JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 21-029
For business meeting on March 12, 2021

Title
Jury Instructions: Revisions, Additions, and Revocations to Criminal Jury Instructions

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

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

Agenda Item Type
Action Required

Effective Date
March 12, 2021

Date of Report
February 10, 2021

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Executive Summary

The Advisory Committee on Criminal Jury Instructions recommends approving for publication the revised criminal jury instructions prepared by the committee under rule 2.1050 of the California Rules of Court. These changes will keep the instructions current with statutory and case authority. Once approved, the revised instructions will be published in the 2021 edition of the *Judicial Council of California Criminal Jury Instructions (CALCRIM)*.

Recommendation

The Advisory Committee on Criminal Jury Instructions recommends that the Judicial Council, effective March 12, 2021, approve the following changes to the criminal jury instructions prepared by the committee:

1. Revisions to CALCRIM Nos. 202, 222, 520, 591, 730, 763, 1140, 1151, 1193, 1202, 1820, 2044, 2520, 2521, 2522, 2624, 2651;

2. Adoption of new CALCRIM Nos. 768 and 1933; and

3. Revocation of CALCRIM No. 3220.

The proposed jury instructions are attached at pages 13–99.

Relevant Previous Council Action

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

Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CALCRIM.* The council approved the last *CALCRIM* release at its September 2020 meeting.

Analysis/Rationale

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

Below is an overview of some of the proposed changes.

Note-Taking and Reading Back of Testimony (CALCRIM No. 202); *Evidence* (CALCRIM No. 222)

In *People v. Triplett* (2020) 48 Cal.App.5th 655 [267 Cal.Rptr.3d 675], the court found that the jury's request for transcripts should have been broadly interpreted as a request for readback of testimony. The committee added a bench note that, if the jury requests transcripts, courts should remind the jury of its right to request readback, stating what testimony it wants read.

Vehicular Manslaughter While Intoxicated (CALCRIM No. 591)

In *People v. Machuca* (2020) 49 Cal.App.5th 393, 400–401 [263 Cal.Rptr.3d 52], the court held that a violation of Vehicle Code section 23153 is not a lesser included offense of Penal Code section 191.5 when the offenses involve separate victims. The committee added this case to the Lesser Included Offenses section and clarified that injury must be to the same victim for driving under the influence causing injury to be a lesser included offense.

Special Circumstance: Murder in Commission of Felony (CALCRIM No. 730)

In *People v. Garcia* (2020) 46 Cal.App.5th 123, 149–155 [259 Cal.Rptr.3d 600], the prosecutor argued that the defendant was an actual killer because he handed duct tape to the co-perpetrator who then used the duct tape to cover the victim's mouth, ultimately causing the victim to die of asphyxiation. The court held that under these facts, only the person or persons who placed the duct tape on the victim's mouth were actual killers within the meaning of Penal Code section

[1] Rule 10.59(a) states: "The committee regularly reviews case law and statutes affecting jury instructions and makes recommendations to the Judicial Council for updating, amending, and adding topics to the council's criminal jury instructions."

190.2(b). In a footnote, the court stated that CALCRIM No. 730 may have contributed to the legal error here and suggested that the committee consider revisions to clarify the concept of actual killer. Based on this opinion, the committee considered changing the definition of actual killer, which the instruction describes as someone who "did an act that caused the death." However, the committee concluded that a change to the language would raise more issues in cases where an act is a substantial factor in causing death, when that act is combined with an act by another that could have caused death. The committee concluded that the error in *Garcia* was the result of improper prosecutorial argument, not the instruction. Thus, a note should be sufficient to prevent an erroneous argument about actual killer liability. The committee added a bench note that explains the meaning of actual killer versus aider and abettor.

Death Penalty: Factors to Consider **(CALCRIM No. 763)**

Based on a committee member's suggestion, the committee added a sentence to inform jurors to disregard any jury instructions given in a prior guilt or sanity phase if they conflict with the jury's consideration and weighing of factors. Although a similar admonition appears in CALCRIM No. 761 (*Death Penalty: Duty of Jury*), the committee decided to remind jurors of this important admonition by adding it to this instruction.

Penalty Trial: Pre-Deliberation Instructions **(Proposed New CALCRIM No. 768)**

A committee member pointed out that CALCRIM does not contain a pre-deliberation instruction for penalty trials and suggested that the committee adapt one from CALCRIM No. 3550 (*Pre-Deliberation Instructions*). Through careful line-by-line analysis, the committee drafted this new instruction for courts to use during the penalty phase.

Felony Unlawful Taking or Driving of Vehicle **(CALCRIM No. 1820)**

In *People v. Bullard* (2020) 9 Cal.5th 94, 110 [260 Cal.Rptr.3d 153, 460 P.3d 262], the California Supreme Court clarified the substantive effect of Proposition 47 on Vehicle Code section 10851: "Except where a conviction is based on posttheft driving (i.e., driving separated from the vehicle's taking by a substantial break), a violation of section 10851 must be punished as a misdemeanor theft offense if the vehicle is worth $950 or less." In accordance with this holding, the committee simplified the instruction by combining the two taking alternatives (taking with intent to temporarily deprive and taking with intent to permanently deprive). The text now contains only two alternatives: taking with intent to deprive and posttheft driving. In accordance with *Bullard*, only the taking alternative includes the element that the vehicle was worth more than $950.

Possession of Counterfeiting Equipment **(Proposed New CALCRIM No. 1933)**

In *People v. Seo* (2020) 48 Cal.App.5th 1081 [262 Cal.Rptr.3d 497], the defendant was convicted of possessing materials used to counterfeit currency. The defendant argued that the trial court incorrectly instructed the jury about the elements of Penal Code section 480(a). The court upheld the instruction that was given but agreed that it lacked clarity and proposed a clearer version for courts to consider in future cases. CALCRIM does not currently have an instruction for this offense. However, the committee reviewed the court's proposed instruction and drafted a new jury instruction based on Penal Code section 480.

False Personation (CALCRIM No. 2044)

An attorney noted that this instruction failed to specify sufficiently that a separate act, apart from the false personation, is required for a violation of Penal Code section 529. The committee reviewed prior case law and decided to change the existing language of "did anything" to "did any act." In reviewing the instruction, the committee determined that the instruction was trying to do too much by covering both sections 529 and 530 of the Penal Code. To clarify the instruction, the committee decided to remove those parts that relate to Penal Code section 530. The committee intends to draft a new instruction for Penal Code section 530 in the next publication cycle.

Carrying Concealed Firearm (CALCRIM Nos. 2520, 2521 & 2522)

People v. Duffy (2020) 51 Cal.App.5th 257, 266 [265 Cal.Rptr.3d 59] held that different subsections of Penal Code section 25400 do not describe separate offenses. The committee added this case and its holding to the Related Issues section, under the heading "Multiple Convictions Prohibited."

Threatening a Witness After Testimony or Information Given (CALCRIM No. 2624); *Trying to Prevent Executive Officer From Performing Duty* (CALCRIM No. 2651)

In *People v. Smolkin* (2020) 49 Cal.App.5th 183, 188 [262 Cal.Rptr.3d 696], the court held that "a conviction under [Penal Code] § 69 based on threatening speech is unconstitutional if the speech was not a 'true threat.'" CALCRIM No. 2624 already contains instructional language based on the reasonable listener standard stated in *People v. Lowery* (2011) 52 Cal.4th 419, 427 [128 Cal.Rptr.3d 648, 257 P.3d 72]. The committee inserted the same language from CALCRIM No. 2624 but didn't include the phrase "rather than just an expression of jest or frustration." The committee felt that the omitted phrase—by providing examples of what would *not* constitute a true threat—could potentially mislead jurors into concluding that jest or frustration was the only way in which a threat could not satisfy the reasonable listener standard.

Amount of Loss (CALCRIM No. 3220)

This enhancement penalty instruction is based on Penal Code section 12022.6, which contained a sunset date of January 1, 2018. Because the Legislature neither extended this date nor otherwise revived the statute, the enhancement no longer applies to offenses committed on or after January 1, 2018. As a result, the committee decided to revoke this instruction.

Policy implications

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

Comments

The proposed additions and revisions to *CALCRIM* circulated for public comment from November 9 through December 11, 2020. The committee received responses from three commenters. The text of all comments received and the committee's responses are included in a comments chart attached at pages 6–11.

Alternatives considered

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

Fiscal and Operational Impacts

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

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

Attachments and Links

1. Chart of comments, at pages 6–11
2. Full text of revised *CALCRIM* instructions, including table of contents, at pages 12–99

CALCRIM-2020-02 Invitation to Comment
Revised CALCRIM Instructions
All comments are verbatim unless indicated by an asterisk (*).

Instruction	Commentator	Comment	Response
202 & 220	Orange County Bar Association, by Scott Garner, President	Agree as modified. The Judicial Council proposes adding a Bench Note to CALCRIM 202 and 222 from the recent case of *People v Triplett* (2020) 48 Cal.App.5th 655, 662, regarding the instructional duty when the jury requests transcripts: The instructional duty should read instead: If the jury requests hard copy transcripts, the trial judge should deny the request, and should remind the jury of the right to request readback and to advise the court whether there is any testimony they request to review. (See *People v. Triplett* (2020) 48 Cal.App.5th 655, 662 [267 Cal.Rptr.3d 675].)	The committee declines to make the suggested change. The proposed bench note, as currently written, clearly conveys the holding of *People v. Triplett* and provides accurate guidance.
520	John T. Philipsborn, criminal defense lawyer*	In addition to the citation to *People v. Roberts* (1992) 2 Cal.4th 271, on the matter of causation, the Committee should recommend citation to *People v. Bland* (2002) 28 Cal.4th 313, 335-36, and *People v. Stanley* (2006) 39 Cal.4th 913, 946-47.	The committee declines to add these cases. *People v. Roberts* adequately explains causation and the proposed cases – which analyze CALJIC instructions - are not helpful to further explain the concept.
730	Offices of the Los Angeles County Public Defender, by Ricardo D. Garcia	The proposed amendment to CALCRIM 730 fails to define "actual killer" for the jury and invites the same type of error cited by the Court of Appeal in *People v. Garcia* (2020) 46 Cal.App.5th 123. In *Garcia*, the Court of Appeal reversed the defendant's murder conviction holding "the language of instruction No. 730 given to [the] jury was wrong because it allowed the jury to consider [defendant's] special circumstance liability based on a theory contrary to law, and constituted legal error." (*People v. Garcia* (2020) 46 Cal.App.5th 123, 155.) The Court of Appeal stated that the jury should have been instructed that "it could find true the special circumstance under section 190.2(a)(17)(A) and (b) only if the prosecution proved beyond a reasonable doubt that [the defendant] "personally killed" [the victim]. Instead, the jury was instructed only that	The committee disagrees with this recommendation. In *Garcia*, the prosecutor's theory of liability caused the error, not the instruction. Further, any change to the instructional definition of "actual killer" would raise more issues in cases where an act is a

* Certified criminal law specialist; a contributor to the original comments (as mentioned in the introduction to the current volumes) of the original CALCRIM instructions. Former Chair, Co-Chair, and Vice-Chair of the *Amicus Curiae* Committee of California Attorneys for Criminal Justice since 1992, and in that capacity in some of my own cases, and in a number of *amicus curiae* briefs filed with the California Supreme Court and Courts of Appeal, have addressed issues that have a bearing on aspects of substantive criminal law.

Instruction	Commentator	Comment	Response
		the prosecution must prove that the defendant "did an act that caused the death of another person." (*Ibid*.) In *People v. Garcia*, the Court of Appeal identified CALCRIM 730's deficiencies and suggested a remedy: "The wording of the pattern instruction CALCRIM No. 730 and the bench notes that reference the sua sponte duty to instruct with CALCRIM No. 240 "[i]f the facts raise an issue whether the homicidal act caused the death" (Bench Notes. to CALCRIM No. 730 (2019) p. 464) may have contributed to the legal error here. It is unclear what authority the bench notes rely on for this proposition. In any event, bench notes are not authority for legal principles. (See *People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7 [104 Cal. Rptr. 2d 582, 18 P.3d 11] [recognizing that jury instructions and accompanying bench notes are not law].) As we have explained, we do not see a basis for applying section 190.2(b), which extends only to a person who personally kills, to a person who only proximately caused the death. **The Advisory Committee on Criminal Jury Instructions may wish to consider revisions to the language of CALCRIM No. 730 to clarify the concept of an actual killer for cases falling under section 190.2(b) that do not involve an intent to kill, as with section 190.2(a)(17)."** (*People v. Garcia*, *supra*, 46 Cal.App.5th at p.155, fn. 32, emphasis added.) CALCRIM 730 should be revised to instruct the jury that the prosecution must prove beyond a reasonable doubt that the defendant was the actual killer, and define the phrase "actual killer" as someone who "personally killed" rather than proximately caused a death. (*Id.* at p. 155.) The Advisory Committee on Criminal Jury Instructions modification of CALCRIM 730's bench notes to include a citation to *People v. Garcia* is an inadequate remedy. CALCRIM 730 should be amended to include language that instructs the jury "the meaning of actual killer is 'particular and restricted', and its application must be literal." (*Ibid.*, internal citations omitted.)	substantial factor in causing death.

CALCRIM-2020-02 Invitation to Comment
Revised CALCRIM Instructions
All comments are verbatim unless indicated by an asterisk (*).

