JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
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Report

TO: Members of the Judicial Council

FROM: Advisory Committee on Criminal Jury Instructions
Hon. Sandra L. Margulies, Chair
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DATE: March 18, 2008

SUBJECT: Jury Instructions: Approve Publication of Revisions and Additions to Criminal Jury Instructions (Action Required)

Issue Statement

The Advisory Committee on Criminal Jury Instructions has completed revisions and additions to the *Judicial Council of California Criminal Jury Instructions (CALCRIM)* that were first published in 2005.

Recommendation

The Advisory Committee on Criminal Jury Instructions recommends that the Judicial Council, effective April 25, 2008, approve for publication under rule 2.1050(d) of the California Rules of Court the revised criminal jury instructions prepared by the advisory committee.

Upon Judicial Council approval, the instructions will be officially published in the latest edition of *CALCRIM*.

The table of contents for the proposed revisions and additions to the jury instructions is attached at pages 6–8. The revised criminal jury instructions are included separately with this report.

Rationale for Recommendation

The Task Force on Jury Instructions was appointed in 1997 on the recommendation of the Blue Ribbon Commission on Jury System Improvement. The mission of the task force was to draft comprehensive, legally accurate jury instructions that can be readily understood by the average juror. In August 2005, the council approved publication of

approximately 700 criminal jury instructions. In August 2006 and June 2007, the council approved additional new and amended criminal jury instructions. The Advisory Committee on Criminal Jury Instructions is charged with maintaining and updating those instructions.

The advisory committee drafted and edited the revisions and additions in this proposal, and circulated them for public comment. The official publisher (LexisNexis Matthew Bender) is preparing to publish both print and electronic versions of the revised and new instructions that are approved by the council.

Overview of Updates
The following instructions are included in this set: Nos. 101, 102, 104, 105, 200, 202, 226, 250, 251, 375, 640, 641, 703, 730, 763, 852, 853, 1070, 1191, 1201, 1203, 1225, 1400, 1401, 1806, 1863, 2100, 2101, 2110, 2111, 2220, 2500, 2701, 2840, 3402–3404, 3406, 3408, 3410, 3425, 3450, 3455, 3470, 3471, 3475, 3476, 3550. Of these, Nos. 640 and 641 are completely redrafted and the rest are revised.

The committee revised the instructions based on comments or suggestions from judges, attorneys, staff, and advisory committee members. The advisory committee also revised instructions based on recent changes in the law. Some examples of the changes follow:

CALCRIM No. 101, *Cautionary Admonitions: Jury Conduct (Before or After Jury Is Selected)*, was revised in response to comments from judges and practitioners that the instruction should specifically admonish jurors about not sharing information by e-mail or on the Internet. In the same vein, the committee added an admonition about use of cell phones or other electronic devices, with an explanation that the court could receive messages to deliver to jurors if necessary.

CALCRIM Nos. 102, 202, *Note-Taking (Pretrial, Posttrial),* were revised to conform to the language added to CACI Nos. 102 and 5010, including notice to the jurors about what will happen to their notes from the trial. Because the disposition of notes falls within the court's discretion, several options are provided as well as an option to insert a different disposition into a blank. A bench note explains the new language.

CALCRIM Nos. 105, *Witnesses (Pretrial);* 200 *Duties of Judge and Jury;* 226, *Witnesses (Posttrial),* were revised because they contained overlapping and redundant admonitions about bias. The committee determined that a comprehensive list of impermissible bases for bias in just one instruction is sufficient. The logical place for that list is CALCRIM 200, because it is given once in the introductory posttrial series. The new comprehensive admonition reminds jurors that the examples of impermissible bias are illustrative and not exclusive and adds a blank for the court to insert any other impermissible basis for bias that may be relevant in a given case. It further enhances the admonition by reminding jurors that bias both for and against a person is impermissible.

The list of impermissible bases for bias also conforms to both the recommendation of California Standard of Judicial Administration 10.20(a)(2), which requires that each judge should "in all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation" as well as California Code of Judicial Ethics, canon 3B(5), prohibiting bias on the basis of "race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status." It also complies with the requirement of recently enacted Penal Code section 1127h, which states:

> In any criminal trial or proceeding, upon the request of a party, the court shall instruct the jury substantially as follows: "Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes bias against the victim or victims, witnesses, or defendant based upon his or her disability, gender, nationality, race or ethnicity, religion, gender identity, or sexual orientation."

Finally, the committee chose to delete the lists of impermissible bases of bias from CALCRIM Nos. 105 and 226, *Witnesses*, but retained a general admonition: "You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have."

CALCRIM Nos. 250 and 251, *Union of Act and Intent Series, General and Specific Intent or Mental State Crimes*, were revised in response to comments from judges who observed that in cases in which all of the charged crimes were of the same type, e.g., all general intent crimes, it would be easier and more practical to provide an option referring to all of the crimes "in this case" instead of listing all of the charged offenses.

CALCRIM Nos. 640 and 641, *Deliberations and Completion of Verdict Forms (*Stone *and Non*-Stone*/Homicide)*, were completely revised to conform to the changes that the council approved last year to CALCRIM Nos. 3516–3519, *Lesser Included Offenses Series.*

CALCRIM No. 1203, *Kidnapping: For Robbery, Rape, or Other Sex Offenses*, was revised to add an element clarifying that the defendant must have had the necessary intent when the asportation began, following an implicit suggestion in *People v. Curry* (2007) 158 Cal.App.4th 766.

Alternative Actions Considered

Rule 10.59 of the California Rules of Court requires the advisory committee to update, amend, and add topics to *CALCRIM* on a regular basis and to submit its

recommendations to the council for approval. The proposed revisions and additions are necessary to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee did not consider any alternative action.

Comments From Interested Parties

The advisory committee received many comments from *CALCRIM* users. The advisory committee evaluated the comments and made changes to the instructions based on the recommendations. A chart summarizing the public comments and the committee response is included at pages 9–71.

Many commentators disagreed with the proposed deletion in CALCRIM No. 200, *Duties of Judge and Jury,* of the admonition not to consider punishment in reaching a verdict. That admonition is already included in CALCRIM No. 101, *Cautionary Admonitions: Jury Conduct (Before or After Jury Is Selected),* and CALCRIM No. 3550, *Predeliberation Instructions.* The committee concluded that hearing this admonition twice at appropriate junctures in the trial was sufficient and therefore did not change its decision to delete the third admonition about not considering punishment.

Another proposed deletion that drew many comments from the criminal defense bar was a conforming change in CALCRIM Nos. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.;* 852, *Evidence of Uncharged Domestic Violence;* 853, *Evidence of Uncharged Abuse of Elder or Dependent Person;* and 1191, *Evidence of Uncharged Sex Offense.* The committee proposed deleting the reference to proof of "each element" to conform to changes the council approved last year in CALCRIM Nos. 103 and 220, *Reasonable Doubt.* The commentators raised the same objections that the committee and council considered and rejected when the language to the reasonable doubt instructions was changed last year. The committee saw no reason to treat these instructions differently than the reasonable doubt instructions. The committee has always avoided referring to the "elements" of the crime because that term is not helpful to jurors.

The committee decided not to recommend a proposed addition to factor (a) of CALCRIM No. 763, *Death Penalty: Factors to Consider—Not Identified as Aggravating or Mitigating* in response to comments that singling out victim impact evidence as one of numerous possible "circumstances of the crime" gave it undue emphasis and was improper as part of a standard jury instruction.

Implementation Requirements and Costs

Implementation costs will be minimal. Under the publication agreement, the official publisher will make copies of the update available to all judicial officers free of charge. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the Administrative Office of the Courts will provide a broad public license for their use and reproduction by noncommercial publishers. With respect to commercial publishers other than the official publisher, the AOC will license their

publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters that may be necessary.

Attachments

CRIMINAL JURY INSTRUCTIONS
Spring 2008
TABLE OF CONTENTS

Instruction	Commentator	Comment	Committee Response
General Comments	Fubey Translation	Agree with proposed changes.	No response required.
	Superior Court of California, County of Sacramento	Agree with proposed changes.	No response required.
	Michael M. Roddy, Executive Officer, Superior Court of California, County of San Diego	Agree with proposed changes.	No response required.
	Victoria Richardon, Full-time Homemaker	It is so sad to see our Judicial Council break their own rules. For their own personal gain. And if they don't all that is going on. They do now. Perjury, kidnapping, and allowing the DCPS to destroy families. And the sad objective, is that we as tax payers are paying for your mistakes.	No response required.
	Hon. Roy O. Chernus, Commissioner, Superior Court of California, County of Marin	Agree with proposed changes.	No response required.
	Hon. William J. Monahan, Superior Court of California, County of Santa Clara	Agree with proposed changes.	No response required.
	Hon. Paul R. Bernal,	In all CALCRIMs where it states "jury room" it should be	The committee disagrees with this

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	Superior Court of California, County of Santa Clara	changed to "jury deliberation room" so that jurors do not think it is okay to deliberate in the jury assembly room.	comment and believes the current term is appropriate and will not create confusion.
	Hon. John D. Conley, Superior Court of California, County of Orange	Too many minor changes are circulated for comment. It is too much to expect busy judges and practitioners to review 205 pages of instructions. It is necessary to keep the number of proposed revisions within reasonable limits if you hope to get proper feedback. Bear in mind lawyers and judges (especially in committees) are always ready to further refine language, but we need to be practical.	The committee has already sought and obtained permission to have the Rules and Projects Committee of the Judicial Council approve the more minor changes to the instructions so that those changes do not circulate for public comment. But the committee will keep Judge Conley's concerns in mind as it contemplates further changes.
101 Cautionary Admonitions	Hon. Roy O. Chernus, Commissioner, Superior Court of California, County of Marin	Consider adding a prohibition to discussing the case on the telephone or by text messaging (since the use of cell phones in the jury room except during deliberations seems to be approved).	This comment addresses matters beyond the scope of the current invitation to comment. The committee will consider it at a future committee meeting.
	Deputy District Attorney Craig Fisher, San Diego County	Consider placing the sentence about not considering punishment after the last sentence about not being influenced by sympathy. These concepts seem to be related. (See also comment re CALCRIM Nos. 200 and 3550.)	This comment addresses matters beyond the scope of the current invitation to comment. The committee will consider it at a future committee meeting.
	Los Angeles County Public Defender	This instruction could mislead the jury based on implications contained in two of its sentences.	This comment addresses matters beyond the scope of the current

Instruction	Commentator	Comment	Committee Response
		Although the instruction reads, "You must not allow anything that happens outside of the courtroom to affect your decision," it does not caution the jurors about allowing anything that happens inside of the courtroom, but outside the evidence, to influence their decision. This sentence should be modified to read, "You must not allow anything that happens outside of the courtroom, or inside the courtroom, that is not part of the evidence in this case, to affect your decision." This argument was considered in *People v. Ibarra* (2007) 156 Cal.App.4th 117. However, the court did not consider the instruction but rejected the defendant's argument on the basis that there was not a reasonable likelihood that the jury applied the instruction in a way that denied the defendant a fair trial in that case.	invitation to comment. The committee will consider it at a future committee meeting.
102 Note-Taking	Superior Court of California, County of Los Angeles	The court should not collect jurors' notes. They should be private. It may have a chilling effect or discourage note-taking if the jurors know their notes might be read by the court or the attorneys. If we as a court have access to the notes, the attorneys may also. It would be best to keep them private.	The commentator makes a policy argument. But no statute or rule prohibits courts from allowing jurors to retain their notes. The instructions do not require a court to advise jurors that they may keep their notes; rather, the judge must advise jurors what will happen to their notes after trial, which is determined by the judge.
105 Witnesses	Hon. Craig Riemer, Superior Court of California, County of Riverside	Nationality is a narrower category than national origin, don't change it.	The change in question conforms to a recent amendment to Penal Code section 1127h. But the issue is moot because the committee

Instruction	Commentator	Comment	Committee Response
			decided to delete the reference to bias in the witness instructions and add a complete list of all possible bases for bias to pretrial instruction 200, including an option to fill in the blank with any valid term not included in the list.
200 Duties of Judge and Jury	Superior Court of California, County of Los Angeles	The use of the terms "gender" and "gender identity" may be confusing to some people. Define what it means.	The committee believes no definition is necessary for a general use instruction. Should the terms require definition in the context of a given case, the court is free to draft an appropriate definition.
	Appellate Projects	To eliminate possible misunderstanding that bias against attorneys, the judge, spectators, or others might be acceptable, or bias based on factors other than those enumerated might be acceptable, insert the phrase "but is not limited to," after "Bias includes."	The committee agrees with this comment and has made an appropriate revision.
	Chief Assistant District Attorney Terry L. Spitz, Monterey County	The sentence "You must reach your verdict without any consideration of punishment" is still good law as recently confirmed by the Supreme Court in *People v. Young* (2005) 34 Cal.4th 1149, 1189. The jury should be reminded that sentencing, if it is to occur, is for the court to decide. Speculation about a possible sentence can needlessly sidetrack a jury from performing its proper duty.	The admonition about not considering punishment is already in CALCRIM Nos. 101 and 3550, so jurors will hear it twice.
	Hon. Karen L.	The sentence "You must reach your verdict without any	The admonition is also in

Instruction	Commentator	Comment	Committee Response
	Robinson, Superior Court of California, County of Orange	consideration of punishment" was added to CALCRIM 3550, but it should be included in CALCRIM No. 200 as well. CALCRIM No. 200 is where the court instructs on things that are not appropriate for the jury to consider in reaching their decision. Bias, sympathy, prejudice, public opinion, and PUNISHMENT are all things that are not appropriate for the jurors to consider. Thus, this sentence should be retained.	CALCRIM No. 101, so it appears in both a pretrial and a predeliberation instruction. The committee believes this is sufficient.
	Azar Elihu, Attorney at Law	Bias includes bias against the witnesses, defendant[s] or alleged victim[s], based on disability, gender, age, nationality, race or ethnicity, religion, gender identity, or sexual orientation. Age should be included in the list.	The committee agrees with this comment and has made an appropriate revision.
	Hon. Craig Riemer, Superior Court of California, County of Riverside	The prohibition against bias and prejudice should be in both this instruction and 3550, since both instructions concern what things should not be considered when deciding the case. If one is to be moved, I would move both.	This comment addresses matters beyond the scope of the current invitation to comment. The committee will consider it at a future committee meeting.
	Deputy District Attorney Craig Fisher, San Diego County	Don't remove the sentence about not considering punishment. It belongs next to the paragraph about not considering sympathy (see also comments re CALCRIM Nos. 101 and 3550).	The admonition also appears also in CALCRIM No. 101 and CALCRIM No. 3550, so it is in both a pretrial and a pre-deliberation instruction. The committee believes this is sufficient.

Instruction	Commentator	Comment	Committee Response
	Los Angeles County Public Defender	This CALCRIM has three proposed modifications: 1. Advise the jury that the instructions they received may be handwritten, typed, etc. and that deleted sections are to be disregarded. Only the final version is to be used. 2. Further define bias. 3. Delete "You must reach your verdict without any consideration of punishment." There is no problem with the first modification. It is a proper statement of the law. The phrase "but is not limited to" should be added after "Bias includes" to read "Bias includes, but is not limited to," Penal Code section 1127h, which authorizes this instruction, does not mandate that it be given exactly as written in the Penal Code, but allows it to be given "substantially" as written in the Penal Code. In addition, Penal Code section 1127h specifies that the instruction shall be given upon request of a party. The "Authority" section, which cites to Penal Code section 1127h, should use the language of the statute to advise the court and the parties that "in any criminal trial or proceeding, upon the request of a party, the court shall instruct the jury" about bias by using language that is substantially like that found in Penal Code section 1127h.	No response required. The committee agrees with this comment and has made appropriate changes. The language in question is not optional in the instruction, but is intended to be the overall bias admonition that goes beyond the scope of the admonition required in Penal Code section 1127h.

Instruction	Commentator	Comment	Committee Response
		The third modification is problematic and probably not lawful. The clause that the jury cannot consider punishment is a true statement of the law and must be given. The proposed deletion is baffling in light of existing law. First, to the extent the court informed the jury that the subject of penalty or punishment must not enter into its deliberations, the admonition was unquestionably correct. (CALJIC No. 17.42.) Without this admonishment, "a jury may permit their consideration of guilt to be deflected by a dread of seeing the accused suffer the statutory punishment." (*People v. Shannon* (1956) 147 Cal.App.2d 300, 306; see also *People v. Alvarez* (1996) 49 Cal.App.4th 679, 687; *People v. Moore* (1985) 166 Cal.App.3d 540, 551; *People v. Allen* (1973) 29 Cal.App.3d 932, 936 ["It is settled that in the trial of a criminal case the trier of fact is not to be concerned with the question of penalty, punishment or disposition in arriving at a verdict as to guilt or innocence."].) (*People v. Nichols* (1997) 54 Cal.App.4th 21, 24.)	The admonition about not considering punishment is already in CALCRIM Nos. 101 and 3550, so jurors will hear it twice.
	Kathy Lynn, Research Attorney in chambers of Hon. Roger W. Boren, Court of Appeal, Second Appellate District	This instruction addresses bias against "witnesses, defendant[s] or alleged victim[s]" based on various listed factors, such as disability, gender, nationality, etc. Two other instructions, CALCRIM No. 105 (p. 9, pretrial instruction) and CALCRIM No. 226 (p. 16, posttrial introductory instruction), address bias with respect to witnesses. Each of these instructions includes the same factors listed in CALCRIM No. 200, but these instructions also include three factors not included in CALCRIM No. 200: "age, . . . socioeconomic status [, or ____ /insert any other impermissible bias as appropriate/]."	In response to this comment and others, the committee is deleting the bias admonition from the witness instructions and providing the comprehensive list in this instruction instead, while adding a blank for insertion of other possible bases for impermissible bias. The reason for the apparent inconsistency between the bias

Instruction	Commentator	Comment	Committee Response
		There does not appear to be a reason not to include these three factors when instructing on bias with respect to defendants and victims as well as witnesses. CALCRIM No. 200 should be modified to add these factors: "age, . . . socioeconomic status [, or ____ /insert any other impermissible bias as appropriate/]." The sentence "You must reach your verdict without any consideration of punishment" was deleted from CALCRIM No. 200. It was added to CALCRIM No. 3550, presumably because the latter instruction also contains the language "You should try to agree on a verdict if you can." (See *People v. Anderson* (2007) 152 Cal.App.4th 919, 929.) Perhaps the deletion from CALCRIM No. 200 was because of the desire not to repeat instructions. The sentence deleted from CALCRIM No. 200 is an important concept that should be introduced early on. However, deleting it from CALCRIM No. 200 may be less objectionable in view of its appearance in the concluding instruction received by the jury just before it commences deliberations.	admonitions in CALCRIM No. 200 and CALCRIM Nos. 105 and 226 (the witness instructions) is that the latter were revised in response to a comment from the Lesbian and Gay Lawyers Association of Los Angeles and the Judicial Council Access and Fairness Advisory Committee. The commentators noted that the lists of proscribed bases for bias differed between *CACI* and *CALCRIM* in general, and in particular wanted sexual orientation included as an impermissible basis for bias, consistent with the list found in California Code of Judicial Ethics, canon 3B(5) and (6), which prohibits bias based on "race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status." The admonition against bias in CALCRIM No. 200 was added to comply with the newly adopted provisions of Penal Code section 1127h, which require such an admonition. While the committee could have simply lengthened the

Instruction	Commentator	Comment	Committee Response
			list of proscribed bases of bias, studies show that jurors tune out when they hear a long list, so in an attempt to comply with the law without taxing jurors'attention spans, the committee struck this compromise. The admonition about not considering punishment is included in CALCRIM No. 101 (pretrial) and CALCRIM No. 3550 (predeliberation) so jurors will hear it twice at appropriate junctures in the trial. The committee does not consider a third admonition necessary.
202 Note-Taking	Superior Court of California, County of Los Angeles	The court should collect jurors' notes. They should be private. It may have a chilling effect or discourage note taking if the jurors know their notes might be read by the court or the attorneys. If we as a court have access to the notes, the attorneys may also. It would be best to keep them private.	The commentator makes a policy argument. But no statute or rule prohibits courts from allowing jurors to retain their notes. The instructions do not require a court to advise jurors that they may keep their notes; rather, the judge must advise jurors what will happen to their notes after trial, which is determined by the judge.
	Hon. Craig Riemer, Superior Court of	We tell jurors in both CALCRIM Nos. 202 and 222 that they can have read-backs. Can't we consolidate this in one place?	This comment goes beyond the scope of subject matter circulated

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	California, County of Riverside		for comment and will be considered at a future committee meeting.
	Los Angeles County Public Defender	The proposed modification to CALCRIM No. 202 adds an optional paragraph to tell the jurors what will happen to the notes they have taken. The proposed language tells the jurors that their notes will be taken from them and somehow disposed of. However the instruction seems to be based upon a faulty predicate, even though the bench notes correctly state that there is no statute or rule that requires any particular disposition of jurors' notes. The faulty predicate is that the court has the power and ability to confiscate juror notes at the end of a trial. Although the instruction specifies that no statute or rule exists giving the court that power, the instruction incorrectly presumes that such power exists. Without a statute or rule allowing courts to confiscate juror writings, a jury instruction should not presume that the court has that power. The proposed modification should be reconsidered.	The commentator makes a policy argument. But no statute or rule prohibits courts from allowing jurors to retain their notes. The instructions do not require a court to advise jurors that they may keep their notes; rather, the judge must advise jurors what will happen to their notes after trial, which is determined by the judge.
226 Witnesses	Azar Elihu, Attorney at Law	Include "nationality and origin" because jury may be biased toward one who is a U.S. citizen but was not born here and has an accent.	The admonition in this instruction will be deleted and superseded by the more comprehensive admonition in CALCRIM No. 200, which will address the commentator's concern.
	Hon. Craig Riemer,	Reconcile the language of CALCRIM Nos. 200 and 226 so that	See explanation above in response

Instruction	Commentator	Comment	Committee Response
	Superior Court of California, County of Riverside	the prohibition of bias and prejudice appears in one but not both. If the definition of bias in CALCRIM No. 200 is expanded, expand it further to cover prejudice as well, and then delete those concepts entirely from 226. It is not necessary to repeat substantially the same concept in CALCRIM No. 226.	to CALCRIM No. 200 regarding apparent inconsistency. The committee agrees to provide one comprehensive admonition about bias in CALCRIM No. 200 and delete the other two in the witness instructions.
250-251 General and Specific Intent	Los Angeles Judges	When the crimes charged in a given case are all of one type, i.e., all general intent crimes or all specific intent crimes, provide an option to just refer to the crimes charged "in this case" instead of requiring a list of all of the charged crimes.	Agreed and done.
375 Evidence of Uncharged Offense	Appellate Projects	The concluding paragraph should retain the formulation of instructions on reasonable doubt that the People must prove each element of the charge beyond a reasonable doubt. See *In re Winship* (1970) 397 U.S. 358, 364 and its progeny. Any formulation of the People's burden that makes less clear that the requirement of proof beyond a reasonable doubt applies to each component of the charge, considered individually, as well as to the identity of the defendant as the perpetrator, serves to undercut the force of this fundamental instruction and is potentially prejudicial to the defendant.	The reference to the elements was deleted in response to suggestions that this language should be consistent with the language in CALCRIM Nos. 103 and 220, the reasonable doubt instructions. The committee notes that CALJIC No. 2.90 does not refer to the elements, either, and has been upheld many times. CALCRIM No. 220 has been upheld as well.
	Deputy District Attorney George McFetridge, Orange County	This comment is directed at No. 375, subpart E; The introduction begins with "The People presented evidence…" The portion of this instruction that I'm commenting on reads as follows: "If you decide that the defendant committed the (uncharged offense[s]/act[s]), you may, but are not required to, consider that	This comment goes beyond the scope of subject matter circulated for comment and will be considered with the next round of comments, but the committee notes that the language in question appears in a list of factors

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		evidence for the limited purpose of deciding whether or not: <E. Accident> [The defendant's alleged actions were the result of mistake or accident)(./;or) I believe the sentence should read: [The defendant's alleged actions in this case were not the result of mistake or accident]. The missing word (underlined in bold) is "not" The italicized words "in this case" are simply my suggestions for further clarification. As currently worded, the instruction isn't correct. It discusses evidence presented by the People and the People have no reason whatsoever to present evidence that the defendant's actions in prior years were the result of mistake. However, the People do have reason to introduce such evidence to show the absence of mistake or accident in the current case as permitted by Evidence Code section 1101(b). Arguably, any previous actions involving mistake or accident would not be relevant to the defendant's current crime since the mistake or accident could have been cured in the interim. In any event, it would be evidence presented by the defense, not the prosecution (contradicting the introductory sentence). Under both Cal. Evidence Code section 1101(b) and the Federal Rule 404(b), such evidence is offered by the prosecution to prove the ABSENCE of mistake or accident. To prove that there was NOT a mistake or accident. It is not offered by the prosecution to prove that there WAS a mistake or accident on some prior occasion.	preceded by the words "whether or NOT." Note that conforming changes would be necessary in CALCRIM No. 2840 if this change is adopted.

Instruction	Commentator	Comment	Committee Response
		People v. Gillard (1997) 57 Cal.App. 136 involved a conviction for failing to disclose prior injuries on a worker's comp. claim. At page 160, that Court cited *People v. Ewoldt* (1994) 7 Cal.4th 380, 402 noting that "the recurrence of similar results tends increasingly to negate accident or inadvertence or self-defense or other innocent mental states, and instead tends to show the presence of the criminal intent which normally accompanies criminal acts." Under both the statutory language and subsequent court interpretations, such evidence of prior similar acts is admitted and relevant to show the ABSENCE of mistake or accident—to show that the current crime is NOT the result of a mistake or accident. So the word "NOT" is missing.	
375, 852, 853, 1191 (proving the *elements* language)	Los Angeles County Public Defender	CALCRIM No. 375 addresses admission of evidence under Evidence Code section 1101(b). CALCRIM No. 852 addresses admission of evidence under Evidence Code section 1109 for prior domestic violence. CALCRIM No. 853 addresses admission of evidence under Evidence Code section 1109 for prior elder abuse. CALCRIM No. 1191 addresses admission of evidence under Evidence Code section 1108. In each of these instructions, the current language states, "It is not sufficient by itself to prove that the defendant is guilty of _____. The People must still prove each element of the charge beyond a reasonable doubt." The proposed revision would state, "It is not sufficient by itself to prove that the	The reference to the elements was deleted in response to commentators who noted that this language should be consistent with the language in CALCRIM Nos. 103 and 220, the reasonable doubt instructions. The committee notes that CALJIC No. 2.90 does not refer to the elements, either, and has been upheld many times. CALCRIM No. 220 has been upheld as well.

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		defendant is guilty of _____. The People must still prove the charge beyond a reasonable doubt." We oppose this change in each instruction. The "each element" language must not be removed because it clarifies the reasonable doubt jury instruction and is required as a matter of law. Many cases confirm the requirement that the jurors be told that they may only find the defendant guilty if they find each element true beyond a reasonable doubt. One such case is *People v. Phillips* (1997) 59 Cal.App.4th 952, in which the trial court failed to give adequate jury instructions regarding reasonable doubt and the presumption of innocence. The prosecution argued that it was harmless error because the jury received instruction from counsel, but the Court of Appeal reversed, finding that the jurors had to be advised specifically that each element had to be proved beyond a reasonable doubt in order to convict on a charge. In our view, the trial court's error suffered no less a constitutional defect than did the trial court in *Sullivan v. Louisiana* (1993) 508 U.S. 275]. The reversal per se rule of *Sullivan* does not allow for exceptions where counsel refer to the reasonable doubt instruction in argument. The structural infirmity present in *Sullivan* is present here as well. The attorneys' references to the requirement of proof beyond a reasonable doubt fell "short of apprising the jurors that defendants were entitled to acquittal unless each element of the crimes charged was proved to the jurors' satisfaction beyond a	

Instruction	Commentator	Comment	Committee Response
		reasonable doubt buttressed by additional instructions on the meaning of that phrase." (*People v. Phillips, supra*, 59 Cal.App.4th 952, 957–958; quoting *People v. Vann* (1974) 12 Cal.3d 220, 227.) In the case of *People v. Crawford* (1997) 58 Cal.App.4th 815, the trial court instructed the jury regarding reasonable doubt and the burden of proof but did so prior to the presentation of evidence. The Court of Appeal found that this early instruction was insufficient to give the jurors notice "that appellant was entitled to acquittal unless each element of the crimes charged was proved to the jurors' satisfaction beyond a reasonable doubt." (*Id.* at p. 825.) The leading case cited for this premise is *People v. Vann* (1974) 12 Cal.3d 220, in which the California Supreme Court found that the trial court's instructions, including oblique references to reasonable doubt, were insufficient to put the jury on notice of its duty. The [trial court's] foregoing references to reasonable doubt in isolated applications of that standard of proof fall far short of apprising the jurors that defendants were entitled to acquittal unless each element of the crimes charged was proved to the jurors' satisfaction beyond a reasonable doubt buttressed by additional instructions on the meaning of that phrase. "No instruction could be more vital . . . since in every criminal case it directs the jury to put away from their minds [sic] all suspicions arising from arrest, indictment, arraignment, and the appearance of the accused before them in his role as a defendant." (*Id.* at p.	

