give alternative 3B if the object has no innocent uses, inserting the appropriate description of the weapon. If the object has innocent uses, the court should give alternative 3A. The court may choose not to give element 3 if the court concludes that a previous case holding that the prosecution does not need to prove knowledge is still valid authority. However, the committee would caution against this approach in light of *Rubalcava* and *In re Jorge M.* (See *People v. Schaefer* (2004) 118 Cal.App.4th 893, 904–905 [13 Cal.Rptr.3d 442] [observing that, since *In re Jorge M.*, it is unclear if the prosecution must prove that the defendant knew shotgun was “sawed off” but that failure to give instruction was harmless if error].)

It is not unlawful to possess a large-capacity magazine or large-capacity conversion kit. It is unlawful, however, to receive or buy these items after January 1, 2014, the effective date of Penal Code sections 32310 and 32311.

## **2722. Battery by Gassing (Pen. Code, §§ 243.9, 4501.1)**

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The defendant is charged [in Count \_\_\_\_] with battery by gassing [in violation of \_\_\_\_\_ <insert appropriate code section[s]>].

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

1. The defendant was (serving a sentence in a [California] state prison/confined in a local detention facility);
2. While so confined, the defendant intentionally committed an act of gassing, that is, (he/she) (placed[,]/ [or] threw[,]/ [or] caused to be placed or thrown) (human excrement/human urine/human bodily fluids or substances/a mixture containing human bodily substances) on the body of (a peace officer/an employee of a (state prison/local detention facility));

**AND**

3. The (excrement/urine/bodily fluids or substances/mixture) actually made contact with the skin [or membranes] of (a peace officer/an employee of a (state prison/local detention facility)).

[A person is *serving a sentence in a state prison* if he or she is (confined in \_\_\_\_\_ <insert name of institution from Pen. Code, § 5003>/committed to the Department of (the Youth Authority/Corrections)) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *serving a sentence in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is not *serving a sentence in a state prison*.]]

[A (county jail/city jail/\_\_\_\_\_ <insert description>) is a *local detention facility*.]

[A sworn member of \_\_\_\_\_ <insert name of agency that employs peace officer>, authorized by \_\_\_\_\_ <insert appropriate section from Pen. Code, § 830 et seq.> to \_\_\_\_\_ <describe statutory authority>, is a peace officer.]

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New January 2006

## BENCH NOTES

### *Instructional Duty*

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

If the battery is charged under Penal Code section 4501.1, in element 1, use the phrase “serving a sentence in state prison” and the bracketed definition of this phrase. If the battery is charged under Penal Code section 243.9, in element 1, give the language referencing a “local detention facility” and the bracketed definition of local detention facility.

When giving the definition of “serving a sentence in a state prison,” give the bracketed portion that begins “regardless of the purpose,” or the bracketed second or third sentence, if requested and relevant based on the evidence.

The jury must determine whether the alleged victim was a peace officer. (*People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].) The court must instruct the jury in the appropriate definition of “peace officer” from the statute. (*Ibid.*) It is error for the court to instruct that the witness is a peace officer as a matter of law. (*Ibid.* [instruction that “Officer Bridgeman and Officer Gurney are peace officers” was error].)

## AUTHORITY

- Elements ▶ Pen. Code, §§ 242, 243.9, 4501.1.
- Confined in State Prison Defined ▶ Pen. Code, § 4504.
- Local Detention Facility Defined ▶ Pen. Code, § 6031.4.

## LESSER INCLUDED OFFENSES

- Battery by Prisoner on Non-Prisoner. *People v. Flores* (2009) 176 Cal.App.4th 924, 929 [97 Cal.Rptr.3d 924].

### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 12–14, 62.

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

### **2723. Battery by Prisoner on Nonprisoner (Pen. Code, § 4501.5)**

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The defendant is charged [in Count \_\_] with battery on someone who was not a prisoner [in violation of Penal Code section 4501.5].

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

1. The defendant willfully touched \_\_\_\_\_ *<insert name of person allegedly battered, excluding title of law enforcement agent>* in a harmful or offensive manner;

2. When (he/she) acted, the defendant was serving a sentence in a [California] state prison;

[AND]

3. \_\_\_\_\_ *<insert name of person allegedly battered, excluding title of law enforcement agent>* was not serving a sentence in state prison(;/.)