Instruction	Commentator	Comment	Response
730	Orange County Bar Association, by Scott Garner, President	Agree as modified. The amendment to CALCRIM 730 involves the addition of a bench note related to the definition of "actual killer" based on the case of *People v. Garcia* (2020) 46 Cal.App.5th 123. The bench note is a legally correct statement of law and clarifies the definition of "actual killer." OCBA agrees with the addition of the bench note regarding the meaning of "actual killer." However, OCBA recommends the Committee revise Element 3/4 to comport with *Garcia* to be a correct statement of law.	The committee disagrees with this recommendation, for the reasons stated above.
1140	Orange County Bar Association, by Scott Garner, President	Agree as modified. The amendment to CALCRIM 1140 under Related Issues clarifies that effective January 1, 2014, misdemeanor distribution of harmful matter is not a lesser included offense of Penal Code section 288.2. Corrects inaccurate Pin Cite. Under the version of Penal Code section 288.2 effective January 1, 2014, misdemeanor distribution of harmful matter (Pen. Code, § 313.1(a)) is not a lesser included offense. (*People v. Collom* (2020) 52 Cal.App.5th 35, **45** [265 Cal.Rptr.3d 705].) Under the prior version of Penal Code section 288.2, in effect until December 31, 2013, the following were held to be lesser included offenses: • Attempted Distribution of Harmful Matter to Minor. Pen. Code, §§ 664, 288.2; see, e.g., *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 185 [94 Cal.Rptr.2d 453]. • Misdemeanor Distribution of Harmful Matter. Pen. Code, § 313.1(a); *People v. Jensen* (2003) 114 Cal.App.4th 224, 244 [7 Cal.Rptr.3d 609]. Proper citation: *People v. Collom* (2020) 52 Cal.App.5th 35, **44** [265 Cal.Rptr.3d 705].	The proposed citation for *People v. Collom* originally contained the pin cite of **42** (not 45), which is where the discussion of statutory interpretation begins. The committee has changed this pin cite to extend through page 44.
2520, 2521, 2522	Orange County Bar Association, by Scott Garner, President	Agree as modified. The amendment to CALCRIMs 2520, 2521, 2522 under Related Issues, adds new case law from *People v. Duffy* (2020) 51 Cal.App.5th 257.	The committee agrees that this comment raises a valid point but decided to make a slightly different change than the one suggested. The sentence now states: "A

CALCRIM-2020-02 Invitation to Comment
Revised CALCRIM Instructions
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Instruction	Commentator	Comment	Response
		Proposed modification to Judicial Council proposal: Change the word "different" to "multiple" in order to clarify that sub sections (1)-(3) are alternative ways of violating Penal Code section 25400(a), and can result in only one conviction for possession of the same firearm. ***Multiple Convictions Prohibited*** A single act of carrying a concealed firearm cannot result in convictions under **multiple** subdivisions of Penal Code section 25400(a). (*People v. Duffy* (2020) 51 Cal.App.5th 257, 266 [265 Cal.Rptr.3d 59].)	single act of carrying a concealed firearm cannot result in multiple convictions under different subdivisions of Penal Code section 25400(a)."
2624	Orange County Bar Association, by Scott Garner, President	Disagree. The change to this CALCRIM is to remove the language "rather than just an expression of jest or frustration" from elements 3 and 4. There is no explanation for this change or any new case that OCBA is aware of that would justify the deletion of this language. The language "jest or frustration" comes from *People v. Lowery* (2011) 52 Cal.4th 419. In *Lowery*, the California Supreme Court analyzed whether Section 140 ran afoul of the First Amendment. In holding that it is constitutional, the California Supreme Court determined that it would construe Section 140(a) "as applying only to those threatening statements that a reasonable listener would understand, in light of the context and surrounding circumstances, to constitute a true threat, namely a serious expression of an intent to commit an act of unlawful violence, rather than an expression of jest or frustration." (*Id.* at p. 427, omitting internal citation and quotations.) The *Lowery* Court noted that the former category (a true threat) would not carry First Amendment protection, while an expression of jest or frustration necessarily would. There is no reason to remove the *Lowery* "jest or frustration" language. This language clarifies the elements and provides a correct statement of the law. Notably, CALCRIM 2624 still cites to *Lowery* for the reasonable listener standard in the use notes, and the "jest or frustration" information is a relevant addition to the CALCRIM. The OCBA disagrees that CALCRIM 2624 should be amended.	Although the proposed deleted language comes directly from *People v. Lowery*, this phrase merely sets forth examples. The committee deleted it because – by providing examples of what would *not* constitute a true threat – it could potentially mislead jurors into concluding that jest or frustration were the *only* ways in which a threat could not satisfy the reasonable listener standard.
3220	Orange County Bar Association,	Disagree. CPC 12022.6 was amended effective January 1, 2008. The statute contained a sunset clause requiring the statute to be repealed by January 1, 2018, unless the Legislature	The committee recommends revocation of this instruction because it is

Instruction	Commentator	Comment	Response
	by Scott Garner, President	requested an extension. (*People v. Medeiros* (2020) 46 Cal.App.5th 1142, 1147.) The Legislature did not request an extension, and as such CPC 12022.6 remains repealed and no longer in effect. However, CPC 12022.6 is still valid on cases where the offense pre-dates January 1, 2018. Therefore, the OCBA disagrees that CALCRIM 3220 should be revoked.	based on an enhancement statute that has been repealed since 2018. For any case in which the enhancement still applies, courts and parties would be able to access this instruction from earlier editions.
520, 591, 763, 768, 1151, 1193, 1202, 1820, 1927, 2044, and 2651	Orange County Bar Association, by Scott Garner, President	Agree.	No response necessary.
3451	John T. Philipsborn, criminal defense lawyer*	While this instruction is not presently in your collection of proposed changes and amendments, I am suggesting that the Advisory Committee should suggest a change to element (2) of the competence definition that reads as follows as present: "Assist, in a rational manner, (his/her) attorney in presenting (his/her) defense, the Committee should at the very least make reference to the United States Supreme Court's seminal decisions on the subject of competence to stand trial." My suggestion is that the Committee review *Indiana v. Edwards* (2008) 554 U.S. 164, 170-71, referencing the standard found in *Drope v. Missouri* (1975) 470 U.S. 162, 171, which is that the accused can "…consult with counsel, and […] assist in preparing (his/her) defense…." I am respectfully suggesting that this change in the wording of Instruction 3451 because California trial judges who preside over competence-related jury trials are failing to provide an instruction on the definition of competence that squares with that set forth by the United States Supreme Court in two separate opinions. If the Committee is <u>not</u> inclined to suggest this change in the actual instruction, then at the very least, under the section "Related Issues" that is at the foot of the instruction (which contains no reference to the fundamental definition of competence to stand trial as set forth by the United States Supreme Court), the Committee should set forth a notation that: The United States Supreme Court has succinctly stated that two cases set	This comment is outside the scope of the invitation. The committee will consider the suggestion at its next meeting.

CALCRIM-2020-02 Invitation to Comment

Revised CALCRIM Instructions

All comments are verbatim unless indicated by an asterisk (*).

Instruction	Commentator	Comment	Response
		forth the Constitution's 'mental competence' standard, *Dusky v. United States* (1960) 362 U.S. 402, and *Drope v. Missouri* (1975) 420 U.S. 162. See *Indiana v. Edwards* (2008) 554 U.S. 164, 170-71. Inclusion of this note would avoid incorrect reference to Penal Code §§ 1367, et seq. and interpreting California decisions as the exclusive sources of the essential definitions of competence to stand trial.	

CALCRIM Proposed Changes:
Table of Contents

202. Note-Taking and Reading Back of Testimony

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

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

Please do not remove your notes from the jury room.

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

New January 2006; Revised June 2007, April 2008, August 2009, February 2012, March 2019, September 2020, March 2021

BENCH NOTES

Instructional Duty

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

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

If the jury requests transcripts, the court should remind the jury of the right to request readback and to advise the court whether there is any testimony they want read. (See *People v. Triplett* (2020) 48 Cal.App.5th 655, 662 [267 Cal.Rptr.3d 675].)

AUTHORITY

- Jurors' Use of Notes. ▸ California Rules of Court, Rule 2.1031.

- Juror Deliberations Must Be Private and Confidential. ▸ *People v. Oliver* (1987) 196 Cal.App.3d 423, 429 [241 Cal.Rptr. 804].

SECONDARY SOURCES

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

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

222. Evidence

"Evidence" is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence.

Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they helped you to understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asked a question that suggested it was true.

During the trial, the attorneys may have objected to questions or moved to strike answers given by the witnesses. I ruled on the objections according to the law. If I sustained an objection, you must ignore the question. If the witness was not permitted to answer, do not guess what the answer might have been or why I ruled as I did. If I ordered testimony stricken from the record you must disregard it and must not consider that testimony for any purpose.

You must disregard anything you saw or heard when the court was not in session, even if it was done or said by one of the parties or witnesses.

[During the trial, you were told that the People and the defense agreed, or stipulated, to certain facts. This means that they both accept those facts as true. Because there is no dispute about those facts you must also accept them as true.]

The court (reporter has made a record of/has recorded) everything that was said during the trial. If you decide that it is necessary, you may ask that the (court reporter's record be read to/court's recording be played for) you. You must accept the (court reporter's record/court's recording) as accurate.

New January 2006; Revised June 2007, August 2009, February 2012, March 2019, March 2021

BENCH NOTES

Instructional Duty

There is no sua sponte duty to instruct on these evidentiary topics; however, instruction on these topics has been approved. (*People v. Barajas* (1983) 145

Cal.App.3d 804, 809 [193 Cal.Rptr. 750]; *People v. Samayoa* (1997) 15 Cal.4th 795, 843–844 [64 Cal.Rptr.2d 400, 938 P.2d 2]; *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [47 Cal.Rptr.2d 516, 906 P.2d 478].)

If the parties stipulated to one or more facts, give the bracketed paragraph that begins with "During the trial, you were told."

If the jury requests transcripts, the court should remind the jury of the right to request readback and to advise the court whether there is any testimony they want read. (See *People v. Triplett* (2020) 48 Cal.App.5th 655, 662 [267 Cal.Rptr.3d 675].)

AUTHORITY

- Evidence Defined ▸ Evid. Code, § 140.
- Arguments Not Evidence ▸ *People v. Barajas* (1983) 145 Cal.App.3d 804, 809 [193 Cal.Rptr. 750].
- Questions Not Evidence ▸ *People v. Samayoa* (1997) 15 Cal.4th 795, 843–844 [64 Cal.Rptr.2d 400].
- Stipulations ▸ *Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141–142 [199 P.2d 952].
- Striking Testimony ▸ *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [47 Cal.Rptr.2d 516, 906 P.2d 478].

RELATED ISSUES

Non-Testifying Courtroom Conduct

There is authority for an instruction informing the jury to disregard defendant's in-court, but non-testifying behavior. (*People v. Garcia* (1984) 160 Cal.App.3d 82, 90 [206 Cal.Rptr. 468] [defendant was disruptive in court; court instructed jurors they should not consider this behavior in deciding guilt or innocence].) However, if the defendant has put his or her character in issue or another basis for relevance exists, such an instruction should not be given. (*People v. Garcia, supra,* 160 Cal.App.3d at p. 91, fn. 7; *People v. Foster* (1988) 201 Cal.App.3d 20, 25 [246 Cal.Rptr. 855].)

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012), Criminal Trial, §§ 715, 726.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, §§ 83.01[1], 83.02[2] (Matthew Bender).

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

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

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

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

[OR]

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

[AND]

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

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

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

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

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

The defendant had *implied malice* if:

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

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

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

AND

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

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

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

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

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

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

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

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

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

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

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

New January 2006; Revised August 2009, October 2010, February 2013, August 2013, September 2017, March 2019, September 2019, March 2021

BENCH NOTES

Instructional Duty

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

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

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

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

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

If the defendant is also charged with first degree felony murder, instruct on that crime and give CALCRIM No. 548, *Murder: Alternative Theories*.

AUTHORITY

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

LESSER INCLUDED OFFENSES

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

Gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5(a)) and vehicular manslaughter (Pen. Code, § 192(c)) are ~~is~~ not ~~a~~ lesser included offenses of murder. (*People v. Sanchez* (2001) 24 Cal.4th 983, 988–992 [103 Cal.Rptr.2d 698, 16 P.3d 118]; *People v. Bettasso* (2020) 49 Cal.App.5th 1050, 1059 [263 Cal.Rptr.3d 563].) Similarly, child abuse homicide (Pen. Code, § 273ab) is not a necessarily included offense of murder. (*People v. Malfavon* (2002) 102 Cal.App.4th 727, 744 [125 Cal.Rptr.2d 618].)

RELATED ISSUES

Causation—Foreseeability

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

Second Degree Murder of a Fetus

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

SECONDARY SOURCES

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

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

591 Vehicular Manslaughter While Intoxicated—Ordinary Negligence (Pen. Code, § 191.5(b))

<If vehicular manslaughter while intoxicated—ordinary negligence is a charged offense, give alternative A; if this instruction is being given as a lesser included offense, give alternative B.>

<Introductory Sentence: Alternative A—Charged Offense>
[The defendant is charged [in Count __] with vehicular manslaughter with ordinary negligence while intoxicated [in violation of Penal Code section 191.5(b)].]

<Introductory Sentence: Alternative B—Lesser Included Offense>
[Vehicular manslaughter with ordinary negligence while intoxicated is a lesser crime than the charged crime of gross vehicular manslaughter while intoxicated.]