Instruction	Commentator	Comment	Committee Response
		227, quoting *People v. Morris* (1968) 260 Cal.App.2d 848, 850; fn. omitted.) Additionally, *People v. Harris* (1994) 9 Cal.4th 407, 438, finds that jury instructions which do not specifically require proof of each element are inadequate. The due process clause of the Fourteenth Amendment to the United States Constitution requires that, before it may obtain a valid conviction, the state must prove every element of a crime and must do so beyond a reasonable doubt. (E.g., *Sullivan v. Louisiana, supra,* 508 U.S. at pp. ___–___, ___ [124 L.Ed.2d at pp. 187–188, 189–190, 113 S.Ct. at pp. 2080–2081, 2082].) It follows that jury instructions in a state criminal trial omitting the requirement of proof of every element of a crime beyond a reasonable doubt are erroneous under the Fourteenth Amendment's due process clause. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 320, fn. 14 [61 L.Ed.2d 560, 574, 99 S.Ct. 2781], emphasis original in *Harris*; see also *People v. Flood* (1998) 18 Cal.4th 470, 523.) The revision should not omit language which helps clarify this critical instruction and is legally correct and mandatory.	
640 Deliberations and Completion of Verdict Forms (*Stone*/ Homicide)	Superior Court of California, County of Los Angeles Deputy District	Eliminate the word "Stone." If the caption of the instructions is going to the jurors, they will not know what it means. Where a jury agrees a defendant is guilty of a lesser included	The committee agrees with this comment and has made an appropriate revision. The committee disagrees with this

Instruction	Commentator	Comment	Committee Response
	Attorney Mitchell Keiter, Orange County	offense but deadlocks regarding his guilt of a greater included offense, the People have the option of retrying the greater (and all included offenses) or accepting the lesser conviction. (*People v. Fields* (1996) 13 Cal.4th 289, 311.) Therefore, where a jury unanimously agrees a defendant is guilty of murder but disagrees as to the degree, the People may accept a second-degree murder conviction without needing to retry the homicide altogether and reinvesting the defendant with a complete presumption of innocence—and opportunity for full acquittal. The proposed change to CALCRIM No. 640 eliminates this option, and therefore the appeals and writs division of the Orange County District Attorney's Office opposes the proposed modification. The current bench notes explain the option created by *People v. Fields*, *supra*, 13 Cal.4th at p. 311: "If, after following the procedures required by *Fields*, the jury declares that it is deadlocked on the greater offense, then the prosecution must elect one of the following options: (1) the prosecutor may request that the court declare a mistrial on the greater offense without recording the verdict on the lesser offense, allowing the prosecutor to retry the defendant for the greater offense; or (2) the prosecutor may ask the court to record the verdict on the lesser offense and to dismiss the greater offense, opting to accept the current conviction rather than retry the defendant on the greater offense. (*People v. Fields*, *supra*, 13 Cal.4th at p. 311.)	comment. Step two says that if the jury is deadlocked on the greater offense, it must report that fact to the court. It does not say the court must order a new trial. The People can request the jury be queried as to whether it has reached a verdict of guilty on murder and, if so, would then have the option to ask that a second-degree verdict be entered (i.e., an acquittal of first-degree murder).

Instruction	Commentator	Comment	Committee Response
		Having convinced a unanimous jury beyond a reasonable doubt of the defendant's guilt of murder, the People need not prove it again to a second jury; they may instead accept a second-degree murder conviction. The current instruction fosters that election by enabling the People to learn of those instances where the jury has deadlocked on the greater charge but agreed to convict on the lesser offense of second-degree murder. If you all agree the People have proved the defendant committed murder, but you cannot all agree on which degree they have proved, do not complete any verdict forms. Instead, the foreperson should send a note reporting that you cannot all agree on *the degree of murder that has been proved*. (CALCRIM No. 640, emphasis added.) The instruction ensures the People will learn of the jury's unanimity as to the lesser charge and thus have the opportunity to accept the second-degree murder conviction rather than retry the entire charge. The proposed instruction will deprive the People of that opportunity. It will instruct the jury: If all of you cannot agree whether the defendant is guilty of [insert greatest level of homicide charged, e.g., first-degree murder] inform me *only that you cannot reach an agreement* and do not complete or sign any verdict forms. . . . (Proposed CALCRIM No. 640 (emphasis added).) Whereas the current instruction will elicit the fact of the jury's disagreement	

Instruction	Commentator	Comment	Committee Response
		over the degree of murder (indicating agreement that the defendant committed at least second-degree murder), the proposed instruction will not elicit that information. It will reveal the existence of some undefined disagreement and nothing more. The existing disagreement among the jurors might be between first-degree murder and second-degree murder, first-degree murder and manslaughter, or first-degree murder and complete acquittal. The People will have no way of knowing. As it is, *People v. Fields* diverges from the federal rule that allows the People to accept a lesser conviction *and* retry for the greater offense (*United States v. Bourdeaux* (8th Cir. 1997) 121 F.3d 1187, 1193; *United States v. Williams* (5th Cir. 2006) 449 F.3d 635, 645), as well as the California rule allowing such retention of the lesser and retrial on the greater in the contexts of special circumstances (*People v. Ghent* (1987) 43 Cal.739, 760-761) and attempted murder (*People v. Bright* (1996) 12 Cal.4th 652, 662, disapproved on other grounds in *People v. Seel* (2004) 34 Cal.4th at p. 550, fn. 6; see also Mitchell Keiter, From *Apprendi* to *Blakely* to *Cunningham:* Popular Sovereignty Enters the Courtroom (2007) 34 West. St. U. L. Rev. 111; Mitchell Keiter, *The Mauled Verdict: The* Knoller *Case Shows Why Res Judicata Should Protect Partial Convictions As Well As Acquittals* (2002) 33 McGeorge L. Rev. 493). The *Fields* rule warrants no further expansion. We therefore respectfully recommend keeping the existing CALCRIM No. 640.	
	Los Angeles County Public Defender	In CALCRIM No. 640 there is erroneous language in part 1, which says: "1. If all of you agree that the People have proved beyond a	The committee disagrees with the comments and believes the phrasing is correct.

Instruction	Commentator	Comment	Committee Response
		reasonable doubt that the defendant is guilty of" The instruction is legally inaccurate. The correct standard is not whether the jury believes that the prosecution has proved the defendant guilty beyond a reasonable doubt, but after considering both the prosecution and the defense, whether the jury believes that the defendant is guilty beyond a reasonable doubt. As phrased, the instruction implies that if the jurors believe that the defendant is guilty beyond a reasonable doubt, without considering the defense case, they may nevertheless return a verdict of guilty. The language should be modified to say: "If all of you agree that the defendant is guilty beyond a reasonable doubt of. . . ." In addition CALCRIM No. 640's language is needlessly inconsistent regarding the phrasing of concluding that the defendant is "guilty." In the first instance of describing a jury finding of guilt, the language is: "1. If all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of . . ." In the second instance the language is: "2. If all of you cannot agree whether the defendant is guilty of . . ." In order to encompass the entire thought in more accurate and	

Instruction	Commentator	Comment	Committee Response
		simpler language, the instruction should consistently say: "If all of you agree that the defendant is guilty beyond a reasonable doubt of . . ."	
	Hon. John D. Conley, Superior Court of California, County of Orange	This instruction is correct as revised, but could be simplified if structured as follows: a. The following are the offenses listed in order of seriousness; b. Then just describe in general terms what the jury does, without breaking it out by attempting to list each crime.	Although this is a challenging instruction, the committee believes that completely restructuring it is not necessary.
641 Deliberations and Completion of Verdict Forms (Non-*Stone/* Homicide)	Los Angeles County Public Defender	In CALCRIM No. 641 there is erroneous language in part 1, which says: "1. If all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of . . ." The correct standard is not whether the jury believes that the prosecution has proved the defendant guilty beyond a reasonable doubt, but after considering both the prosecution and the defense, whether the jury believes that the defendant is guilty beyond a reasonable doubt. As phrased, the instruction implies that if the jurors believe that the defendant is guilty beyond a reasonable doubt, without considering the defense case, they may nevertheless return a verdict of guilty. The language should be modified to say: "If all of you agree that the defendant is guilty beyond a	The committee prefers the current language and believes there is no error.

Instruction	Commentator	Comment	Committee Response
		reasonable doubt of . . ."	
703 Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder	Appellate Projects	Invert the order of elements two and three, and change the new element two to read: 2. The defendant was a major participant in the crime *before or during the killing;* AND 3. When the defendant participated in the crime, (he/she) acted with reckless indifference to human life.	The committee disagrees with the comments of the Appellate Projects and Deputy District Attorney Fisher and agrees with the suggestions of Judges Coen and Wellington. Accordingly, the instruction has been restored to its original form. Judge Wellington's suggestion about removing the reference to conspiracy goes beyond the scope of the changes circulated for comment, so the committee will consider it at its next meeting.
	Deputy District Attorney Craig Fisher, San Diego County	The new element three is vague because it could cause a juror to mistakenly believe that nonkillers' "major" participation must all occur before or during the killing. Modify thus: 1. The defendant's participation in the crime began before or during the killing; 2. The defendant was a major participant in the crime; AND 3. When the defendant participated in the crime, (he/she) acted with reckless indifference to human life. Finally, change the related case cite under the "Authority" heading to the original California Supreme Court case setting forth this legal principle: *People v. Pulido* (1967) 15 Cal.4th 713, 722–726. The Ninth Circuit did not formulate this substantive legal principle, they just applied a different harmless error standard than the California Supreme Court. See also CALCRIM No. 730.	
	Hon. Ronald S. Coen, Superior Court of	If a court is going to give CALCRIM No. 703, the court must also give either CALCRIM Nos. 400 and 401, aiding and	

Instruction	Commentator	Comment	Committee Response
	California, County of Los Angeles	abetting, or CALCRIM Nos. 415 or 416, conspiracy. The aiding and abetting instruction expressly states that defendant's actions and intent must occur before or during the commission of the crime. This is also stated, by definition, in the conspiracy instructions. I am always concerned with too much verbiage by the trial court. Consequently, the current version is adequate.	
	Hon. Michael D. Wellington, Superior Court of California, County of San Diego	The proposed instruction seems to be based on the assumption that *People v. Pulido* bars a felony murder special circumstance finding under Penal Code, § 190.2(d) unless the defendant was a participant in the crime before the killing occurs. I don't think *Pulido* stands for that at all. *Pulido* was not a special circumstances case. It merely held that one who doesn't becomes an aider and abettor (or conspirator) to the robbery until after the killing is not guilty of felony murder. So the issue there was not whether the felony murder special circumstance was proved pursuant to Penal Code, § 190.2 (d). The issue was whether defendant was liable for the murder in the first place. It looks to me that issues are being mixed like apples and oranges in this discussion. I think this has led to some confusion. I think it is important to distinguish the requirements for a murder conviction (*Pulido*) from the requirements for a true finding on a felony murder special circumstance (Penal Code, § 190.2(d).). CALCRIM No. 703 implements Penal Code, § 190.2(d) setting out the requirements for a true finding on a felony murder special circumstance. When *Tison v. Arizona* held that the Eighth Amendment is not offended by a death sentence for a	

Instruction	Commentator	Comment	Committee Response
		nonkiller who was a major participant and acted with reckless disregard, California implemented that decision with this statute. The statute is not entirely coextensive with *Tison*. What Penal Code, § 190.2(d) requires is that, for the special circumstance to be found true, defendant must have acted with reckless disregard and as a major participant when he aided, abetted, counseled, commanded, etc. The dispute between the defense and prosecution is about whether defendant needs to be a major participant before the killing or whether it's sufficient for him to simply be some kind of participant before the killing, so long as he ultimately becomes a major participant. This is the wrong issue. It is the result of mixing up *Pulido's* rule regarding a murder conviction with Penal Code, § 190.2(d)'s rule regarding a true finding on a felony murder special circumstance. There is nothing in Penal Code, § 190.2 (d) relating reckless disregard and major participation to the time of the killing. It relates them to the time of the aiding and abetting. So, I think the dispute is over a false issue. If the defendant didn't start aiding and abetting (or conspiring) until after the killing, he's simply not guilty of felony murder. That's what *Pulido* says. So, we would never get to the special circumstance issue. But if he was properly convicted of felony murder and is charged with the felony murder special circumstance, then we get to the instructions on Penal Code, § 190.2(d). They should simply implement the language of the statute. Something like this: "The People must prove the defendant intended to kill or the People must prove the defendant:	

Instruction	Commentator	Comment	Committee Response
		1. Aided and abetted the commission of the crime, and did so while 2. A major participant in the crime and while 3. Acting with reckless disregard for human life" One more thought. The instruction makes provision for its use where the defendant is a conspirator rather than an aider and abettor. But Penal Code, § 190.2(d) on its own terms only applies to aiders and abettors. I may have missed it, but I am unaware of any authority supporting either death or life without possibility for parole for a nonkiller who had no intent to kill and whose connection to the crime is only as a conspirator. It may be arguable that *Tison v. Arizona* would allow it past an Eighth Amendment challenge if he was a major participant acting with reckless disregard. But as I mentioned earlier, Penal Code, § 190.2(d) is not coextensive with *Tison*. Penal Code, § 190.2(d) is the only authority to impose death or LWOP on a person who was not the actual killer and who had no intent to kill. It simply doesn't apply to conspirators. It seems to me the conspiracy options should be removed.	
730 Special Circumstances: Murder in Commission of a Felony	Deputy District Attorney Craig Fisher, San Diego County	Change the related case cite under the "Authority" heading to the original California Supreme Court case setting forth this legal principle: *People v. Pulido* (1967) 15 Cal.4th 713, 722–726. The Ninth Circuit did not formulate this substantive legal principle, they just applied a different harmless error standard than the California Supreme Court. See also CALCRIM No. 703.	The committee disagrees with this comment, see response to CALCRIM No. 703 above.

Instruction	Commentator	Comment	Committee Response
763 Death Penalty: Factors to Consider	Appellate Projects, similar comments received from Hon. Ronald S. Coen, Superior Court of California, County of Los Angeles and Hon. Michael D. Wellington, Superior Court of California, County of San Diego	The proposed revision to factor (a) inappropriately singles out for emphasis one fact out of numerous possible "circumstances of the crime," thus suggesting the jury should pay special attention to it or give it special weight. Since victim impact evidence always functions as aggravation, the proposal is not even-handed but rather selects as the sole example of the circumstances of the crime a factor adverse to the defense. This undue emphasis is exacerbated by the use of the unqualified term "friends." While the Supreme Court has upheld evidence of impact on family and "close" friends (*People v. Leonard* (2007) 40 Cal.4th 1370, 1419; *People v. Pollock* (2005) 32 Cal.4th 1153, 1183) the admissibility of evidence of impact on more attenuated acquaintances of the defendant is not yet resolved. We do not believe there should be an instruction singling out victim impact evidence, but if there is, it should be limited to family and close friends, so the instruction is not getting out ahead of the courts. The words "or not" should be deleted from subdivision (b), for consistency with subdivisions (c), (d), (e), (f), (g), (h), and (j).	The committee agrees with this first comment and has made the suggested changes. *People v. Ledesma* (2006) 39 Cal.4th 641 states that any instruction directing a jury to "consider" specific evidence is properly refused as argumentative. What may be pinpointed is not specific evidence as such, but the theory of the case. Penal Code, § 190.3 uses the "presence or absence of' language identically in (b) and (c). It also uses the "whether or not" language in (d),(e), (f), (g), (h) and (j). The instruction uses just "whether" for (d) through (j) because the absence of one of these mitigating factors must not be considered to be an aggravating factor. (*People v. Murtishaw* (1989) 48 Cal.3d 1001.) But since that prohibition

Instruction	Commentator	Comment	Committee Response
			doesn't apply to (b) or (c), the committee will retain that language, which prevents the jury from speculating about what distinctions are implied by the variations.
853 Evidence of Uncharged Abuse of Elder or Dependent Person	Appellate Projects	The concluding paragraph should retain the formulation of instructions on reasonable doubt that the People must prove each element of the charge beyond a reasonable doubt. See *In re Winship* (1970) 397 U.S. 358, 364 and its progeny. Any formulation of the People's burden that makes less clear that the requirement of proof beyond a reasonable doubt applies to each component of the charge, considered individually, as well as to the identity of the defendant as the perpetrator, serves to undercut the force of this fundamental instruction and is potentially prejudicial to the defendant.	The reference to the elements was deleted in response to suggestions that this language should be consistent with the language in CALCRIM Nos. 103 and 220, the reasonable doubt instructions. The committee notes that CALJIC No. 2.90 does not refer to the elements, either, and has been upheld many times. CALCRIM No. 220 has been upheld as well.
1070 Unlawful Sexual Intercourse: Defendant 21 or Older	Los Angeles County Public Defender	The proposed revision is incomprehensible. If you read what is struck out, what is left, and what is added, you wind up with gibberish: "In order for reasonable and actual belief to excuse the defendant's behavior, the tending to show that (he/she) reasonably believed." We think what is intended is for it to say that "there must be evidence tending to show . . ." If so, this change is probably intended to correct what might appear from the original instruction that the People had the burden of showing that the defendant did not have such a good faith belief even in the absence of any evidence to the contrary. This is an affirmative defense, so there must be evidence in the record to support it before the People's burden to disprove it beyond a reasonable doubt arises.	The changed language is not gibberish but may have been difficult to read in "change mode." It reads as follows: "In order for reasonable and actual belief to excuse the defendant's behavior, there must be evidence tending to show that (he/she) reasonably and actually believed that the other person was age 18 or older. If you have a reasonable doubt about whether the defendant reasonably and actually believed

Instruction	Commentator	Comment	Committee Response
		However, if what is intended is for it to say that "the defense must produce evidence tending to show . . ." it is wrong. If there is evidence anywhere in the record, the instruction must be given. It does not matter which party produced that evidence. The actual language to be adopted must be clarified, and the language indicating that the defendant must himself present evidence must not be adopted.	that the other person was age 18 or older, you must find (him/her) not guilty." Accordingly, the changed language addresses the commentators' concern and no further changes are necessary.
1191 Evidence of Uncharged Sex Offense	Appellate Projects	The concluding paragraph should retain the formulation of instructions on reasonable doubt that the People must prove each element of the charge beyond a reasonable doubt. See *In re Winship* (1970) 397 U.S. 358, 364 and its progeny. Any formulation of the People's burden that makes less clear that the requirement of proof beyond a reasonable doubt applies to each component of the charge, considered individually, as well as to the identity of the defendant as the perpetrator, serves to undercut the force of this fundamental instruction and is potentially prejudicial to the defendant.	The reference to the elements was deleted in response to suggestions that this language should be consistent with the language in CALCRIM Nos. 103 and 220, the reasonable doubt instructions. The committee notes that CALJIC No. 2.90 does not refer to the elements, either, and has been upheld many times. CALCRIM No. 220 has been upheld as well.
1201 Kidnapping: Child or Person Incapable of Consent	Deputy District Attorney Mitchell Keiter, Orange County	The proposed instruction adds language based on a recent case where the Court of Appeal held, as described in the bench note: "taking requirement satisfied when a defendant relies *on deception* to obtain a child's consent and through verbal directions and his constant physical presence takes the child a substantial distance." (See *People v. Dalerio* (2006) 144 Cal.App.4th 775, 783, italics added.) In other words, a defendant violates the law by taking through deception just as by taking through force. Unfortunately, the proposed addition to the instruction has the	The committee has revised the language in response to this comment.

Instruction	Commentator	Comment	Committee Response
		potential to give a semi-attentive juror the contrary message. The instruction states: "A defendant *may take and carry away* and move a [child] by tricking the [child] into accompanying him or her a substantial distance for an illegal purpose." Although the instruction's meaning is obvious upon even limited scrutiny, the first impression a juror (listening through dozens of other instructions) forms is that, as the italicized phrase suggests, it is permissible for a suspect to abduct a victim through deception, or at least it would not violate the statute as would using force. It is possible to improve the instruction's wording. For example, "It violates the law to take and carry away and move a [child] by tricking the [child] into accompanying him or her a substantial distance for an illegal purpose," or "the defendant satisfies the element of unlawful moving if he/she takes and carries away move a [child] by tricking the [child] into accompanying him or her a substantial distance for an illegal purpose." Because many jurors will lack both the expertise and the opportunity for reflection enjoyed by the Judicial Council, we respectfully recommend the instruction does not state in any way that a "defendant may" perform an illegal abduction.	
1203 Kidnapping: For Robbery, Rape, or Other Sex Offenses	Deputy District Attorney Mitchell Keiter, Orange County	A. Introduction A proposed jury instruction adds the element, "When that movement began the defendant already intended to commit (robbery/rape etc.)." The instruction is susceptible to misinterpretation. Even more susceptible to misinterpretation is the bench note heading, "Intent to Commit Robbery Must Exist at Time of Original Taking." Although comparable language has appeared in Supreme Court cases, it appeared in response to	The committee disagrees with this suggestion. The Court of Appeal examined CALCRIM No. 1203 in *People v. Curry* (2007) 158 Cal.App.4th 766 and determined that while it was a correct statement of the law, it only implicitly stated the requirement that the intent to rob must exist at

Instruction	Commentator	Comment	Committee Response
		fact-specific cases and does not accurately express the law. The forbidden intent must be present at the beginning of an asportation that increases the danger to the victim, not necessarily the "original" taking. An apt analogy lies with the law of burglary, as the Supreme Court and Court of Appeal explained decades ago. (*People v. Tribble* (1971) 4 Cal.3d 826, 832; *People v. Smith* (1963) 223 Cal.App.2d 225, 234, disapproved on other grounds in *People v. Hood* (1969) 1 Cal.3d 444, 450.) *Tribble* and *Smith* cited the rule that burglary occurs only where the entry occurs with a felonious intent. (*People v. Tribble*, *supra*, at p. 832; *People v. Smith*, *supra*, at p. 234.) The Supreme Court, however, recently recognized the felonious intent need not be present at the time of the original entry into the residence; it is sufficient that an offender later entered a room with that intent. (*People v. Sparks* (2002) 28 Cal.4th 71, 73: "a defendant's entry into a bedroom within a single-family house with the requisite intent can support a burglary conviction [even] if that intent was formed only after the defendant's entry into the house.") The same principle applies to aggravated kidnapping; a defendant violates Penal Code section 209, even if he lacks the intent to rape/rob at the time of the initial seizure, so long as he subsequently asports the victim in a way that exposes her to an increased risk of harm. Without question, the cases cited in bench notes appear to require the intent to exist prior to the victim's first movement. (See *People v. Tribble*, *supra*, 4 Cal.3d at p. 832, [section 209 violated if "the kidnaper intended to commit robbery at the time of the original seizing"]; *People v. Thornton* (1974) 11 Cal.3d 738, 769, disapproved on other grounds in *People v. Flannel*	the time the movement commences. The committee's proposed new element 5 now makes that point explicit.

Instruction	Commentator	Comment	Committee Response
		(1979) 25 Cal.3d 668, 684, fn. 12 [statute requires "that the intent to rob be formed prior to the commencement of asportation"]; see also *People v. Davis* (2005) 36 Cal.4th 510, 565-566: "All that is required is that the defendant have the specific intent to commit a robbery at the time the kidnapping begins.") Careful analysis reveals, however, there may be multiple asportations, and it is sufficient if the defendant harbors the proscribed intent prior to any one (not just the first) that exposed the victim to additional harm. B. The Development of Section 209: The Trouble With *Tribble* The confusion arises from the imprecise language used in *People v. Tribble*, *supra*, 4 Cal.3d 826, and *People v. Smith*, *supra*, 223 Cal.App.2d 225; all subsequent cases have cited *Tribble* as authority. But nothing in *Tribble* supports a rule that the intent to rob (or rape) must precede the very first asportation. *Tribble* followed *Smith* in using sweeping language because both were noting the legislative amendment that superseded the former rule announced in *People v. Brown* (1947) 29 Cal.2d 555 and therefore directly echoed that case's language. (*People v. Tribble*, *supra*, 4 Cal.3d at p. 832, quoting *People v. Smith*, *supra*, 223 Cal.App.2d, at p. 234.) Penal Code section 209 has evolved over time. When the Court decided *Brown*, section 209 applied to anyone who "kidnaps or carries away . . . or who holds or detains." (*People v. Brown*, *supra*, 29 Cal.2d at p. 558.) This section makes it unnecessary to determine whether the kidnaper intended to commit extortion or robbery at the time of	

Instruction	Commentator	Comment	Committee Response
		the original seizure. . . .[W]hatever may have been the original motive of the kidnapping, if the kidnaper commits extortion or robbery during the kidnapping, he "holds or detains" his victim "to commit extortion or robbery" within the meaning of section 209. (*Ibid*.) The Legislature in 1951 amended section 209, deleting the "holds or detains" language as it pertained to robbery (although keeping it for ransom and extortion cases). (*People v. Tribble*, supra, 4 Cal.3d at p. 831.) *Smith* and *Tribble* therefore quoted *Brown's* sweeping language—to reject it. The deletion of the "holds or detains" language meant the defendant had to asport the victim with the proscribed intent; mere detention was no longer enough. But *Smith* and *Tribble* explained the legislative revisions by simply reversing the *Brown* holding: the new provisions "make it necessary for the trier of fact to determine whether the kidnaper intended to commit robbery at the time of the original seizing." (*People v. Tribble, supra*, 4 Cal.3d, at p. 832, *quoting People v. Smith, supra*, 223 Cal.App.2d, at p. 234.) According to *Tribble* and *Smith*, if under former section 209 it was not "necessary" for the trier to "determine whether the kidnaper intended to commit . . . robbery at the time of the original seizure," then post-*Brown* the law must be that it was. The trouble with *Tribble* (and the case it followed, *Smith*) is that neither contemplated a multistage series of movements during which the defendant's intent changed. On the contrary, the premise of both *Tribble* and *Smith* is a single asportation during which the kidnapper's intent remained constant. Either the defendant intended the robbery at the outset or developed	

Instruction	Commentator	Comment	Committee Response
		that intent after the movement had been completed. Thus the *Tribble* court insisted the issue for the jury was "whether he intended to commit robbery at the time the kidnapping commenced or whether the intent to commit robbery was an afterthought to a kidnapping. . . ." (*People v. Tribble, supra*, 4 Cal.3d at p. 832.) *Smith* likewise assumed the intent to rob [or rape] occurred either before or after the asportation but not during it. "[T]he trier of fact [must] determine whether the kidnapper intended to commit robbery at the time of the original seizing [because] a robbery during a kidnapping where the intent was formed after the asportation is . . . not a kidnapping for purpose of robbery." (*People v. Smith, supra*, 223 Cal.App.2d, at p. 234.) C. Emphasizing Danger Over Timing Subsequent case law, however, indicated the crucial test is not whether the proscribed intent exists before any asportation but whether it exists prior to an asportation that exposes the victim to greater danger. This accords with the Legislature's intent: "[T]he primary purpose of the kidnapping-to-commit-robbery statute is to impose harsher criminal sanctions to deter activity that substantially increases the risk of harm." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1168.) Accordingly, a defendant may violate section 209 where, even after an earlier asportation, a defendant, harboring the proscribed intent, reasports a victim in a way that exposes her to greater danger. The Supreme Court's opinion in *People v. Laursen* (1972) 8 Cal.3d 192, followed a risk-of-harm analysis. *Laursen*	

Instruction	Commentator	Comment	Committee Response
		offered the reverse of a kidnapping during which a robbery ensues; it was a robbery that transmuted into a kidnapping. During a robbery Laursen and his codefendant took a hostage and kidnapped him to effect their escape. (*Id.* at pp. 196–197.) On appeal Laursen contended he could not be guilty of kidnapping for the purpose of robbery because he did not form the intent to kidnap until after the robbery had begun. (*Id*. at p. 198.) The Court rejected the argument that both the robbery and the kidnapping must have been intended prior to the start of either. Such a conclusion does not follow from the reasoning of *Tribble*. Since a robbery committed as an afterthought to a kidnaping generally does not substantially increase the risk that someone will be injured or killed, such conduct may not be proscribed by the provisions of section 209. On the other hand, the carrying away of the victim or some other individual during the commission of a robbery, even though motivated by events occurring after the commencement of a robbery still in progress, most certainly increases the risk that he will be injured or killed and is specifically the type of conduct made punishable by section 209. (*Id.* at p. 199.) Two cases decided soon after *Laursen* illustrate this risk-of-harm analysis. In *People v. Bailey* (1974) 38 Cal.App.3d 693, the defendant kidnapped a couple and had them drive to facilitate his escape from a correctional facility. (*Id.* at pp. 696–697.) When he had the couple drop him off, he took some of the husband's money. (*Id.* at p. 697.) The Court of Appeal noted there was no direct evidence of when Bailey developed the intent to rob; accordingly, it was error not to instruct on the	

Instruction	Commentator	Comment	Committee Response
		lesser offense of simple kidnapping. (*Id.* at pp. 699–700.) Even if Bailey developed the intent to rob during the asportation and not after it, the intent to rob exposed the victims to minimal if any additional risk of harm. The facts of *People v. Stephenson* (1974) 10 Cal.3d 652, however, produced the opposite result. After the defendant had driven the victim and let her and her husband out of the car, he shoved the wife back into the car (without her husband), and then drove away and raped her. (*Id*. at pp. 657–659.) This second phase of the asportation in *Stephenson* exposed the victim to a substantially greater risk of harm and thus warranted an aggravated kidnapping conviction even though Stephenson may have lacked the intent to rape when he first asported the victim. Accordingly, section 209 applies where a defendant asports the victim with the intent to rob or rape, regardless of whether there had been a prior asportation. An initial asportation lacking such an intent cannot immunize a defendant from the consequences of a subsequent asportation with such intent that increases the danger to the victim. This logical application has become all the more important now that section 209 covers kidnapping both for the purpose of robbery and rape. In cases like *Bailey* or *Tribble* where robbery is an afterthought, the taking of the victim's money will rarely involve further asportation exposing the victim to additional danger, which is highly likely, however, where the kidnapper later develops the intent to rape or commit another sex offense. Thus a defendant who develops an intent to rape after an initial asportation is likely to warrant "harsher criminal sanctions to deter activity that substantially increases the risk of harm." (*People v. Cooper, supra*, 53 Cal.3d at p.	

Instruction	Commentator	Comment	Committee Response
		1168.) Correct instruction to the jury is essential. D. Proposal The proposed instruction (element 5) is not wrong; the phrase "When that movement began" could apply to the subsequent, victim-endangering asportation, as in *People v. Stephenson*, *supra*, 10 Cal.3d 652. But a juror also might interpret it to preclude an aggravated kidnapping charge unless the defendant harbored the proscribed intent from the outset. We therefore oppose the proposed instruction because it is not necessary; the first element instructs the jury on the need for the proscribed intent, and the second element informs the jury that the defendant must have "Act[ed] with that intent [in taking the victim]." To the extent anyone is concerned that jurors might not realize the first element (the proscribed intent) must precede the second (the taking), **clarification is possible simply by adding the word "then" to the second element (either preceding "Acting" or "took")**. The addition of this single word would guarantee that a juror would not convict a defendant unless the juror believed he already harbored the proscribed intent prior to the asportation that exposed the victim to additional danger.	
	Deputy District Attorney Craig Fisher, San Diego County	The proposed new element 5 is unnecessary and wrong. New element 5 is intended to convey the requirement that the defendant form the intent to commit the specified crime before rather than after asportation of the victim. But this requirement is already contained in element 2. Element 1 sets forth the required criminal intent. Element 2 then requires that the defendant	See response to previous comment.