*<Give element 4 when self-defense or defense of another is an issue raised by the evidence.>*

[AND]

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

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

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

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

A person is *serving a sentence in a state prison* if he or she is (confined in \_\_\_\_\_ <insert name of institution from Pen. Code, § 5003>)/committed to the Department of (Corrections and Rehabilitation, Division of Juvenile Justice/Corrections and Rehabilitation)) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *serving a sentence in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is not *serving a sentence in a state prison*.]

<When lawful performance is an issue, give the following paragraph and Instruction 2671, *Lawful Performance: Custodial Officer*.>

[A custodial officer is not lawfully performing his or her duties if he or she is using unreasonable or excessive force in his or her duties. Instruction 2671 explains when force is unreasonable or excessive.]

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

## BENCH NOTES

### *Instructional Duty*

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

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

The court has a **sua sponte** duty to instruct on defendant’s reliance on self-defense as it relates to the use of excessive force. (See *People v. Coleman* (1978) 84 Cal.App.3d 1016, 1022–1023 [149 Cal.Rptr. 134]; *People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) If there is evidence of excessive force, give bracketed element 4, the last bracketed paragraph, and the appropriate portions of CALCRIM No. 2671, *Lawful Performance: Custodial Officer*.

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

In the definition of “serving a sentence in a state prison,” give the bracketed portion that begins with “regardless of the purpose,” or the bracketed second or third sentence, if requested and relevant based on the evidence.

### ***Related Instructions***

CALCRIM No. 960, *Simple Battery*.

## **AUTHORITY**

- Elements of Battery by Prisoner on Nonprisoner ▶ Pen. Code, § 4501.5.
- Elements of Battery ▶ Pen. Code, § 242; see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- Willful Defined ▶ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- 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.

### ***Secondary Sources***

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, §§ 12–15, 57.

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Defenses, § 67.

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

## **LESSER INCLUDED OFFENSES**

- Simple Battery ▶ Pen. Code, § 242.
- Assault ▶ Pen. Code, § 240.
- ~~Battery by Gassing. *People v. Flores* (2009) 176 Cal.App.4th 924, 929 [97 Cal.Rptr.3d 924].~~

**2724–2734. Reserved for Future Use**



**3428. Mental Impairment: Defense to Specific Intent or Mental State  
(Pen. Code, § 28)**

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**You have heard evidence that the defendant may have suffered from a mental (disease[,]/ [or] defect[,]/ [or] disorder). You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted [or failed to act] with the intent or mental state required for that crime.**

**The People have the burden of proving beyond a reasonable doubt that the defendant acted [or failed to act] with the required intent or mental state, specifically:** \_\_\_\_\_ *<insert specific intent or mental state required, e.g., “malice aforethought,” “the intent to permanently deprive the owner of his or her property,” or “knowledge that . . .”>.* **If the People have not met this burden, you must find the defendant not guilty of** \_\_\_\_\_ *<insert name of alleged offense>.*  
*<Repeat this paragraph for each offense requiring specific intent or a specific mental state.>*

**[Do not consider evidence of mental (disease[,]/ [or] defect[,]/ [or] disorder) when deciding if** \_\_\_\_\_ *<insert name of nontarget offense>* **was a natural and probable consequence of** \_\_\_\_\_ *<insert name of target offense>.*]

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

**BENCH NOTES**

***Instructional Duty***

The court has no sua sponte duty to instruct on mental impairment as a defense to specific intent or mental state; however, the trial court must give this instruction on request. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588].) The jury may consider evidence of mental impairment and its effect on the defendant’s ability to form any mental state required for the offense charged. (Pen. Code, § 28; *People v. Reyes* (1997) 52 Cal.App.4th 975, 983–985 [61 Cal.Rptr.2d 39] [relevant to knowledge element in receiving stolen property]; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131–1134 [77 Cal.Rptr.2d 428, 959 P.2d 735] [voluntary intoxication relevant to mental state in aiding and abetting].)

Evidence of mental impairment may not be considered for general-intent crimes, unless there is an element, such as knowledge, that requires a specific mental state.

(*People v. Reyes*, *supra*, 52 Cal.App.4th at pp. 983–985; *People v. Mendoza*, *supra*, 18 Cal.4th at pp. 1131–1134 [aiding and abetting].)

In all cases, the court must insert the specific intent or mental state required and the offense for which the mental state is an element. (See *People v. Hill* (1967) 67 Cal.2d 105, 118 [60 Cal.Rptr. 234, 429 P.2d 586].)

Give the bracketed paragraph that begins with “You must not consider evidence of mental” when instructing on aiding and abetting liability for a nontarget offense. (*People v. Mendoza*, *supra*, 18 Cal.4th at p. 1134.)