To prove that the defendant is guilty of vehicular manslaughter with ordinary negligence while intoxicated, the People must prove that:

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

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

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

negligence;

AND

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

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

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

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

Instruction[s] __ tell[s] you what the People must prove in order to prove that the defendant (drove under the influence of (an alcoholic beverage/ [or] a drug) [or a combined influence of an alcoholic beverage and a drug]/drove while having a blood alcohol level of 0.08 or higher/ drove under the influence of (an alcoholic beverage/ [or] a drug) [or a combined influence of an alcoholic beverage and a drug] when under the age of 21/drove while having a blood alcohol level of 0.05 or higher when under the age of 21/operated a vessel under the influence of (an alcoholic beverage/ [or] a drug [or a combined influence of an alcoholic beverage and a drug])/operated a vessel while having a blood alcohol level of 0.08 or higher).

[The difference between this offense and the charged offense of gross vehicular manslaughter while intoxicated is the degree of negligence required. I have already defined *gross negligence* for you.]

***Ordinary negligence*[, on the other hand,] is the failure to use reasonable care to prevent reasonably foreseeable harm to oneself or someone else. A person is negligent if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).**

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

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

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

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

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

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

New January 2006; Revised June 2007, March 2021

BENCH NOTES

Instructional Duty

Important note: The legislature repealed Penal Code section 192(c)(3) in the form that was previously the basis for this instruction effective January 1, 2007.

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

The court has a **sua sponte** duty to specify the predicate misdemeanor(s) or infraction(s) alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].) In element 1, instruct on the particular "under the influence" offense charged. In element 2, instruct on either theory of vehicular manslaughter (misdemeanor/infraction or lawful act committed with negligence) as appropriate. The court **must** also give the appropriate instruction on the elements of the driving under the influence offense and the predicate misdemeanor or infraction.

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

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

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

AUTHORITY

- Vehicular Manslaughter While Intoxicated. ▸ Pen. Code, § 191.5(b).
- Vehicular Manslaughter During Operation of a Vessel While Intoxicated. ▸ Pen. Code, § 192.5(c).

- Unlawful Act Dangerous Under the Circumstances of Its Commission. ▸ *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374].
- Specifying Predicate Unlawful Act. ▸ *People v. Milham* (1984) 159 Cal.App.3d 487, 506 [82 Cal.Rptr. 688].
- Elements of the Predicate Unlawful Act. ▸ *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Unanimity Instruction. ▸ *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].
- Ordinary Negligence. ▸ Pen. Code, § 7, subd. 2; Rest.2d Torts, § 282.
- Causation. ▸ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal. Rptr. 863].
- Imminent Peril/Sudden Emergency Doctrine. ▸ *People v. Boulware* (1940) 41 Cal.App.2d 268, 269 [106 P.2d 436].

LESSER INCLUDED OFFENSES

- Vehicular Manslaughter With Ordinary Negligence Without Intoxication. ▸ Pen. Code, § 192(c)(2); see *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1466–1467 [26 Cal.Rptr.2d 610].
- Injury to ~~Someone~~ Same Victim While Driving Under the Influence of Alcohol or Drugs. ▸ Veh. Code, § 23153; *People v. Machuca* (2020) 49 Cal.App.5th 393, 400–401 [263 Cal.Rptr.3d 52]; *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1466–1467 [26 Cal.Rptr.2d 610].

RELATED ISSUES

See the Related Issues section to CALCRIM No. 590, *Gross Vehicular Manslaughter While Intoxicated*.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 263–271.

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

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

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

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

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

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

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

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

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

AND

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

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

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

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

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

If the prosecution's theory is that the defendant committed or attempted to commit the underlying felony, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph

that begins with "To decide whether," select "the defendant" in the first sentence. Give all appropriate instructions on any underlying felonies.

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

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

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

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

If the alleged homicide occurred between 1983 and 1987 (the window of time between *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 135 [197 Cal.Rptr. 79, 672 P.2d 862] and *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [240 Cal.Rptr. 585, 742 P.2d 1306]), then the prosecution must also prove intent to kill on the part of the actual killer. (*People v. Bolden* (2002) 29 Cal.4th 515, 560 [127 Cal.Rptr.2d 802, 58 P.3d 931]; *People v. Mendoza* (2000) 24 Cal.4th 130, 182 [99

Cal.Rptr.2d 485, 6 P.3d 150].) The court should then modify this instruction to specify intent to kill as an element.

AUTHORITY

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

RELATED ISSUES

Applies to Felony Murder and Provocative Act Murder

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

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

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

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

SECONDARY SOURCES

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

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

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

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

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

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

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

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

The factors are:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

AUTHORITY

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

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

COMMENTARY

Aggravating and Mitigating Factors—Need Not Specify

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

Although the court is not required to specify which factors are the aggravating factors, it is not error for the court to do so. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1269 [74 Cal.Rptr.2d 212, 954 P.2d 475].) In *People v. Musselwhite, supra,* 17 Cal.4th at p. 1269, decided prior to *Hillhouse*, the Supreme Court held

that the trial court properly instructed the jury that "*only* factors (a), (b) and (c) of section 190.3 could be considered in aggravation . . . " (italics in original).

SECONDARY SOURCES

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

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

When you go to the jury room, the first thing you should do is (choose a foreperson/decide whether to retain the same foreperson). The foreperson should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard. Please treat one another courteously.

It is your duty to talk with one another and to deliberate in the jury room in order to agree on a penalty if you can. Each of you must decide the penalty for yourself, but only after you have discussed the evidence with the other jurors. Do not hesitate to change your mind if you become convinced that you are wrong. But do not change your mind just because other jurors disagree with you.

Keep an open mind and openly exchange your thoughts and ideas about this case. Stating your opinions too strongly at the beginning or immediately announcing how you plan to vote may interfere with an open discussion.

Do not talk about the case or about any of the people or any subject involved in it with anyone, including, but not limited to, your spouse or other family, or friends, spiritual leaders or advisors, or therapists. You must discuss the case only in the jury room and only when all jurors are present. Do not discuss your deliberations with anyone. Do not communicate using: _____<*insert currently popular social media*> **during your deliberations**.

It is very important that you not use the Internet (, a dictionary/[, or _____<*insert other relevant source of information*>]) in any way in connection with this case during your deliberations or at any time until your jury service is completed.

[During the trial, several items were received into evidence as exhibits. You may examine whatever exhibits you think will help you in your deliberations. (These exhibits will be sent into the jury room with you when you begin to deliberate./If you wish to see any exhibits, please request them in writing.)]

If you need to communicate with me while you are deliberating, send a note through the bailiff, signed by the foreperson or by one or more members of the jury. To have a complete record of this trial, it is important that you not communicate with me except by a written note. If you have questions, I will talk with the attorneys before I answer, so it may take some time. You should

continue your deliberations while you wait for my answer. I will answer any questions in writing or orally here in open court.

Do not reveal to me or anyone else any aspect of your deliberations or how the vote stands on the question of penalty unless I ask you to do so.

Your verdict of either death or life without possibility of parole must be unanimous. This means that, to return a verdict, all of you must agree to it. [Do not reach a decision by the flip of a coin or by any similar act.]

<During a retrial, give the following paragraph on request to inform jury about prior proceedings without introducing extraneous matters>

[Sometimes issues are tried in separate trials. The only issue in this trial is the penalty.]

It is not my role to tell you what your verdict should be. [Do not take anything I said or did during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be.]

You will be given [a] verdict form[s]. As soon as all jurors have agreed on a verdict, the foreperson must date and sign the [appropriate] verdict form[s] and notify the bailiff.

New March 2021

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct that the jury's verdict must be unanimous. Although there is no sua sponte duty to instruct on the other topics relating to deliberations, there is authority approving such instructions. (See *People v. Gainer* (1977) 19 Cal.3d 835, 856 [139 Cal.Rptr. 861, 566 P.2d 997]; *People v. Selby* (1926) 198 Cal. 426, 439 [245 P. 426]; *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].)

If the court automatically sends exhibits into the jury room, give the bracketed sentence that begins with "These exhibits will be sent into the jury room." If not, give the bracketed phrase that begins with "You may examine whatever exhibits you think."

Give the bracketed sentence that begins with "Do not take anything I said or did during the trial" unless the court will be commenting on the evidence. (See Pen. Code, §§ 1127, 1093(f).)

Give the bracketed paragraph that begins with "Sometimes issues are tried in separate trials" if requested. (*People v. Hicks* (2017) 4 Cal.5th 203, 205 [226 Cal.Rptr.3d 565, 407 P.3d 409].)

AUTHORITY

- Exhibits. ▸ Pen. Code, § 1137.
- Questions. ▸ Pen. Code, § 1138.
- Verdict Forms. ▸ Pen. Code, § 1140.
- Unanimous Verdict. ▸ Cal. Const., art. I, § 16; Pen. Code, § 190.4(b); *People v. Howard* (1930) 211 Cal. 322, 325 [295 P. 333]; *People v. Kelso* (1945) 25 Cal.2d 848, 853–854 [155 P.2d 819]; *People v. Collins* (1976) 17 Cal.3d 687, 692 [131 Cal.Rptr. 782, 552 P.2d 742]; *People v. Anderson* (2018) 5 Cal.5th 372, 425 [235 Cal.Rptr.3d 1].
- Duty to Deliberate. ▸ *People v. Gainer* (1977) 19 Cal.3d 835, 856 [139 Cal.Rptr. 861, 566 P.2d 997].
- Judge's Conduct as Indication of Verdict. ▸ *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].
- Keep an Open Mind. ▸ *People v. Selby* (1926) 198 Cal. 426, 439 [245 P. 426].
- Hung Jury. ▸ *People v. Gainer* (1977) 19 Cal.3d 835, 850–852 [139 Cal.Rptr. 861, 566 P.2d 997]; *People v. Moore* (2002) 96 Cal.App.4th 1105, 1118-1121 [117 Cal.Rptr.2d 715].

RELATED ISSUES

Admonition Not to Discuss Case with Anyone

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

> It is troubling that during deliberations not one but two jurors had conversations with their pastors that ultimately addressed the issue being resolved at the penalty phase in this case. Because jurors instructed not to speak to anyone about the case except a fellow juror

> during deliberations . . . . may assume such an instruction does not apply to confidential relationships, we recommend the jury be expressly instructed that they may not speak to anyone about the case, except a fellow juror during deliberations, and that this includes, but is not limited to, spouses, spiritual leaders or advisers, or therapists. Moreover, the jury should also be instructed that if anyone, other than a fellow juror during deliberations, tells a juror his or her view of the evidence in the case, the juror should report that conversation immediately to the court.

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

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

SECONDARY SOURCES

4 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial §§ 726-727.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02, 85.03[1], 85.05[1] (Matthew Bender).

1140 Distributing, Sending, or Exhibiting Harmful Material (Pen. Code, § 288.2(a)(1) & (2))

The defendant is charged [in Count __] with (exhibiting[,]/ sending[,]/ distributing[,]/ [or] offering to exhibit or distribute) harmful material to a minor [or to a person the defendant believed was a minor] [in violation of Penal Code section 288.2].

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

<Give alternative paragraph 1A for violations of Penal Code section 288.2(a)(1)>

[1. The defendant (exhibited[,]/ sent[,]/ caused to be sent[,]/ distributed[,]/ [or] offered to exhibit or distribute) harmful material depicting a minor or minors engaging in sexual conduct to another person by any means;]

<Give alternative paragraph 1B for violations of Penal Code section 288.2(a)(2)>

[1. The defendant (exhibited[,]/ sent[,]/ caused to be sent[,]/ distributed[,]/ [or] offered to exhibit or distribute) harmful material to another person by any means;]

2. **When the defendant acted, (he/she) knew the character of the material;**

3. **When the defendant acted, (he/she) knew, should have known, or believed that the other person was a minor;**

4. **When the defendant acted, (he/she) intended to arouse, appeal to, or gratify the lust, passions, or sexual desires of (himself/herself) or of the other person;**

AND

5. **When the defendant acted, (he/she) intended to engage in sexual intercourse, sodomy, or oral copulation with the other person or to have either person touch an intimate body part of the other person.**

You must decide whether the material at issue in this case meet[s] the definition of harmful material. Material is *harmful* if, when considered as a whole:

1. **It shows or describes sexual conduct in an obviously offensive way;**

2. **A reasonable person would conclude that it lacks serious literary, artistic, political, or scientific value for minors;**

AND

3. **An average adult person, applying contemporary statewide standards, would conclude it appeals to prurient interest.**

For the purpose of this instruction, an *intimate body part* includes the sexual organ, anus, groin, or buttocks of any person, or the breasts of a female.

A *prurient interest* is a shameful or morbid interest in nudity, sex, or excretion.

***Material,* as used in this instruction, means any (book, magazine, newspaper, video recording, or other printed or written material[;]/ [or] any picture, drawing, photograph, motion picture, or other pictorial representation[;]/ [or] any statue or other figure[;]/ [or] any recording, transcription, or mechanical, chemical, or electrical reproduction[;]/ [or] any other articles, equipment, machines, or materials). [*Material* includes live or recorded telephone messages when transmitted or distributed as part of a commercial transaction.]**

***Applying contemporary statewide standards* means using present-day standards and determining the effect of the material on all those whom it is likely to reach within the state, in other words, its impact on the average person in the statewide community. The *average adult person* is a hypothetical person who represents the entire community, including both men and women; religious and nonreligious people; and adults of varying ages, educational and economic levels, races, ethnicities, and points of view. The *contemporary statewide standard* means what is acceptable to the statewide community as a whole, not what some person or persons may believe the community ought to accept. The test you must apply is not what you find offensive based on your own personal, social, or moral views. Instead, you**

must make an objective determination of what would offend the statewide community as a whole.

[You may consider evidence of local community standards in deciding what the contemporary statewide standard is. However, you may not use the standard of a local community, by itself, to establish the contemporary statewide standard.]