Instruction	Commentator	Comment	Committee Response
		"acting with that intent" kidnap the victim. This is a proper expression of the requisite concurrence of act and intent. In addition to being unnecessary, proposed element 5 is wrong. It confuses any initial movement of the victim with the asportation or illegal movement element of kidnapping. As written it does not account for situations where the defendant is criminally liable for violating Penal Code section 209(b), even though the initial movement of the victim was consensual. For example, the defendant may innocently offer to drive the victim home. During the drive, however, the defendant may decide instead to take the victim into the desert to rape her. The defendant then uses force or fear to overcome the victim's objections and/or resistance to the continued movement. The defendant would still be guilty of kidnap for rape even though he did not have the requisite criminal intent "when the movement began." The final bracketed paragraph of No. 1203, which refers the jurors back to elements 1 and 2, adequately conveys the applicable legal principles for this scenario. New element 5 would confuse the jurors, or worse, lead them to the wrong result.	
	Kathy Lynn, Research Attorney in chambers of Hon. Roger W. Boren, Court of Appeal, Second Appellate District	1. A portion of the proposed modification to this instruction concerns the defense of good faith belief regarding consent to the movement: "If you have a reasonable doubt about whether the defendant actually believed that the other person consented to the movement you must find (him/her) not guilty." (p. 86) The words "reasonably and" should be added before "actually," to comport with the language earlier in the same paragraph of the instruction: "The defendant is not guilty of	The committee agrees with this suggestion and has made appropriate revisions.

Instruction	Commentator	Comment	Committee Response
		kidnapping if (he/she) reasonably and actually believed that the other person consented to the movement." (See CALCRIM No. 1215 (simple kidnapping; Pen. Code, § 207(a), bound volume I, p. 913–914), which reads, "The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person consented to the movement;" see also CALCRIM No. 1070 (unlawful sexual intercourse, Pen. Code, § 261.5, pp. 73–74), which has a similar paragraph on good faith belief as to age of the victim and reads, "If you have a reasonable doubt about whether the defendant reasonably and actually believed that the other person was age 18 or older, you must find (him/her) not guilty;" CALCRIM No. 1000 (rape, Pen. Code, § 261(a), bound volume I, p. 681), which states, "The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the woman consented.") 2. A more fundamental question arises as to the proposed modification. Element 7 of CALCRIM No. 1203, which is to be given if the court is instructing on reasonable belief that the victim consented to the movement, states, "To prove that the defendant is guilty of this crime, the People must prove that: . . . The defendant did not actually and reasonably believe that the other person consented to the movement." (p. 85) The subsequent portion of the instruction explaining good faith belief in consent originally stated, "The defendant is not guilty of kidnapping if (he/she) reasonably and actually believed that the other person consented to the movement. *The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that*	The committee agrees with this suggestion and has made appropriate revisions.

Instruction	Commentator	Comment	Committee Response
		the other person consented to the movement. If the People have not met this burden, you must find the defendant not guilty of this crime." (p. 86, italics added) The proposed modification deletes the italicized language and substitutes the following: "In order for reasonable and actual belief to excuse the defendant's behavior, there must be evidence tending to show that (he/she) reasonably and actually believed that the other person consented to the movement. If you have a reasonable doubt about whether the defendant actually believed that the other person consented to the movement, you must find (him/her) not guilty." (p. 86) CALCRIM Nos. 1000 (rape, bound volume I, p. 681) and 1215 (simple kidnapping, bound volume I, p. 913) similarly address good faith belief in consent but were not so modified. A modification similar to that proposed for CALCRIM No. 1203 has also been proposed for CALCRIM No. 1070 (unlawful sexual intercourse, Pen. Code, § 261.5, p. 73), but the CALCRIM No. 1070 modification corrects an erroneous statement of the law regarding unlawful sexual intercourse contained in the existing instruction: belief as to age is not part of the People's burden of proof in the offense of unlawful sexual intercourse. (*People v. Zeihm* (1974) 40 Cal.App.3d 1085, 1089.) It does not appear that such a correction is necessary in the case of the CALCRIM No. 1203 instruction. While the revision proposed for CALCRIM No. 1203 comports with the language in *People v. Mayberry* (1975) 15 Cal.3d 143, 157 (defendant "was only required to raise a reasonable doubt as to whether he had such a [bona fide and reasonable] belief [that the victim consented]"), the original wording in CALCRIM No. 1203, which still appears in CALCRIM Nos. 1000 and 1215,	

Instruction	Commentator	Comment	Committee Response
		appears easier to understand than the proposed revision.	
1225 Defense to Kidnapping: Protecting Child from Imminent Harm	Anonymous commentator	Update instruction and bench notes to indicate that *People v. Neidinger* (2006) 40 Cal.4th 67, 79, resolved the issue of the defendant's burden of proof.	Agreed and done.
1400 Active Participation in Criminal Street Gang	Managing Deputy District Attorney Charles T. Olvis, Monterey County	Comment 1. The instruction changes the order of the statute from "promote, further or assist" to "assisted, furthered, or promoted." This change in language from Penal Code section 186.22(a) is likely to lead to unnecessary litigation and confusion and should be changed to appropriately reflect the statute. Comment 2. The instruction continues to omit the word "any" prior to "felonious criminal conduct." This change in language from Penal Code section 186.22(a) is likely to lead to unnecessary litigation and confusion and should be changed to appropriately reflect the statute. Comment 3. The instruction should define "promote, further or assist". Here is language from *People v. Ngoun:* "In common usage, 'promote' means to contribute to the progress or growth of; 'further' means to help the progress of; [***8] and 'assist' means to give aid or support. (*Webster's New College Dict.* (1995) pp. 885, 454, 68.) The literal meanings of these critical words squares with the expressed purposes of the lawmakers." (*People v. Ngoun*, 88 Cal. App. 4th 432, 436 (Cal. Ct. App. 2001).) Comment 4. The paragraph which reads as follows:	These comments go beyond the scope of subject matter circulated for comment and will be considered at a future committee meeting.

Instruction	Commentator	Comment	Committee Response
		"Felonious criminal conduct means committing or attempting to commit [any of] the following crime[s]: <insert felony or felonies by gang members that the defendant is alleged to have furthered, assisted, or promoted>." This paragraph should be altered to match the change made for the direct commission of the crime instead of only as an aider and abettor. Thus it should read as follows: "Felonious criminal conduct means committing or attempting to commit [any of] the following crime[s]: <insert felony or felonies by gang members that the defendant is alleged to have furthered, assisted, or promoted or directly committed>." Comment 5. Currently there is a paragraph that reads as follows: "To decide whether a member of the gang [or the defendant] committed <insert felony or felonies listed immediately above and crimes from Pen. Code, § 186.22(e)(1)–(33) inserted in definition of pattern of criminal gang activity>, please refer to the separate instructions that I (will give/have given) you on (that/ those) crime[s]." This paragraph combines two separate and distinct parts of 186.22(a). The first part is related to the current felonious criminal conduct. The second part is the pattern of criminal gang activity (predicate offenses) which are the past offenses previously committed which qualify the group as a criminal street gang. The paragraph separated into two paragraphs as follows: 1. The paragraph for the "current felonious criminal conduct": "To decide whether a member of the gang [or the	

Instruction	Commentator	Comment	Committee Response
		defendant] committed <insert felony or felonies listed immediately above and crimes from Pen. Code, § 186.22(e)(1)–(33) inserted in definition of pattern of criminal gang activity>, please refer to the separate instructions that I (will give/have given) you on (that/ those) crime[s]." The above paragraph should remain where it is located as it relates to the felonious criminal conduct mentioned in the paragraph above it. 2. The paragraph for the pattern of criminal gang activity: "[To decide whether a member of the gang [or the defendant] committed <insert felony or felonies from Pen. Code, § 186.22(e)(1)–(33)>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]" Only use the above paragraph if the pattern of gang activity has not been legally established such as by certified documents showing the conviction or sustained juvenile petition. Said another way, this paragraph would only apply in the unusual case where the conduct being used to establish the pattern of criminal gang activity has *not* resulted in a conviction or sustained juvenile petition. The new paragraph should be bracketed with a note that it only applies where the "pattern of gang activity" has not been legally established, such as by certified documents showing the conviction or sustained juvenile petition. Said another way, this paragraph would only apply in the unusual case where the conduct being used to establish the pattern of criminal gang activity has *not* resulted in a conviction or sustained juvenile	

Instruction	Commentator	Comment	Committee Response
		petition. Similar to the modification made to instruction No. 1401. This paragraph should appear in the section "A pattern of criminal gang activity, as used here, means:" just after the language of alternative 1b and before the number 2.	
	Kathy Lynn, Research Attorney in chambers of Hon. Roger W. Boren, Court of Appeal, Second Appellate District	*People v. Salcido* (2007) 149 Cal.App.4th 356 is cited under the Authority section for "Active Participation Defined." (p. 96) It appears that it would more appropriately be cited under "Applies to Both Perpetrator and Aider and Abettor" (p. 97) or under a new entry, "Willfully assisted, furthered, or promoted felonious criminal conduct."	The committee agrees with this comment and has made an appropriate revision.
1401 Felony Committed for Benefit of Criminal Street Gang	Managing Deputy District Attorney Charles T. Olvis, Monterey County	Comment 1. This instruction applies to Penal Code section 186.22(d) as well as 186.22(b)(1) and so the title should reflect "186.22(b)(1)/186.22(d)." Comment 2. The instruction changes the order of the statute from "promote, further or assist" to "assisted, furthered, or promoted." This change in language from Penal Code section 186.22(b)(1) is likely to lead to unnecessary litigation and confusion and should be changed to appropriately reflect the statute. Comment 3. The instruction continues to omit the word "any" prior to "criminal conduct." This change in language from Penal Code section 186.22(b)(1) is likely to lead to unnecessary litigation and confusion and should be changed to appropriately reflect the statute.	These comments go beyond the scope of subject matter circulated for comment and will be considered with the next round of comments, but the committee will revise the code reference in the title.

Instruction	Commentator	Comment	Committee Response
		Comment 4. The use note on page 104 saying that the enhancement does not apply is incorrect. The case cited, *Lopez*, only stands for the proposition that an extra 10 years cannot be imposed. That is different than saying that the enhancement does not apply to homicide. This would be misleading to a trial judge.	
	Kathy Lynn, Research Attorney in chambers of Hon. Roger W. Boren, Court of Appeal, Second Appellate District	A portion of this instruction provides, "[To decide whether a member of the gang [or the defendant] committed ___ [insert one or more crimes listed in Pen. Code, § 186.22(e)(1)-(33)], please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]" (p. 101) This refers to the predicate offenses that enter into the definitions of criminal street gang and the pattern of criminal gang activity. Predicate offenses may be established, inter alia, by proof of the commission of, or by proof of a conviction for, an enumerated offense. The bench notes state that "[t]he court should . . . give the appropriate instructions defining the elements of all crimes inserted in the definition of 'criminal street gang' or 'pattern of criminal gang activity.'" (p. 102) The proposed modification adds the following note to the court before the instruction quoted above: "/The court may give the following paragraph when one of the predicate crimes is not a prior conviction or a currently charged offense/" (p. 101) As the proposed note apparently recognizes, it is not necessary to define the elements of a crime if it is established by evidence of a conviction. (1) The bench note quoted above should itself be modified to this effect. (2) The proposed note to the court should be modified to add the italicized words as follows: "The court may give the following paragraph when one of the predicate crimes *is not established by a prior conviction*	The committee agrees to change the corresponding bench note but otherwise prefers the current language.

Instruction	Commentator	Comment	Committee Response
		. . . ." However, it does not appear necessary to include "or a currently charged offense" in the proposed note ("/The court may give the following paragraph when one of the predicate crimes is not a prior conviction or a currently charged offense/"). The effect of including this phrase in the proposed note would be to omit the instruction, which informs the jury that the court will separately define the elements of the predicate offenses, in the situation where a predicate offense is the same as the charged offense. According to the bench note, the court should give separate instructions defining the elements of every predicate crime. Since this is required for predicate offenses whether or not they are the same as the charged crime, there is no reason not to inform the jury by means of this instruction that it will be separately instructed on the elements when the predicate happens to be one of the charged crimes.	
1806 Theft by Embezzlement	Appellate Projects	The defendant's entitlement to a mistaken belief instruction and defense is compromised by the addition of a requirement that his good faith belief be not wholly unreasonable. Reasonableness may be a relevant consideration in assessing whether the defendant actually had a good faith belief, but the absence of reasonableness as to some component of that belief does not as a matter of law negate "good faith." See *People v. Navarro* (1979) 99 Cal.App.3d Supp 1, 11: "It is true that if the jury thought the defendant's belief to be unreasonable, it might infer that he did not in good faith hold such belief. If, however, it concluded that defendant in good faith believed that he had the right to take the beams, even though such belief was unreasonable as measured by the objective standard of a	The committee agrees with this comment and has conformed the good faith belief language in CALCRIM Nos. 1806 and 1863 to the original language of CALCRIM No. 1863.

Instruction	Commentator	Comment	Committee Response
		hypothetical reasonable man, defendant was entitled to an acquittal since the specific intent required to be proved as an element of the offense had not been established." It is correct that *People v. Stewart* (1976) 16 Cal.3d 133, 140 stated: "[T]he circumstances in a particular case might indicate that although defendant may have 'believed' he acted lawfully, he was aware of contrary facts which rendered such a belief wholly unreasonable, and hence in bad faith." This statement cannot be properly read to establish an "objective reasonableness" requirement for the defense of good faith belief in authorization to use the property. *Stewart* did not, explicitly or implicitly, purport to change the basic principles underlying the mistake of fact doctrine; it was applying them to a particular case. The cited passage does no more than focus on the factual predicate of whether the defendant actually entertained a good faith belief in his entitlement and point out that the unreasonableness of a belief may be evidence that a defendant did not actually hold it. But this is not true in every case, as shown in *People v. Russell* (2006) 144 Cal.App.4th 1415, 1426 (belief need not be "reasonable") and *Navarro*, and properly read, *Stewart* is consistent with those cases. The mistake of fact defense is focused on the sincerity of the defendant's subjective belief, not on whether the jury deems that belief to be reasonable. The current language of CALCRIM No. 1863 strikes the correct balance: "if the claimed belief was wholly unreasonable, the jury may conclude the defendant did not sincerely hold it." Further, the language of the addition to the instruction creates a	

Instruction	Commentator	Comment	Committee Response
		serious potential for misunderstanding. It is confusing, because read as intended it requires the jury to distinguish between "merely" and "completely" unreasonable beliefs, without providing any guidance on the basis for such distinction. Further, jurors might not make such a distinction at all, since "completely" can be construed as adding no meaningful content to "unreasonable." The jury would then be led to the conclusion that the mistaken belief must be "reasonable," a reading that is flatly wrong (see *Russell*, *supra* 144 Cal.App.4th at 1428–1429, quoting current CALCRIM No. 1863.) To avoid these possible misinterpretations, we suggest that if the committee wishes to clarify CALCRIM No. 1806, language adapted from the current language of CALCRIM No. 1863 should be added.	
1863 Defense to Theft or Robbery: Claim of Right	Appellate Projects Hon. Karen L.	The proposed revision interjects a "completely unreasonable" exception to the defendant's good faith belief defense that he had a right to the property taken. As with CALCRIM No. 1806, that is not an accurate statement of the law. For example, a former spouse may have unreasonably thought she was entitled to repossess the TV purchased with money she earned while her husband refused to work, whereas if she had read, or remembered, the consent decree, she would have known the TV had been awarded to her former husband; but as a matter of law that does not negate her good faith belief the TV was hers. Again, the "completely unreasonable" terminology is both unauthorized and confusing. The current language of CALCRIM No. 1863, treating unreasonableness as an evidentiary standard for assessing the sincerity of belief, is the correct statement of law. The text that is stricken reads far clearer than the proposed	The committee agrees with these comments and has revised 1863 accordingly.

Instruction	Commentator	Comment	Committee Response
	Robinson, Superior Court of California, County of Orange	revision. The stricken text also provides the jury with sufficient guidance in determining whether the defendant acted with a good faith belief or not. Take the first sentence from the proposed revision and add it as the first sentence of the stricken portion, and then reinstate the amended stricken portion as the final text.	
2220 Driving With Suspended or Revoked Driving Privilege	Los Angeles County Public Defender	The proposed revision replaces each use of "driver's license" with "driving privilege." Plainly, the goal is to clarify that a person can violate the applicable Vehicle Code sections even though he or she has never been issued a driver's license. (*People v. Matas* (1988) 200 Cal.App.3d Supp. 7, 9.) There are two flaws with the proposed revision. First, as drafted, the proposed revision substitutes legalese for plain English, contrary to the foundational objective of *CALCRIM*. Laypersons know the term "driver's license." But the proposed substitute, "driving privilege," is a legal term, and an obscure one at that. "Driver's license" appears in 885 separate sections of the California Statutes, according to a Westlaw search; "driver's privilege" in but 27 sections. If "driver's privilege" is used sparsely in the statutes, the term is even more obscure in everyday communication. Normal persons speak of getting their driver's license when they turn 16, not of exercising their driving privilege. One says one can lose one's license if one drives drunk, not one's privilege. Thus, the proposed instruction, by attempting to fix that which is not broken, will regress clarity. Further, the proposed amendment to add the unusual term "driving privilege" will prompt requests from befuddled	The word "privilege" is taken from Vehicle Code section 14601.1 and the committee prefers to retain it.

Instruction	Commentator	Comment	Committee Response
		deliberating jurors for a definition of the term. The proposed revision does not include a definition. Courts will have to gather the parties, the reporter, and the court staff, contrary to judicial economy, and will have to individually fashion ad hoc answers, contrary to *CALCRIM's* purpose of fostering statewide uniformity in jury instructions. Second, labeling an activity a "privilege" connotes that it is of little importance. A "privilege" receives minimal legal protection. Jurors would equate "privilege" to that which they give their children when the children are well behaved. In comparison, licenses are substantial, official. One does not speak of awarding one's child a license to, for example, watch television or a license to have an extra 30 minutes before bedtime. Accordingly, jurors considering a case involving a "privilege" will scrutinize the prosecution's case less rigorously than one involving a "license." In other words, "licenses" implicitly rest on rights—concepts appropriate in a court of law. Privileges exist at plenary whim, a concept possibly appropriate in the principal's office, but not in a criminal court. Breaches of privilege are summarily adjudicated; matters involving rights, including actions involving a license, are accorded due process of law. (See, e.g., *Rondon v. Alcoholic Beverage Control Appeals Bd.* (2007) 151 Cal.App.4th 1274 [action to revoke or to suspend a license implicates general due process rights].) Jurors perceive the distinction, and they will adjust their scrutiny and care based on whether they are hearing a case involving a license or a privilege, notwithstanding other instructions admonishing that the standard of proof is beyond a reasonable doubt.	

Instruction	Commentator	Comment	Committee Response
		There are two alternative revisions to the proposed revision that would mitigate its side-effects yet provide the clarification that the revisor seeks. One, the safest alternative, is to simply add a bracketed alternative paragraph as follows: <Give only if the defendant has never been issued a valid license.> ["A person may have a suspended driver's license even though (he/she) has never been issued a valid driver's license."] A use note could be added to advise the court to give the bracketed paragraph if the evidence shows that the defendant has never been issued a valid driver's license. Or the harm engendered by the term "privilege" could be limited by restricting its use to those cases in which the accused actually has never been issued a valid driver's license. Such cases are the only ones in which the "license/privilege" distinction is relevant. The existing instruction, which does not contain the term "privilege," is drafted perfectly as is for cases in which the defendant has been issued a valid license. To accommodate never licensed defendants, the instruction could be amended to replace each use of "driver's license" with "(driver's license/ [or] driving privilege)." The court would select the applicable option case by case.	
	Kathy Lynn, Research Attorney in chambers of Hon. Roger W. Boren, Court of Appeal, Second Appellate District	1. The instruction was modified throughout to substitute "driving privilege" for "driver's license." The same substitution should be made in the subheading under "Related Issues" (p. 136) and in the discussions of *People v. Gutierrez* (1998) 65 Cal.App.4th Supp. 1 and *In re Hayes* (1969) 70 Cal.2d 604 (p. 137).	The committee does not believe these further changes are necessary since the cases cited specifically refer to driver's licenses.

Instruction	Commentator	Comment	Committee Response
		2. The bench notes to CALCRIM Nos. 2100, 2101, 2110, and 2111 have been modified to delete language about instruction on permissive inferences (see pp. 113 [CALCRIM No. 2100], 121 [CALCRIM No. 2101], 126 [CALCRIM No. 2110], 131 [CALCRIM No. 2111]). The bench note to CALCRIM No. 2220 (p. 135) has not been so modified, but the same reasoning presumably applies in this instruction. It should be modified to delete the following language: "In addition, it is only appropriate to instruct the jury on a permissive inference if there is no evidence to contradict the inference. (Evid. Code, § 640.) If any evidence has been introduced to support the opposite factual finding, then the jury 'shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption.' (*Ibid*.)."	The committee agrees with this comment and has made an appropriate revision.
2500 Illegal Possession, etc., of Weapon	Hon. Craig Riemer, Superior Court of California, County of Riverside	This instruction confuses knowledge of the presence of the object with knowledge of the nature of the object. Compare it to 2300, which correctly asks the jury to find both knowledge of presence and knowledge of nature. Make additional changes to separate those two issues, e.g.: 1. The defendant possessed a short-barreled shotgun; 2. The defendant knew that he possessed that object; AND 3. The defendant knew that the object was a short-barreled shotgun.	This comment goes beyond the scope of the material that circulated for public comment and will be considered by the committee at a future committee meeting.
2701 Violation of Court Order: Protective Order or Stay Away	Los Angeles County Public Defender	The proposed revision substitutes the word "intentionally" for "wilfully" when a violation of Penal Code section 273.6 is alleged. This is in conformance with the statutory language. However, the comment states that this is a "scienter" requirement, and no definition of the term "intentionally" is	The committee believes that the commentator's concerns are addressed by the current wording of the instruction.

Instruction	Commentator	Comment	Committee Response
		given. Section 273.6 requires an "intentional and knowing" violation of a court order. If "intentional" was merely a scienter requirement, then "knowing" would be redundant. The statute cannot be interpreted in that way. "Every word, phrase, and provision in a statute must be given meaning and effect. . . ." (*Anthony v. Superior Court* (1980) 109 Cal.App.3d 346, 355.) Moreover, "intentional" cannot be interpreted as "wilful," since the Legislature used that word in Penal Code section 166 and used a different word in section 273.6. "When the Legislature uses materially different language in statutory provisions addressing the same subject or related subjects, the normal inference is that the Legislature intended a difference in meaning." (*People v. Trevino* (2001) 26 Cal.4th 237, 242.) Thus, "intentional" is not a mere scienter requirement, but a requirement that it be proved that the defendant not only knew of the order, but also intended to violate the order. Accordingly, the definition of "willfully" should be bracketed, and given only when violations of section 166 are alleged. There should be a further bracketed definition of "intentionally" to be given when a violation of section 273.6 is alleged, as follows: "Someone intentionally violates and order when, with knowledge of an order, (he/she) engages in conduct with the purpose of violating the order."	
2840 Evidence of Uncharged Tax Offense: Failed to	Appellate Projects	The concluding paragraph should retain the formulation of instructions on reasonable doubt that the People must prove each element of the charge beyond a reasonable doubt. See *In re Winship* (1970) 397 U.S. 358, 364 and its progeny. Any	The reference to the elements was deleted in response to suggestions that this language should be consistent with the language in

Instruction	Commentator	Comment	Committee Response
File Previous Returns		formulation of the People's burden that makes less clear that the requirement of proof beyond a reasonable doubt applies to each component of the charge, considered individually, as well as to the identity of the defendant as the perpetrator, serves to undercut the force of this fundamental instruction and is potentially prejudicial to the defendant.	CALCRIM Nos. 103 and 220, the reasonable doubt instructions. The committee notes that CALJIC No. 2.90 does not refer to the elements, either, and has been upheld many times. CALCRIM No. 220 has been upheld as well.
	Los Angeles County Public Defender	The proposed revision both improves and worsens the existing instruction. For the better, it would make explicit that the People must prove each allegation beyond a reasonable doubt. The present instruction satisfactorily states that the prosecution must prove each element of each charge beyond a reasonable doubt, but it fails to inform the jury that the burden and standard of proof apply equally to charged allegations. For the worse, the proposed revision condenses "must still prove each element of _____ <insert charged offense> beyond a reasonable doubt" to "must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt." Under the proposed revision, jurors would no longer be advised in this instruction that proof of a charge means proof of each of its elements. Only by referring to other instructions could the jury learn this bedrock principle, and, even then, jurors might mistake that when the People present propensity evidence (here, of uncharged tax offenses or the failure to file previous returns), the charged offense(s) may be considered holistically, not element by element. Brevity does not justify dispensing with the due process protection afforded by the existing "each element" language. "The People must still prove the charge beyond a reasonable	See response to previous comment.

Instruction	Commentator	Comment	Committee Response
		doubt" is hardly shorter than the following revision, which hereby is suggested in lieu of the proposed revision: "The People must still prove (the/each) element of each (charge/[and] allegation) beyond a reasonable doubt." This version would clarify that allegations must be proved beyond a reasonable doubt while preserving the existing language's information that to prove a charge means to prove each of its elements.	
3406 Mistake of Fact	Appellate Projects	Rephrase the second and third paragraphs of the bench notes to take account of the fact that a number of general intent crimes also have a "knowledge of the facts" element, which functions similarly to a specific intent. (See *People v. Whitfield* (1994) 7 Cal.4th 437, 450; *People v. Reyes* (1997) 52 Cal.App.4th 975, 984–985, and fn. 6.) For such crimes, and unreasonable but honestly held (good faith) belief would be a valid defense, because it still negates an essential element of the charge. (*People v. Russell, supra*, 144 Cal.App.4th 1415, 1425–1426.) For example, receiving stolen property has been considered a general intent crime (*People v. Wielograf* (1980) 101 Cal.App.3d 488, 494), but the requirement that the defendant know the property is stolen functions like a specific intent element. (*Russell*, at 1426–1426; see also *Reyes* at 982–985.) Accordingly, the following language belongs in the bench notes: "If (i) the defendant is charged with a general intent crime, and (ii) the evidence supporting the instruction does not go to the issue of knowledge that is an element of the crime (e.g., in a prosecution for receiving stolen property, knowledge that the property has been stolen), then the trial court must instruct with	This comment addresses matters beyond the scope of the current invitation to comment. The committee will consider it during the next round of revisions.

Instruction	Commentator	Comment	Committee Response
		the bracketed language requiring that defendant's belief be both actual and reasonable. Do not use the bracketed language requiring the belief to be reasonable if either (i) the intent at issue is specific criminal intent, or (ii) the evidentiary issue underlying the instruction goes to knowledge that is an element of the crime. A different way to accomplish the same thing would be to use the existing bench notes, and then add the following paragraph after the second and third paragraphs: "For these purposes, an essential element of knowledge of a fact underlying a crime (e.g., knowledge of property's stolen character, as an element of receiving stolen property) is treated the same as specific criminal intent, even if the crime is otherwise deemed to be one of general intent. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 984 & fn. 6; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425–1426.)"	
3425 Unconsciousness	Los Angeles County Public Defender	The proposed revisions are only to the bench notes. The proposed revisions are an improvement on the existing use note. However, the existing instruction uses a presumption to unconstitutionally shift the burden of proof to the defendant. (See Lundy, Forcite California (Fall 2007), Series 3400 Defenses and Insanity.) Forcite offers alternative instructions to CALCRIM No. 3425. A Forcite instruction or an equivalent should be adopted to remedy constitutional defects in 3425. The revisions under consideration here would not modify the actual jury instruction, only the bench notes. Hence, the proposed revisions would not affect the instruction's substantive deficiency.	This comment addresses matters beyond the scope of the current invitation to comment. The committee will consider it during the next round of revisions.

Instruction	Commentator	Comment	Committee Response
3450 Insanity: Determination, Effect of Verdict	Deputy District Attorney Dolores Carr, Santa Clara County	Our comment deals with the circumstance where there are periods of sanity and periods of insanity. The proposed instruction deletes the language which instructs the jury to assume the defendant was legally sane. Our concern is that the proposed instruction should make it clear that if there are periods of sanity and periods of insanity, it is still the defendant's burden to prove insanity at the time the crime was committed. Our proposed language: "You may find that at times the defendant was legally sane and at other times he/she was legally insane. The defendant must prove that it is more likely than not that he/she was legally insane when he/she committed the crime[s]."	The committee agrees with these comments and has revised the instruction accordingly.
	Los Angeles County Public Defender	The instruction may contain prejudicially irrelevant principles and mislead jurors by suggesting that a verdict of not guilty by reason of insanity could result in release and outpatient treatment and that an additional sanity trial would be required to continue a defendant's incarceration. This instruction and its predecessor CALJIC No. 4.01 were designed to assuage any juror fear that an insanity finding will result in release of the accused. (*People v. Kelly* (1992) 1 Cal.4th 495, 538.) *People v. Kipp* (1986) 187 Cal.App.3d 748 disapproved a special jury instruction which stated that a later finding of restored sanity would result in the defendant's release.	