In an attempted murder case, it was error to insert “intent to kill” instead of “express malice” as the required intent in paragraph two of this instruction. (See *People v. Ocegueda* (2016) 247 Cal.App.4th 1393, 1407 [203 Cal.Rptr.3d 233].)

The court may need to modify this instruction to ensure it does not prohibit the jury from considering evidence of a defendant’s mental illness or impairment for a purpose other than deciding whether defendant possessed the required mental state for murder. (*People v. McGehee* (2016) 246 Cal.App.4th 1190, 1205 [201 Cal.Rptr.3d 714].) For example, giving this unmodified instruction with CALCRIM No. 362, *Consciousness of Guilt: False Statements*, could be error if a defendant’s false statements were the product of mental illness or impairment. (*Ibid*).

## AUTHORITY

- Statutory Authority ▶ Pen. Code, § 28; see also Pen. Code, §§ 25, 29.
- Instructional Requirements ▶ *People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588].
- Mental States—Knowledge ▶ *People v. Reyes* (1997) 52 Cal.App.4th 975, 983–985 [61 Cal.Rptr.2d 39].
- Mental States—Aiding and Abetting ▶ *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131–1134 [77 Cal.Rptr.2d 428, 959 P.2d 735].

## Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 10.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.03 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 124, *Jurisdiction and Disposition Hearings*, § 124.04 (Matthew Bender).

## RELATED ISSUES

### *Scope of Expert Testimony*

Penal Code section 29 provides that an expert testifying about a defendant's mental illness "shall not testify as to whether the defendant had or did not have the required mental states." (Pen. Code, § 29.) In *People v. Coddington* (2000) 23 Cal.4th 529, 582–583 [97 Cal.Rptr.2d 528, 2 P.3d 1081], disapproved on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13 [108 Cal.Rptr.2d 409, 25 P.3d 618], the Supreme Court held that the trial court improperly restricted the scope of the expert testimony when the court refused to permit "hypothetical questions regarding the effect of mental defect or illness on a person's ability to deliberate or premeditate." (*Id.* at p. 582.) "An expert's opinion that a form of mental illness can lead to impulsive behavior is relevant to the existence *vel non* of the mental states of premeditation and deliberation regardless of whether the expert believed appellant actually harbored those mental states at the time of the killing." (*Id.* at pp. 582–583 [*italics original*]; see also *People v. Nunn* (1996) 50 Cal.App.4th 1357, 1364–1365 [58 Cal.Rptr.2d 294] [discussing appropriate scope of expert testimony].)

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

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

*New January 2006; Revised February 2016 [\[insert date of council approval\]](#)*

### BENCH NOTES

#### *Instructional Duty*

The court may give this instruction on request when supported by the evidence. (*People v. Olguin* (1995) 31 Cal.App.4th 1355, 1381 [37 Cal.Rptr.2d 596].) The California Supreme Court has held that language in CALJIC No. 5.55, which is similar to this instruction, correctly states California law on self-defense and imperfect self-defense. (*People v. Enraca* (2012) 53 Cal.4th 735, 761-762 [269 P.3d 543]; *People v. Hinshaw* (1924) 194 Cal. 1, 26 [227 P. 156].) This instruction may require modification in the rare case in which a defendant intends to provoke only a non-deadly confrontation and the victim responds with deadly force. (*People v. Eulian*, (2016) 247 Cal.App.4th 1324, 1334 [203 Cal.Rptr.3d 101]; However, a Court of Appeal has held that this instruction does not accurately state California law where a defendant uses force intending only to provoke a fistfight and the victim responds with deadly force. see also (*People v. Ramirez* (2015) 233 Cal.App.4th 940, 952 [183 Cal.Rptr.3d 267]). The court should modify this instruction if necessary.

### AUTHORITY

- Instructional Requirements ▶ *People v. Olguin* (1995) 31 Cal.App.4th 1355, 1381 [37 Cal.Rptr.2d 596]; *Fraguglia v. Sala* (1936) 17 Cal.App.2d 738, 743–744 [62 P.2d 783]; *People v. Hinshaw* (1924) 194 Cal. 1, 26 [227 P. 156].
- This Instruction Generally a Correct Statement of Law ▶ *People v. Eulian*, (2016) 247 Cal.App.4th 1324, 1334 [203 Cal.Rptr.3d 101].)

#### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, §§ 75, 78.

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

**3473. Reserved for Future Use**

**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 *[insert date of council approval]*

**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];

## **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 (3d ed. 2000) Defenses, § 73.

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**