The material is not harmful unless a reasonable person would conclude that, taken as a whole, it lacks serious literary, artistic, political, or scientific value for minors. When deciding whether the material is harmful, do not weigh its value against its prurient appeal.

[The depiction of nudity, by itself, does not make material harmful. In order for material containing nudity to be harmful, it must depict sexual activity and it must meet the requirements for harmful material listed above.]

[The depiction of sexual activity, by itself, does not make material harmful. In order for material depicting sexual activity to be harmful, it must meet the requirements for harmful material listed above.]

The People must prove that the defendant knew the character of the material but do not need to prove that the defendant knew whether the material met the definition of harmful material.

A *minor* is anyone 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.]

[If it appears from the nature of the material or the circumstances of its distribution or showing that it is designed for clearly defined deviant sexual groups, the appeal of the material must be judged based on its intended audience.]

[In deciding the material's nature and whether it lacks serious literary, artistic, political, or scientific value, consider whether the circumstances of its (production[,]/ presentation[,]/ sale[,]/ dissemination[,]/ distribution[,]/ publicity) indicate that the material was being commercially exploited because of its prurient appeal. You must determine the weight, if any, to give this evidence.]

[In deciding whether, applying contemporary statewide standards, the material appeals to a prurient interest, you may consider whether similar

material is openly shown in the community. You must determine the weight, if any, to give this evidence.]

[Harmful material may be sent or distributed by live or recorded telephone messages.]

[To *distribute* means to transfer possession, whether or not the transfer is made for money or anything else of value.]

<Defense: Parent providing sex education>
[A parent or guardian is not guilty of this offense if he or she acted to promote legitimate sex education. The People must prove beyond a reasonable doubt that the defendant was not providing legitimate sex education. If the People have not met this burden, you must find the defendant not guilty of this crime.]

<Defense: Legitimate scientific or educational purpose>
[The defendant is not guilty of this crime if (he/she) was engaging in legitimate scientific or educational activities. The People have the burden of proving beyond a reasonable doubt that the defendant was not acting for a legitimate scientific or educational purpose. If the People have not met this burden, you must find the defendant not guilty of this crime.]

New January 2006; Revised February 2015, March 2021

BENCH NOTES

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

Give the bracketed sentence 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].)

Penal Code section 288.2(a) was amended effective January 1, 2014.
Give any of the other bracketed paragraphs on request.

Defenses—Instructional Duty
If there is sufficient evidence that the defendant was "acting in aid of legitimate sex education," the court has a **sua sponte** duty to instruct on that defense. (See Pen. Code, § 288.2(f).) It is unclear who bears the burden of proof and what standard of proof applies to this defense. In the absence of statutory authority or

case law stating that the defendant must prove the defense by a preponderance of the evidence, the committee has drafted the instruction to provide that the prosecution must prove beyond a reasonable doubt that the defense does not apply. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].)

If there is sufficient evidence that the defendant was engaging in legitimate scientific or educational activities, the court has a **sua sponte** duty to instruct on that defense. (See Pen. Code, § 288.2(g).) It is unclear who bears the burden of proof and what standard of proof applies to this defense. In the absence of statutory authority or case law stating that the defendant must prove the defense by a preponderance of the evidence, the committee has drafted the instruction to provide that the prosecution must prove beyond a reasonable doubt that the defense does not apply. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–479 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; see also *People v. Woodward* (2004) 116 Cal.App.4th 821, 840–841 [10 Cal.Rptr.3d 779] ["legitimate" does not require definition and the trial court erred in giving amplifying instruction based on *People v. Marler* (1962) 199 Cal.App.2d Supp. 889 [18 Cal.Rptr. 923]].)

AUTHORITY

- Elements. ▸ Pen. Code, § 288.2(a)(1), (2)).
- Harmful Matter Defined. ▸ Pen. Code, § 313.
- Know Character of Matter. ▸ Pen. Code, § 313(e); see *People v. Kuhns* (1976) 61 Cal.App.3d 735, 756–758 [132 Cal.Rptr. 725] [no error in instructing that it was unnecessary to establish that the accused had knowledge that material was legally obscene].
- Means of Distribution. ▸ Pen. Code, § 288.2(a)(1), (2)).
- Contemporary Community Standards. ▸ See *Roth v. United States* (1957) 354 U.S. 476, 489–490 [77 S.Ct. 1304, 1 L.Ed.2d 1498] [quoting trial court instruction].
- Prurient Interest Defined. ▸ *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, 77 [127 Cal.Rptr. 317, 545 P.2d 229] [quoting former Pen. Code, § 311].
- Taken or Considered as a Whole. ▸ *People v. Goulet* (1971) 21 Cal.App.3d Supp. 1, 3 [98 Cal.Rptr. 782]; *Kois v. Wisconsin* (1972) 408 U.S. 229, 231 [92 S.Ct 2245, 33 L.Ed.2d 312].
- Matter Designed for Deviant Sexual Group. ▸ Pen. Code, § 313(a)(1); see *People v. Young* (1977) 77 Cal.App.3d Supp. 10, 14–15 [143 Cal.Rptr. 604].

- Commercial Exploitation Is Probative of Matter's Nature. ▸ Pen. Code, § 313(a)(2); *People v. Kuhns* (1976) 61 Cal.App.3d 735, 748–753 [132 Cal.Rptr. 725].
- Similar Matter Shown in Community. ▸ *In re Harris* (1961) 56 Cal.2d 879, 880 [366 P.2d 305]; *People v. Heller* (1979) 96 Cal.App.3d Supp. 1, 7 [157 Cal.Rptr. 830].
- Obscenity Contrasted With Sex. ▸ *Roth v. United States* (1957) 354 U.S. 476, 487 [77 S.Ct. 1304, 1 L.Ed.2d 1498].
- Obscenity Contrasted With Nudity. ▸ *People v. Noroff* (1967) 67 Cal.2d 791, 795–796 [63 Cal.Rptr. 575, 433 P.2d 479]; *In re Panchot* (1968) 70 Cal.2d 105, 108–109 [73 Cal.Rptr. 689, 448 P.2d 385].
- Defense of Sex Education. ▸ Pen. Code, § 288.2(f).
- Defense of Legitimate Scientific or Educational Activity. ▸ Pen. Code, § 288.2(g).
- Prior Version of This Instruction Was Correct. ▸ *People v. Richardson* (2007) 151 Cal.App.4th 790, 803 [60 Cal.Rptr.3d 458].

LESSER INCLUDED OFFENSES

Under the version of Penal Code section 288.2 effective January 1, 2014, misdemeanor distribution of harmful matter (Pen. Code, § 313.1(a)) is not a lesser included offense. (*People v. Collom* (2020) 52 Cal.App.5th 35, 42–44 [265 Cal.Rptr.3d 705].)

Under the prior version of Penal Code section 288.2, in effect until December 31, 2013, the following were held to be lesser included offenses:

- Attempted Distribution of Harmful Matter to Minor. ▸ Pen. Code, §§ 664, 288.2; see, e.g., *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 185 [94 Cal.Rptr.2d 453].
- Misdemeanor Distribution of Harmful Matter. ▸ Pen. Code, § 313.1(a); *People v. Jensen* (2003) 114 Cal.App.4th 224, 244 [7 Cal.Rptr.3d 609].

RELATED ISSUES

Telephone, Cable, or ISPs

A telephone corporation, a cable television company or its affiliates, an Internet service provider, or commercial online service provider does not violate section 288.2 by

carrying, broadcasting, or transmitting harmful matter while providing its services. (Pen. Code, § 288.2(e).)

Expert Testimony Not Required

Neither the prosecution nor the defense is required to introduce expert witness testimony regarding the harmful nature of the matter. (Pen. Code, § 312.1 [abrogating *In re Giannini* (1968) 69 Cal.2d 563, 574 [72 Cal.Rptr. 655, 446 P.2d 535]].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 125.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.21[1][d][iii], [2][c], Ch. 144, *Crimes Against Order*, § 144.10[2] (Matthew Bender).

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

1151 Pandering (Pen. Code, § 266i)

The defendant is charged [in Count _____] with pandering [in violation of Penal Code section 266i].

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

<Alternative 1A—persuaded/procured>

[1. The defendant successfully (persuaded/procured) _____ <*insert name*> to become a prostitute(;/.)]

< Alternative 1B—promises/threats/violence used to cause person to become prostitute>

[1. The defendant used (promises[,]/ threats[,]/ violence[,]/ [or] any device or scheme) to (cause/persuade/encourage/induce) _____ <*insert name*> to become a prostitute[, although the defendant's efforts need not have been successful](;/.)]

<Alternative 1C—arranged/procured a position>

[1. The defendant (arranged/procured a position) for _____ <*insert name*> to be a prostitute in either a house of prostitution or any other place where prostitution is encouraged or allowed(;/.)]

<Alternative 1D—promises/threats/violence used to cause person to remain>

[1. The defendant used (promises[,]/ threats[,]/ violence[,]/ [or] any device or scheme) to (cause/persuade/encourage/induce) _____ <*insert name*> to remain as a prostitute in a house of prostitution or any other place where prostitution is encouraged or allowed(;/.)]

<Alternative 1E—used fraud>

[1. The defendant used fraud, trickery, or duress [or abused a position of confidence or authority] to (persuade/procure) _____ <*insert name*> to (be a prostitute/enter any place where prostitution is encouraged or allowed/enter or leave California for the purpose of prostitution)(;/.)]

<Alternative 1F—received money>

[1. The defendant (received/gave/agreed to receive/agreed to give) money or something of value in exchange for (persuading/attempting to persuade/procuring/attempting to procure) _____ *<insert name>* **to (be a prostitute/enter or leave California for the purpose of prostitution)(;/.)]**

AND

2. The defendant intended to influence _____ *<insert name>* **to be a prostitute(;/.)**

<Give element 3 when defendant charged with pandering a minor.>
[AND

3. _____ *<insert name>* **was (16 years old or older/under the age of 16) at the time the defendant acted.]**

[It does not matter whether _____ *<insert name>* **was (a prostitute already/ [or] an undercover police officer).]**

A *prostitute* is a person who engages in sexual intercourse or any lewd act with another person in exchange for money [or other compensation]. [Pandering requires that an intended act of prostitution be with someone other than the defendant.] A *lewd act* means physical contact of the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification.

[*Duress* means a direct or implied threat of force, violence, danger, hardship, or retribution that would cause a reasonable person to do [or submit to] something that he or she would not do [or submit to] otherwise. When deciding whether the act was accomplished by duress, consider all the circumstances, including the person's age and (her/his) relationship to the defendant.]

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

New January 2006; Revised April 2011, February 2012, August 2012, February 2015, April 2020, March 2021

BENCH NOTES

Instructional Duty

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

In element 1, give the appropriate alternative A-F depending on the evidence in the case. (See *People v. Montgomery* (1941) 47 Cal.App.2d 1, 12, 24, 27–28 [117 P.2d 437] [statutory alternatives are not mutually exclusive], disapproved on other grounds in *People v. Dillon* (19830 34 Cal.3d 441, 454 fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697] and *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301 fn. 11 [124 Cal.Rtpr. 204, 540 P.2d 44].)

The committee included "persuade" and "arrange" as options in element one because the statutory language, "procure," may be difficult for jurors to understand.

Give bracketed element 3 if it is alleged that the person procured, or otherwise caused to act, by the defendant was a minor "over" or "under" the age of 16 years. (Pen. Code, § 266i(b).)

Give the bracketed paragraph defining duress on request if there is sufficient evidence that duress was used to procure a person for prostitution. (Pen. Code, § 266i(a)(5); see *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071] [definition of "duress"].)

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].)

There is a split of authority on whether pandering requires that services be procured for a person other than the defendant. (*People v. Dixon* (2011) 191 Cal.App.4th 1154, 1159-1160 [119 Cal.Rptr.3d 901] [third person required]; *People v. Jacobo* (2019) 37 Cal.App.5th 32, 47 [249 Cal.Rptr.3d 236] [no third person required].) If the court concludes that Penal Code section 266i(a)(2) requires a third person, give the bracketed sentence that begins with "Pandering requires."

Defenses—Instructional Duty

If necessary for the jury's understanding of the case, the court must instruct **sua sponte** on a defense theory in evidence, for example, that nude modeling does not constitute an act of prostitution and that an act of procuring a person solely for the purpose of nude modeling does not violate either the pimping or pandering statute. (*People v. Hill* (1980) 103 Cal.App.3d 525, 536–537 [163 Cal.Rptr. 99].)

AUTHORITY

- Elements. ▸ Pen. Code, § 266i.
- Prostitution Defined. ▸ Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535 [163 Cal.Rptr. 99]; *People v. Romo* (1962) 200 Cal.App.2d 83, 90–91 [19 Cal.Rptr. 179]; *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433] [lewd act requires touching between prostitute and customer].
- Procurement Defined. ▸ *People v. Montgomery* (1941) 47 Cal.App.2d 1, 12 [117 P.2d 437], disapproved on other grounds in *People v. Dillon* (1983) 34 Cal.3d 441, 454 fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697] and *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301 fn. 11 [124 Cal.Rtpr. 204, 540 P.2d 44].
- Proof of Actual Prostitution Not Required. ▸ *People v. Osuna* (1967) 251 Cal.App.2d 528, 531–532 [59 Cal.Rptr. 559].
- Duress Defined. ▸ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]; *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416].
- Good Faith Belief That Minor Is 18 No Defense to Pimping and Pandering. ▸ *People v. Branch* (2010) 184 Cal.App.4th 516, 521-522 [109 Cal.Rptr.3d 412].
- Specific Intent Crime. ▸ *People v. Zambia* (2011) 51 Cal.4th 965, 980 [127 Cal.Rptr.3d 662, 254 P.3d 965].
- Victim May [Appear to] Be a Prostitute Already. ▸ *People v. Zambia* (2011) 51 Cal.4th 965, 981 [127 Cal.Rptr.3d 662, 254 P.3d 965].
- Encouraging Person to Become Prostitute Need Not Be Successful. ▸ *People v. Zambia* (2011) 51 Cal.4th 965, 980 [127 Cal.Rptr.3d 662, 254 P.3d 965].
- This Instruction Upheld. ▸ *People v. Campbell* (2020) 51 Cal.App.5th 463, 495–496 [265 Cal.Rptr.3d 136]

LESSER INCLUDED OFFENSES

- Attempted Pandering. ▸ Pen. Code, §§ 664, 266i; *People v. Charles* (1963) 218 Cal.App.2d 812, 819 [32 Cal.Rptr. 653]; *People v. Benenato* (1946) 77 Cal.App.2d 350, 366–367 [175 P.2d 296], disapproved on other grounds in *In re Wright* (1967) 65 Cal.2d 650, 654–655, fn. 3 [56 Cal.Rptr. 110, 422 P.2d 998].