Instruction	Commentator	Comment	Committee Response
		The instruction should be changed to omit the portion in paragraph eight that reads, ". . . or outpatient treatment program, if appropriate. He may not, generally, be kept in a mental hospital or outpatient program longer than the maximum sentence available for his crime. If the state requests additional confinement beyond the maximum sentence, the defendant will be entitled to a new sanity trial before a new jury." This is particularly true in any case that carries a life term, since the issue of being held longer than the maximum period of confinement clearly will not apply. In addition, because almost all mentally ill people have lucid moments, the portion of this instruction that reads, "If you conclude that at times the defendant was legally sane and other times the defendant was insane, you must assume that he was legally sane when he committed the crime," might erroneously direct the jury to a finding of sanity even when a defendant might have been insane at the time of the crime, merely if he was sane at any other time. In the recent case of *People v. Thomas* (Cal.App. 3 Dist.,2007) 156 Cal.App.4th 304, 309–310, the court acknowledged that this portion of the instruction could be misleading. The court stated that "no good can come from informing the jury that, once evidence has been presented that the defendant was sane at times and insane at other times, it must assume he was sane at the time of the offenses. This assumption existed before evidence was presented. Thus, there is the risk the jury might read the highlighted portion to mean the assumption is irrebuttable."	
3470	Los Angeles County	The current language of the bench notes to CALCRIM No. 3470	The committee disagrees with this

Instruction	Commentator	Comment	Committee Response
Right to Self-Defense or Defense of Another (Nonhomicide)	Public Defender	should not be modified. When the decisions in *Flood* and *Breverman* are read in context and together, it is clear that the current language of the bench notes is accurate. The *Breverman* court cited with approval the following language from its decision in *People v. Sedeno* (1974) 10 Cal.3d 703: "In the case of defenses, we concluded, a sua sponte instructional duty arises 'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'" (*People v. Breverman* (1998) 19 Cal.4th 142, 157.) This language was not overruled, distinguished, or disapproved of in the *Breverman* decision. Significantly, the purported justification for the change to the bench notes is the decision in *People v. Flood* (1998) 18 Cal.4th 470, 480, which predates the *Breverman* decision. The decision in *Flood* was issued on July 2, 1998, while the decision in *Breverman* was issued on August 31, 1998. The correct reading of *Flood* and *Breverman* is that the trial court has a general sua sponte duty to instruct on a defense in two situations. The first is when "the defendant is relying on such defense" without any requirement of supporting substantial evidence. The second is when "substantial evidence supportive of such defense" exists even though the defense is not relying on such defense, unless it is inconsistent with the defense theory of the case. Only the duty to instruct in the second situation was addressed in *Flood*, i.e., there is only a sua sponte duty to instruct on a defense which is not being relied upon if there	comment because *Breverman* was dealing with lesser included offenses and not the rule for instructing on defenses. It did not say the court must instruct on a defense not presented by the evidence, and isolated language from an opinion is not a holding. The trial court does not have to instruct, *sua sponte* or otherwise, on theories not supported by any evidence. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 418; *People v. Stitely* (2005) 35 Cal.4th 514, 551.)

Instruction	Commentator	Comment	Committee Response
		exists substantial evidence to support that defense. Therefore, the court's independent sua sponte duty to instruct in the first situation, i.e., when a defendant relies on a particular defense, was not affected by the decision in *Flood*. Additionally, the bench notes invite confusion on the part of the trial courts because of its failure to define the meaning of the phrase "substantial evidence." The California Supreme Court in *People v. Flannel* (1979) 25 Cal.3d 668, 684 states that "[a] trial court should not, however, measure the substantiality of the evidence by undertaking to weigh the credibility of the witnesses, a task exclusively relegated to the jury. If the evidence should prove minimal and insubstantial, however, the court need not instruct on its effect."	The committee agrees with this comment and has made appropriate changes.
3471 Right to Self-Defense: Mutual Combat or Initial Aggressor	Los Angeles County Public Defender	The current language of CALCRIM No. 3471 should not be modified. No authority is given to justify the proposed modification. Secondly, the proposed modification would turn the instruction into a vague, misleading, and confusing statement of the law. For example, jurors could interpret "aggressor" as one who initiates a verbal, as opposed to a physical, confrontation.	The committee prefers the current language.
3475, 3476 (Defenses)	Los Angeles County Public Defender	The current language of the bench notes to CALCRIM Nos. 3475 and 3476 should not be modified. When the decisions in *Flood* and *Breverman* are read in context and together, it is clear that the current language of the Bench Notes is accurate. The *Breverman* court cited with approval the following language from its decision in *People v. Sedeno* (1974) 10 Cal.3d 703: "In the case of defenses, we concluded, a sua sponte instructional duty arises 'only if it appears that the defendant is relying on	The committee disagrees with this comment, because *Breverman* was dealing with lesser included offenses and not the rule for instructing on defenses. It did not say the court must instruct on a defense not presented by the evidence, and isolated language from an opinion is not a holding.

Instruction	Commentator	Comment	Committee Response
		such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'" (*People v. Breverman* (1998) 19 Cal.4th 142, 157.) This language was not overruled, distinguished, or disapproved of in the *Breverman* decision. Significantly, the purported justification for the change to the Bench Notes is the decision in *People v. Flood* (1998) 18 Cal.4th 470, 480, which predates the *Breverman* decision. The decision in *Flood* was issued on July 2, 1998, while the decision in *Breverman* was issued on August 31, 1998. The correct reading of *Flood* and *Breverman* is that the trial court has a general sua sponte duty to instruct on a defense in two situations. The first is when "the defendant is relying on such defense" without any requirement of supporting substantial evidence. The second is when "substantial evidence supportive of such defense" exists even though the defense is not relying on such defense, unless it is inconsistent with the defense theory of the case. Only the duty to instruct in the second situation was addressed in *Flood,* i.e., there is only a sua sponte duty to instruct on a defense which is not being relied upon if there exists substantial evidence to support that defense. Therefore, the court's independent sua sponte duty to instruct in the first situation, i.e., when a defendant relies on a particular defense, was not affected by the decision in *Flood*. Additionally, the bench notes invite confusion on the part of the trial courts because of its failure to define the meaning of the phrase "substantial evidence." The California Supreme Court in *People v. Flannel* (1979) 25 Cal.3d 668, 684 states that "[a] trial	The trial court does not have to instruct, sua sponte or otherwise, on theories not supported by any evidence. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 418; *People v. Stitely* (2005) 35 Cal.4th 514, 551.) The committee agrees with this comment and has made appropriate changes.

Instruction	Commentator	Comment	Committee Response
		court should not, however, measure the substantiality of the evidence by undertaking to weigh the credibility of the witnesses, a task exclusively relegated to the jury. If the evidence should prove minimal and insubstantial, however, the court need not instruct on its effect."	
	Elaine Alexander, Executive Director, Appellate Defenders, Inc.	Re the bench note statement on when to instruct on defenses: The standard is indeed whether there is sufficient evidence of a defense for a reasonable trier of fact to find a reasonable doubt as to the defendant's guilt (with the exception noted in the original footnote). *People v. Salas* (2006) 37 Cal.4th 967, 982–983, says: "[A] defendant has a right to have the trial court, on its own initiative, give a jury instruction on any affirmative defense for which the record contains substantial evidence. . . . In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt. . . .' (*People v. Jones* (2003) 112 Cal.App.4th 341, 351 see *People v. Ramirez* (1990) 50 Cal.3d 1158, 1180; *People v. Jeter* (1964) 60 Cal.2d 671, 674; *People v. Simmons* (1989) 213 Cal. App. 3d 573, 579, and cases there cited.)" (See also *Mathews v. United States* (1988) 485 U.S. 58, 63 ["a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor"]; *People v. Mower* (2002) 28 Cal.4th 457, 481 ["defendant is required merely to raise a	The committee agrees with this comment and has made appropriate changes.

Instruction	Commentator	Comment	Committee Response
		reasonable doubt as to medical marijuana defense"]; *People v. Tewksbury* (1976) 15 Cal.3d 953, 963-964, and cases cited; *People v. Saavedra* (2007) 156 Cal.App.4th 561, 567, 569 [defendant entitled to instruction on self-defense]; *People v. Cole* (2007) 156 Cal.App.4th 452, 483-483 [defendants "bore the initial burden of producing evidence that supported a reasonable doubt" as to whether they had good faith belief they were not required to obtain broker-dealer license].) Many courts may find it difficult, in the rush of trial, to research the law on instructions on defenses and, relying only on the bench note's reference to "substantial evidence," give that language its most familiar meaning—as it is used on appeal to assess the sufficiency of the evidence to support a conviction. There, the burden of proof is beyond a reasonable doubt, and the reviewing court's task is to determine whether the trier of fact could reasonably have found that burden was met. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [on appeal, "the relevant question is whether . . . any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," emphasis omitted]; *People v. Johnson* (1980) 26 Cal.3d 557, 578 [substantial evidence is "evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt"].) Sufficient evidence to sustain a conviction beyond a reasonable doubt is of course radically different from sufficient evidence to raise a reasonable doubt, and thus the trial court may fall into error. *Salas* and the other cases on defense instructions cited, as well as	

Instruction	Commentator	Comment	Committee Response
		Jackson and its progeny, follow logically from the general principle that the term "substantial evidence" means sufficient evidence for a reasonable trier of fact to find the applicable burden of proof has been met. The content of the term varies according to the applicable burden of proof. (E.g., *In re Jasmon O.* (1994) 8 Cal.4th 398, 423 ["as a reviewing court, we . . . decide if the evidence . . . is reasonable, credible and of solid value—such that a reasonable trier of fact could find that termination of parental rights is appropriate based on clear and convincing evidence," internal quotation marks omitted]; see also *Lake v. Reed* (1997) 16 Cal.4th 448, 468 [preponderance]; cf. *Dart Industries, Inc. v. Commercial Union Ins. Co*. (2002) 28 Cal.4th 1059, 1082, conc. opn. of Brown, J. [evidence sufficient under preponderance standard, but not under clear and convincing one].) Since the defendant's burden of proof with respect to most defenses is to raise a reasonable doubt, it would be helpful for the bench notes to highlight that standard and avoid possible misunderstanding. Substitute the following paragraph for the current new insertion, which includes the refinements that (1) the evidence must be sufficient "if believed" and (2) the jury must be acting as a "reasonable" trier of fact: "The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a sua sponte duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case. Substantial evidence means	

Instruction	Commentator	Comment	Committee Response
		evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt." As pointed out in the original footnote, for defenses that a defendant must prove by a preponderance of the evidence, such as necessity (CALCRIM No. 3403) and entrapment (CALCRIM No. 3408), the added sentence would read: "Substantial evidence means evidence of (necessity/entrapment), which, if believed, would be sufficient for a reasonable jury to find that the defendant has shown the defense to be more likely than not."	
3550 Predeliberation Instructions	Deputy District Attorney Craig Fisher, San Diego County Los Angeles County Public Defender	The important warning about not considering punishment belongs in this final, predeliberation instruction. It should also remain in the introductory instruction, CALCRIM No. 200. See also comments re CALCRIM Nos. 101 and 200. The instruction is legally accurate.	No response required. No response required.

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

I will now explain some basic rules of law and procedure. These rules ensure that both sides receive a fair trial.

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

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

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

You must reach your verdict without any consideration of punishment.

Do not do any research on your own or as a group. Do not use a dictionary, the Internet, or other reference materials. Do not investigate the facts or law. Do not conduct any tests or experiments, or visit the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate.

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

During the trial, do not speak to any party, witness, or lawyer involved in the trial. Do not listen to anyone who tries to talk to you about the case or about any of the people or subjects involved in it. If someone asks you about the

case, tell him or her that you cannot discuss it. If that person keeps talking to you about the case, you must end the conversation.

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

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

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

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

Do not let bias, sympathy, prejudice, or public opinion influence your decision.

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

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

Do not give the sentence that begins "Do not let bias," in the penalty phase of a capital trial.

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

AUTHORITY

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

Secondary Sources

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

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

RELATED ISSUES

Admonition Not to Discuss Case With Anyone

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

> It is troubling that during deliberations not one but two jurors had conversations with their pastors that ultimately addressed the issue being resolved at the penalty phase in this case. Because jurors

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

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

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

Jury Misconduct

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

102. Note-Taking

You have been given notebooks and may take notes during the trial. Do not remove them from the courtroom. You may take your notes into the jury room during deliberations. I do not mean to discourage you from taking notes, but here are some points to consider if you take notes:

1. **Note-taking may tend to distract you. It may affect your ability to listen carefully to all the testimony and to watch the witnesses as they testify;**

AND

2. **The 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.**

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

BENCH NOTES

Instructional Duty

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

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

AUTHORITY

- Resolving Jurors' Questions ▸ Pen. Code, § 1137.
- Jurors' Use of Notes ▸ California Rules of Court, Rule 2.1031

Secondary Sources

6 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Judgment, § 18.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.05[2] (Matthew Bender).

104. Evidence

You must decide what the facts are in this case. You must use only the evidence that is presented in the courtroom [or during a jury view]. "Evidence" is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I tell you to consider as evidence. The fact that the defendant was arrested, charged with a crime, or brought to trial is not evidence of guilt.

Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys will 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 help you understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asks a question that suggests it is true.

During the trial, the attorneys may object to questions asked of a witness. I will rule on the objections according to the law. If I sustain an objection, the witness will not be permitted to answer, and you must ignore the question. If the witness does not answer, do not guess what the answer might have been or why I ruled as I did. If I order testimony stricken from the record, you must disregard it and must not consider that testimony for any purpose.

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

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

New January 2006

BENCH NOTES

Instructional Duty

There is no sua sponte duty to instruct on these evidentiary topics; however, instruction on these principles has been approved. (See *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].)

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, 938 P.2d 2].
- Striking Testimony ▸ *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [47 Cal.Rptr.2d 516, 906 P.2d 478].

Secondary Sources

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

105. Witnesses

You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have.
~~The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness's disability, gender, race, religion, ethnicity, sexual orientation, gender identity, age, national origin, [or] socioeconomic status [, or _____ <insert any other impermissible bias as appropriate>].~~ You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe.

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

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

- **[Did other evidence prove or disprove any fact about which the witness testified?]**

- **[Did the witness admit to being untruthful?]**

- **[What is the witness's character for truthfulness?]**

- **[Has the witness been convicted of a felony?]**

- **[Has the witness engaged in [other] conduct that reflects on his or her believability?]**

- **[Was the witness promised immunity or leniency in exchange for his or her testimony?]**

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

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

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

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

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on factors relevant to a witness's credibility. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–884 [123

Cal.Rptr. 119, 538 P.2d 247].) Although there is no sua sponte duty to instruct on inconsistencies in testimony or a witness who lies, there is authority approving instruction on both topics. (*Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 426 [175 P.2d 607]; *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107 [55 Cal.Rptr.2d 21].)

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

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

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

AUTHORITY

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

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000), § 642.

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

200. Duties of Judge and Jury

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

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

Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes, but is not limited to, bias for or against the witnesses, attorneys, defendant[s] or alleged victim[s], based on disability, gender, nationality, national origin, race or ethnicity, religion, gender identity, sexual orientation, age, [or] socioeconomic status, (./,) [or _____ <*insert any other impermissible basis for bias as appropriate*>.]

~~**You must reach your verdict without any consideration of punishment.**~~

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

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

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

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

decided what the facts are, follow the instructions that do apply to the facts as you find them.

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

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

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

Do not give the paragraph~~sentence~~ that begins "Do not let bias," in the penalty phase of a capital trial.

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

AUTHORITY

- Copies of Instructions ▸ Pen. Code, §§ 1093(f), 1137.
- Judge Determines Law ▸ Pen. Code, §§ 1124, 1126; *People v. Como* (2002) 95 Cal.App.4th 1088, 1091 [115 Cal.Rptr.2d 922]; see *People v. Williams* (2001) 25 Cal.4th 441, 455 [106 Cal.Rptr.2d 295, 21 P.3d 1209].
- Jury to Decide the Facts ▸ Pen. Code, § 1127.
- Attorney's Comments Are Not Evidence ▸ *People v. Stuart* (1959) 168 Cal.App.2d 57, 60–61 [335 P.2d 189].
- Consider All Instructions Together ▸ *People v. Osband* (1996) 13 Cal.4th 622, 679 [55 Cal.Rptr.2d 26, 919 P.2d 640]; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [25 Cal.Rptr.2d 602]; *People v. Shaw* (1965) 237 Cal.App.2d 606, 623 [47 Cal.Rptr. 96].

- ~~Do Not Consider Punishment ▸ *People v. Nichols* (1997) 54 Cal.App.4th 21, 24 [62 Cal.Rptr.2d 433].~~
- Follow Applicable Instructions ▸ *People v. Palmer* (1946) 76 Cal.App.2d 679, 686–687 [173 P.2d 680].
- No Bias, Sympathy, or Prejudice ▸ Pen. Code, § 1127h; *People v. Hawthorne* (1992) 4 Cal.4th 43, 73 [14 Cal.Rptr.2d 133, 841 P.2d 118].

Secondary Sources

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

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

RELATED ISSUES

Jury Misconduct

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

202. Note-Taking

You have been given notebooks and may have taken notes during the trial. You may use your notes during deliberations. The 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 you. It is the record that must guide your deliberations, not your notes.

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

BENCH NOTES

Instructional Duty

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

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

AUTHORITY

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

Secondary Sources

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).

226. Witnesses

You alone, must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have.
~~The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness's disability, gender, race, religion, ethnicity, sexual orientation, gender identity, age, national origin, [or] socioeconomic status[, or _____ <*insert any other impermissible bias as appropriate*>].~~ You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe.

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

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

- **[Did other evidence prove or disprove any fact about which the witness testified?]**

- **[Did the witness admit to being untruthful?]**

- **[What is the witness's character for truthfulness?]**

- **[Has the witness been convicted of a felony?]**

- **[Has the witness engaged in [other] conduct that reflects on his or her believability?]**

- **[Was the witness promised immunity or leniency in exchange for his or her testimony?]**

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

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

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

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

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on factors relevant to a witness's credibility. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–884 [123 Cal.Rptr. 119, 538 P.2d 247].) Although there is no sua sponte duty to instruct on

inconsistencies in testimony or a witness who lies, there is authority approving instruction on both topics. (*Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 426 [175 P.2d 607]; *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107 [55 Cal.Rptr.2d 21].)

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

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

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

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

AUTHORITY

- Factors ▸ Evid. Code, § 780; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–884 [123 Cal.Rptr. 119, 538 P.2d 247].
- Inconsistencies ▸ *Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 426 [175 P.2d 607].
- Witness Who Lies ▸ *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107 [55 Cal.Rptr.2d 21].
- Proof of Character by Negative Evidence ▸ *People v. Adams* (1902) 137 Cal. 580, 582 [70 P. 662].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000), § 642.

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

250. Union of Act and Intent: General Intent

The crime[s] [or other allegation[s]] charged in this case require[s] proof of the union, or joint operation, of act and wrongful intent.

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

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the union of act and general criminal intent. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].) However, this instruction **must not** be used if the crime requires a specific mental state, such as knowledge or malice, even if the crime is classified as a general intent offense. In such cases, the court must give CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*.

If the case involves both offenses requiring a specific intent or mental state and offenses that do not, the court may give CALCRIM No. 252, *Union of Act and Intent: General and Specific Intent Together*, in place of this instruction.

The court should specify for the jury which offenses require only a general criminal intent by inserting the names of the offenses and count numbers where indicated in the second paragraph of the instruction. (*People v. Hill* (1967) 67 Cal.2d 105, 118 [60 Cal.Rptr. 234, 429 P.2d 586].) If all the charged crimes and allegations involve general intent, the court need not provide a list in the blank provided in this instruction.

If the defendant is charged with aiding and abetting or conspiracy to commit a general-intent offense, the court must instruct on the specific intent required for aiding and abetting or conspiracy. (See *People v. McCoy* (2001) 25 Cal.4th 1111,

1117–1118 [108 Cal.Rptr.2d 188, 24 P.3d 1210]; *People v. Bernhardt, supra,* 222 Cal.App.2d at pp. 586–587.)

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

Defenses—Instructional Duty

"A person who commits a prohibited act 'through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence' has not committed a crime." (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 [49 Cal.Rptr.2d 86] [quoting Pen. Code, § 26].) Similarly, an honest and reasonable mistake of fact may negate general criminal intent. (*People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673].) If there is sufficient evidence of these or other defenses, such as unconsciousness, the court has a **sua sponte** duty to give the appropriate defense instructions. (See Defenses and Insanity, CALCRIM No. 3400 et seq.)

AUTHORITY

- Statutory Authority ▸ Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
- Instructional Requirements ▸ *People v. Hill* (1967) 67 Cal.2d 105, 117 [60 Cal.Rptr. 234, 429 P.2d 586]; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 586–587 [35 Cal.Rptr. 401]; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923 [49 Cal.Rptr.2d 86].
- History of General-Intent Requirement ▸ *Morissette v. United States* (1952) 342 U.S. 246 [72 S.Ct. 240, 96 L.Ed. 288]; see also *People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 1–5.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02[1], [2] (Matthew Bender).

RELATED ISSUES

Sex Registration and Knowledge of Legal Duty

The offense of failure to register as a sex offender requires proof that the defendant actually knew of his or her duty to register. (*People v. Garcia* (2001) 25 Cal.4th 744, 754 [107 Cal.Rptr.2d 355, 23 P.3d 590].) For the charge of failure to register, it is error to give an instruction on general criminal intent that informs the jury that a person is "acting with general criminal intent, even though he may not know that his act or conduct is unlawful." (*People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rtpr.3d 260]; *People v. Edgar* (2002) 104 Cal.App.4th 210, 219 [127 Cal.Rptr.2d 662].) In such cases, the court should give CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*, instead of this instruction.

251. Union of Act and Intent: Specific Intent or Mental State

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

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

<Repeat next paragraph as needed>
[The specific (intent/ [and/or] mental state) required for the crime of _____ *<insert name[s] of alleged offense[s] e.g., burglary>* **is** _____*<insert specific intent>*.**]**

New January 2006; Revised August 2006, June 2007

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the union of act and specific intent or mental state. (*People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365].) This instruction **must** be given if the crime requires a specific mental state, such as knowledge or malice, even if the crime is classified as a general intent offense.

Do not give this instruction if the case involves only general-intent offenses that do not require any specific mental state. (See CALCRIM No. 250, *Union of Act and Intent: General Intent*.) If the case involves both offenses requiring a specific intent or mental state and offenses that do not, the court may give CALCRIM No. 252, *Union of Act and Intent: General and Specific Intent Together*, in place of this instruction.

The court should specify for the jury which offenses are specific-intent offenses by inserting the names of the offenses and count numbers where indicated in the second paragraph of the instruction. (See *People v. Hill* (1967) 67 Cal.2d 105, 118

[60 Cal.Rptr. 234, 429 P.2d 586].) The court may use the final optional paragraph if it deems it helpful, particularly in cases with multiple counts.

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

This instruction does not apply to criminal negligence or strict liability. If the defendant is also charged with a criminal negligence or strict liability offense, the court should give the appropriate Union of Act and Intent instruction: CALCRIM No. 253, *Union of Act and Intent: Criminal Negligence*, or CALCRIM No. 254, *Union of Act and Intent: Strict-Liability Crime*.

Defenses—Instructional Duty

Evidence of voluntary intoxication or mental impairment may be admitted to show that the defendant did not form the required mental state. (See *People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364].) The court has no sua sponte duty to instruct on these defenses; however, the trial court must give these instructions on request if supported by the evidence. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588]; see Defenses and Insanity, CALCRIM No. 3400 et seq.)

AUTHORITY

- Statutory Authority ▸ Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
- Instructional Requirements ▸ *People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365]; *People v. Ford* (1964) 60 Cal.2d 772, 792–793 [36 Cal.Rptr. 620, 388 P.2d 892]; *People v. Turner* (1971) 22 Cal.App.3d 174, 184 [99 Cal.Rptr. 186]; *People v. Hill* (1967) 67 Cal.2d 105, 117 [60 Cal.Rptr. 234, 429 P.2d 586].

Secondary Sources

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

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.03 (Matthew Bender).

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

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

375. Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.

<Introductory Sentence Alternative A—evidence of other offense admitted>
[The People presented evidence that the defendant committed ((another/other) offense[s]/the offense[s] of _____ *<insert description of alleged offense[s]>***) that (was/were) not charged in this case.]**

<Introductory Sentence Alternative B—evidence of other act admitted>
[The People presented evidence (of other behavior by the defendant that was not charged in this case/that the defendant _____ *<insert description of alleged conduct admitted under Evid. Code, § 1101(b)>***).]**

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

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

If you decide that the defendant committed the (uncharged offense[s]/act[s]), you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not:

<SELECT SPECIFIC GROUNDS OF RELEVANCE AND DELETE ALL OTHER OPTIONS.>

<A. Identity>
[The defendant was the person who committed the offense[s] alleged in this case](./; or)

<B. Intent>
[The defendant acted with the intent to _____ *<insert specific intent required to prove the offense[s] alleged>* **in this case](./; or)**

<C. Motive>
[The defendant had a motive to commit the offense[s] alleged in this case](./; or)

<D. Knowledge>
[The defendant knew _____ *<insert knowledge required to prove the offense[s] alleged>* **when (he/she) allegedly acted in this case](./; or)**

<E. Accident>
[The defendant's alleged actions were the result of mistake or accident](./; or)

<F. Common Plan>
[The defendant had a plan [or scheme] to commit the offense[s] alleged in this case](./; or)

<G. Consent>
[The defendant reasonably and in good faith believed that _____ *<insert name or description of complaining witness>* **consented](./; or)**

<H. Other Purpose>
[The defendant _____ *<insert description of other permissible purpose; see Evid. Code, § 1101(b)>***.]**

[In evaluating this evidence, consider the similarity or lack of similarity between the uncharged (offense[s]/ [and] act[s]) and the charged offense[s].]

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

[Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.]

If you conclude that the defendant committed the (uncharged offense[s]/ act[s]), that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of _____ *<insert charge[s>]* **[or that the _____***<insert allegation[s]>***has been proved]. The People must still prove ~~each element of~~ (the/every) _____(charge/ [and] allegation) beyond a reasonable doubt.**

New January 2006

BENCH NOTES

Instructional Duty

The court must give this instruction on request when evidence of other offenses has been introduced. (Evid. Code, § 1101(b); *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. Collie* (1981) 30 Cal.3d 43, 63–64 [177 Cal.Rptr. 458, 634 P.2d 534].) The court is only required to give this instruction **sua sponte** in the "occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose." (*People v. Collie, supra,* 30 Cal.3d at pp. 63–64.)

Do not give this instruction in the penalty phase of a capital case. (See CALCRIM No. 764, *Death Penalty: Evidence of Other Violent Crimes*.)

If evidence of uncharged conduct is admitted **only** under Evidence Code section 1108 or 1109, **do not** give this instruction. (See CALCRIM No. 1191, *Evidence of Uncharged Sex Offense*; CALCRIM No. 852, *Evidence of Uncharged Domestic Violence*; and CALCRIM No. 853, *Evidence of Uncharged Abuse of Elder or Dependent Person*.)

If the court admits evidence of uncharged conduct amounting to a criminal offense, give introductory sentence alternative A and select the words "uncharged offense[s]" where indicated. If the court admits evidence under Evidence Code section 1101(b) that does not constitute a criminal offense, give introductory sentence alternative B and select the word "act[s]" where indicated. (*People v. Enos* (1973) 34 Cal.App.3d 25, 42 [109 Cal.Rptr. 876] [evidence tending to show defendant was "casing" a home admitted to prove intent where burglary of another home charged and defendant asserted he was in the second home by accident].) The court is not required to identify the specific acts to which this instruction applies. (*People v. Nicolas* (2004) 34 Cal.4th 614, 668 [21 Cal.Rptr.3d 612, 101 P.3d 509].)

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

give the alternative "another offense" or "other offenses" without specifying the uncharged offenses.

The court must instruct the jury on what issue the evidence has been admitted to prove and delete reference to all other potential theories of relevance. (*People v. Swearington* (1977) 71 Cal.App.3d 935, 949 [140 Cal.Rptr. 5]; *People v. Simon* (1986) 184 Cal.App.3d 125, 131 [228 Cal.Rptr. 855].) Select the appropriate grounds from options A through H and delete all grounds that do not apply.

When giving option F, the court may give the bracketed "or scheme" at its discretion, if relevant.

The court may give the bracketed sentence that begins with "In evaluating this evidence" at its discretion when instructing on evidence of uncharged offenses that has been admitted based on similarity to the current offense. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 402–404 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Balcom* (1994) 7 Cal.4th 414, 424 [27 Cal.Rptr.2d 666, 867 P.2d 777].) For example, when the evidence of similar offenses is admitted to prove common plan, intent, or identity, this bracketed sentence would be appropriate.

Give the bracketed sentence beginning with "Do not conclude from this evidence that" on request if the evidence is admitted only under Evidence Code section 1101(b). Do not give this sentence if the court is also instructing under Evidence Code section 1108 or 1109.

The paragraph that begins with "If you conclude that the defendant committed" has been included to prevent jury confusion regarding the standard of proof. (See *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1013 [130 Cal.Rptr.2d 254, 62 P.3d 601] [instruction on section 1108 evidence sufficient where it advised jury that prior offense alone not sufficient to convict; prosecution still required to prove all elements beyond a reasonable doubt].)

AUTHORITY

- Evidence Admissible for Limited Purposes ▸ Evid. Code, § 1101(b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393–394 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Balcom* (1994) 7 Cal.4th 414, 422 [27 Cal.Rptr.2d 666, 867 P.2d 777].
- Degree of Similarity Required ▸ *People v. Ewoldt* (1994) 7 Cal.4th 380, 402–404 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Balcom* (1994) 7 Cal.4th 414, 424 [27 Cal.Rptr.2d 666, 867 P.2d 777].

- Analysis Under Evidence Code Section 352 Required ▸ *People v. Ewoldt* (1994) 7 Cal.4th 380, 404 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Balcom* (1994) 7 Cal.4th 414, 426–427 [27 Cal.Rptr.2d 666, 867 P.2d 777].
- Instructional Requirements ▸ *People v. Collie* (1981) 30 Cal.3d 43, 63–64 [177 Cal.Rptr. 458, 634 P.2d 534]; *People v. Morrisson* (1979) 92 Cal.App.3d 787, 790 [155 Cal.Rptr. 152].
- Other Crimes Proved by Preponderance of Evidence ▸ *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708].
- Potential Conflict With Circumstantial Evidence Instruction ▸ *People v. James* (2000) 81 Cal.App.4th 1343, 1358–1359 [96 Cal.Rptr.2d 823].

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, §§ 74–95.