There is no crime of aiding and abetting prostitution. (*People v. Gibson* (2001) 90 Cal.App.4th 371, 385 [108 Cal.Rptr.2d 809].)

RELATED ISSUES

See Related Issues section to CALCRIM No. 1150, *Pimping*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 85.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.11[3] (Matthew Bender).

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

1193 Testimony on Child Sexual Abuse Accommodation Syndrome

You have heard testimony from _____ <*insert name of expert*> regarding child sexual abuse accommodation syndrome.

_____'s <*insert name of expert*> testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against (him/her) [or any conduct or crime[s] with which (he/she) was not charged].

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 molested, and in evaluating the believability of (his/her) testimony.

New January 2006; Revised August 2016, April 2020, March 2021

BENCH NOTES

Instructional Duty

Several courts of review have concluded there is no sua sponte duty to give this instruction 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, 921 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.Rtpr.2d 431], which did find a sua sponte duty to give this instruction.

Related Instructions

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

AUTHORITY

- Eliminate Juror Misconceptions or Rebut Attack on Victim's Credibility. ▸ *People v. Bowker* (1988) 203 Cal.App.3d 385, 393–394 [249 Cal.Rptr. 886].
- This Instruction Upheld. ▸ *People v. Munch* (2020) 52 Cal.App.5th 464, 473–474 [266 Cal.Rptr.3d 136]; *People v. Gonzales* (2017) 16 Cal.App.5th 494, 504 [224 Cal.Rptr.3d 421].

COMMENTARY

The jurors must understand that the research on child sexual abuse accommodation syndrome assumes a molestation occurred and seeks to describe and explain children's common reactions to the experience. (*People v. Bowker* (1988) 203 Cal.App.3d 385, 394 [249 Cal.Rptr. 886].) However, it is unnecessary and potentially misleading to instruct that the expert testimony assumes that a molestation has in fact occurred. (See *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1387 [7 Cal.Rptr.2d 660].)

The prosecution must identify the myth or misconception the evidence is designed to rebut (*People v. Bowker, supra*, 203 Cal.App.3d at p. 394; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 735 [256 Cal.Rptr. 446]; *People v. Harlan* (1990) 222 Cal.App.3d 439, 449–450 [271 Cal.Rptr. 653]), or the victim's credibility must have been placed in issue (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744–1745 [32 Cal.Rptr.2d 345]).

RELATED ISSUES

Expert Testimony Regarding Parent's Behavior

An expert may also testify regarding reasons why a parent may delay reporting molestation of his or her child. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300–1301 [283 Cal.Rptr. 382, 812 P.2d 563].)

SECONDARY SOURCES

1 Witkin, California Evidence (5th ed. 2012) Opinion Evidence, §§ 54–56.

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

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

Couzens & Bigelow, Sex Crimes: California Law and Procedure § 12:7 (The Rutter Group).

1202 Kidnapping: For Ransom, Reward, ~~or~~ Extortion or to Exact From Another Person (Pen. Code, § 209(a))

The defendant is charged [in Count __] with kidnapping ~~for the purpose of~~ (for ransom[,]/ [or] for reward[,]/ [or] to commit extortion[,]/ [or] to get from a different person money or something valuable) [that resulted in (death[,]/ [or] bodily harm[,]/ [or] exposure to a substantial likelihood of death)] [in violation of Penal Code section 209(a)].

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

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

<Alternative 2A—held or detained>

[2. The defendant held or detained that person;]

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

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

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

   [AND]

4. **The 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 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 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 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 person consented to go with the defendant. The 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 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 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] for reward[,]/ [or] to commit extortion[,]/ [or] to get from a different person money or something valuable), you must then decide whether the People have proved the additional allegation that the defendant (caused the kidnapped

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

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

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

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

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

AND

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

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

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

New January 2006; Revised April 2011, February 2015, March 2017, September 2020, March 2021

BENCH NOTES

Instructional Duty

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

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

Give the bracketed definition of "consent" on request.

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

"Extortion" is defined in Penal Code section 518. If the kidnapping was for purposes of extortion, give one of the bracketed definitions of extortion on request. Give the second definition if the defendant is charged with intending to extort an official act. (*People v. Hill* (1983) 141 Cal.App.3d 661, 668 [190 Cal.Rptr. 628]; see *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1229–1230 [277 Cal.Rptr. 382]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [219 Cal.Rptr. 7, 706 P.2d 1141] [defining "official act"].) Extortion may also be committed by using "the color of official right" to make an official do an act. (Pen. Code, § 518; see *Evans v. United States* (1992) 504 U.S. 255, 258 [112 S.Ct. 1881, 119 L.Ed.2d 57]; *McCormick v. United States* (1990) 500 U.S. 257, 273 [111 S.Ct. 1807, 114 L.Ed.2d 307] [both discussing common law definition].) It appears that this type of extortion rarely occurs in the context of kidnapping, so it is excluded from this instruction.

Defenses—Instructional Duty

The court has a **sua sponte** duty to instruct on the defense of consent if there is sufficient evidence to support the defense. (See *People v. Davis* (1995) 10 Cal.4th 463, 516–518 [41 Cal.Rptr.2d 826, 896 P.2d 119] [approving consent instruction as given]; see also *People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 165 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [when court must instruct on defenses].) Give the bracketed paragraph on the defense of consent. On request, if supported by the evidence, also give the bracketed paragraph that

begins with "Consent may be withdrawn." (See *People v. Camden* (1976) 16 Cal.3d 808, 814 [129 Cal.Rptr. 438, 548 P.2d 1110].)

The defendant's reasonable and actual belief in the victim's consent to go with the defendant may be a defense. (See *People v. Greenberger* (1997) 58 Cal.App.4th 298, 375 [68 Cal.Rptr.2d 61]; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [127 Cal.Rptr. 279] [reasonable, good faith belief that victim consented to movement is a defense to kidnapping].)

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

AUTHORITY

- Elements. ▸ Pen. Code, § 209(a).
- Requirement of Lack of Consent. ▸ *People v. Eid* (2010) 187 Cal.App.4th 859, 878 [114 Cal.Rptr.3d 520].
- Extortion. ▸ Pen. Code, § 518; *People v. Hill* (1983) 141 Cal.App.3d 661, 668 [190 Cal.Rptr. 628]; see *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1229–1230 [277 Cal.Rptr. 382].
- Amount of Physical Force Required. ▸ *People v. Chacon* (1995) 37 Cal.App.4th 52, 59 [43 Cal.Rptr.2d 434]; *People v. Schoenfeld* (1980) 111 Cal.App.3d 671, 685–686 [168 Cal.Rptr. 762].
- Bodily Injury Defined. ▸ *People v. Chacon* (1995) 37 Cal.App.4th 52, 59; *People v. Schoenfeld* (1980) 111 Cal.App.3d 671, 685–686; see *People v. Reed* (1969) 270 Cal.App.2d 37, 48–50 [75 Cal.Rptr. 430] [injury reasonably foreseeable from defendant's act].
- Control Over Victim When Intent Formed. ▸ *People v. Martinez* (1984) 150 Cal.App.3d 579, 600–602 [198 Cal.Rptr. 565] [disapproved on other ground in *People v. Hayes* (1990) 52 Cal.3d 577, 627–628, fn. 10 [276 Cal.Rptr. 874, 802 P.2d 376].]
- No Asportation Required. ▸ *People v. Macinnes* (1973) 30 Cal.App.3d 838, 844 [106 Cal.Rptr. 589]; see *People v. Rayford* (1994) 9 Cal.4th 1, 11–12, fn. 8 [36 Cal.Rptr.2d 317, 884 P.2d 1369]; *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1227 [277 Cal.Rptr. 382].
- Official Act Defined. ▸ *People v. Mayfield* (1997) 14 Cal.4th 668, 769–773 [60 Cal.Rptr.2d 1, 928 P.2d 485]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [219 Cal.Rptr. 7, 706 P.2d 1141].

- Kidnapping To Extract From Another Person Any Money or Valuable Thing Requires That The Other Person Not Be The Person Kidnapped. ▸ *People v. Harper* (2020) 44 Cal.App.5th 172, 192–193 [257 Cal.Rptr.3d 440]; *People v. Stringer* (2019) 41 Cal.App.5th 974, 983 [254 Cal.Rptr.3d 678].

COMMENTARY

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

LESSER INCLUDED OFFENSES

- False Imprisonment ▸ Pen. Code, §§ 236, 237; *People v. Chacon* (1995) 37 Cal.App.4th 52, 65 [43 Cal.Rptr.2d 434]; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1121 [281 Cal.Rptr. 338]; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547 [90 Cal.Rptr. 866].
- Extortion ▸ Pen. Code, § 518.
- Attempted Extortion ▸ Pen. Code, §§ 664, 518.
- Multiple Convictions of Lesser Included Offenses of Pen. Code, § 209(a) Possible ▸ *People v. Eid* (2014) 59 Cal.4th 650, 655–658 [174 Cal.Rptr.3d 82, 328 P.3d 69].

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

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

RELATED ISSUES

Extortion Target

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

No Good-Faith Exception

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

SECONDARY SOURCES

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

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

1820. Felony Unlawful Taking or Driving of Vehicle (Veh. Code, § 10851(a), (b))

The defendant is charged [in Count __] with unlawfully taking or driving a vehicle [in violation of Vehicle Code section 10851].

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

<Alternative A—taking with intent to deprive>

[1. The defendant took someone else's vehicle without the owner's consent;

2. When the defendant took the vehicle, (he/she) intended to deprive the owner of possession or ownership of the vehicle for any period of time;

AND

3. The vehicle was worth more than $950.]

[OR]

<Alternative BA—~~joyriding~~ posttheft driving>

[1. The defendant drove someone else's vehicle without the owner's consent;

AND

2. When the defendant drove the vehicle, (he/she) intended to deprive the owner of possession or ownership of the vehicle for any period of time~~(;/.)~~]

~~[OR]~~

~~<Alternative B—taking with intent to temporarily deprive>~~

~~**[1. The defendant took someone else's vehicle without the owner's consent;**~~

~~**AND**~~

~~**2. When the defendant took the vehicle, (he/she) intended to temporarily deprive the owner of possession or ownership of the vehicle(;/.)]**~~

~~**[OR]**~~

~~***<Alternative C—theft with intent to permanently deprive>***~~

~~**[1. The defendant took someone else's vehicle without the owner's consent;**~~

~~**2. When the defendant took the vehicle, (he/she) intended to permanently deprive the owner of possession or ownership of the vehicle;**~~

~~**AND**~~

~~**3. The vehicle was worth more than $950.]**~~

[Even if you conclude that the owner had allowed the defendant or someone else to take or drive the vehicle before, you may not conclude that the owner consented to the driving or taking on _____<*insert date of alleged crime*> **based on that previous consent alone.]**

[A *taking* requires that the vehicle be moved for any distance, no matter how small.]

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

<*Sentencing Factor: Ambulance, Police Vehicle, Fire Dept. Vehicle*>
[If you find the defendant guilty of unlawfully taking or driving a vehicle, you must then decide whether the People have proved the additional allegation that the defendant took or drove an emergency vehicle on call. To prove this allegation, the People must prove that:

1. **The vehicle was (an ambulance/a distinctively marked law enforcement vehicle/a distinctively marked fire department vehicle);**

2. **The vehicle was on an emergency call when it was taken;**

AND

3. **The defendant knew that the vehicle was on an emergency call.**

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.]

<Sentencing Factor: Modified for Disabled Person>
[If you find the defendant guilty of unlawfully taking or driving a vehicle, you must then decide whether the People have proved the additional allegation that the defendant took or drove a vehicle modified for a disabled person. To prove this allegation, the People must prove that:

1. **The vehicle was modified for the use of a disabled person;**

2. **The vehicle displayed a distinguishing license plate or placard issued to disabled persons;**

AND

3. **The defendant knew or reasonably should have known that the vehicle was so modified and displayed the distinguishing plate or placard.**

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

New January 2006; Revised September 2018, March 2021

BENCH NOTES

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

If the prosecution alleges that the vehicle was an emergency vehicle or was modified for a disabled person, the court has a **sua sponte** duty to instruct on the sentencing factor. (Veh. Code, § 10851(b); see Veh. Code, § 10851(d) [fact issues for jury].)