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

RELATED ISSUES

Circumstantial Evidence—Burden of Proof

Evidence of other offenses is circumstantial evidence that the defendant committed the offense charged. (See *People v. James* (2000) 81 Cal.App.4th 1343, 1358, fn. 9 [96 Cal.Rptr.2d 823].) Courts have recognized a potential conflict between the preponderance standard required to prove uncharged offenses and the reasonable doubt standard required to prove each underlying fact when the case is based primarily on circumstantial evidence. (See *People v. Medina* (1995) 11 Cal.4th 694, 763–764 [47 Cal.Rptr.2d 165, 906 P.2d 2]; *People v. James, supra,* 81 Cal.App.4th at p. 1358, fn. 9.) The court must give the general circumstantial evidence instruction (CALCRIM No. 223, *Direct and Circumstantial Evidence: Defined*) "only when the prosecution relies on circumstantial evidence to prove the defendant's guilt from a pattern of incriminating circumstances, not when circumstantial evidence serves solely to corroborate direct evidence." (*People v. James, supra,* 81 Cal.App.4th at p. 1359.) Thus, if evidence of other offenses is offered to corroborate direct evidence that the defendant committed the crime, no conflict exists. However, when the prosecution's case rests substantially or entirely on circumstantial evidence, there will be a conflict between this instruction and CALCRIM No. 223. (*People v. James, supra,* 81 Cal.App.4th at p. 1358, fn. 9; *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382, fn. 4; *People v.*

Jeffries (2000) 83 Cal.App.4th 15, 23–24, fn. 7.) No case has determined how this conflict should be resolved. If this issue arises in a particular case, the court should consider the authorities cited and determine whether it is necessary to modify this instruction. (*People v. Younger, supra,* 84 Cal.App.4th at p. 1382, fn. 4; *People v. Jeffries, supra,* 83 Cal.App.4th at p. 24, fn. 7.)

Issue in Dispute

The "defendant's plea of not guilty does put the elements of the crime in issue for the purpose of deciding the admissibility of evidence of uncharged misconduct, unless the defendant has taken some action to narrow the prosecution's burden of proof." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4 [27 Cal.Rptr.2d 646, 867 P.2d 757]; *People v. Rowland* (1992) 4 Cal.4th 238, 260 [14 Cal.Rptr.2d 377, 841 P.2d 897].) The defense may seek to "narrow the prosecution's burden of proof" by stipulating to an issue. (*People v. Bruce* (1989) 208 Cal.App.3d 1099, 1103–1106 [256 Cal.Rptr. 647].) "[T]he prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness." (*People v. Scheid* (1997) 16 Cal.4th 1, 16–17 [65 Cal.Rptr.2d 348, 939 P.2d 748].) However, an offer to stipulate may make the evidence less probative and more cumulative, weighing in favor of exclusion under Evidence Code section 352. (*People v. Thornton* (2000) 85 Cal.App.4th 44, 49 [101 Cal.Rptr.2d 825] [observing that offer "not to argue" the issue is insufficient].) The court must also consider whether there could be a "reasonable dispute" about the issue. (See *People v. Balcom* (1994) 7 Cal.4th 414, 422–423 [27 Cal.Rptr.2d 666, 867 P.2d 777] [evidence of other offense not admissible to show intent to rape because if jury believed witness's account, intent could not reasonably be disputed]; *People v. Bruce, supra,* 208 Cal.App.3d at pp. 1103–1106 [same].)

Subsequent Offenses Admissible

Evidence of a subsequent as well as a prior offense is admissible. (*People v. Balcom* (1994) 7 Cal.4th 414, 422–423, 425 [27 Cal.Rptr.2d 666, 867 P.2d 777].)

Offenses Not Connected to Defendant

Evidence of other offenses committed in the same manner as the alleged offense is not admissible unless there is sufficient evidence that the defendant committed the uncharged offenses. (*People v. Martinez* (1992) 10 Cal.App.4th 1001, 1006–1007 [12 Cal.Rptr.2d 838] [evidence of how auto-theft rings operate inadmissible]; *People v. Hernandez* (1997) 55 Cal.App.4th 225, 242 [63 Cal.Rptr.2d 769] [evidence from police database of similar sexual offenses committed by unknown assailant inadmissible].)

640. Deliberations and ~~Procedure for~~ Completion of Verdict Forms: For Use When Jury Is Given Not Guilty Forms for Each Level of Homicide ~~With *Stone* Instruction~~

[For each count charging (murder/ manslaughter),] (Y/y)ou (have been/will be) given verdict forms for guilty and not guilty of [first degree murder (, /and)]] [second degree murder (, /and)] [voluntary manslaughter (, /and)] [involuntary manslaughter].

You may consider these different kinds of homicide in whatever order you wish, but I can accept a verdict of guilty of a lesser crime only if all of you have found the defendant not guilty of [all of] the greater crime(s).

[As with all the charges in this case,] (To/to) return a verdict of guilty or not guilty on a count, you must all agree on that decision.

Follow these directions before you give me any completed and signed, final verdict form(s). [Return the unused verdict forms to me, unsigned.]

1. **If all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of _____ <*insert greatest level of homicide charged*>, complete and sign that verdict form. Do not complete or sign any other verdict forms [for that count].**

2. **If all of you cannot agree whether the defendant is guilty of _____ <*insert greatest level of homicide charged*>, inform me only that you cannot reach an agreement and do not complete or sign any verdict forms [for that count].**

3. **If all of you agree that the defendant is not guilty of _____ <*insert greatest level of homicide charged*> but also agree that the defendant is guilty of _____ <*insert greatest included offense*>, complete and sign the form for not guilty of _____ <*insert greatest level of homicide charge* > and the form for guilty of _____ <*insert greatest included offense*>. Do not complete or sign any other verdict forms [for that count].**

4. If all of you agree that the defendant is not guilty of _____ <insert greatest level of homicide charged> but cannot agree whether the defendant is guilty of _____ <insert greatest included offense>, complete and sign the form for not guilty of _____ <insert greatest level of homicide charge > and inform me that you cannot reach further agreement. Do not complete or sign any other verdict forms [for that count].

<In addition to paragraphs 1-4, give the following if there is one, but only one, lesser included offense>

[5. If all of you agree that the defendant is not guilty of first degree murder and not guilty of _____ <insert greatest included offense>, complete and sign the verdict forms for not guilty of both.]

< In addition to 1-4, give the following if there is more than one lesser included offense>

[5. If all of you agree that the defendant is not guilty of first degree murder and not guilty of _____ <insert greatest included offense>, but also agree that the defendant is guilty of _____ <insert second greatest included offense>, complete and sign the forms for not guilty of _____ <insert greatest level of homicide charged> and not guilty of _____ <insert greatest included offense> and the form for guilty of _____ <insert second greatest included offense>. Do not complete or sign any other verdict forms [for that count].

[6. If all of you agree that the defendant is not guilty of first degree murder and not guilty of _____ <insert greatest included offense>, but cannot agree whether the defendant is guilty of _____ <insert second greatest included offense>, complete and sign the forms for not guilty of _____ <insert greatest level of homicide charged> and not guilty of _____ <insert greatest included offense> and inform me that you cannot reach further agreement. Do not complete or sign any other verdict forms [for that count].

<In addition to 1-6, give the following if there are two, but only two, lesser included offenses>

[7. If all of you agree that the defendant is not guilty of first degree murder, _____ <insert greatest included offense>, or _____ <insert second greatest included offense>, complete and sign the verdict forms for not guilty of all.]

<In addition to 1-6, give the following if there are three lesser included offenses>

[7. If all of you agree that the defendant is not guilty of first or second degree murder or voluntary manslaughter, but also agree that the defendant is guilty of involuntary manslaughter, complete and sign the forms for not guilty of first murder, not guilty of second degree murder, and not guilty of voluntary manslaughter, and the form for guilty of involuntary manslaughter. Do not complete or sign any other verdict forms [for that count].

[8. If all of you agree that the defendant is not guilty of first or second degree murder or voluntary manslaughter, but cannot agree whether the defendant is guilty of involuntary manslaughter, complete and sign the forms for not guilty of first degree murder, not guilty of second degree murder, and not guilty of voluntary manslaughter, and inform me that you cannot reach further agreement. Do not complete or sign any other verdict forms [for that count].

[9. If all of you agree that the defendant is not guilty of any homicide [charged in that count], complete and sign the verdict forms for not guilty of first murder, not guilty of second degree murder, not guilty of voluntary manslaughter, and not guilty of involuntary manslaughter.]

Old version is below. It is striken out pending approval of the new draft above.

~~**You have been given several verdict forms for (the/each) count of murder [and manslaughter]. [These instructions apply to each count separately.]**~~

~~**In connection with Count[s] __, I have given you __** *<insert number of verdict forms>* **separate verdict forms. These are: Guilty/Not Guilty of first degree**~~

~~murder and second degree murder [and (voluntary manslaughter[,]/ [and] involuntary manslaughter)].~~

~~You may consider these different kinds of homicide in whatever order you wish. I am going to explain how to complete the verdict forms using one order, but you may choose the order to use. As with all the charges in this case, to return a verdict of guilty or not guilty on a count, you must all agree on that decision.~~

~~If you all agree the People have not proved the defendant committed an unlawful killing, then you must complete each verdict form stating that (he/she) is not guilty.~~

~~If you all agree the People have proved the defendant killed unlawfully, you must decide what kind or degree of unlawful killing the People have proved.~~

~~If you all agree that the People have proved that the unlawful killing was first degree murder, complete the verdict form stating that the defendant is guilty of first degree murder. Do not complete the other verdict forms for this count.~~

~~If you all agree that the defendant is not guilty of first degree murder, but you agree the People have proved the killing was second degree murder, you must do two things. First, complete the verdict form stating that the defendant is not guilty of first degree murder. Then, complete the verdict form stating that the defendant is guilty of second degree murder. Do not complete the verdict form stating that the defendant is guilty of second degree murder unless you all agree that the defendant is not guilty of first degree murder. Do not complete the other verdict forms for this count.~~

~~If you all agree the People have proved the defendant committed murder, but you cannot all agree on which degree they have proved, do not complete any verdict forms. Instead, the foreperson should send a note reporting that you cannot all agree on the degree of murder that has been proved.~~

~~If you all agree that the defendant is not guilty of first degree murder, but you cannot all agree on whether or not the People have proved the defendant committed second degree murder, then you must do two things. First, complete the verdict form stating that the defendant is not guilty of first degree murder. Second, the foreperson should send a note reporting that you cannot all agree that second degree murder has been proved. Do not complete any other verdict forms for this count.~~

~~The People have the burden of proving that the defendant committed first degree murder rather than a lesser offense. If the People have not met this burden, you must find the defendant not guilty of first degree murder.~~

~~<A. Voluntary Manslaughter: Lesser Included>~~

~~[If you all agree that the defendant is not guilty of first or second degree murder, but you all agree the People have proved that (he/she) is guilty of voluntary manslaughter, then you must do two things. First, complete the verdict forms stating that (he/she) is not guilty of first and second degree murder. Second, complete the verdict form stating that (he/she) is guilty of voluntary manslaughter. Do not complete the verdict form stating that the defendant is guilty of voluntary manslaughter unless you all agree that the defendant is not guilty of murder. Do not complete any other verdict forms for this count.~~

~~If you all agree that the defendant is not guilty of first or second degree murder, but you cannot all agree on whether or not the People have proved the defendant committed voluntary manslaughter, then you must do two things. First, complete both verdict forms stating that the defendant is not guilty of first and second degree murder. Second, the foreperson should send a note reporting that you cannot all agree that voluntary manslaughter has been proved.~~

~~The People have the burden of proving that the defendant committed murder rather than a lesser offense. If the People have not met this burden, you must find the defendant not guilty of murder.]~~

~~<B. Involuntary Manslaughter: Lesser Included>~~

~~[If you all agree that the defendant is not guilty of murder or voluntary manslaughter, but you all agree the People have proved that (he/she) is guilty involuntary manslaughter, then you must do two things. First, complete the verdict forms stating that (he/she) is not guilty of first degree murder, second degree murder, and voluntary manslaughter. Second, complete the verdict form stating that (he/she) is guilty of involuntary manslaughter. Do not complete the verdict form stating that the defendant is guilty of involuntary manslaughter unless you all agree that the defendant is not guilty of murder or voluntary manslaughter.~~

~~If you all agree that the defendant is not guilty of murder or voluntary manslaughter, but you cannot all agree whether or not the People have proved the defendant committed involuntary manslaughter, then you must do two things. First, complete all three verdict forms stating that the defendant is not guilty of first degree murder, second degree murder, and voluntary~~

~~**manslaughter. Second, the foreperson should send a note reporting that you cannot all agree that involuntary manslaughter has been proved.**~~

~~**The People have the burden of proving that the defendant committed murder or voluntary manslaughter rather than a lesser offense. If the People have not met this burden, you must find the defendant not guilty of murder and not guilty of voluntary manslaughter.]**~~

New January 2006

BENCH NOTES

Instructional Duty

In all homicide cases where one or more lesser offense is submitted to the jury, the court has a **sua sponte** duty to give this instruction or CALCRIM No. 641, *Procedure for Completion of Verdict Forms: Without Stone Instruction*. (See *People v. Avalos* (1984) 37 Cal.3d 216, 228 [207 Cal.Rptr. 549, 689 P.2d 121] [must instruct jury that it must be unanimous as to degree of murder]; *People v. Dixon* (1979) 24 Cal.3d 43, 52 [154 Cal.Rptr. 236, 592 P.2d 752] [jury must determine degree]; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of greater offense must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832] [duty to instruct that jury cannot convict of a lesser offense unless it has concluded that defendant is not guilty of the greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809] [duty to give jury opportunity to render a verdict of partial acquittal on a greater offense], clarified in *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [no duty to inquire about partial acquittal in absence of indication jury may have found defendant not guilty of greater offense].)~~*People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [duty to instruct that jury may render a verdict of partial acquittal on a greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].)~~

In *Stone v. Superior Court, supra*, 31 Cal.3d at p. 519, the Supreme Court suggested that the trial court provide the jury with verdict forms of guilty/not guilty on each of the charged and lesser offenses. The court later referred to this "as a judicially declared rule of criminal procedure." (*People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].) However, this is not a mandatory procedure. *(Ibid.)* If the court chooses not to follow the procedure suggested in *Stone*, the court may give CALCRIM No. 641, *Procedure for Completion of Verdict Forms: Without Stone Instruction*, in place of this

instruction. ~~If the jury later declares that it is unable to reach a verdict on a lesser offense, then the court must give this instruction, providing the jury an opportunity to acquit on the greater offense. (*People v. Marshall*, *supra*, 13 Cal.4th at p. 826; *Stone v. Superior Court*, *supra*, 31 Cal.3d at p. 519.)~~

The court should tell the jury it may not return a guilty verdict on a lesser included offense unless it has found the defendant not guilty of the greater offense. (*People v. Fields*, *supra*, 13 Cal.4th at pp. 310–311.) If the jury announces that it is deadlocked on the greater offense but, despite the court's instructions, has returned a guilty verdict on the lesser included offense, the court should again instruct the jury that it may not convict of the lesser included offense unless it has found the defendant not guilty of the greater offense. (*Ibid.*) The court should direct the jury to reconsider the "lone verdict of conviction of the lesser included offense" in light of this instruction. (*Ibid.*; Pen. Code, § 1161.) If the jury is deadlocked on the greater offense but the court nevertheless records a guilty verdict on the lesser included offense and then discharges the jury, retrial on the greater offense will be barred. (*People v. Fields*, *supra*, 13 Cal.4th at p. 307; Pen. Code, § 1023.)

~~The court should not accept a guilty verdict on a lesser offense unless the jury has returned a not guilty verdict on the greater offense. (*People v. Fields*, *supra*, 13 Cal.4th at pp. 310–311.) If the court does record a guilty verdict on the lesser offense without first requiring an explicit not guilty finding on the greater offense and then discharges the jury, retrial on the greater offense will be barred. (*Id.* at p. 307; Pen. Code, § 1023.) If, despite the court's instructions, the jury has returned a guilty verdict on the lesser offense without explicitly acquitting on the greater offense, the court must again instruct the jury that it may not convict of the lesser offense unless it has found the defendant not guilty of the greater offense. (*People v. Fields*, *supra*, 13 Cal.4th at p. 310.) The court should direct the jury to reconsider the "lone verdict of conviction of the lesser included offense" in light of this instruction. (*Ibid.*; Pen. Code, § 1161.)~~

If, after following the procedures required by *Fields*, the jury declares that it is deadlocked on the greater offense, then the prosecution must elect one of the following options: (1) the prosecutor may request that the court declare a mistrial on the greater offense without recording the verdict on the lesser offense, allowing the prosecutor to retry the defendant for the greater offense; or (2) the prosecutor may ask the court to record the verdict on the lesser offense and to dismiss the greater offense, opting to accept the current conviction rather than retry the defendant on the greater offense. (*People v. Fields*, *supra*, 13 Cal.4th at p. 311.)

The court may not control the sequence in which the jury considers the various homicide offenses. (*People v. Kurtzman*, *supra*, 46 Cal.3d at pp. 330–331.)

Do not give this instruction if felony murder is the only theory for first degree murder. (*People v. Mendoza* (2000) 23 Cal.4th 896, 908–909 [98 Cal.Rptr.2d 431, 4 P.3d 265].)

~~This instruction should be modified if the highest charge is second degree murder or voluntary manslaughter. (*People v. Aikin* (1971) 19 Cal.App.3d 685, 700 [97 Cal.Rptr. 251] [error to instruct jury that it must agree on degree of murder where case submitted to jury on second degree murder only], disapproved on other grounds in *People v. Lines* (1975) 13 Cal.3d 500, 513 [119 Cal.Rptr. 225, 531 P.2d 793].)~~

AUTHORITY

- Lesser Included Offenses—Duty to Instruct ▸ Pen. Code, § 1159; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- Degree to Be Set by Jury ▸ Pen. Code, § 1157; *People v. Avalos* (1984) 37 Cal.3d 216, 228 [207 Cal.Rptr. 549, 689 P.2d 121]; *People v. Dixon* (1979) 24 Cal.3d 43, 52 [154 Cal.Rptr. 236, 592 P.2d 752].
- Reasonable Doubt as to Degree ▸ Pen. Code, § 1097; *People v. Morse* (1964) 60 Cal.2d 631, 657 [36 Cal.Rptr. 201, 388 P.2d 33]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d 852].
- Conviction of Lesser Precludes Re-trial on Greater ▸ Pen. Code, § 1023; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832]; *People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].
- Court May Ask Jury to Reconsider Conviction on Lesser Absent Finding on Greater ▸ Pen. Code, § 1161; *People v. Fields* (1996) 13 Cal.4th 289, 310 [52 Cal.Rptr.2d 282, 914 P.2d 832].
- Must Permit Partial Verdict of Acquittal on Greater ▸ *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Trial, § 631.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.20 (Matthew Bender).

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

641. Deliberations and ~~Procedure for~~ Completion of Verdict Forms: For Use When Jury Is Given Only One Not Guilty Verdict Form for Each Count (Homicide) ~~Without *Stone* Instruction~~

For each count charging (murder/ manslaughter) you (have been/will be) given verdict forms for guilty of [first degree murder][,] [guilty of second degree murder][,] [guilty of voluntary manslaughter][,] [guilty of involuntary manslaughter][,] and not guilty.

You may consider these different kinds of homicide in whatever order you wish, but I can accept a verdict of guilty of a lesser crime only if all of you have found the defendant not guilty of [all of] the greater crime[s].

[As with all the charges in this case,] (To/to) return a verdict of guilty or not guilty on a count, you must all agree on that decision.

Follow these directions before you give me any completed and signed, final verdict form. You will complete and sign only one verdict form [per count]. Return the unused verdict forms to me, unsigned.

1. **If all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of _____ *< greatest level of homicide charged >*, complete and sign that verdict form. Do not complete or sign any other verdict forms [for that count].**

2. **If all of you agree that the People have not proved beyond a reasonable doubt that the defendant is guilty of _____ *< greatest level of homicide charged >* but also agree that the defendant is guilty of _____ *< greatest included offense >*, complete and sign the form for guilty of _____ *< greatest included offense >*. Do not complete or sign any other verdict forms [for that count]. You may return a verdict of guilty of _____ *<greatest included offense >* only if you have found the defendant not guilty of _____ *< greatest level of homicide charged >*.**

< Two Lesser Included Offenses >

[3. If all of you agree that the People have not proved beyond a reasonable doubt that the defendant is guilty of _____ < *greatest level of homicide charged* > and _____ < *greatest included offense* >, but also agree that the defendant is guilty of _____ < *second greatest included offense* >, return the form for guilty of _____ < *second greatest included offense* >. Do not complete or sign any other verdict forms [for that count]. You may return a verdict of guilty of _____ < *second greatest included offense* > only if you have found the defendant not guilty of _____ < *greatest level of homicide charged* > and _____ < *greatest included offense* >.]

< Three Lesser Included Offenses >

[4. If all of you agree that the People have not proved beyond a reasonable doubt that the defendant is guilty of first or second degree murder or voluntary manslaughter, but also agree that the defendant is guilty of involuntary manslaughter, complete and sign the form for guilty of involuntary manslaughter. Do not complete or sign any other verdict forms [for that count]. You may return a verdict of guilty of involuntary manslaughter only if you have found the defendant not guilty of murder or voluntary manslaughter.]

5. If all of you agree the People have not proved the defendant committed an unlawful killing, complete and sign the verdict form for not guilty.

6. If all of you cannot agree whether the defendant committed an unlawful killing or what kind of unlawful killing (he/she) committed, inform me only that you cannot reach agreement [on that count] and do not complete or sign any verdict form [for that count]. You may return to me a verdict of guilty of a lesser crime only if all of you have found the defendant not guilty of [all of] the greater crime[s].

Old version is below. It is stricken out pending approval of the new version above.

~~**You have been given [one] verdict form[s] for (the/each) count of murder [and manslaughter]. [These instructions apply to each count separately.]**~~

You may consider these different kinds of homicide in whatever order you wish. I am going to explain how to complete the verdict form[s] using one order, but you may choose the order to use.

As with all the charges in this case, to return a verdict of guilty or not guilty on a count, you must all agree on that decision.

If you all agree the People have not proved the defendant committed an unlawful killing, then you must state on the verdict form that (he/she) is not guilty.

If you all agree the People have proved the defendant committed murder, you must also decide what degree of murder the People have proved. You must all agree on the degree of murder (he/she) committed. If you all agree that the defendant is guilty of murder and on the degree of murder, then complete the form stating that the defendant is guilty of murder and the degree. Do not return a verdict form stating that the defendant is guilty of second degree murder unless you all agree that the defendant is not guilty of first degree murder.

The People have the burden of proving that the defendant committed first degree murder rather than a lesser offense. If the People have not met this burden, you must find the defendant not guilty of first degree murder.

<A. Voluntary Manslaughter: Lesser Included>

[If you all agree that the defendant is not guilty of first or second degree murder, but you all agree the People have proved (he/she) is guilty of voluntary manslaughter, then complete the verdict form stating that (he/she) is guilty of voluntary manslaughter. Do not complete a verdict form stating the defendant is guilty of voluntary manslaughter unless you all agree that the defendant is not guilty of murder.

The People have the burden of proving that the defendant committed murder rather than a lesser offense. If the People have not met this burden, you must find the defendant not guilty of murder.]

<B. Involuntary Manslaughter: Lesser Included>

[If you all agree that the defendant is not guilty of murder and not guilty of voluntary manslaughter, but you all agree the People have proved that the defendant is guilty of involuntary manslaughter, then complete the verdict form stating that (he/she) is guilty of involuntary manslaughter. Do not complete a verdict form stating that the defendant is guilty of involuntary

~~**manslaughter unless you all agree that the defendant is not guilty of murder and not guilty of voluntary manslaughter.**~~

~~**The People have the burden of proving that the defendant committed murder or voluntary manslaughter rather than a lesser offense. If the People have not met this burden, you must find the defendant not guilty of murder and not guilty of voluntary manslaughter.]**~~

New January 2006

BENCH NOTES

Instructional Duty

In all homicide cases where one or more lesser offense is submitted to the jury, the court has a **sua sponte** duty to give this instruction or CALCRIM No. 640, *Procedure for Completion of Verdict Forms: With Stone Instruction*. (See *People v. Avalos* (1984) 37 Cal.3d 216, 228 [207 Cal.Rptr. 549, 689 P.2d 121] [must instruct jury that it must be unanimous as to degree of murder]; *People v. Dixon* (1979) 24 Cal.3d 43, 52 [154 Cal.Rptr. 236, 592 P.2d 752] [jury must determine degree]; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of greater offense must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832] [duty to instruct that jury cannot convict of a lesser offense unless it has concluded that defendant is not guilty of the greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809] [duty to give jury opportunity to render a verdict of partial acquittal on a greater offense], clarified in *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [no duty to inquire about partial acquittal in absence of indication jury may have found defendant not guilty of greater offense].)~~*People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [duty to instruct that jury may render a verdict of partial acquittal on a greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].)~~

In *Stone v. Superior Court, supra*, 31 Cal.3d at p. 519, the Supreme Court suggested that the trial court provide the jury with verdict forms of guilty/not guilty on each of the charged and lesser offenses. The court later referred to this "as a judicially declared rule of criminal procedure." (*People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].) However, this is not a mandatory procedure. *(Ibid.)* If the court chooses not to follow the procedure suggested in *Stone*, the court may give this instruction. If the jury later declares that it is unable to reach a verdict on a lesser offense, then the court must provide~~d~~

the jury an opportunity to acquit on the greater offense. (*People v. Marshall, supra,* 13 Cal.4th at p. 826; *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519.) In such cases, the court must give CALCRIM No. 640 and must provide the jury with verdict forms of guilty/not guilty for each offense. (*People v. Marshall, supra,* 13 Cal.4th at p. 826; *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519.)

The court should tell the jury it may not return a guilty verdict on a lesser included offense unless it has found the defendant not guilty of the greater offense. (*People v. Fields, supra,* 13 Cal.4th at pp. 310–311.) If the jury announces that it is deadlocked on the greater offense but, despite the court's instructions, has returned a guilty verdict on the lesser included offense, the court should again instruct the jury that it may not convict of the lesser included offense unless it has found the defendant not guilty of the greater offense. (*Ibid.*) The court should direct the jury to reconsider the "lone verdict of conviction of the lesser included offense" in light of this instruction. (*Ibid.*; Pen. Code, § 1161.) If the jury is deadlocked on the greater offense but the court nevertheless records a guilty verdict on the lesser included offense and then discharges the jury, retrial on the greater offense will be barred. (*People v. Fields, supra,* 13 Cal.4th at p. 307; Pen. Code, § 1023.)

~~The court should not accept a guilty verdict on a lesser offense unless the jury has returned a not guilty verdict on the greater offense. (*People v. Fields, supra,* 13 Cal.4th at pp. 310–311.) If the court does record a guilty verdict on the lesser offense without first requiring an explicit not guilty finding on the greater offense and then discharges the jury, re-trial on the greater offense will be barred. (*Id.* at p. 307; Pen. Code, § 1023.) If, despite the court's instructions, the jury has returned a guilty verdict on the lesser offense without explicitly acquitting on the greater offense, the court must again instruct the jury that it may not convict of the lesser offense unless it has found the defendant not guilty of the greater offense. (*People v. Fields, supra,* 13 Cal.4th at p. 310.) The court should direct the jury to reconsider the "lone verdict of conviction of the lesser included offense" in light of this instruction. (*Ibid.*; Pen. Code, § 1161.)~~

If, after following the procedures required by *Fields*, the jury declares that it is deadlocked on the greater offense, then the prosecution must elect one of the following options: (1) the prosecutor may request that the court declare a mistrial on the greater offense without recording the verdict on the lesser offense, allowing the prosecutor to re-try the defendant for the greater offense; or (2) the prosecutor may ask the court to record the verdict on the lesser offense and to dismiss the greater offense, opting to accept the current conviction rather than re-try the defendant on the greater offense. (*People v. Fields, supra,* 13 Cal.4th at p. 311.) The court may not control the sequence in which the jury considers the various homicide offenses. (*People v. Kurtzman, supra,* 46 Cal.3d at pp. 322, 330.)

Do not give this instruction if felony murder is the only theory for first degree murder. (*People v. Mendoza* (2000) 23 Cal.4th 896, 908–909 [98 Cal.Rptr.2d 431, 4 P.3d 265].)

~~This instruction should be modified if the highest charge is second degree murder or voluntary manslaughter. (*People v. Aikin* (1971) 19 Cal.App.3d 685, 700 [97 Cal.Rptr. 251] [error to instruct jury that it must agree on degree of murder where case submitted to jury on second degree murder only], disapproved on other grounds in *People v. Lines* (1975) 13 Cal.3d 500, 513 [119 Cal.Rptr. 225, 531 P.2d 793].)~~

AUTHORITY

- Lesser Included Offenses—Duty to Instruct ▸ Pen. Code, § 1159; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- Degree to Be Set by Jury ▸ Pen. Code, § 1157; *People v. Avalos* (1984) 37 Cal.3d 216, 228 [207 Cal.Rptr. 549, 689 P.2d 121]; *People v. Dixon* (1979) 24 Cal.3d 43, 52 [154 Cal.Rptr. 236, 592 P.2d 752].
- Reasonable Doubt as to Degree ▸ Pen. Code, § 1097; *People v. Morse* (1964) 60 Cal.2d 631, 657 [36 Cal.Rptr. 201, 388 P.2d 33]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d 852].
- Conviction of Lesser Precludes Re-trial on Greater ▸ Pen. Code, § 1023; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832]; *People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].
- Court May Ask Jury to Reconsider Conviction on Lesser Absent Finding on Greater ▸ Pen. Code, § 1161; *People v. Fields* (1996) 13 Cal.4th 289, 310 [52 Cal.Rptr.2d 282, 914 P.2d 832].
- Must Permit Partial Verdict of Acquittal on Greater ▸ *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Trial, § 631.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.20 (Matthew Bender).

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

642–699. Reserved for Future Use

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

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

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

1. **The defendant's participation in the crime began before or during the killing ~~was a major participant in the crime~~;**

~~AND~~

2. **The defendant was a major participant in the crime~~When the defendant participated in the crime, (he/she) acted with reckless indifference to human life~~;**

AND

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

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

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

[If you decide that the defendant is guilty of first degree murder, but you cannot agree whether the defendant was the actual killer, then, in order to find (this/these) special circumstance[s] true, you must find either that the

defendant acted with intent to kill or you must find that the defendant acted with reckless indifference to human life and was a major participant in the crime.]

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

New January 2006

BENCH NOTES

Instructional Duty

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

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

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

Give the bracketed paragraph stating that the People do not have to prove intent to kill or reckless indifference on the part of the actual killer if there is a codefendant

alleged to be the actual killer or if the jury could convict the defendant as either the actual killer or an accomplice.

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

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

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

AUTHORITY

- Accomplice Intent Requirement, Felony Murder ▸ Pen. Code, § 190.2(d).
- Reckless Indifference to Human Life ▸ *People v. Estrada* (1995) 11 Cal.4th 568, 578 [46 Cal.Rptr.2d 586, 904 P.2d 1197]; *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127].
- Constitutional Standard for Intent by Accomplice ▸ *Tison v. Arizona* (1987) 481 U.S. 137, 157–158 [107 S.Ct. 1676, 95 L.Ed.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 453, 460.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty*, § 87.14 (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 commited [or attempted to commit] _____** *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***;]**

(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;**

[AND]

(4/5). The act causing the death and the _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>* **[or attempted _____** *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***] were part of one continuous transaction(;/.)**

<Give element 5/6 if the court concludes it must instruct on causal relationship between felony and death; see Bench Notes.>

[AND

(5/6). There was a logical connection between the act causing the death and the _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>* **[or attempted _____** *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***]. The connection between the fatal act and the _____** *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>* **[or attempted _____** *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***] must involve more than just their occurrence at the same time and place.]**

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

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 causation is an issue, 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.

Bracketed element 6 is based on *People v. Cavitt* (2004) 33 Cal.4th 187, 193 [14 Cal.Rptr.3d 281, 91 P.3d 222]. In *Cavitt*, the Supreme Court clarified the liability of a nonkiller under the felony-murder rule when a cofelon commits a killing. The court held that "the felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act causing the death. The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction." (*Ibid.* [italics in original].) The majority concluded that

the court has no sua sponte duty to instruct on the necessary causal connection. (*Id.* at pp. 203–204.) In concurring opinions, Justice Werdegar, joined by Justice Kennard, and Justice Chin expressed the view that the jury should be instructed on the necessary causal relationship. (*Id.* at pp. 212–213.) The court should give bracketed element 6 if the evidence raises an issue over the causal connection between the felony and the killing. In addition, the court may give this bracketed element at its discretion in any case in which this instruction is given. If the prosecution alleges that the defendant did not commit the felony but aided and abetted or conspired to commit the felony, the committee recommends giving bracketed element 6. (See discussion of conspiracy liability in the Related Issues section of CALCRIM No. 540B, *Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act*.)

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, 501 [244 Cal.Rptr. 148, 749 P.2d 803]; *People v. Navarette* (2003) 30 Cal.4th 458, 505 [133 Cal.Rptr.2d 89, 66 P.3d 1182].)

The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*.

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. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222]; *People v. Valdez* (2004) 32 Cal.4th 73, 105 [8 Cal.Rptr.3d 271, 82 P.3d 296].
- Continuous Transaction Requirement ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 88 [17 Cal.Rptr.3d 710, 96 P.3d 30] [applying rule to special circumstance]; *People v. Hernandez* (1988) 47 Cal.3d 315, 348 [253 Cal.Rptr. 199, 763 P.2d 1289]; *People v. Fields* (1983) 35 Cal.3d 329, 364–368 [197 Cal.Rptr. 803, 673 P.2d 680]; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1025–1026 [248 Cal.Rptr. 568, 755 P.2d 1017].
- Logical Connection Required for Liability of Nonkiller ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- 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].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000), Punishment, §§ 450, 451, 452, 453.

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).

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].)

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 whichthat the defendant was convicted of 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* involves the unlawful use or attempted use of force or violence or the direct or implied threat to use force or violence. [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) the defendant was convicted in this case... the absence of any prior felony conviction.

(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.

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

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 [111. S.Ct. 1023, 112 L.Ed.2d 1105]; *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.)*

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].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 462, 466–467, 475, 480, 483–484, 493–497.

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

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).

852. Evidence of Uncharged Domestic Violence

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

<Alternative A—As defined in Pen. Code, § 13700>
[*Domestic violence* means abuse committed against (an adult/a fully emancipated minor) who is a (spouse[,]/ [or] former spouse[,]/ [or] cohabitant[,]/ [or] former cohabitant[,]/ [or] person with whom the defendant has had a child[,]/ [or] person who dated or is dating the defendant[,]/ [or] person who was or is engaged to the defendant).]

<Alternative B—As defined in Fam. Code, § 6211>
[*Domestic violence* means abuse committed against a (child/grandchild/parent/grandparent/brother/sister) of the defendant.]

***Abuse* means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else.**

[A *fully emancipated minor* is a person under the age of 18 who has gained certain adult rights by marrying, being on active duty for the United States armed services, or otherwise being declared emancipated under the law.]

[The term *cohabitants* means two unrelated persons living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) the parties' holding themselves out as husband and wife, (5) the parties' registering as domestic partners, (6) the continuity of the relationship, and (7) the length of the relationship.]

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

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

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

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

New January 2006; Revised August 2006, June 2007

BENCH NOTES

Instructional Duty

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

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

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

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

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

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

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

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

Related Instructions

- CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*
- CALCRIM No. 1191, *Evidence of Uncharged Sex Offense*.
- CALCRIM No. 853, *Evidence of Uncharged Abuse of Elder or Dependent Person*.

AUTHORITY

- Instructional Requirement ▸ Evid. Code, § 1109(a)(1); see *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1016 [130 Cal.Rptr.2d 254, 62 P.3d 601]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 37 [107 Cal.Rptr.2d 100]; *People v. Falsetta* (1999) 21 Cal.4th 903, 923–924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [dictum].
- Abuse Defined ▸ Pen. Code, § 13700(a).
- Cohabitant Defined ▸ Pen. Code, § 13700(b).
- Domestic Violence Defined ▸ Evid. Code, § 1109(d)(3); Pen. Code, § 13700(b); Fam. Code, § 6211; see *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1139 [83 Cal.Rptr.2d 320] [spousal rape is higher level of domestic violence].
- Emancipation of Minors Law ▸ Fam. Code, § 7000 et seq.
- Other Crimes Proved by Preponderance of Evidence ▸ *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. James* (2000) 81 Cal.App.4th 1343, 1359 [96 Cal.Rptr.2d 823].
- Propensity Evidence Alone Is Not Sufficient to Support Conviction Beyond a Reasonable Doubt ▸ *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [101 Cal.Rptr.2d 624]; *People v. James* (2000) 81 Cal.App.4th 1343, 1357–1358, fn. 8 [96 Cal.Rptr.2d 823]; see *People v. Hill* (2001) 86 Cal.App.4th 273, 277–278 [103 Cal.Rptr.2d 127] [in context of prior sexual offenses].

Secondary Sources

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

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

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

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

COMMENTARY

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

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

RELATED ISSUES

Constitutional Challenges

Evidence Code section 1109 does not violate a defendant's rights to due process (*People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095–1096 [98 Cal.Rptr.2d 696]; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1028–1029 [92 Cal.Rptr.2d 208]; *People v. Johnson* (2000) 77 Cal.App.4th 410, 420 [91 Cal.Rptr.2d 596]; see *People v. Falsetta* (1999) 21 Cal.4th 903, 915–922 [89 Cal.Rptr.2d 847, 986 P.2d 182] (construing Evid. Code, § 1108, a parallel statute to Evid. Code, § 1109); *People v. Branch* (2001) 91 Cal.App.4th 274, 281 [109 Cal.Rptr.2d 870] (construing Evid. Code, § 1108) or equal protection (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310–1313 [97 Cal.Rptr.2d 727]; see *People v. Fitch* (1997) 55 Cal.App.4th 172, 184–185 [63 Cal.Rptr.2d 753] (construing Evid. Code, § 1108).

Exceptions

Evidence of domestic violence occurring more than 10 years before the charged offense is inadmissible under section 1109 of the Evidence Code, unless the court determines that the admission of this evidence is in the interest of justice. (Evid.

Code, § 1109(e).) Evidence of the findings and determinations of administrative agencies regulating health facilities is also inadmissible under section 1109. (Evid. Code, § 1109(f).)

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

853. Evidence of Uncharged Abuse of Elder or Dependent Person

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

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

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

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

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

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

~~element of~~ **_____ (charge/ [and] allegation)** ~~every charge~~ **beyond a reasonable doubt.**

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

New January 2006

BENCH NOTES

Instructional Duty

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

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

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

In the paragraph that begins with "If you decide that the defendant committed," the committee has placed the phrase "and did commit" in brackets. One appellate court has criticized instructing the jury that it may draw an inference about disposition. (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [96

Cal.Rptr.2d 823].) The court should review the Commentary section below and give the bracketed phrase at its discretion.

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

Related Instructions
CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, or Common Plan, etc.*
CALCRIM No. 852, *Evidence of Uncharged Domestic Violence.*
CALCRIM No. 1191, *Evidence of Uncharged Sex Offense.*

AUTHORITY

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

Secondary Sources

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

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

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

COMMENTARY

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

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

RELATED ISSUES

Exceptions

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

administrative agencies regulating health facilities is also inadmissible under section 1109. (Evid. Code, § 1109(f).)

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

854–859. Reserved for Future Use

1070. Unlawful Sexual Intercourse: Defendant 21 or Older (Pen. Code, § 261.5(a) & (d))

The defendant is charged [in Count __] with having unlawful sexual intercourse with a person who was under the age of 16 years at a time after the defendant had reached (his/her) 21st birthday [in violation of Penal Code section 261.5(d)].

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

1. **The defendant had sexual intercourse with another person;**

2. **The defendant and the other person were not married to each other at the time of the intercourse;**

3. **The defendant was at least 21 years old at the time of the intercourse;**

AND

4. **The other person was under the age of 16 years at the time of the intercourse.**

Sexual intercourse **means any penetration, no matter how slight, of the vagina or genitalia by the penis. [Ejaculation is not required.]**

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

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

<Defense: Good Faith Belief 18 or Over>
[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the other person was age 18 or older. ~~**The People must prove beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person was at least 18 years old. If the People have not met this burden, you must find the defendant not guilty of this crime**~~**. In order for reasonable and actual belief to excuse the defendant's behavior, there must be evidence** ~~**defense must produce evidence**~~ **tending to**

show that (he/she) reasonably and actually believed that the other person was age 18 or older. If you have a reasonable doubt about whether the defendant reasonably and actually believed that the other person was age 18 or older, you must find (him/her) not guilty.]

]

New January 2006

BENCH NOTES

Instructional Duty

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

For a discussion of the **sua sponte** duty to instruct on the defense of mistake of fact, see CALCRIM No. 3406.

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

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

Defenses—Instructional Duty

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

Related Instruction

CALCRIM No. 3406, *Mistake of Fact.*

AUTHORITY

- Elements ▸ Pen. Code, § 261.5(a) & (d).
- Minor's Consent Not a Defense ▸ *People v. Kemp* (1934) 139 Cal.App. 48, 51 [34 P. 502].

- Sexual Intercourse Defined ▸ Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr.406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].
- Good Faith Belief in Victim's Age ▸ *People v. Zeihm* (1974) 40 Cal.App.3d 1085, 1089.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 45–46.

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 20–24.

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

LESSER INCLUDED OFFENSES

- Attempted Unlawful Sexual Intercourse ▸ Pen. Code, §§ 664, 261.5; see, e.g., *People v. Nicholson* (1979) 98 Cal.App.3d 617, 622–624 [159 Cal.Rptr. 766].

Contributing to the delinquency of a minor (Pen. Code, § 272) is not a lesser included offense of unlawful sexual intercourse. (*People v. Bobb* (1989) 207 Cal.App.3d 88, 93–96 [254 Cal.Rptr. 707], disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 198, fn. 7 [47 Cal.Rptr.2d 569, 906 P.2d 531].)

RELATED ISSUES

Calculating Age

The "birthday rule" of former Civil Code section 26 (now see Fam. Code, § 6500) applies. A person attains a given age as soon as the first minute of his or her birthday has begun, not on the day before the birthday. (*In re Harris* (1993) 5 Cal.4th 813, 844–845, 849 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Participant Must be Over 21

One of the two participants in the act of unlawful sexual intercourse must be over 21 and the other person must be under 16. Proof that an aider and abettor was over 21 is insufficient to sustain the aider and abettor's conviction if neither of the actual participants was over 21 years old. (See *People v. Culbertson* (1985) 171

Cal.App.3d 508, 513, 515 [217 Cal.Rptr. 347] [applying same argument to section 288a(c), where perpetrator must be 10 years older than victim under 14].)

Mistaken Belief About Victim's Age

A defendant is not entitled to a mistake of fact instruction if he claims that he believed that the complaining witness was over 16. His belief would still constitute the *mens rea* of intending to have sex with a minor. (*People v. Scott* (2000) 83 Cal.App.4th 784, 800–801 [100 Cal.Rptr.2d 70].) However, if he claims that he believed that the complaining witness was over 18 years old, he is entitled to the mistake of fact instruction. (See *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 [39 Cal.Rptr. 361, 393 P.2d 673].)

Married Minor Victim

A defendant may be convicted of unlawful sexual intercourse even if the minor victim is married or was previously married to another person. (*People v. Courtney* (1960) 180 Cal.App.2d 61, 62 [4 Cal.Rptr. 274][construing former statute]; *People v. Caldwell* (1967) 255 Cal.App.2d 229, 230–231 [63 Cal.Rptr. 63].)

Sterility

Sterility is not a defense to unlawful sexual intercourse. (*People v. Langdon* (1987) 192 Cal.App.3d 1419, 1421 [238 Cal.Rptr. 158].)

1191. Evidence of Uncharged Sex Offense

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

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

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

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

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

New January 2006

BENCH NOTES

Instructional Duty

The court must give this instruction on request when evidence of other sexual offenses has been introduced. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [error to refuse limiting instruction on request]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1317–1318 [97

Cal.Rptr.2d 727] [in context of prior acts of domestic violence]; but see *CJER Mandatory Criminal Jury Instructions Handbook* (CJER 13th ed. 2004) Sua Sponte Instructions, § 2.1112(e) [included without comment within sua sponte instructions]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1067 [210 Cal.Rptr. 880] [general limiting instructions should be given when evidence of past offenses would be highly prejudicial without them].)

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

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

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

Related Instructions
CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc*.
CALCRIM No. 852, *Evidence of Uncharged Domestic Violence*.
CALCRIM No. 853, *Evidence of Uncharged Abuse to Elder or Dependent Person*.

AUTHORITY

- Instructional Requirement ▸ Evid. Code, § 1108(a); see *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1016 [130 Cal.Rptr.2d 254, 62 P.3d 601]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 37 [107 Cal.Rptr.2d 100]; *People v. Falsetta* (1999) 21 Cal.4th 903, 923–924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [dictum].
- Sexual Offense Defined ▸ Evid. Code, § 1108(d)(1).
- Other Crimes Proved by Preponderance of Evidence ▸ *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. James* (2000) 81 Cal.App.4th 1343, 1359 [96 Cal.Rptr.2d 823]; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 146 [89 Cal.Rptr.2d 28].

- Propensity Evidence Alone Is Not Sufficient to Support Conviction Beyond a Reasonable Doubt ▸ *People v. Hill* (2001) 86 Cal.App.4th 273, 277–278 [103 Cal.Rptr.2d 127]; see *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [101 Cal.Rptr.2d 624] [in context of prior acts of domestic violence]; *People v. James* (2000) 81 Cal.App.4th 1343, 1357–1358, fn. 8 [96 Cal.Rptr.2d 823] [same].

Secondary Sources

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.23[3][e][ii], [4] (Matthew Bender).

COMMENTARY

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

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

RELATED ISSUES

Constitutional Challenges

Evidence Code section 1108 does not violate a defendant's rights to due process (*People v. Falsetta* (1999) 21 Cal.4th 903, 915–922 [89 Cal.Rptr.2d 847, 986 P.2d

182]; *People v. Branch* (2001) 91 Cal.App.4th 274, 281 [109 Cal.Rptr.2d 870]; *People v. Fitch* (1997) 55 Cal.App.4th 172, 184 [63 Cal.Rptr.2d 753]) or equal protection (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310–1313 [97 Cal.Rptr.2d 727]; *People v. Fitch, supra,* 55 Cal.App.4th at pp. 184–185).

Expert Testimony

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

Rebuttal Evidence

When the prosecution has introduced evidence of other sexual offenses under Evidence Code section 1108(a), the defendant may introduce rebuttal character evidence in the form of opinion evidence, reputation evidence, and evidence of specific incidents of conduct under similar circumstances. (*People v. Callahan* (1999) 74 Cal.App.4th 356, 378–379 [87 Cal.Rptr.2d 838].)

Subsequent Offenses Admissible

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

Evidence of Acquittal

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

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

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

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

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

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

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

[AND]

3. **The defendant moved the (child/ [or] mentally impaired person) with an illegal intent or for an illegal purpose(;/.)**

[AND]

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

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

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

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

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

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

New January 2006

BENCH NOTES

Instructional Duty

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

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

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

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

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

Related Instructions

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

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

AUTHORITY

- Elements ▸ Pen. Code, § 207(a), (e).
- Punishment If Victim Under 14 Years of Age ▸ Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206] [ignorance of victim's age not a defense].
- Asportation Requirement ▸ See *People v. Martinez* (1999) 20 Cal.4th 225, 235–237 [83 Cal.Rptr.2d 533, 973 P.2d 512] [adopting modified two-pronged asportation test from *People v. Rayford* (1994) 9 Cal.4th 1, 12–14 [36 Cal.Rptr.2d 317, 884 P.2d 1369] and *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225]].
- Force Required to Kidnap Unresisting Infant or Child ▸ *In re Michele D.* (2002) 29 Cal.4th 600, 610 [128 Cal.Rptr.2d 92, 59 P.3d 164]; Pen. Code, § 207(e).
- Movement Must Be for Illegal Purpose or Intent if Victim Incapable of Consent ▸ *In re Michele D.* (2002) 29 Cal.4th 600, 610–611 [128 Cal.Rptr.2d 92, 59 P.3d 164]; *People v. Oliver* (1961) 55 Cal.2d 761, 768 [12 Cal.Rptr. 865, 361 P.2d 593].
- Substantial Distance Requirement ▸ *People v. Derek Daniels* (1993) 18 Cal.App.4th 1046, 1053 [22 Cal.Rptr.2d 877]; *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058] [since movement must be more than slight or trivial, it must be substantial in character].
- Deceit May Substitute for Force ▸ *People v. Dalerio* (2006) 144 Cal.App.4th 775, 783 [50 Cal.Rptr.3d 724] [taking requirement satisfied when a defendant

relies on deception to obtain a child's consent and through verbal directions and his constant physical presence takes the child a substantial distance].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 252, 253.

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

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

COMMENTARY

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

LESSER INCLUDED OFFENSES

- Attempted Kidnapping ▸ Pen. Code, §§ 664, 207; *People v. Fields* (1976) 56 Cal.App.3d 954, 955–956 [129 Cal.Rptr. 24].

RELATED ISSUES

Victim Must Be Alive

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

1203. Kidnapping: For Robbery, Rape, or Other Sex Offenses (Pen. Code, § 209(b))

The defendant is charged [in Count __] with kidnapping for the purpose of (robbery/rape/spousal rape/oral copulation/sodomy/sexual penetration) [in violation of Penal Code section 209(b)].

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

1. **The defendant intended to commit (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/ [or]_____**<*insert other offense specified in statute*>**;**

2. **Acting with that intent, the defendant took, held, or detained another person by using force or by instilling a reasonable fear ;**

3. **Using that force or fear, the defendant moved the other person [or made the other person move] a substantial distance;**

4. **The other person was moved or made to move a distance beyond that merely incidental to the commission of a (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/ [or]_____**<*insert other offense specified in statute*>**;**

5. **When that movement began, the defendant already intended to commit (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/ [or] _____**<*insert other offense specified in statute*>**;**

[AND]

~~5.~~**6. The other person did not consent to the movement(;/.)**

<*Give element ~~6~~7 if instructing on reasonable belief in consent*>
[AND

7. **The defendant did not actually and reasonably believe that the other person consented to the movement.]**

As used here, *substantial distance* means more than a slight or trivial distance. The movement must have substantially increased the risk of [physical or psychological] harm to the person beyond that necessarily present in the (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/ [or] _____ *<insert other offense specified in statute>*). **In deciding whether the movement was sufficient, consider all the circumstances relating to the movement.**

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

[To be guilty of kidnapping for the purpose of (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration), the defendant does not actually have to commit the (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/ [or]_____ *<insert other offense specified in statute>***.]**

To decide whether the defendant intended to commit (robbery/ [or] rape/ [or] spousal rape/ [or] oral copulation/ [or] sodomy/ [or] sexual penetration/ [or]_____ *<insert other offense specified in statute>*)**), please refer to the separate instructions that I (will give/have given) you on that crime.**

<Defense: Good Faith Belief in Consent>
[The defendant is not guilty of kidnapping if (he/she) reasonably and actually believed that the other person consented to the movement. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person consented to the movement. If the People have not met this burden, you must find the defendant not guilty of this crime.]

<Defense: Consent Given>
[The defendant is not guilty of kidnapping if the other person consented to go with the defendant. The other person consented if (he/she) (1) freely and voluntarily agreed to go with or be moved by the defendant, (2) was aware of the movement, and (3) had sufficient ~~maturity and understanding~~ mental capacity to choose to go with the defendant. The People have the burden of proving beyond a reasonable doubt that the other person did not consent to go with the defendant. If the People have not met this burden, you must find the defendant not guilty of this crime.]

[Consent may be withdrawn. If, at first, a person agreed to go with the defendant, that consent ended if the person changed his or her mind and no longer freely and voluntarily agreed to go with or be moved by the defendant. The defendant is guilty of kidnapping if after the other person withdrew consent, the defendant committed the crime as I have defined it.]

BENCH NOTES

Instructional Duty

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

In addition, the court has a **sua sponte** duty to instruct on the elements of the alleged underlying crime.

Give the bracketed definition of "consent" on request.

Defenses—Instructional Duty

The court has a **sua sponte** duty to instruct on the defense of consent if there is sufficient evidence to support the defense. (See *People v. Davis* (1995) 10 Cal.4th 463, 516–518 [41 Cal.Rptr.2d 826, 896 P.2d 119] [approving consent instruction as given]; see also *People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 165 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [when court must instruct on defenses].) Give the bracketed paragraph on the defense of consent. On request, if supported by the evidence, also give the bracketed paragraph that begins with "Consent may be withdrawn." (See People v. Camden (1976) 16 Cal.3d 808, 814 [129 Cal.Rptr. 438, 548 P.2d 1110].)

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

Timing of Necessary Intent

No court has specifically stated whether the necessary intent must precede all movement of the victim, or only one phase of it involving an independently adequate asportation.

Related Instructions

Kidnapping a child for the purpose of committing a lewd or lascivious act is a separate crime under Penal Code section 207(b). See CALCRIM No. 1200, *Kidnapping: For Child Molestation*.

AUTHORITY

- Elements ▸ Pen. Code, § 209(b); *People v. Rayford* (1994) 9 Cal.4th 1, 12–14, 22 [36 Cal.Rptr.2d 317, 884 P.2d 1369] [following modified two-prong *Daniels* test for movement necessary for aggravated kidnapping]; *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225]; *People v. Shadden* (2001) 93 Cal.App.4th 164, 168 [112 Cal.Rptr.2d 826].
- Robbery Defined ▸ Pen. Code, § 211.
- Rape Defined ▸ Pen. Code, § 261.
- Other Sex Offenses Defined ▸ Pen. Code, §§ 262 [spousal rape], 264.1 [acting in concert], 286 [sodomy], 288a [oral copulation], 289 [sexual penetration].
- Intent to Commit Robbery Must Exist at Time of Original Taking ▸ *People v. Tribble* (1971) 4 Cal.3d 826, 830–832 [94 Cal.Rptr. 613, 484 P.2d 589]; *People v. Bailey* (1974) 38 Cal.App.3d 693, 699 [113 Cal.Rptr. 514]; see *People v. Thornton* (1974) 11 Cal.3d 738, 769–770 [114 Cal.Rptr. 467], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668 [160 Cal.Rptr. 84, 603 P.2d 1].
- Kidnapping to Effect Escape From Robbery ▸ *People v. Laursen* (1972) 8 Cal.3d 192, 199–200 [104 Cal.Rptr. 425, 501 P.2d 1145] [violation of section 209 even though intent to kidnap formed after robbery commenced].
- Kidnapping Victim Need Not Be Robbery Victim ▸ *People v. Laursen* (1972) 8 Cal.3d 192, 200, fn. 7 [104 Cal.Rptr. 425, 501 P.2d 1145].
- Use of Force or Fear ▸ See *People v. Martinez* (1984) 150 Cal.App.3d 579, 599–600 [198 Cal.Rptr. 565], disapproved on other grounds in *People v. Hayes* (1990) 52 Cal.3d 577, 627–628, fn. 10 [276 Cal.Rptr. 874, 802 P.2d 376]; *People v. Jones* (1997) 58 Cal.App.4th 693, 713–714 [68 Cal.Rptr.2d 506].
- Movement Must Substantially Increase Risk of Harm to Victim ▸ *People v. Dominguez* (2006) 39 Cal.4th 1141, 1153.
- Movement Must Be for Illegal Purpose or Intent if Victim Incapable of Consent ▸ *In re Michele D.* (2002) 29 Cal.4th 600, 610–611 [128 Cal.Rptr.2d 92, 59 P.3d 164]; *People v. Oliver* (1961) 55 Cal.2d 761, 768 [12 Cal.Rptr. 865, 361 P.2d 593].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 257–265, 274, 275.

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

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

~~COMMENTARY~~

~~The instruction states that the movement must "substantially" increase the risk of harm to the victim beyond that necessarily included in the underlying robbery, rape, or sex offense. In *People v. Martinez* (1999) 20 Cal.4th 225 [83 Cal.Rptr.2d 533, 973 P.2d 512], the Court observed that "[u]nlike our decisional authority, [section 209(b)(2)] does not require that the movement 'substantially' increase the risk of harm to the victim." (*Id.* at p. 232, fn. 4 [dictum, discussing 1997 amendment to section 209(b)(2)].) One appellate court has followed the *Martinez* dictum in holding that kidnapping for carjacking does not require that the physical movement of the victim *substantially* increase the risk of harm. (*People v. Ortiz* (2002) 101 Cal.App.4th 410, 415 [124 Cal.Rptr.2d 92].) Nevertheless, a recent Supreme Court case repeats the "substantial" increase in harm element without discussing the *Martinez* footnote. (See *People v. Nguyen* (2000) 22 Cal.4th 872, 885–886 [95 Cal.Rptr.2d 178, 997 P.2d 493].) Until this issued is clarified, the committee decided to retain the word "substantial."~~

LESSER INCLUDED OFFENSES

- Kidnapping ▸ Pen. Code, § 207; *People v. Bailey* (1974) 38 Cal.App.3d 693, 699 [113 Cal.Rptr. 514]; see *People v. Jackson* (1998) 66 Cal.App.4th 182, 189 [77 Cal.Rptr.2d 564].
- Attempted Kidnapping ▸ Pen. Code, §§ 664, 207.
- False Imprisonment ▸ Pen. Code, §§ 236, 237; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1121 [281 Cal.Rptr. 338]; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547 [90 Cal.Rptr. 866]; *People v. Shadden* (2001) 93 Cal.App.4th 164, 171 [112 Cal.Rptr.2d 826].

RELATED ISSUES

Psychological Harm

Psychological harm may be sufficient to support conviction for aggravated kidnapping under Penal Code section 209(b). An increased risk of harm is not limited to a risk of bodily harm. (*People v. Nguyen* (2000) 22 Cal.4th 872, 885–886 [95 Cal.Rptr.2d 178, 997 P.2d 493] [substantial movement of robbery victim that posed substantial increase in risk of psychological trauma beyond that expected from stationary robbery].)

1225. Defense to Kidnapping: Protecting Child From Imminent Harm (Pen. Code, § 207(f)(1))

The defendant is not guilty of kidnapping if (he/she) (took/stole/enticed away/detained/concealed/harbored) a child under the age of 14 years to protect that child from danger of imminent harm.

An *imminent harm* is an immediate and present threat of harm. Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed that the child was in imminent danger.

~~*<Alternative A—reasonable doubt standard>*~~
[The People have the burden of proving beyond a reasonable doubt that the defendant did not act to protect the child from the danger of imminent harm. If the People have not met this burden, you must find the defendant not guilty of kidnapping.]

~~*<Alternative B—preponderance standard>*~~
~~**[The defendant has the burden of proving by a preponderance of the evidence that (he/she) was acting to protect the child from danger of imminent harm. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.**~~

New January 2006

BENCH NOTES

Instructional Duty

~~No reported cases specifically discuss the court's duty to instruct on the prevention of imminent harm to a child. Generally, a~~An instruction on a defense must be given **sua sponte** if there is substantial evidence supporting the defense and the defendant is relying on the defense or the defense is not inconsistent with the defendant's theory of the case. (*People v. Sedeno* (1974) 10 Cal.3d 703, 716–717 [112 Cal.Rptr. 1, 518 P.2d 913], disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1] and in *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn. 10, 164-178 [77 Cal.Rptr.2d 870, 960 P.2d 1094]; *People v. Burnham* (1986) 176 Cal.App.3d 1134, 1139, fn. 3 [222 Cal.Rptr. 630].)

The prevention of imminent harm may be asserted against the following forms of kidnapping (Pen. Code, § 207(f)(1)):

1. Simple kidnapping by force or fear. (Pen. Code, § 207(a).)

2. Kidnapping for the purpose of committing a lewd or lascivious act with a child. (Pen. Code, § 207(b).)

3. Kidnapping by force or fear for the purpose of selling the victim into slavery or involuntary servitude. (Pen. Code, § 207(c).)

4. Kidnapping by bringing a person unlawfully abducted out of state into California. (Pen. Code, § 207(d).)

~~Whether the defendant must prove this defense by a preponderance of the evidence or the prosecution must prove its absence beyond a reasonable doubt has not been finally resolved. (See *In re Michele D.* (2002) 29 Cal.4th 600, 611 [128 Cal.Rptr.2d 92, 59 P.3d 164] [observing in dicta that this is a "limited affirmative defense"].) The court must instruct as to which party bears the burden. (*People v. Mower* (2002) 28 Cal.4th 457, 478–479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) The committee has provided the court with both options. The court must select and give one of the two options. The committee recommends reviewing *People v. Mower*, *supra*, 28 Cal.4th at pp. 478–479, discussing affirmative defenses and burdens of proof generally. (See also *In re Michele D.*, *supra*, 29 Cal.4th at p. 611 [the prosecution bears the burden of proving that the defendant kidnapped the minor for an illegal purpose]; *People v. Oliver* (1961) 55 Cal.2d 761, 768 [12 Cal.Rptr. 865, 361 P.2d 593] [same]; *People v. Ojeda-Parra* (1992) 7 Cal.App.4th 46, 50 [8 Cal.Rptr.2d 634] [same].)~~

Related Instructions
CALCRIM No. 3403, *Necessity*.