If the defendant is charged with unlawfully driving or taking an automobile and with receiving the vehicle as stolen property, and there is evidence of only one act or transaction, the trial court has a **sua sponte** duty to instruct the jury that the defendant cannot be convicted of both stealing the vehicle and receiving a stolen vehicle. (*People v. Black* (1990) 222 Cal.App.3d 523, 525 [271 Cal.Rptr. 771]; *People v. Strong* (1994) 30 Cal.App.4th 366, 376 [35 Cal.Rptr.2d 494].) In such cases, give CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited*.

Similarly, a defendant cannot be convicted of grand theft of a vehicle and unlawfully taking the vehicle in the absence of any evidence showing a substantial break between the taking and the use of the vehicle. (*People v. Kehoe* (1949) 33 Cal.2d 711, 715 [204 P.2d 321]; see *People v. Malamut* (1971) 16 Cal.App.3d 237, 242 [93 Cal.Rptr. 782] [finding substantial lapse between theft and driving].) In such cases, give CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited*.

The bracketed paragraph that begins with "Even if you conclude that" may be given on request if there is evidence that the owner of the vehicle previously agreed to let the defendant or another person drive or take the vehicle. (Veh. Code, § 10851(c).)

The bracketed sentence defining "taking" may be given on request if there is a question whether a vehicle that was taken was moved any distance. (*People v. White* (1945) 71 Cal.App.2d 524, 525 [162 P.2d 862].)

The definition of "vehicle" may be given on request. (See Veh. Code, § 670 ["vehicle" defined].)

AUTHORITY

- Elements ▸ Veh. Code, § 10851(a), (b); *De Mond v. Superior Court* (1962) 57 Cal.2d 340, 344 [368 P.2d 865].
- Ambulance Defined ▸ Veh. Code, § 165(a).
- Owner Defined ▸ Veh. Code, § 460.
- Application to Trolley Coaches ▸ Veh. Code, § 21051.

- Expiration of Owner's Consent to Drive ▸ *People v. Hutchings* (1966) 242 Cal.App.2d 294, 295 [51 Cal.Rptr. 415].
- Taking Defined ▸ *People v. White* (1945) 71 Cal.App.2d 524, 525 [162 P.2d 862] [any removal, however slight, constitutes taking]; *People v. Frye* (1994) 28 Cal.App.4th 1080, 1088 [34 Cal.Rptr.2d 180] [taking is limited to removing vehicle from owner's possession].
- Vehicle Value Must Exceed $950 for Felony Taking With Intent to Temporarily or Permanently Deprive ▸ *People v. Bullard* (2020) 9 Cal.5th 94, 109 [260 Cal.Rptr.3d 153, 460 P.3d 262], *People v. Page* (2017) 3 Cal.5th 1175, 1183-1187 [225 Cal.Rptr.3d 786, 406 P.3d 319].

LESSER INCLUDED OFFENSES

- Attempted Unlawful Driving or Taking of Vehicle ▸ Pen. Code, § 664; Veh. Code, § 10851(a), (b).

RELATED ISSUES

Other Modes of Transportation
The "joyriding" statute, Penal Code section 499b, now only prohibits the unlawful taking of bicycles, motorboats, or vessels. The unlawful taking or operation of an aircraft is a felony, as prohibited by Penal Code section 499d.

Community Property
A spouse who takes a community property vehicle with the intent to temporarily, not permanently, deprive the other spouse of its use is not guilty of violating Vehicle Code section 10851. (*People v. Llamas* (1997) 51 Cal.App.4th 1729, 1739–1740 [60 Cal.Rptr.2d 357].)

Consent Not Vitiated by Fraud
The fact that an owner's consent was obtained by fraud or misrepresentation does not supply the element of nonconsent. (*People v. Cook* (1964) 228 Cal.App.2d 716, 719 [39 Cal.Rptr. 802].)

Theft-Related Convictions
A person cannot be convicted of taking a vehicle and receiving it as stolen property unless the jury finds that the defendant unlawfully drove the vehicle, as opposed to unlawfully taking it, and there is other evidence that establishes the elements of receiving stolen property. (*People v. Jaramillo* (1976) 16 Cal.3d 752, 757–759 [129 Cal.Rptr. 306, 548 P.2d 706]; *People v. Cratty* (1999) 77

Cal.App.4th 98, 102–103 [91 Cal.Rptr.2d 370]; *People v. Strong* (1994) 30 Cal.App.4th 366, 372–374 [35 Cal.Rptr.2d 494].)

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 107–113.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.10A, Ch. 143, *Crimes Against Property*, § 143.01[1][j], [2][c], [4][c] (Matthew Bender).

1933. Possession of Counterfeiting Equipment (Pen. Code, § 480)

The defendant is charged [in Count __] with making or possessing counterfeiting equipment [in violation of Penal Code section 480].

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

1. **The defendant [made] [or] [possessed] (a/an) (die/ [or] plate/ [or] apparatus/ [or] paper/ [or] metal/ [or] machine/ [or] _____**<*insert other item*>**;**

[2. The defendant knew of the equipment's presence;]

AND

(2/3). The defendant knew that the (die/ [or] plate/ [or] apparatus/ [or] paper/ [or] metal/ [or] machine/ [or] _____<*insert other item*>**) had been or would be used to counterfeit (coin/gold dust/gold or silver (bars/bullion/lumps/pieces/nuggets)/bank notes or bills).**

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

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

[The People allege that the defendant possessed the following items: _____ <*insert description of each item when multiple items alleged*>**. You may not find the defendant guilty unless you all agree that the People have proved that the defendant possessed at least one of these items and you all agree on which item (he/she) possessed.]**

New March 2021

BENCH NOTES

Instructional Duty

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

Give the bracketed sentence that begins with "The defendant knew" if the defendant is charged with possessing the equipment. Do not give this bracketed sentence if the defendant is only charged with making the equipment.

If the prosecution alleges under a single count that the defendant possessed multiple counterfeiting equipment, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

AUTHORITY

- Elements ▸ Pen. Code, § 480; *People v. Seo* (2020) 48 Cal.App.5th 1081, 1084–1085 [262 Cal.Rptr.3d 497].
- Statute Constitutional ▸ *Ex parte Dixon* (1953) 41 Cal.2d 756, 763–764 [264 P.2d 513].
- Possession of the Means for Counterfeiting Does Not Include Possession of Completed Counterfeit Items ▸ *People v. Clark* (1992) 10 Cal.App.4th 1259, 1267 [13 Cal.Rptr.2d 209].
- Bills Include Federal and Foreign Currency ▸ *People v. McDonnell* (1889) 80 Cal. 285, 287 [22 P. 190]; *People v. Ray* (1996) 42 Cal.App.4th 1718, 1723 [50 Cal.Rptr.2d 612].
- Unanimity Instruction If Multiple Items ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

2044. False Personation (Pen. Code, §§ 529(a)~~, 530~~)

The defendant is charged [in Count _____] with falsely impersonating another person in that person's private or official capacity and performing certain acts [in violation of Penal Code section ~~(~~529(a)~~/530)~~].

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

1. **The defendant falsely impersonated another person in the other person's private or official capacity;**

   AND

2. **While falsely impersonating that person, the defendant:**

~~*<Use the following paragraphs for violations of Penal Code section 529(a)>*~~

~~[~~[~~2~~A. Posted bail or acted as surety for anyone in any proceeding, before any judge or officer authorized to take that bail or surety(;/.)]

[OR~~or~~]

[~~2~~B(1). Verified, published, acknowledged, or proved, in the name of that person, any written document;

AND

~~[2~~B(2)~~C~~. When the defendant did so, (he/she) intended that the written document be recorded, delivered, or used as though it were an authentic document(./;)]

[OR~~or~~]

[~~2~~C~~D~~. Did any~~thing~~ act that, if done by the person being falsely impersonated, might cause (that person to be liable in a lawsuit or criminal prosecution/ [or] that person to pay any amount of money/ [or] that person to be subject to any charge, forfeiture, or penalty/ [or] the defendant or anyone else to receive a benefit as a result).]

~~*<Use the following paragraphs for violations of Penal Code section 530>*~~

~~[2E. Received money or property;~~
~~2F. The defendant knew that the money or property was intended to be delivered to the person that (he/she) was falsely impersonating;~~
~~2G. The money or property was worth (more than $950/$950 or less);~~
~~2H. When the defendant acted, (he/she) intended to deprive the true owner of the money or property, or use it for (his/her) own benefit, or let someone else use it.]]~~

New February 2015; Revised March 2021

BENCH NOTES

Instructional Duty

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

AUTHORITY

- Elements ▸ Pen. Code, §§ 529(a)~~, 530~~.
- Additional Act Requirement ▸ *People v. Guion* (2013) 213 Cal.App.4th 1426, 1431–1432 [153 Cal.Rptr.3d 395].

RELATED ISSUES

Penal Code section 529(a)(3) does not require any specific mental state beyond intentionally falsely impersonating another. *People v. Rathert* (2000) 24 Cal.4th 200, 205–206 [99 Cal.Rptr.2d 779, 6 P.3d 700].

~~LESSER INCLUDED OFFENSES~~

- ~~A violation of Penal Code section 529(b) is a lesser included offense of section 529(a).~~

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, § 202

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 10, *Investigative Detention*, § 10.05[2] (Matthew Bender)

2045–2099. Reserved for Future Use

2520. Carrying Concealed Firearm on Person (Pen. Code, § 25400(a)(2))

The defendant is charged [in Count __] with unlawfully carrying a concealed firearm on (his/her) person [in violation of Penal Code section 25400(a)(2)].

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

1. **The defendant carried on (his/her) person a firearm capable of being concealed on the person;**

2. **The defendant knew that (he/she) was carrying a firearm;**

AND

3. **It was substantially concealed on the defendant's person.**

[A *firearm capable of being concealed on the person* is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion and that has a barrel less than 16 inches in length. [A *firearm capable of being concealed on the person* also includes any device that has a barrel 16 inches or more in length that is designed to be interchanged with a barrel less than 16 inches in length.] [A *firearm* also includes any rocket, rocket-propelled projectile launcher, or similar device containing any explosive or incendiary material, whether or not the device is designed for emergency or distress signaling purposes.]]

[The term *firearm capable of being concealed on the person* is defined in another instruction.]

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

[Firearms carried openly in belt holsters are not concealed.]

<Defense: Statutory Exemption>
[The defendant did not unlawfully carry a concealed firearm if _____ *<insert defense from Pen. Code, § 25600, 25605, 25525, 25510, or 25450>***. The People have the burden of proving beyond a reasonable doubt that the defendant unlawfully carried a concealed firearm. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

New January 2006; Revised February 2012, March 2021

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. If the defendant is charged with any of the sentencing factors in Penal Code section 25400(c), the court must also give the appropriate instruction from CALCRIM Nos. 2540–2546. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].)

The court should give the bracketed definition of "firearm capable of being concealed on the person" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Penal Code section 25400(a) prohibits carrying a concealed "pistol, revolver, or other firearm capable of being concealed upon the person." Penal Code section 16530 provides a single definition for this class of weapons. Thus, the committee has chosen to use solely the all-inclusive phrase "firearm capable of being concealed on the person."

Defenses—Instructional Duty

Exemptions and a justification for carrying a concealed firearm are stated in Penal Code sections 25600, 25605, 25525, 25510, and 25450. If sufficient evidence has been presented to raise a reasonable doubt about the existence of a legal basis for the defendant's actions, the court has a **sua sponte** duty to give the bracketed instruction on the 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 that begins, "The defendant did not unlawfully . . . ."

Related Instructions

CALCRIM No. 2540, *Carrying Firearm: Specified Convictions*.
CALCRIM No. 2541, *Carrying Firearm: Stolen Firearm*.
CALCRIM No. 2542, *Carrying Firearm: Active Participant in Criminal Street Gang*.
CALCRIM No. 2543, *Carrying Firearm: Not in Lawful Possession*.
CALCRIM No. 2544, *Carrying Firearm: Possession of Firearm Prohibited Due to Conviction, Court Order, or Mental Illness*.
CALCRIM No. 2545, *Carrying Firearm: Not Registered Owner*.

CALCRIM No. 2546, *Carrying Concealed Firearm: Not Registered Owner and Weapon Loaded*.

AUTHORITY

- Elements ▸ Pen. Code, § 25400(a)(2).
- Firearm Defined ▸ Pen. Code, § 16520.
- Knowledge Required ▸ *People v. Jurado* (1972) 25 Cal.App.3d 1027, 1030–1031 [102 Cal.Rptr. 498]; *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52].
- Concealment Required ▸ *People v. Nelson* (1960) 185 Cal.App.2d 578, 580–581 [8 Cal.Rptr. 288].
- Factors in Pen. Code, § 25400(c) Sentencing Factors, Not Elements ▸ *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].
- Justifications and Exemptions ▸ Pen. Code, §§ 25600, 25605, 25525, 25510, 25450.
- Need Not Be Operable ▸ *People v. Marroquin* (1989) 210 Cal.App.3d 77, 82 [258 Cal.Rptr. 290].
- Substantial Concealment ▸ *People v. Wharton* (1992) 5 Cal.App.4th 72, 75 [6 Cal.Rptr.2d 673] [interpreting now-repealed Pen. Code, § 12020(a)(4)]; *People v. Fuentes* (1976) 64 Cal.App.3d 953, 955 [134 Cal.Rptr. 885] [same].
- Statute Is Not Unconstitutionally Vague ▸ *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1355 [83 Cal.Rptr.2d 619].

LESSER INCLUDED OFFENSES

If the defendant is charged with one of the sentencing factors that makes this offense a felony, then the misdemeanor offense is a lesser included offense. The statute defines as a misdemeanor all violations of the statute not covered by the specified sentencing factors. (Pen. Code, § 25400(c)(7).) The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor has been proved. If the jury finds that the sentencing factor has not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

Multiple Convictions Prohibited

A single act of carrying a concealed firearm cannot result in multiple convictions under different subdivisions of Penal Code section 25400(a). (*People v. Duffy* (2020) 51 Cal.App.5th 257, 266 [265 Cal.Rptr.3d 59].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 203, 204 – 209.