CALCRIM No. 3402, *Duress or Threats*.

AUTHORITY

- Instructional Requirements ▸ Pen. Code, § 207(f)(1).
- Imminent Harm Defined ▸ See *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1269 [62 Cal.Rptr.2d 345] [defining "imminent" for purposes of imperfect self-defense to murder charge]; *In re Eichorn* (1998) 69 Cal.App.4th 382, 389 [81 Cal.Rptr.2d 535] [citing with approval definition of necessity that includes physical harm].

- Defendant's Burden of Proof When Negating Element of Crime ▸ *People v. Neidinger* (2006) 40 Cal.4th 67, 79.

Secondary Sources

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

RELATED ISSUES

Whether Belief Must Be Reasonable

The language of Penal Code section 207(f)(1) does explicitly require that the defendant "reasonably" believe that the child was in danger of harm. There are no reported cases on this issue.

1400. Active Participation in Criminal Street Gang (Pen. Code, § 186.22(a))

The defendant is charged [in Count __] with participating in a criminal street gang [in violation of Penal Code section 186.22(a)].

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

1. **The defendant actively participated in a criminal street gang;**

2. **When the defendant participated in the gang, (he/she) knew that members of the gang engage in or have engaged in a pattern of criminal gang activity;**

AND

3. **The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by:**

    a. **directly and actively committing a felony offense;**

OR

    b. **aiding and abetting a felony offense.**

Active participation **means involvement with a criminal street gang in a way that is more than passive or in name only.**

[The People do not have to prove that the defendant devoted all or a substantial part of (his/her) time or efforts to the gang, or that (he/she) was an actual member of the gang.]

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

<If criminal street gang has not already been defined in another instruction>
[A *criminal street gang* is any ongoing organization, association, or group of three or more persons, whether formal or informal:

1. **That has a common name or common identifying sign or symbol;**

2. **That has, as one or more of its primary activities, the commission of** _____ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>***;**

AND

3. **Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity.**

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

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

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

   <Give 1A if the crime or crimes are in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>
   1A. (any combination of two or more of the following crimes/[,][or] two or more occurrences of [one or more of the following crimes]:) _____ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>*;

   [OR]

   <Give 1B if one or more of the crimes are in Pen. Code, § 186.22(e)(26)–(30)>
   1B. [at least one of the following crimes:]_____ *<insert one or more crimes from Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>*
   AND
   [at least one of the following crimes:] _____*<insert one or more crimes in Pen. Code, § 186.22(e)(26)–(30)>*;

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

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

AND

4. **The crimes were committed on separate occasions or were personally committed by two or more persons.]**

The People need not prove that every perpetrator involved in the pattern of criminal gang activity, if any, was a member of the alleged criminal street gang at the time when such activity was taking place.
[The crimes, if any, that establish a pattern of criminal gang activity, need not be gang-related.]

[If you find the defendant guilty of a crime in this case, you may consider that crime in deciding whether one of the group's primary activities was commission of that crime and whether a pattern of criminal gang activity has been proved.]

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

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

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

To decide whether a member of the gang [or the defendant] committed _____ *<insert felony or felonies listed immediately above and crimes from Pen. Code, § 186.22(e)(1)–(33) inserted in definition of pattern of criminal gang activity>***, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].**

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

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

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

3. **Before or during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime;**

AND

4. **The defendant's words or conduct did in fact aid and abet the commission of the crime.**

Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

[If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.]

[A person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed. To withdraw, a person must do two things:

1. **He or she must notify everyone else he or she knows is involved in the commission of the crime that he or she is no longer participating. The notification must be made early enough to prevent the commission of the crime;**

AND

2. **He or she must do everything reasonably within his or her power to prevent the crime from being committed. He or she does not have to actually prevent the crime.**

The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you may not find the defendant guilty under an aiding and abetting theory.]

New January 2006; Revised August 2006, June 2007

BENCH NOTES

Instructional Duty

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

In element 2 of the paragraph defining a "criminal street gang," insert one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33) that are alleged to be the primary activities of the gang. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323–324 [109 Cal.Rptr.2d 851, 27 P.3d 739].)

In element 1A of the paragraph defining a "pattern of criminal gang activity," insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient]) if the alleged crime or crimes are listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). Give on request the bracketed phrase "any combination of" if two or more different crimes are inserted in the blank. If one or more of the alleged crimes are listed in Penal Code section 186.22(e)(26)–(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). (See Pen. Code, § 186.22(j) ["A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone."].)

In the definition of "felonious criminal conduct," insert the felony or felonies the defendant allegedly aided and abetted. (See *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].)

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

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

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

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

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

Defenses—Instructional Duty

If there is evidence that the defendant was merely present at the scene or only had knowledge that a crime was being committed, the court has a **sua sponte** duty to give the bracketed paragraph that begins with "If you conclude that defendant was present." (*People v. Boyd* (1990) 222 Cal.App.3d 541, 557 fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].)

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

Related Instructions

This instruction should be used when a defendant is charged with a violation of Penal Code section 186.22(a) as a substantive offense. If the defendant is charged with an enhancement under 186.22(b), use CALCRIM No. 1401, *Felony Committed for Benefit of Criminal Street Gang*.

For additional instructions relating to liability as an aider and abettor, see the Aiding and Abetting series (CALCRIM No. 400 et seq.).

AUTHORITY

- Elements ▸ Pen. Code, § 186.22(a); *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1468 [83 Cal.Rptr.2d 307].
- Active Participation Defined ▸ Pen. Code, § 186.22(i); *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined ▸ Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].
- Pattern of Criminal Gang Activity Defined ▸ Pen. Code, §§ 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927

P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236].

- Willful Defined ‣ Pen. Code, § 7(1).
- Applies to Both Perpetrator and Aider and Abettor ‣ *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436 [105 Cal.Rptr.2d 837]; *People v. Castenada* (2000) 23 Cal.4th 743, 749–750 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Felonious Criminal Conduct Defined ‣ *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].
- Separate Intent From Underlying Felony ‣ *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].
- Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct ‣ *People v. Salcido* (2007) 149 Cal.App.4th 356.

Secondary Sources

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 23–28.

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

COMMENTARY

The jury may consider past offenses as well as circumstances of the charged crime. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739], disapproving *In re Elodio O.* (1997) 56 Cal.App.4th 1175, 1181 [66 Cal.Rptr.2d 95], to the extent it only allowed evidence of past offenses.) A "pattern of criminal gang activity" requires two or more "predicate offenses" during a statutory time period. The charged crime may serve as a predicate offense (*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]), as can another offense committed on the same occasion by a fellow gang member. (*People v. Loeun* (1997) 17 Cal.4th 1, 9–10 [69 Cal.Rptr.2d 776, 947 P.2d 1313]; see also *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two incidents each with single perpetrator, or single incident with multiple participants committing one or more specified offenses, are sufficient]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484 [67 Cal.Rptr.2d 126].) However, convictions of a perpetrator and an aider and abettor for a single crime establish only one predicate offense (*People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196]), and "[c]rimes occurring *after* the charged offense cannot serve as predicate offenses to

prove a pattern of criminal gang activity." (*People v. Duran, supra,* 97 Cal.App.4th at 1458 [original italics].)

LESSER INCLUDED OFFENSES

Predicate Offenses Not Lesser Included Offenses
The predicate offenses that establish a pattern of criminal gang activity are not lesser included offenses of active participation in a criminal street gang. (*People v. Burnell* (2005) 132 Cal.App.4th 938, 944–945 [34 Cal.Rptr.3d 40].)

RELATED ISSUES

Conspiracy
Anyone who actively participates in a criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, assists, or benefits from any felonious criminal conduct by the members, is guilty of conspiracy to commit that felony. (Pen. Code, § 182.5; see Pen. Code, § 182 and CALCRIM No. 415, *Conspiracy*.)

Labor Organizations or Mutual Aid Activities
The California Street Terrorism Enforcement and Prevention Act does not apply to labor organization activities or to employees engaged in activities for their mutual aid and protection. (Pen. Code, § 186.23.)

Related Gang Crimes
Soliciting or recruiting others to participate in a criminal street gang, or threatening someone to coerce them to join or prevent them from leaving a gang, are separate crimes. (Pen. Code, § 186.26.) It is also a crime to supply a firearm to someone who commits a specified felony while participating in a criminal street gang. (Pen. Code, § 186.28.)

Unanimity
The "continuous-course-of-conduct exception" applies to the "pattern of criminal gang activity" element of Penal Code section 186.22(a). Thus the jury is not required to unanimously agree on which two or more crimes constitute a pattern of criminal activity. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758].)

1401. Felony Committed for Benefit of Criminal Street Gang (Pen. Code, § 186.22(b)(1))

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those crime[s])][,][or the lesser offense[s] of _____<*insert lesser offense[s]*>**], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant committed that crime (for the benefit of[,]/ at the direction of[,]/ [or] in association with) a criminal street gang. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

[You must also decide whether the crime[s] charged in Count[s] ___ (was/were) committed on the grounds of, or within 1,000 feet of a public or private (elementary/ [or] vocational/ [or] junior high/ [or] middle school/ [or] high) school open to or being used by minors for classes or school-related programs at the time.]

To prove this allegation, the People must prove that:

1. **The defendant (committed/ [or] attempted to commit) the crime (for the benefit of[,]/ at the direction of[,]/ [or] in association with) a criminal street gang;**

AND

2. **The defendant intended to assist, further, or promote criminal conduct by gang members.**

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

<*If criminal street gang has not already been defined in another instruction***>**
[A *criminal street gang* is any ongoing organization, association, or group of three or more persons, whether formal or informal:

1. **That has a common name or common identifying sign or symbol;**

2. **That has, as one or more of its primary activities, the commission of _____ <*insert one or more crimes listed in Pen. Code, § 186.22(e)(1)-(25), (31)–(33)*>;**

AND

3. **Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity.**

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

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

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

   <Give 1A if the crime or crimes are in Pen. Code, § 186.22(e)(1)-(25), (31)–(33)>
   1A. (any combination of two or more of the following crimes/[,][or] two or more occurrences of [one or more of the following crimes]:) _____ <*insert one or more crimes listed in Pen. Code, § 186.22(e)(1)-(25), (31)–(33)>;*

   [OR]

   <Give 1B if one or more of the crimes are in Pen. Code, § 186.22(e)(26)–(30)>
   1B. [at least one of the following crimes:]_____ <*insert one or more crimes from Pen. Code, § 186.22(e)(1)-(25), (31)–(33)>*
   AND
   [at least one of the following crimes:] _____<*insert one or more crimes in Pen. Code, § 186.22(e)(26)–(30)>*;

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

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

AND

4. **The crimes were committed on separate occasions or were personally committed by two or more persons.]**

[The crimes, if any, that establish a pattern of criminal gang activity, need not be gang-related.]

[The People need not prove that the defendant is an active or current member of the alleged criminal street gang.]

[If you find the defendant guilty of a crime in this case, you may consider that crime in deciding whether one of the group's primary activities was commission of that crime and whether a pattern of criminal gang activity has been proved.]

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

<The court may give the following paragraph when one of the predicate crimes is not established by a prior conviction or a currently charged offense>
[To decide whether a member of the gang [or the defendant] committed _____ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(33)>***, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

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

New January 2006; Revised August 2006, June 2007

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

In element 2 of the paragraph defining a "criminal street gang," insert one or more of the crimes listed in Penal Code section 186.22(e)(1)–(25), (31)–(33) that are alleged to be the primary activities of the gang. (See *People v. Sengpadychith*, *supra*, 26 Cal.4th at 323–324.)

In element 1A of the paragraph defining a "pattern of criminal gang activity," insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient].) if the alleged crime or crimes are listed in Penal Code section 186.22(e)(1)–(25), (31)–(33). Give on request the bracketed phrase "any combination of" if two or more different crimes are inserted in the blank. If one or more of the alleged crimes are listed in Penal Code section 186.22(e)(26)-(30), give element 1B and insert that crime or crimes and one or more of the crimes listed in Penal Code section 182.22(e)(1)–(25), (31)–(33). (See Pen. Code, § 186.22(j) ["A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone."].)

The court should also give the appropriate instructions defining the elements of all crimes inserted in the definition of "criminal street gang" or "pattern of criminal gang activity" that have not been established by prior convictions."

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

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

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

The court may bifurcate the trial on the gang enhancement, at its discretion. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 [16 Cal.Rptr.3d 880, 94 P.3d 1080].)

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

AUTHORITY

- Enhancement ▸ Pen. Code, § 186.22(b)(1).
- Criminal Street Gang Defined ▸ Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].
- Pattern of Criminal Gang Activity Defined ▸ Pen. Code, § 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236]; see *People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196] [conviction of perpetrator and aider and abettor for single crime establishes only single predicate offense].
- Active or Current Participation in Gang Not Required ▸ *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207 [66 Cal.Rptr.2d 816].
- Primary Activities Defined ▸ *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323–324 [109 Cal.Rptr.2d 851, 27 P.3d 739].

Secondary Sources

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 25.

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

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

RELATED ISSUES

Commission On or Near School Grounds
In imposing a sentence under Penal Code section 186.22(b)(1), it is a circumstance in aggravation if the defendant's underlying felony was committed on or within 1,000 feet of specified schools. (Pen. Code, § 186.22(b)(2).)

Enhancements for Multiple Gang Crimes
Separate criminal street gang enhancements may be applied to gang crimes committed against separate victims at different times and places, with multiple

criminal intents. (*People v. Akins* (1997) 56 Cal.App.4th 331, 339–340 [65 Cal.Rptr.2d 338].)

Wobblers

Specific punishments apply to any person convicted of an offense punishable as a felony or a misdemeanor that is committed for the benefit of a criminal street gang and with the intent to promote criminal conduct by gang members. (See Pen. Code, § 186.22(d); see also *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 909 [135 Cal.Rptr.2d 30, 69 P.3d 951].) However, the felony enhancement provided by Penal Code section 186.22(b)(1) cannot be applied to a misdemeanor offense made a felony pursuant to section 186.22(d). (*People v. Arroyas* (2002) 96 Cal.App.4th 1439, 1449 [118 Cal.Rptr.2d 380].)

Murder—Enhancements Under Penal Code section 186.22(b)(1) Do Not Apply

The enhancements provided by Penal Code section 186.22(b)(1) do not apply to crimes "punishable by imprisonment in the state prison for life . . . " (Pen. Code, § 186.22(b)(5); *People v. Lopez* (2005) 34 Cal.4th 1002, 1004 [22 Cal.Rptr.3d 869, 103 P.3d 270].) Thus, the ten-year enhancement provided by Penal Code section 186.22(b)(1)(C) for a violent felony committed for the benefit of the street gang does not apply to the crime of murder.

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

1806. Theft by Embezzlement (Pen. Code, §§ 484, 503)

The defendant is charged [in Count ___] with [grand/petty] theft by embezzlement [in violation of Penal Code section 503].

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

1. **An owner [or the owner's agent] entrusted (his/her) property to the defendant;**

2. **The owner [or owner's agent] did so because (he/she) trusted the defendant;**

3. **The defendant fraudulently (converted/used) that property for (his/her) own benefit;**

AND

4. **When the defendant (converted/used) the property, (he/she) intended to deprive the owner of (it/its use).**

A person acts *fraudulently* when he or she takes undue advantage of another person or causes a loss to that person by breaching– a duty, trust or confidence.

[A good faith belief in acting with authorization to use the property is a defense.]

[In deciding whether the defendant believed that (he/she) had a right to the property and whether (he/she) held that belief in good faith, consider all the facts known to (him/her) at the time (he/she) obtained the property, along with all the other evidence in the case. The defendant may hold a belief in good faith even if the belief is mistaken or unreasonable. But if the defendant was aware of facts that made that belief completely unreasonable, you may conclude that the belief was not held in good faith.]

[An intent to deprive the owner of property, even temporarily, is enough.]

[Intent to restore the property to its owner is not a defense.]

[An *agent* is someone to whom the owner has given complete or partial authority and control over the owner's property.]

[For petty theft, the property taken can be of any value, no matter how slight.]

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

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

If the evidence supports it, the court has a **sua sponte** duty to instruct that a good faith belief in acting with authorization to use the property is a defense. *People v. Stewart* (1976) 16 Cal.3d 133, 140 [127 Cal.Rptr.117, 544 P.2d 1317].

Related Instructions

If the defendant is charged with grand theft, give CALCRIM No. 1801 *Theft: Degrees*. If the defendant is charged with petty theft, no other instruction is required, and the jury should receive a petty theft verdict form.

If the defendant is charged with petty theft with a prior conviction, give CALCRIM No. 1850, *Petty Theft With Prior Conviction.*

AUTHORITY

Elements ▸ Pen. Code, §§ 484, 503–515; *In re Basinger* (1988) 45 Cal.3d 1348, 1363 [249 Cal.Rptr. 110, 756 P.2d 833] *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1845 [52 Cal.Rptr.2d 765]; *People v. Kronemyer* (1987) 189 Cal.App.3d 314 [234 Cal.Rptr. 442].

Fraud Defined ▸ *People v. Talbot* (1934) 220 Cal. 3, 15 [28 P.2d 1057]; People v. Stein (1979) 94 Cal.App.3d 235, 241 [156 Cal.Rptr. 299].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 26.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Petty Theft ▸ Pen. Code, § 486.
- Attempted Theft ▸ Pen. Code, §§ 664, 484.

RELATED ISSUES

Alter Ego Defense

A partner can be guilty of embezzling from his own partnership. "[T]hough [the Penal Code] requir[es] that the property be 'of another' for larceny, [it] does not require that the property be 'of another' for embezzlement. . . . It is both illogical and unreasonable to hold that a partner cannot steal from his partners merely because he has an undivided interest in the partnership property. Fundamentally, stealing that portion of the partners' shares which does not belong to the thief is no different from stealing the property of any other person." (*People v. Sobiek* (1973) 30 Cal.App.3d 458, 464, 468 [106 Cal.Rptr. 519]; see Pen. Code, § 484.)

Fiduciary Relationships

Courts have held that creditor/debtor and employer/employee relationships are not presumed to be fiduciary relationships in the absence of other evidence of trust or confidence. (*People v. Wooten* (1996) 44 Cal.App.4th 1834, 1846 [52 Cal.Rptr.2d 765] [creditor/debtor]; *People v. Threestar* (1985) 167 Cal.App.3d 747, 759 [213 Cal.Rptr. 510] [employer/employee].)

1863. Defense to Theft or Robbery: Claim of Right (Pen. Code, § 511)

If the defendant obtained property under a claim of right, (he/she) did not have the intent required for the crime of (theft/ [or] robbery).

The defendant obtained property under a claim of right if (he/she) believed in good faith that (he/she) had a right to the specific property or a specific amount of money, and (he/she) openly took it.

In deciding whether the defendant believed that (he/she) had a right to the property and whether (he/she) held that belief in good faith, consider all the facts known to (him/her) at the time (he/she) obtained the property, along with all the other evidence in the case. The defendant may hold a belief in good faith even if the belief is mistaken or unreasonable. But if the defendant was aware of facts that made that belief completely unreasonable, you may conclude that the belief was not held in good faith.

[The claim-of-right defense does not apply if the defendant attempted to conceal the taking at the time it occurred or after the taking was discovered.]

[The claim-of-right defense does not apply to offset or pay claims against the property owner of an undetermined or disputed amount.]

[The claim-of-right defense does not apply if the claim arose from an activity commonly known to be illegal or known by the defendant to be illegal.]

If you have a reasonable doubt about whether the defendant had the intent required for (theft/ [or] robbery), you must find (him/her) not guilty of _____ <*insert specific theft crime*>.

New January 2006

BENCH NOTES

Instructional Duty

When a claim of right is supported by substantial evidence, the trial court must instruct **sua sponte** on the defense. (*People v. Creath* (1995) 31 Cal.App.4th 312, 319 [37 Cal.Rptr.2d 336]; see *People v. Barnett* (1998) 17 Cal.4th 1044, 1145 [74 Cal.Rptr.2d 121, 954 P.2d 384] [no substantial evidence supporting inference of bona fide belief].)

AUTHORITY

- Defense. ▸ Pen. Code, § 511; *People v. Tufunga* (1999) 21 Cal.4th 935, 952, fn. 4 [90 Cal.Rptr.2d 143, 987 P.2d 168]; *People v. Romo* (1990) 220 Cal.App.3d 514, 517, 518 [269 Cal.Rptr. 440].
- Good Faith Belief. ▸ *People v. Stewart* (1976) 16 Cal.3d 133, 139–140 [127 Cal.Rptr. 117, 544 P.2d 1317]; *People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, 4, 10–11 [160 Cal.Rptr. 692].
- No Concealment of Taking. ▸ *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1848–1849 [52 Cal.Rptr.2d 765].
- Not Available to Recover Unliquidated Claims. ▸ *People v. Holmes* (1970) 5 Cal.App.3d 21, 24–25 [84 Cal.Rptr. 889].
- Not Available to Recover From Notoriously or Known Illegal Activity. ▸ *People v. Gates* (1987) 43 Cal.3d 1168, 1181–1182 [240 Cal.Rptr. 666, 743 P.2d 301].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 32, 34.

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

1864–1899. Reserved for Future Use

2100. Driving Under the Influence Causing Injury (Veh. Code, § 23153(a))

The defendant is charged [in Count __] with causing injury to another person while driving under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug] [in violation of Vehicle Code section 23153(a)].

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

1. **The defendant drove a vehicle;**

2. **When (he/she) drove, the defendant was under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug].**

3. **While driving under the influence, the defendant also (committed an illegal act/ [or] neglected to perform a legal duty);**

   AND

4. **The defendant's (illegal act/ [or] failure to perform a legal duty) caused bodily injury to another person.**

A person is *under the influence* if, as a result of (drinking [or consuming] an alcoholic beverage/ [and/or] taking a drug), his or her mental or physical abilities are so impaired that he or she is no longer able to drive a vehicle with the caution of a sober person, using ordinary care, under similar circumstances.

[An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains ethanol. Ethanol is also known as ethyl alcohol, drinking alcohol, or alcohol. [An *alcoholic beverage* includes _____ *<insert type[s] of beverage[s] from Veh. Code, § 109 or Bus. & Prof. Code, § 23004, e.g., wine, beer>*.**]]**

[A *drug* is a substance or combination of substances, other than alcohol, that could so affect the nervous system, brain, or muscles of a person that it would appreciably impair his or her ability to drive as an ordinarily cautious person, in full possession of his or her faculties and using reasonable care, would drive under similar circumstances.]

[If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent or more at the time of the chemical analysis, you may, but are not required to, conclude that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Health Services.]

[The People allege that the defendant committed the following illegal act[s]: _____ *<list name[s] of offense[s]>***.**

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

[The People [also] allege that the defendant failed to perform the following legal (duty/duties) while driving the vehicle: (the duty to exercise ordinary care at all times and to maintain proper control of the vehicle/_____ *<insert other duty or duties alleged>***).]**

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (committed [at least] one illegal act/[or] failed to perform [at least] one duty).

<Alternative A—unanimity required; see Bench Notes>
[You must all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

<Alternative B—unanimity not required; see Bench Notes>
[But you do not have to all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]]

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

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

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

[It is not a defense that the defendant was legally entitled to use the drug.] [If the defendant was under the influence of (an alcoholic beverage/ [and/or] a drug), then it is not a defense that something else also impaired (his/her) ability to drive.]

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

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

If the prosecution alleges under element 3 that the defendant committed an act forbidden by law, the court has a **sua sponte** duty to specify the predicate offense alleged and to instruct on the elements of that offense. (*People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].)

If the prosecution alleges under element 3 that the defendant neglected to perform a duty imposed by law, the court has a **sua sponte** duty to instruct on the duty allegedly neglected. (See *People v. Minor, supra,* 28 Cal.App.4th at pp. 438–439.) If the prosecution alleges that the defendant neglected the general duty of every driver to exercise ordinary care (see *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243]), the court should give the bracketed definition of "ordinary care."

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

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction

required], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, failure to give harmless error if was required].) If the court concludes that a unanimity instruction is appropriate, give the unanimity alternative A. If the court concludes that unanimity is not required, give the unanimity alternative B.

The bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent" explains a rebuttable presumption created by statute. (See Veh. Code, § 23610; Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences.
~~In addition, it is only appropriate to instruct the jury on a permissive inference if there is *no* evidence to contradict the inference. (Evid. Code, § 604.) If any evidence has been introduced to support the opposite factual finding, then the jury "shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." *(Ibid.)*~~

~~Therefore, the~~The court **must not** give the bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent" if there is no evidence that the defendant's blood alcohol level was at or above 0.08 percent at the time of the test. In addition, if the test falls within the range in which no presumption applies, 0.05 percent to just below 0.08 percent, do not give this bracketed sentence. (*People v. Wood* (1989) 207 Cal.App.3d Supp. 11, 15 [255 Cal.Rptr. 537].) The court should also consider whether there is sufficient evidence to establish that the test result exceeds the margin of error before giving this instruction for test results of 0.08 percent. (Compare *People v. Campos* (1982) 138 Cal.App.3d Supp. 1, 4–5 [188 Cal.Rptr. 366], with *People v. Randolph* (1989) 213 Cal.App.3d Supp. 1, 11 [262 Cal.Rptr. 378].)

The statute also creates a rebuttable presumption that the defendant was not under the influence if his or her blood alcohol level was less than 0.05 percent. (*People v. Gallardo* (1994) 22 Cal.App.4th 489, 496 [27 Cal.Rptr.2d 502].) Depending on the facts of the case, the defendant may be entitled to a pinpoint instruction on this presumption. It is not error to refuse an instruction on this presumption if the prosecution's theory is that the defendant was under the combined influence of drugs and alcohol. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250 [32 Cal.Rptr.2d 442].)

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with "In evaluating any test results in this case." (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

Give the bracketed sentence stating that "it is not a defense that something else also impaired (his/her) ability to drive" if there is evidence of an additional source of impairment such as an epileptic seizure, inattention, or falling asleep.

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra,* 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].)

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

Defenses—Instructional Duty

On request, if supported by the evidence, the court must instruct on the "imminent peril/sudden emergency" doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) The court may use the bracketed instruction on sudden emergency in CALCRIM No. 590, *Gross Vehicular Manslaughter While Intoxicated.*

Related Instructions

CALCRIM No. 2101, *Driving With 0.08 Percent Blood Alcohol Causing Injury*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions.*

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

CALCRIM No. 595, *Vehicular Manslaughter: Speeding Laws Defined*.

AUTHORITY

- Elements ▸ Veh. Code, § 23153(a); *People v. Minor* (1994) 28 Cal.App.4th 431, 438 [33 Cal.Rptr.2d 641].
- Alcoholic Beverage Defined ▸ Veh. Code, § 109, Bus. & Prof. Code, § 23004.
- Drug Defined ▸ Veh. Code, § 312.
- Presumptions ▸ Veh. Code, § 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Under the Influence Defined ▸ *People v. Schoonover* (1970) 5 Cal.App.3d 101, 105–107 [85 Cal.Rptr. 69]; *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665–666 [49 Cal.Rptr.2d 710].
- Must Instruct on Elements of Predicate Offense ▸ *People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Negligence—Ordinary Care ▸ Pen. Code, § 7, subd. 2; Restatement Second of Torts, § 282; *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243] [ordinary negligence standard applies to driving under the influence causing injury].
- Causation ▸ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Legal Entitlement to Use Drug Not a Defense ▸ Veh. Code, § 23630.
- Unanimity Instruction ▸ *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].
- Prior Convictions ▸ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210.

2 Witkin, California Evidence (4th ed. 2000) Demonstrative Evidence, § 54.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.36 (Matthew Bender).

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

LESSER INCLUDED OFFENSES

- Misdemeanor Driving Under the Influence or With 0.08 Percent ▸ Veh. Code, § 23152(a) & (b); *People v. Capetillo* (1990) 220 Cal.App.3d 211, 220 [269 Cal.Rptr. 250].

RELATED ISSUES

DUI Cannot Serve as Predicate Unlawful Act

"[T]he evidence must show an unlawful act or neglect of duty *in addition* to driving under the influence." (*People v. Minor* (1994) 28 Cal.App.4th 431, 438 [33 Cal.Rptr.2d 641] [italics in original]; *People v. Oyaas* (1985) 173 Cal.App.3d 663, 668 [219 Cal.Rptr. 243].)

Act Forbidden by Law

The term " 'any act forbidden by law' . . . refers to acts forbidden by the Vehicle Code . . . ." (*People v. Clenney* (1958) 165 Cal.App.2d 241, 253 [331 P.2d 696].) The defendant must commit the act when driving the vehicle. (*People v. Capetillo* (1990) 220 Cal.App.3d 211, 217 [269 Cal.Rptr. 250] [violation of Veh. Code, § 10851 not sufficient because offense not committed "when" defendant was driving the vehicle but by mere fact that defendant was driving the vehicle].)

Neglect of Duty Imposed by Law

"In proving the person neglected any duty imposed by law in driving the vehicle, it is not necessary to prove that any specific section of [the Vehicle Code] was violated." (Veh. Code, § 23153(c); *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243].) "[The] neglect of duty element . . . is satisfied by evidence which establishes that the defendant's conduct amounts to no more than ordinary negligence." (*People v. Oyaas, supra,* 173 Cal.App.3d at p. 669.) "[T]he law imposes on any driver [the duty] to exercise ordinary care at all times and to maintain a proper control of his or her vehicle." (*Id.* at p. 670.)

Multiple Victims to One Drunk Driving Accident

"In *Wilkoff v. Superior Court* [(1985) 38 Cal.3d 345, 352 [211 Cal.Rptr. 742, 696 P.2d 134]] we held that a defendant cannot be charged with multiple counts of felony drunk driving under Vehicle Code section 23153, subdivision (a), where injuries to several people result from one act of drunk driving." (*People v. McFarland* (1989) 47 Cal.3d 798, 802 [254 Cal.Rptr. 331, 765 P.2d 493].)