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

2521. Carrying Concealed Firearm Within Vehicle (Pen. Code, § 25400(a)(1))

The defendant is charged [in Count __] with unlawfully carrying a concealed firearm within a vehicle [in violation of Penal Code section 25400].

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

1. **The defendant carried within a vehicle a firearm capable of being concealed on the person;**

2. **The defendant knew the firearm was in the vehicle;**

3. **The firearm was substantially concealed within the vehicle;**

AND

4. **The vehicle was under the defendant's control or direction.**

[A *firearm capable of being concealed on the person* is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion and that has a barrel less than 16 inches in length. [A *firearm capable of being concealed on the person* also includes any device that has a barrel 16 inches or more in length that is designed to be interchanged with a barrel less than 16 inches in length.] [A *firearm* also includes any rocket, rocket-propelled projectile launcher, or similar device containing any explosive or incendiary material, whether or not the device is designed for emergency or distress signaling purposes.]]

[The term *firearm capable of being concealed on the person* is defined in another instruction.]

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

[Firearms carried openly in belt holsters are not concealed.]

<Defense: Statutory Exemption>

[The defendant did not unlawfully carry a concealed firearm within a vehicle if _____ <*insert defense from Pen. Code, §§ 25450, 25510, 25525, 25600, 25605, or 25610, ,* >. The People have the burden of proving beyond a reasonable doubt that the defendant unlawfully carried a concealed firearm within a vehicle. If the People have not met this burden, you must find the defendant not guilty of this crime.]

New January 2006; Revised February 2012, March 2018, March 2021

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. If the defendant is charged with any of the sentencing factors in Penal Code section 25400(c), the court must also give the appropriate instruction from CALCRIM Nos. 2540–2546. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].)

The court should give the bracketed definition of "firearm capable of being concealed on the person" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Penal Code section 25400(a) prohibits carrying a concealed "pistol, revolver, or other firearm capable of being concealed upon the person." Penal Code section 16530 provides a single definition for this class of weapons. Thus, the committee has chosen to use solely the all-inclusive phrase "firearm capable of being concealed on the person."

Defenses—Instructional Duty

Exemptions and a justification for carrying a concealed firearm are stated in Penal Code sections 25450, 25510, 25525, 25600, 25605, and~~,~~ 25610. If sufficient evidence has been presented to raise a reasonable doubt about the existence of a legal basis for the defendant's actions, the court has a **sua sponte** duty to give the bracketed instruction on the 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 that begins, "The defendant did not unlawfully . . . ."

Related Instructions

CALCRIM No. 2540, *Carrying Firearm: Specified Convictions*.
CALCRIM No. 2541, *Carrying Firearm: Stolen Firearm*.

CALCRIM No. 2542, *Carrying Firearm: Active Participant in Criminal Street Gang*.
CALCRIM No. 2543, *Carrying Firearm: Not in Lawful Possession*.
CALCRIM No. 2544, *Carrying Firearm: Possession of Firearm Prohibited Due to Conviction, Court Order, or Mental Illness*.
CALCRIM No. 2545, *Carrying Firearm: Not Registered Owner*.
CALCRIM No. 2546, *Carrying Concealed Firearm: Not Registered Owner and Weapon Loaded*.

AUTHORITY

- Elements ▸ Pen. Code, § 25400(a)(1).
- Firearm Defined ▸ Pen. Code, § 16520.
- Knowledge Required ▸ *People v. Jurado* (1972) 25 Cal.App.3d 1027, 1030–1031 [102 Cal.Rptr. 498]; *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52].
- Concealment Required ▸ *People v. Nelson* (1960) 185 Cal.App.2d 578, 580–581 [8 Cal.Rptr. 288].
- Factors in Pen. Code, § 25400(c) Sentencing Factors, Not Elements ▸ *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].
- Justifications and Exemptions ▸ Pen. Code, §§ 25600, 25605, 25525, 25510, 25450.
- Need Not Be Operable ▸ *People v. Marroquin* (1989) 210 Cal.App.3d 77, 82 [258 Cal.Rptr. 290].
- Substantial Concealment ▸ *People v. Wharton* (1992) 5 Cal.App.4th 72, 75 [6 Cal.Rptr.2d 673] [interpreting now-repealed Pen. Code, § 12020(a)(4)]; *People v. Fuentes* (1976) 64 Cal.App.3d 953, 955 [134 Cal.Rptr. 885] [same].
- Statute Is Not Unconstitutionally Vague ▸ *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1355 [83 Cal.Rptr.2d 619].

LESSER INCLUDED OFFENSES

If the defendant is charged with one of the sentencing factors that makes this offense a felony, then the misdemeanor offense is a lesser included offense. The statute defines as a misdemeanor all violations of the statute not covered by the specified sentencing factors. (Pen. Code, § 25400(c)(7).) The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor

has been proved. If the jury finds that the sentencing factor has not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

Gun in Unlocked Carrying Case Is Concealed

"If a firearm is transported in a vehicle in such a manner as to be invisible unless its carrying case is opened, it is concealed in the ordinary and usual meaning of the term." (*People v. Hodges* (1999) 70 Cal.App.4th 1348, 1355 [83 Cal.Rptr.2d 619].) Thus, carrying a firearm in an unlocked case in a vehicle violates Penal Code section 25400(a)(1). *(Ibid.)* However, Penal Code section 25525 makes it lawful to transport a firearm in a vehicle if it is in a *locked* case.

Not Necessary for Defendant to Possess or Control the Firearm

"The statute does not require that the defendant have the exclusive possession and control of the firearm." (*People v. Davis* (1958) 157 Cal.App.2d 33, 36 [320 P.2d 88].) The court in *People v. Davis, supra*, upheld the conviction where the defendant owned and controlled the vehicle and knew of the presence of the firearm below the seat, even though the weapon was placed there by someone else and belonged to someone else. *(Ibid.)*

Multiple Convictions Prohibited

A single act of carrying a concealed firearm cannot result in multiple convictions under different subdivisions of Penal Code section 25400(a). (*People v. Duffy* (2020) 51 Cal.App.5th 257, 266 [265 Cal.Rptr.3d 59].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 203-209.

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

2522. Carrying Concealed Firearm: Caused to Be Carried Within Vehicle (Pen. Code, § 25400(a)(3))

The defendant is charged [in Count __] with unlawfully causing a firearm to be carried concealed within a vehicle [in violation of Penal Code section 25400].

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

1. **The defendant caused a firearm capable of being concealed on the person to be concealed while it was carried within a vehicle;**

2. **The defendant knew that (he/she) caused the firearm to be concealed in the vehicle;**

3. **The firearm was substantially concealed within the vehicle;**

AND

4. **The defendant was in the vehicle during the time the firearm was concealed there.**

[A *firearm capable of being concealed on the person* is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion and that has a barrel less than 16 inches in length. [A *firearm capable of being concealed on the person* also includes any device that has a barrel 16 inches or more in length that is designed to be interchanged with a barrel less than 16 inches in length.] [A *firearm* also includes any rocket, rocket-propelled projectile launcher, or similar device containing any explosive or incendiary material, whether or not the device is designed for emergency or distress signaling purposes.]]

[The term *firearm capable of being concealed on the person* is defined in another instruction.]

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

[Firearms carried openly in belt holsters are not concealed.]

[The People do not need to prove that the defendant initially brought the firearm into the vehicle.]

<Defense: Statutory Exemption>
[The defendant did not unlawfully cause a firearm to be carried concealed within a vehicle if _____ *<insert defense from Pen. Code, § 25600, 25605, 25525, 25510, or 25450>***. The People have the burden of proving beyond a reasonable doubt that the defendant unlawfully caused a firearm to be carried concealed within a vehicle. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

New January 2006; Revised February 2012, March 2021

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. If the defendant is charged with any of the sentencing factors in Penal Code section 25400(c), the court must also give the appropriate instruction from CALCRIM Nos. 2540–2546. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].)

The court should give the bracketed definition of "firearm capable of being concealed on the person" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Penal Code section 25400(a) prohibits carrying a concealed "pistol, revolver, or other firearm capable of being concealed upon the person." Penal Code section 16530 provides a single definition for this class of weapons. Thus, the committee has chosen to use solely the all-inclusive phrase "firearm capable of being concealed on the person."

Defenses—Instructional Duty
Exemptions and a justification for carrying a concealed firearm are stated in Penal Code sections 25600, 25605, 25525, 25510, and 25450. If the defense presents sufficient evidence to raise a reasonable doubt about the existence of a legal basis for the defendant's actions, the court has a **sua sponte** duty to give the bracketed instruction on the 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 that begins, "The defendant did not unlawfully . . . ."

Related Instructions
CALCRIM No. 2540, *Carrying Firearm: Specified Convictions*.
CALCRIM No. 2541, *Carrying Firearm: Stolen Firearm*.
CALCRIM No. 2542, *Carrying Firearm: Active Participant in Criminal Street Gang*.
CALCRIM No. 2543, *Carrying Firearm: Not in Lawful Possession*.
CALCRIM No. 2544, *Carrying Firearm: Possession of Firearm Prohibited Due to Conviction, Court Order, or Mental Illness*.
CALCRIM No. 2545, *Carrying Firearm: Not Registered Owner*.
CALCRIM No. 2546, *Carrying Concealed Firearm: Not Registered Owner and Weapon Loaded*.

AUTHORITY

- Elements ▸ Pen. Code, § 25400(a)(3).
- Firearm Defined ▸ Pen. Code, § 16520.
- Knowledge Required ▸ *People v. Jurado* (1972) 25 Cal.App.3d 1027, 1030–1031 [102 Cal.Rptr. 498]; *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52].
- Concealment Required ▸ *People v. Nelson* (1960) 185 Cal.App.2d 578, 580–581 [8 Cal.Rptr. 288].
- Factors in Pen. Code, § 25400(c) Sentencing Factors, Not Elements ▸ *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].
- Justifications and Exemptions ▸ Pen. Code, §§ 25600, 25605, 25525, 25510, 25450.
- Need Not Be Operable ▸ *People v. Marroquin* (1989) 210 Cal.App.3d 77, 82 [258 Cal.Rptr. 290].
- Substantial Concealment ▸ *People v. Wharton* (1992) 5 Cal.App.4th 72, 75 [6 Cal.Rptr.2d 673] [interpreting now-repealed Pen. Code, § 12020(a)(4)]; *People v. Fuentes* (1976) 64 Cal.App.3d 953, 955 [134 Cal.Rptr. 885] [same].
- Statute Is Not Unconstitutionally Vague ▸ *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1355 [83 Cal.Rptr.2d 619].

LESSER INCLUDED OFFENSES

If the defendant is charged with one of the sentencing factors that makes this offense a felony, then the misdemeanor offense is a lesser included offense. The

statute defines as a misdemeanor all violations of the statute not covered by the specified sentencing factors. (Pen. Code, § 25400(c)(7).) The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor has been proved. If the jury finds that the sentencing factor has not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

Defendant Need Not Bring Firearm Into Car

"Appellant caused the gun to be carried concealed in a vehicle in which he was an occupant, by concealing the gun between the seats. His conduct fits the language and purpose of the statute. The prosecution was not required to prove that appellant initially brought the gun into the car." (*People v. Padilla* (2002) 98 Cal.App.4th 127, 134 [119 Cal.Rptr.2d 457].)

Multiple Convictions Prohibited

A single act of carrying a concealed firearm cannot result in multiple convictions under different subdivisions of Penal Code section 25400(a). (*People v. Duffy* (2020) 51 Cal.App.5th 257, 266 [265 Cal.Rptr.3d 59].)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 203, 204–209.

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

2523–2529. Reserved for Future Use

2624. Threatening a Witness After Testimony or Information Given (Pen. Code, § 140(a))

The defendant is charged [in Count __] with (using force/ [or] threatening to use force) against a witness [in violation of Penal Code section 140(a)].

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

1. **_____** *<insert name/description of person allegedly targeted>* **gave (assistance/ [or] information) to a (law enforcement officer/public prosecutor) in a (criminal case/juvenile court case);**

[AND]

2. **The defendant willfully (used force/ [or] threatened to use force or violence against _____** *<insert name/description of person allegedly targeted>*/ **[or] threatened to take, damage, or destroy the property of _____** *<insert name/description of person allegedly targeted>*) **because (he/she) had given that (assistance/[or] information)(;/.)**

<Give the following language if the violation is based on a threat>

[AND]

[3. A reasonable listener in a similar situation with similar knowledge would interpret the threat, in light of the context and surrounding circumstances, as a serious expression of intent to commit an act of unlawful force or violence ~~rather than just an expression of jest or frustration~~(;/.)]

[OR]

[(3./4.) A reasonable listener in a similar situation with similar knowledge would interpret the threat, in light of the context and surrounding circumstances, as a serious expression of intent to commit an act of unlawful taking, damage or destruction of property ~~rather than just an expression of jest or frustration~~.]

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

[An officer or employee of (a/an) (local police department[,]/ [or] sheriff's office[,]/ [or] _____ <*insert title of agency of peace officer enumerated in Pen. Code, § 13519(b)*>) is a *law enforcement officer*.]

[A lawyer employed by (a/an/the) (district attorney's office[,]/ [or] Attorney General's office[,]/ [or] city (prosecutor's/attorney's) office) to prosecute cases is a *public prosecutor*.]

[The People do not need to prove that the threat was communicated to _____ <*insert name/description of person allegedly targeted*> or that (he/she) was aware of the threat.]

New January 2006; Revised August 2012, March 2021

BENCH NOTES

Instructional Duty

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

AUTHORITY

- Elements ▸ Pen. Code, § 140(a).
- Witness Defined ▸ Pen. Code, § 136(2).
- Victim Defined ▸ Pen. Code, § 136(3).
- Public Prosecutor Defined ▸ Gov. Code, §§ 26500, 12550, 41803.
- Law Enforcement Officer Defined ▸ Pen. Code, § 13519(b).
- General Intent Offense ▸ *People v. McDaniel* (1994) 22 Cal.App.4th 278, 283 [27 Cal.Rptr.2d 306].
- Threat Need Not Be Communicated to Target ▸ *People v. McLaughlin* (1996) 46 Cal.App.4th 836, 842 [54 Cal.Rptr.2d 4].
- Reasonable Listener Standard ▸ *People v. Lowery* (2011) 52 Cal.4th 419, 427 [128 Cal.Rptr.3d 648, 257 P.3d 72].

COMMENTARY

Penal Code section 140 does not define "threat." (Cf. Pen. Code, §§ 137(b), 76 [both statutes containing definition of threat].) In *People v. McDaniel* (1994) 22 Cal.App.4th 278, 283 [27 Cal.Rptr.2d 306], the Court of Appeal held that threatening a witness under Penal Code section 140 is a general intent crime. According to the holding of *People v. McDaniel, supra,* 22 Cal.App.4th at p. 284, there is no requirement that the defendant intend to cause fear to the victim or intend to affect the victim's conduct in any manner. In *People v. McLaughlin* (1996) 46 Cal.App.4th 836, 842 [54 Cal.Rptr.2d 4], the court held that the threat does not need to be communicated to the intended target in any manner. The committee has drafted this instruction in accordance with these holdings. However, the court may wish to consider whether the facts in the case before it demonstrate a sufficiently "genuine threat" to withstand First Amendment scrutiny. (See *In re George T.* (2004) 33 Cal.4th 620, 637–638 [16 Cal.Rptr.3d 61, 93 P.3d 1007]; *People v. Gudger* (1994) 29 Cal.App.4th 310, 320–321 [34 Cal.Rptr.2d 510]; *Watts v. United States* (1969) 394 U.S. 705, 707 [89 S.Ct. 1399, 22 L.Ed.2d 664]; *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, 1027.)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, § 9.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.02; Ch. 142, *Crimes Against the Person,* § 142.11A[1][a] (Matthew Bender).

2625–2629. Reserved for Future Use

2651. Trying to Prevent an Executive Officer From Performing Duty (Pen. Code, § 69)

The defendant is charged [in Count __] with trying to (prevent/ [or] deter) an executive officer from performing that officer's duty [in violation of Penal Code section 69].

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

1. **The defendant willfully and unlawfully used (violence/ [or] a threat of violence) to try to (prevent/ [or] deter) an executive officer from performing the officer's lawful duty;**

2. **When the defendant acted, (he/she) intended to (prevent/ [or] deter) the executive officer from performing the officer's lawful duty;**

<Give the following language if the violation is based on a threat>

[3. A reasonable listener in a similar situation with similar knowledge would interpret the threat, in light of the context and surrounding circumstances, as a serious expression of intent to commit an act of unlawful force or violence;]

AND

(3/4). When the defendant acted, (he/she) knew that the person was an executive officer.

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

An *executive officer* is a government official who may use his or her own discretion in performing his or her job duties. [(A/An) _____ *<insert title, e.g., peace officer, commissioner, etc.>* **is an *executive officer.*]**

The executive officer does not need to be performing his or her job duties at the time the threat is communicated.

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

[Photographing or recording an *executive officer* while the officer is in a public place or while the person photographing or recording is in a place where he or she has the right to be is not, by itself, a crime.]

[The defendant does not have to communicate the threat directly to the intended victim, but may do so through someone else. The defendant must, however, intend that (his/her) statement be taken as a threat by the intended victim.]

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

[A sworn member of _____ *<insert name of agency that employs peace officer>*, **authorized by** _____ *<insert appropriate section from Pen. Code, § 830 et seq.>* **to** _____ *<describe statutory authority>*, **is a *peace officer*.]**

[The duties of (a/an) _____ *<insert title of officer specified in Pen. Code, § 830 et seq.>* **include** _____ *<insert job duties>*.**]**

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

New January 2006; Revised August 2014, August 2016, September 2019, March 2021

BENCH NOTES

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

In order to be "performing a lawful duty," an executive officer, including a peace officer, must be acting lawfully. (*In re Manuel G.* (1997) 16 Cal.4th 805, 816–817 [66 Cal.Rptr.2d 701, 941 P.2d 880]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) The court has a **sua sponte** duty to

instruct on lawful performance and the defendant's reliance on self-defense as it relates to the use of excessive force when this is an issue in the case. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].)

For this offense, "the relevant factor is simply the lawfulness of the official conduct that the defendant (through threat or violence) has attempted to deter, and not the lawfulness (or official nature) of the conduct in which the officer is engaged at the time the threat is made." (*In re Manuel G., supra,* 16 Cal.4th at p. 817.) Thus, if the evidence supports the conclusion that the defendant attempted to deter the officer's current performance of a duty, the court should instruct on the lawfulness of that duty. *(Ibid.)* Where the evidences supports the conclusion that the defendant attempted to deter the officer from performing a duty in the future, the court should only instruct on the lawfulness of that future duty. *(Ibid.)*

If there is an issue in the case as to the lawful performance of a duty by a peace officer, give the last bracketed paragraph and CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

If a different executive officer was the alleged victim, the court will need to draft an appropriate definition of lawful duty if this is an issue in the case.

AUTHORITY

- Elements. ▸ Pen. Code, § 69; *People v. Atkins* (2019) 31 Cal.App.5th 963, 979 [243 Cal.Rptr.3d 283] [statute requires actual knowledge that person was an executive officer].
- Specific Intent Required. ▸ *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1154 [124 Cal.Rptr.2d 373, 52 P.3d 572].
- Immediate Ability to Carry Out Threat Not Required. ▸ *People v. Hines* (1997) 15 Cal.4th 997, 1061 [64 Cal.Rptr.2d 594, 938 P.2d 388].
- Lawful Performance Element to Attempting to Deter. ▸ *In re Manuel G.* (1997) 16 Cal.4th 805, 816–817 [66 Cal.Rptr.2d 701, 941 P.2d 880].
- Statute Constitutional. ▸ *People v. Hines* (1997) 15 Cal.4th 997, 1061 [64 Cal.Rptr.2d 594, 938 P.2d 388].
- Merely Photographing or Recording Officers Not a Crime ▸ Pen. Code, § 69(b).

- Reasonable Listener Standard ▸ *People v. Lowery* (2011) 52 Cal.4th 419, 427 [128 Cal.Rptr.3d 648, 257 P.3d 72]; *People v. Smolkin* (2020) 49 Cal.App.5th 183, 188 [262 Cal.Rptr.3d 696].

RELATED ISSUES

Resisting an Officer Not Lesser Included Offense
Resisting an officer, Penal Code section 148(a), is not a lesser included offense of attempting by force or violence to deter an officer. (*People v. Smith* (2013) 57 Cal.4th 232, 240-245 [159 Cal.Rptr.3d 57, 303 P.3d 368].)

Statute as Written Is Overbroad
The statute as written would prohibit lawful threatening conduct. To avoid overbreadth, this instruction requires that the defendant act both "willfully" and "unlawfully." (*People v. Superior Court (Anderson)* (1984) 151 Cal.App.3d 893, 895–896 [199 Cal.Rptr. 150].)

State of Mind of Victim Irrelevant
Unlike other threat crimes, the state of mind of the intended victim is irrelevant. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153 [124 Cal.Rptr.2d 373, 52 P.3d 572]; *People v. Hines* (1997) 15 Cal.4th 997, 1061, fn. 15 [64 Cal.Rptr.2d 594, 938 P.2d 388].)

Immediate Ability to Carry Out Threat Not Required
"As long as the threat reasonably appears to be a serious expression of intention to inflict bodily harm and its circumstances are such that there is a reasonable tendency to produce in the victim a fear that the threat will be carried out, a statute proscribing such threats is not unconstitutional for lacking a requirement of immediacy or imminence. Thus, threats may be constitutionally prohibited even when there is no *immediate* danger that they will be carried out." (*People v. Hines* (1997) 15 Cal.4th 997, 1061 [64 Cal.Rptr.2d 594, 938 P.2d 388] [quoting *In re M.S.* (1995) 10 Cal.4th 698, 714 [42 Cal.Rptr.2d 355, 896 P.2d 1365], citation and internal quotation marks removed, emphasis in original]; see also *People v. Gudger* (1994) 29 Cal.App.4th 310, 320–321 [34 Cal.Rptr.2d 510]; *Watts v. United States* (1969) 394 U.S. 705, 707 [89 S.Ct. 1399, 22 L.Ed.2d 664]; *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, 1027.)

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, § 128.

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

3220. Amount of Loss (Pen. Code, § 12022.6)

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ <*insert lesser offense[s]*>], you must then decide whether the People have proved the additional allegation that the value of the property (taken[,]/ [or] damaged[,]/ [or] destroyed) was more than $_____ <*insert amount alleged*>.

To prove this allegation, the People must prove that:

1. **In the commission [or attempted commission] of the crime, the defendant (took[,]/ [or] damaged[,]/ [or] destroyed) property;**

2. **When the defendant acted, (he/she) intended to (take[,]/ [or] damage[,]/ [or] destroy) the property;**

AND

3. **The loss caused by the defendant's (taking[,]/ [or] damaging[,]/ [or] destroying) the property was greater than $_____ <*insert amount alleged*>.**

[If you find the defendant guilty of more than one crime, you may add together the loss suffered by each victim in Count[s] _____<*specify all counts that jury may use to compute cumulative total loss*> to determine whether the total losses to all the victims were more than $_____ <*insert amount alleged*> if the People prove that:

A. **The defendant intended to and did (take[,]/ [or] damage[,]/ [or] destroy) property in each crime;**

AND

B. **The losses arose from a common scheme or plan.]**

[The value of property is the fair market value of the property.]

[When computing the amount of loss according to this instruction, do not count any taking, damage, or destruction more than once simply because it is mentioned in more than one count, if the taking, damage, or destruction mentioned in those counts refers to the same taking, damage, or destruction with respect to the same victim.]

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

New January 2006; Revised August 2009, April 2010, August 2016

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the enhancement when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

The court **must** insert the alleged amounts of loss in the blanks provided so that the jury may first determine whether the statutory threshold amount exists for any single victim, and then whether the statutory threshold amount exists for all victims or for all losses to one victim cumulatively.

AUTHORITY

- Enhancement ▸ Pen. Code, § 12022.6 [in effect until January 1, 2018 unless otherwise extended].
- Value Is Fair Market Value ▸ *People v. Swanson* (1983) 142 Cal.App.3d 104, 107–109 [190 Cal.Rptr. 768].
- Definition of "Loss" of Computer Software ▸ Pen. Code, § 12022.6(e).
- Defendant Need Not Intend to Permanently Deprive Owner of Property ▸ *People v. Kellett* (1982) 134 Cal.App.3d 949, 958–959 [185 Cal.Rptr. 1].
- Victim Need Not Suffer Actual Loss ▸ *People v. Bates* (1980) 113 Cal.App.3d 481, 483–484 [169 Cal.Rptr 853]; *People v. Ramirez* (1980) 109 Cal.App.3d 529, 539–540 [167 Cal.Rptr. 174].
- Defendant Need Not Know or Reasonably Believe Value of Item Exceeded Amount Specified ▸ *People v. DeLeon* (1982) 138 Cal.App.3d 602, 606–607 [188 Cal.Rptr. 63].

- Great Taking Enhancement Encompasses Liability of Aiders and Abettors ▸ *People v. Acosta* (2014) 226 Cal.App.4th 108, 123-126 [171 Cal.Rptr.3d 774].

RELATED ISSUES

"Take"

As used in Penal Code section 12022.6, "take" does not have the same meaning as in the context of theft. (*People v. Kellett* (1982) 134 Cal.App.3d 949, 958–959 [185 Cal.Rptr. 1].) The defendant need not intend to permanently deprive the owner of the property so long as the defendant intends to take, damage, or destroy the property. *(Ibid.)* Moreover, the defendant need not actually steal the property but may "take" it in other ways. (*People v. Superior Court (Kizer)* (1984) 155 Cal.App.3d 932, 935 [204 Cal.Rptr. 179].) Thus, the enhancement may be applied to the crime of receiving stolen property *(ibid.)* and to the crime of driving a stolen vehicle (*People v. Kellett, supra,* 134 Cal.App.3d at pp. 958–959).

"Loss"

As used in Penal Code section 12022.6, "loss" does not require that the victim suffer an actual or permanent loss. (*People v. Bates* (1980) 113 Cal.App.3d 481, 483–484 [169 Cal.Rptr. 853]; *People v. Ramirez* (1980) 109 Cal.App.3d 529, 539–540 [167 Cal.Rptr. 174].) Thus, the enhancement may be imposed when the defendant had temporary possession of the stolen property but the property was recovered (*People v. Bates, supra,* 113 Cal.App.3d at pp. 483–484), and when the defendant attempted fraudulent wire transfers but the bank suffered no actual financial loss (*People v. Ramirez, supra,* 109 Cal.App.3d at pp. 539–540).

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 378.

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 727.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.45 (Matthew Bender).