However, when "a defendant commits vehicular manslaughter with gross negligence[,] . . . he may properly be punished for [both the vehicular manslaughter and] injury to a separate individual that results from the same incident." (*Id.* at p. 804.) The prosecution may also charge an enhancement for multiple victims under Vehicle Code section 23558.

See also the Related Issues section in CALCRIM No. 2110, *Driving Under the Influence*.

2101. Driving With 0.08 Percent Blood Alcohol Causing Injury (Veh. Code, § 23153(b))

The defendant is charged [in Count __] with causing injury to another person while driving with a blood alcohol level of 0.08 percent or more [in violation of Vehicle Code section 23153(b)].

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

1. **The defendant drove a vehicle;**

2. **When (he/she) drove, the defendant's blood alcohol level was 0.08 percent or more by weight;**

3. **When the defendant was driving with that blood alcohol level, (he/she) also (committed an illegal act/ [or] neglected to perform a legal duty);**

AND

4. **The defendant's (illegal act/ [or] failure to perform a legal duty) caused bodily injury to another person.**

[If the People have proved beyond a reasonable doubt that a sample of the defendant's (blood/breath) was taken within three hours of the defendant's [alleged] driving and that a chemical analysis of the sample showed a blood alcohol level of 0.08 percent or more, you may, but are not required to, conclude that the defendant's blood alcohol level was 0.08 percent or more at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Health Services.]

[The People allege that the defendant committed the following illegal act[s]: _____ *<list name[s] of offense[s]>***.**

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

[The People [also] allege that the defendant failed to perform the following legal (duty/duties) while driving the vehicle: (the duty to exercise ordinary care at all times and to maintain proper control of the vehicle/_____ *<insert other duty or duties alleged>***).]**

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (committed [at least] one illegal act/[or] failed to perform [at least] one duty).

<Alternative A—unanimity required; see Bench Notes>
[You must all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

<Alternative B—unanimity not required; see Bench Notes>
[But you do not have to all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]]

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

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

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

New January 2006; Revised August 2006

BENCH NOTES

Instructional Duty

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

If the prosecution alleges under element 3 that the defendant committed an act forbidden by law, the court has a **sua sponte** duty to specify the predicate offense alleged and to instruct on the elements of that offense. (*People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].)

If the prosecution alleges under element 3 that the defendant neglected to perform a duty imposed by law, the court has a **sua sponte** duty to instruct on the duty allegedly neglected. (See *People v. Minor, supra,* 28 Cal.App.4th at pp. 438–439.) If the prosecution alleges that the defendant neglected the general duty of every driver to exercise ordinary care (see *People v. Oyass* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243]), the court should give the bracketed definition of "ordinary care."

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

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

The bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that a sample of" explains a rebuttable presumption created by statute. (See Veh. Code, § 23152(b); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences. ~~In addition, it is only appropriate to instruct the jury on a permissive inference if there is *no* evidence to contradict the inference. (Evid. Code, § 640.) If any evidence has been introduced to support the opposite factual finding, then the jury "shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." *(Ibid.)*~~

~~Therefore, t~~The court **must not** give the bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that a sample of" if there is evidence that the defendant's blood alcohol level was below 0.08 percent at the time of the test.

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with "In evaluating any test results in this case." (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington*, *supra*, 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2110, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].)

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

Defenses—Instructional Duty
On request, if supported by the evidence, the court must instruct on the "imminent peril/sudden emergency" doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) The court may use the bracketed instruction on sudden emergency in CALCRIM No. 590, *Gross Vehicular Manslaughter While Intoxicated*.

Related Instructions
CALCRIM No. 2100, *Driving Under the Influence Causing Injury*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions.*

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

CALCRIM No. 595, *Vehicular Manslaughter: Speeding Laws Defined*.

AUTHORITY

- Elements ▸ Veh. Code, § 23153(b); *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266 [198 Cal.Rptr. 149, 673 P.2d 732].
- Partition Ratio ▸ Veh. Code, § 23152(b); *People v. Bransford* (1994) 8 Cal.4th 885, 890 [35 Cal.Rptr.2d 613, 884 P.2d 70].
- Presumptions ▸ Veh. Code, § 23153(b); Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Must Instruct on Elements of Predicate Offense ▸ *People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Negligence—Ordinary Care ▸ Pen. Code, § 7(2); Restatement Second of Torts, § 282.
- Causation ▸ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Unanimity Instruction ▸ *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188

Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].

- Statute Constitutional ▸ *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 273 [198 Cal.Rptr. 145, 673 P.2d 732].
- Prior Convictions ▸ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.36 (Matthew Bender).

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

LESSER INCLUDED OFFENSES

- Misdemeanor Driving Under the Influence or With 0.08 Percent ▸ Veh. Code, § 23152(a) & (b); *People v. Capetillo* (1990) 220 Cal.App.3d 211, 220 [269 Cal.Rptr. 250].

RELATED ISSUES

See the Related Issues section in CALCRIM No. 2111, *Driving With 0.08 Percent Blood Alcohol* and CALCRIM No. 2100, *Driving Under the Influence Causing Injury*.

2102–2109. Reserved for Future Use

2110. Driving Under the Influence (Veh. Code, § 23152(a))

The defendant is charged [in Count __] with driving under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug] [in violation of Vehicle Code section 23152(a)].

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

1. **The defendant drove a vehicle;**

AND

2. **When (he/she) drove, the defendant was under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug].**

A person is *under the influence* if, as a result of (drinking [or consuming] an alcoholic beverage/ [and/or] taking a drug), his or her mental or physical abilities are so impaired that he or she is no longer able to drive a vehicle with the caution of a sober person, using ordinary care, under similar circumstances.

The manner in which a person drives is not enough by itself to establish whether the person is or is not under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug]. However, it is a factor to be considered, in light of all the surrounding circumstances, in deciding whether the person was under the influence.

[An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains ethanol. Ethanol is also known as ethyl alcohol, drinking alcohol, or alcohol. [An *alcoholic beverage* includes _____ <*insert type[s] of beverage[s] from Veh. Code, § 109 or Bus. & Prof. Code, § 23004, e.g., wine, beer*>.]]

[A *drug* is a substance or combination of substances, other than alcohol, that could so affect the nervous system, brain, or muscles of a person that it would appreciably impair his or her ability to drive as an ordinarily cautious person, in full possession of his or her faculties and using reasonable care, would drive under similar circumstances.]

[If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent or more at the time of the chemical analysis, you may, but are not required to, conclude that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Health Services.]

[It is not a defense that the defendant was legally entitled to use the drug.]

[If the defendant was under the influence of (an alcoholic beverage/ [and/or] a drug), then it is not a defense that something else also impaired (his/her) ability to drive.]

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with a misdemeanor or a felony based on prior convictions.

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra,* 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].)

The bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent"

explains a rebuttable presumption created by statute. (See Veh. Code, § 23610; Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences. ~~In addition, it is only appropriate to instruct the jury on a permissive inference if there is *no* evidence to contradict the inference. (Evid. Code, § 604.) If any evidence has been introduced to support the opposite factual finding, then the jury "shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." *(Ibid.)*~~

~~Therefore, t~~The court **must not** give the bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent" if there is no substantial evidence that the defendant's blood alcohol level was at or above 0.08 percent at the time of the test. In addition, if the test falls within the range in which no presumption applies, 0.05 percent to just below 0.08 percent, do not give this bracketed sentence. (*People v. Wood* (1989) 207 Cal.App.3d Supp. 11, 15 [255 Cal.Rptr. 537].) The court should also consider whether there is sufficient evidence to establish that the test result exceeds the margin of error before giving this instruction for test results of 0.08 percent. (Compare *People v. Campos* (1982) 138 Cal.App.3d Supp. 1, 4–5 [188 Cal.Rptr. 366], with *People v. Randolph* (1989) 213 Cal.App.3d Supp. 1, 11 262 Cal.Rptr. 378].)

The statute also creates a rebuttable presumption that the defendant was not under the influence if his or her blood alcohol level was less than 0.05 percent. (*People v. Gallardo* (1994) 22 Cal.App.4th 489, 496 [27 Cal.Rptr.2d 502].) Depending on the facts of the case, the defendant may be entitled to a pinpoint instruction on this presumption. It is not error to refuse an instruction on this presumption if the prosecution's theory is that the defendant was under the combined influence of drugs and alcohol. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250 [32 Cal.Rptr.2d 442].)

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with "In evaluating any test results in this case." (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

Give the bracketed sentence stating that "it is not a defense that something else also impaired (his/her) ability to drive" if there is evidence of an additional source of impairment such as an epileptic seizure, inattention, or falling asleep.

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

Related Instructions
CALCRIM No. 2111, *Driving With 0.08 Percent Blood Alcohol.*

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions.*

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

AUTHORITY

- Elements ▸ Veh. Code, § 23152(a).
- Alcoholic Beverage Defined ▸ Veh. Code, § 109; Bus. & Prof. Code, § 23004.
- Drug Defined ▸ Veh. Code, § 312.
- Driving ▸ *Mercer v. Dept. of Motor Vehicles* (1991) 53 Cal.3d 753, 768 [280 Cal.Rptr. 745, 809 P.2d 404].
- Presumptions ▸ Veh. Code, § 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Mandatory Presumption Unconstitutional Unless Instructed as Permissive Inference ▸ *People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].
- Under the Influence Defined ▸ *People v. Schoonover* (1970) 5 Cal.App.3d 101, 105–107 [85 Cal.Rptr. 69]; *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665–666 [49 Cal.rptr.2d 710].
- Manner of Driving ▸ *People v. Weathington* (1991) 231 Cal.App.3d 69, 84 [252 Cal.Rptr. 170]; *People v. McGrath* (1928) 94 Cal.App. 520, 524 [271 P. 549].
- Legal Entitlement to Use Drug Not a Defense ▸ Veh. Code, § 23630.
- Prior Convictions ▸ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [252 Cal.Rptr. 170].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210.

2 Witkin, California Evidence (4th ed. 2000) Demonstrative Evidence, § 54.

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

LESSER INCLUDED OFFENSES

If the defendant is charged with felony driving under the influence based on prior convictions, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the prior convictions have been proved. If the jury finds that the prior convictions have not been proved, then the offense should be set at a misdemeanor.

- Attempted Driving Under the Influence ▸ Pen. Code, § 664; Veh. Code, § 23152(a); *People v. Garcia* (1989) 214 Cal.App.3d Supp.1, 3–4 [262 Cal.Rptr. 915].

RELATED ISSUES

Driving

"[S]ection 23152 requires proof of volitional movement of a vehicle." (*Mercer v. Dept. of Motor Vehicles* (1991) 53 Cal.3d 753, 768 [280 Cal.Rptr. 745, 809 P.2d 404].) However, the movement may be slight. (*Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1029 [229 Cal.Rptr. 310]; *Henslee v. Dept. of Motor Vehicles* (1985) 168 Cal.App.3d 445, 450–453 [214 Cal.Rptr. 249].) Further, driving may be established through circumstantial evidence. (*Mercer*, *supra*, 53 Cal.3d at p. 770; *People v. Wilson* (1985) 176 Cal.App.3d Supp. 1, 9 [222 Cal.Rptr. 540] [sufficient evidence of driving where the vehicle was parked on the freeway, over a mile from the on-ramp, and the defendant, the sole occupant of the vehicle, was found in the driver's seat with the vehicle's engine running].) See CALCRIM No. 2241, *Driver and Driving Defined*.

PAS Test Results

The results of a preliminary alcohol screening (PAS) test "are admissible upon a showing of either compliance with title 17 or the foundational elements of (1) properly functioning equipment, (2) a properly administered test, and (3) a qualified operator . . . ." (*People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203].)

Presumption Arising From Test Results—Timing

Unlike the statute on driving with a blood alcohol level of 0.08 percent or more, the statute permitting the jury to presume that the defendant was under the influence if he or she had a blood alcohol level of 0.08 percent or more does not contain a time limit for administering the test. (Veh. Code, § 23610; *People v. Schrieber* (1975) 45 Cal.App.3d 917, 922 [119 Cal.Rptr. 812].) However, the court in *Schrieber, supra,* noted that the mandatory testing statute provides that "the test must be incidental to both the offense and to the arrest and . . . no substantial time [should] elapse . . . between the offense and the arrest." (*Id.* at p. 921.)

2111. Driving With 0.08 Percent Blood Alcohol (Veh. Code, § 23152(b))

The defendant is charged [in Count __] with driving with a blood alcohol level of 0.08 percent or more [in violation of Vehicle Code section 23152(b)].

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

1. **The defendant drove a vehicle;**

AND

2. **When (he/she) drove, the defendant's blood alcohol level was 0.08 percent or more by weight.**

[If the People have proved beyond a reasonable doubt that a sample of the defendant's (blood/breath) was taken within three hours of the defendant's [alleged] driving and that a chemical analysis of the sample showed a blood alcohol level of 0.08 percent or more, you may, but are not required to, conclude that the defendant's blood alcohol level was 0.08 percent or more at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Health Services.]

New January 2006; Revised August 2006, June 2007

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with a misdemeanor or a felony based on prior convictions.

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v.*

Weathington, *supra*, 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].)

The bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that a sample of" explains a rebuttable presumption created by statute. (See Veh. Code, § 23152(b); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences~~. In addition, it is only appropriate to instruct the jury on a permissive inference if there is *no* evidence to contradict the inference. (Evid. Code, § 604.) If any evidence has been introduced to support the opposite factual finding, then the jury "shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." *(Ibid.)*~~

~~Therefore, t~~The court **must not** give the bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that a sample of" if there is no substantial evidence that the defendant's blood alcohol level was at or above 0.08 percent at the time of the test.

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with "In evaluating any test results in this case." (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

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

Related Instructions
CALCRIM No. 2110, *Driving Under the Influence*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions.*

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

AUTHORITY

- Elements ▸ Veh. Code, § 23152(b); *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266 [198 Cal.Rptr. 145, 673 P.2d 732].
- Partition Ratio ▸ Veh. Code, § 23152(b); *People v. Bransford* (1994) 8 Cal.4th 885, 890 [35 Cal.Rptr.2d 613, 884 P.2d 70].
- Presumptions ▸ Veh. Code, § 23610; Veh. Code, § 23152(b); Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Statute Constitutional ▸ *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 273 [198 Cal.Rptr. 145, 673 P.2d 732].
- Prior Convictions ▸ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210.

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

LESSER INCLUDED OFFENSES

If the defendant is charged with felony driving under the influence based on prior convictions, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the prior convictions have been proved. If the jury finds that the prior convictions have not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

Partition Ratio

In 1990, the Legislature amended Vehicle Code section 23152(b) to state that the "percent, by weight, of alcohol in a person's blood is based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath." Following this amendment, the Supreme Court held that evidence of variability of breath-alcohol partition ratios was not relevant and properly excluded. (*People v. Bransford* (1994) 8 Cal.4th 885, 890–893 [35 Cal.Rptr.2d 613, 884 P.2d 70].) See the Related Issues section in CALCRIM No. 2110, *Driving Under the Influence*.

2220. Driving With Suspended or Revoked Driving Privilege~~License~~ (Veh. Code, §§ 13106, 14601, 14601.1, 14601.2, 14601.5.)

The defendant is charged [in Count __] with driving while (his/her) driving privilege~~er's license~~ was (suspended/ [or] revoked) [in violation of _____ *<insert appropriate code section[s]>*]**.**

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

1. **The defendant drove a motor vehicle while (his/her) driving~~er's~~ privilege~~license~~ was (suspended/ [or] revoked) [for _____** *<insert basis for suspension or revocation>*]**;**

AND

2. **When the defendant drove, (he/she) knew that (his/her) driving~~er's license~~ privilege was (suspended/ [or] revoked).**

[If the People prove that:

1. **The California Department of Motor Vehicles mailed a notice to the defendant telling (him/her) that (his/her) driving privilege~~er's license~~ had been (suspended/ [or] revoked);**

2. **The notice was sent to the most recent address reported to the department [or any more recent address reported by the person, a court, or a law enforcement agency];**

AND

3. **The notice was not returned to the department as undeliverable or unclaimed;**

then you may, but are not required to, conclude that the defendant knew that (his/her) driving privilege~~er's license~~ was (suspended/ [or] revoked).]

[If the People prove beyond a reasonable doubt that a court informed the defendant that (his/her) driving privilege~~er's license~~ had been (suspended/ [or] revoked), you may but are not required to conclude that the defendant

knew that (his/her) driving privilegeer's license was (suspended/ [or] revoked).]

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

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

New January 2006

BENCH NOTES

Instructional Duty

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

In element 1, the court may insert the reason for the suspension or revocation unless the court has accepted a stipulation regarding this issue.

The two bracketed paragraphs that begin with "If the People prove" each explain rebuttable presumptions created by statute. (See Veh. Code, §§ 14601(a), 14601.1(a), 14602(c), 14601.5(c); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [658 P.2d 1302].) In accordance with *Roder*, the bracketed paragraphs have been written as permissive inferences. In addition, it is only appropriate to instruct the jury on a permissive inference if there is *no* evidence to contradict the inference. (Evid. Code, § 640.) If any evidence has been introduced to support the opposite factual finding, then the jury "shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." *(Ibid.)*

Therefore, tThe court **must not** give the bracketed paragraph that begins with "If the People prove that the California Department of Motor Vehicles mailed a notice" if there is evidence that the defendant did not receive the notice or for other reasons did not know that his or her driving privilege license was revoked or suspended.

Similarly, the court **must not** give the bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that a court informed the defendant" if there is evidence that the defendant did not receive the notice or for other reasons

did not know that his or her driving privilege~~license~~ was revoked or suspended. In addition, this provision regarding notice by the court only applies if the defendant is charged with a violation of Vehicle Code section 14601.2. (See Veh. Code, § 14601.2(c).) Do not give this paragraph if the defendant is charged under any other Vehicle Code section.

Give the bracketed definition of motor vehicle unless the court has already given the definition in another instruction. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Give CALCRIM No. 2241, *Driver and Driving Defined*, on request.

If the defendant is charged with one or more prior convictions, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the defendant has stipulated to the conviction. If the court has granted a bifurcated trial on the prior conviction, use CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

AUTHORITY

- Elements ▸ Veh. Code, §§ 13106, 14601, 14601.1, 14601.2, 14601.5.
- Motor Vehicle Defined ▸ Veh. Code, § 415.
- Actual Knowledge of Suspension or Revocation Required ▸ *In re Murdock* (1968) 68 Cal.2d 313, 315–316 [66 Cal.Rptr. 380, 437 P.2d 764].
- Mandatory Presumption Unconstitutional Unless Instructed as Permissive Inference ▸ *People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 239.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction*, § 93.08[6] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1][c] (Matthew Bender).

RELATED ISSUES

Suspension or Revocation Continues Until License Restored

In *People v. Gutierrez* (1998) 65 Cal.App.4th Supp. 1 [76 Cal.Rptr.2d 166], the defendant's license had been suspended for a period of one year for driving under the influence. The defendant was arrested for driving after that one-year period had expired. The court held that the defendant's license remained suspended even though the stated time period had passed because the defendant had not taken the steps necessary to restore his driving privilege. (*Id.* at pp. 8–9.)

Privilege to Drive May Be Suspended or Revoked Even If No License Issued
A person's privilege to drive may be suspended or revoked even though that person has never been issued a valid driver's license. (*People v. Matas* (1988) 200 Cal.App.3d Supp. 7, 9 [246 Cal.Rptr. 627].)

May Be Punished for This Offense and Driving Under the Influence
In *In re Hayes* (1969) 70 Cal.2d 604, 611 [75 Cal.Rptr. 790, 451 P.2d 430], the court held that Penal Code section 654 did not preclude punishing the defendant for both driving under the influence and driving with a suspended license.

2500. Illegal Possession, etc., of Weapon (Pen. Code, § 12020(a)(1) & (2))

The defendant is charged [in Count __] with unlawfully (possessing/manufacturing/causing to be manufactured/importing/keeping for sale/offering or exposing for sale/giving/lending) a weapon, specifically (a/an) _____ *<insert type of weapon from Pen. Code, § 12020(a)>* **[in violation of Penal Code section 12020(a)].**

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

1. **The defendant (possessed/manufactured/caused to be manufactured/imported into California/kept for sale/offered or exposed for sale/gave/lent) (a/an) _____** *<insert type of weapon from Pen. Code, § 12020(a)>***;**

2. **The defendant knew that (he/she) (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent) the _____** *<insert type of weapon from Pen. Code, § 12020(a)>***;**

[AND]

<Alternative 3A—object capable of innocent uses>

[3. The defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent) the object as a weapon. When deciding whether the defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent) the object *as a weapon*, consider all the surrounding circumstances relating to that question, including when and where the object was (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent)[,] [and] [where the defendant was going][,] [and] [whether the object was changed from its standard form][,] and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.(;/.)]

<Alternative 3B—object designed solely for use as weapon>

[3. The defendant knew that the object (was (a/an) _____ *<insert characteristics~~type~~ of weapon from Pen. Code, § 12020(a), e.g., "unusually short shotgun, penknife containing stabbing instrument~~cane sword," short-barreled shotgun~~>*__/could be used _____ <insert description of weapon, e.g., "as a stabbing weapon," or "for purposes of offense or defense">.]__

<Give element 4 only if defendant is charged with offering or exposing for sale.>
[AND

4. The defendant intended to sell it.]

<Give only if alternative 3B is given.>
[The People do not have to prove that the defendant intended to use the object as a weapon.]

(A/An) _____ *<insert type of weapon from Pen. Code, § 12020(a)>* **means _____** *<insert appropriate definition from Pen. Code, § 12020(c)>***.**

<Give only if the weapon used has specific characteristics of which the defendant must have been aware.>
[A _____ *<insert type of weapon specified in element 3B>* **is _____** *<insert defining characteristics of weapon>.*
[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/visible)).]

[(A/An) _____ *<insert prohibited firearm from Pen. Code, § 12020(a)>* **does not need to be in working order if it was designed to shoot and appears capable of shooting.]**

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

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

[The People allege that the defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent) the following weapons: _____ *<insert description of each weapon when multiple items alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (possessed/manufactured/caused to be manufactured/imported/kept for**

sale/offered or exposed for sale/gave/lent) at least one of these weapons and you all agree on which weapon (he/she) (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent).]

<Defense: Statutory Exemptions>
[The defendant did not unlawfully (possess/manufacture/cause to be manufactured/import/keep for sale/offer or expose for sale/give/lend) (a/an) _____ <*insert type of weapon from Pen. Code, § 12020(a)*> if _____ <*insert exception from Pen. Code, § 12020(b)*>. The People have the burden of proving beyond a reasonable doubt that the defendant unlawfully (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent) (a/an) _____ <*insert type of weapon from Pen. Code, § 12020(a)*>. If the People have not met this burden, you must find the defendant not guilty of this crime.]

New January 2006; Revised August 2006

BENCH NOTES

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

In element 1, insert one of the following weapons from Penal Code section 12020(a):

Firearms
short-barreled shotgun
short-barreled rifle
undetectable firearm
firearm that is not immediately recognizable as a firearm
unconventional pistol
cane gun, wallet gun, or zip gun

Firearm Equipment and Ammunition
camouflaging firearm container
ammunition that contains or consists of any fléchette dart
bullet containing or carrying an explosive agent
multiburst trigger activator
large-capacity magazine

Knives and Swords
ballistic knife

belt buckle knife
lipstick case knife
cane sword
shobi-zue
air gauge knife
writing pen knife

Martial Arts Weapons
nunchaku
shuriken

Other Weapons
metal knuckles
leaded cane
metal military practice handgrenade or metal replica handgrenade
instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sap, or sandbag

Element 3 contains the requirement that the defendant know that the object is a weapon. A more complete discussion of this issue is provided in the Commentary section below. Select alternative 3A if the object is capable of innocent uses. In such cases, the court has a **sua sponte** duty to instruct on when an object is possessed "as a weapon." (*People v. Fannin*, *supra*, 91 Cal.App.4th at p. 1404; *People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. 9 [47 Cal.Rptr. 772, 408 P.2d 100].)

Select alternative 3B if the object "has no conceivable innocent function" (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1405 [111 Cal.Rptr.2d 496]), or when the item is specifically designed to be one of the weapons defined in Penal Code section 12020(c) (see *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885]).

Give element 4 only if the defendant is charged with offering or exposing for sale. (See *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].)

Following the elements, insert the appropriate definition of the alleged weapon from Penal Code section 12020(c). Subdivision (c) defines all the terms used in subdivision (a), *except* the following:

> "firearm which is not immediately recognizable as a firearm" (no cases on meaning but see definition of firearm in Penal Code, § 12001(b));

"bullet containing or carrying an explosive agent" (see *People v. Lanham* (1991) 230 Cal.App.3d 1396, 1400 [282 Cal.Rptr. 62], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297]);

"metal military practice handgrenade or metal replica handgrenade" (no cases on meaning); and

"instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sap, or sandbag" (see *People v. Fannin, supra,* 91 Cal.App.4th at p. 1402 [definition of "slungshot"]; *People v. Mulherin* (1934) 140 Cal.App. 212, 215 [35 P.2d 174] [definition of this class of weapons]).

For any of the weapons not defined in subdivision (c), use an appropriate definition from the case law, where available.

If the prosecution alleges under a single count that the defendant possessed multiple weapons and the possession was "fragmented as to time . . . [or] space," the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following weapons," inserting the items alleged. Also make the appropriate adjustments to the language of the instruction to refer to multiple weapons or objects.

Defenses—Instructional Duty

If there is sufficient evidence to raise a reasonable doubt about the existence of one of the statutory exemptions, the court has a **sua sponte** duty to give the bracketed instruction on that defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph beginning, "The defendant did not unlawfully . . . ." (see Pen. Code, § 12020(b)).

AUTHORITY

- Elements ▸ Pen. Code, § 12020(a)(1) & (2).
- Definitions ▸ Pen. Code, §§ 12020(c), 12001.
- Exemptions ▸ Pen. Code, § 12020(b).

- Need Not Prove Intent to Use ‣ *People v. Rubalcava* (2000) 23 Cal.4th 322, 328 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. 9 [47 Cal.Rptr. 772, 408 P.2d 100].
- Knowledge Required ‣ *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885].
- Specific Intent Required for Offer to Sell ‣ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Specific Intent Includes Knowledge of Forbidden Characteristics of Weapon ‣ *People v. King* (2006) 38 Cal.4th 617, 627–628 [42 Cal.Rptr.3d 743, 133 P.3d 636].
- Innocent Object—Must Prove Possessed as Weapon ‣ *People v. Grubb* (1965) 63 Cal.2d 614, 620–621 [47 Cal.Rptr. 772, 408 P.2d 100]; *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404 [111 Cal.Rptr.2d 496].
- Definition of Blackjack, etc. ‣ *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1402 [111 Cal.Rptr.2d 496]; *People v. Mulherin* (1934) 140 Cal.App. 212, 215 [35 P.2d 174].
- Firearm Need Not Be Operable ‣ *People v. Favalora* (1974) 42 Cal.App.3d 988, 991 [117 Cal.Rptr. 291].
- Measurement of Sawed-Off Shotgun ‣ *People v. Rooney* (1993) 17 Cal.App.4th 1207, 1211–1213 [21 Cal.Rptr.2d 900]; *People v. Stinson* (1970) 8 Cal.App.3d 497, 500 [87 Cal.Rptr. 537].
- Measurement of Fléchette Dart ‣ *People v. Olmsted* (2000) 84 Cal.App.4th 270, 275 [100 Cal.Rptr.2d 755].
- Constructive vs. Actual Possession ‣ *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Knowledge of Specific Characteristics of Weapon ‣ *People v. King* (2006) 38 Cal.4th 617, 628 [42 Cal.Rptr.3d 743, 133 P.3d 636].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 161.

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

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

COMMENTARY

Element 3—Knowledge

"Intent to use a weapon is not an element of the crime of weapon possession." (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404 [111 Cal.Rptr.2d 496] .) However, interpreting Penal Code section 12020(a)(4), possession of a concealed dirk or dagger, the Supreme Court stated that "[a] defendant who does not know that he is carrying the weapon or that the concealed instrument may be used as a stabbing weapon is . . . not guilty of violating section 12020." (*People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52].) Applying this holding to possession of other weapons prohibited under Penal Code section 12020(a), the courts have concluded that the defendant must know that the object is a weapon or may be used as a weapon, or must possess the object "as a weapon." (*People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885]; *People v. Taylor* (2001) 93 Cal.App.4th 933, 941 [114 Cal.Rptr.2d 23]; *People v. Fannin, supra,* 91 Cal.App.4th at p. 1404.)

In *People v. Gaitan, supra,* 92 Cal.App.4th at p. 547, for example, the court considered the possession of "metal knuckles," defined in Penal Code section 12020(c)(7) as an object "worn for purposes of offense or defense." The court held that the prosecution does not have to prove that the defendant *intended* to use the object for offense or defense but must prove that the defendant *knew* that "the instrument may be used for purposes of offense or defense." (*Id.* at p. 547.)

Similarly, in *People v. Taylor, supra,* 93 Cal.App.4th at p. 941, involving possession of a cane sword, the court held that "[i]n order to protect against the significant possibility of punishing innocent possession by one who believes he or she simply has an ordinary cane, we infer the Legislature intended a scienter requirement of actual knowledge that the cane conceals a sword."

Finally, *People v. Fannin, supra,* 91 Cal.App.4th at p. 1404, considered whether a bicycle chain with a lock at the end met the definition of a "slungshot." The court held that "if the object is not a weapon per se, but an instrument with ordinary innocent uses, the prosecution must prove that the object was possessed *as a weapon*." (*Ibid.* [emphasis in original]; see also *People v. Grubb* (1965) 63 Cal.2d 614, 620–621 [47 Cal.Rptr. 772, 408 P.2d 100] [possession of modified baseball bat].)

~~Prior to *People v. Rubalcava*, *supra*, 23 Cal.4th 322, some cases held that the prosecution did not have to prove that the defendant knew that the object was a weapon of a prohibited class. (*People v. Lanham* (1991) 230 Cal.App.3d 1396, 1401–1405 [282 Cal.Rptr. 62] [exploding bullets—need not know exploding]; *People v. Valencia* (1989) 214 Cal.App.3d 1410, 1415 [263 Cal.Rptr. 301] [sawed-off shotgun—need not know "sawed-off"]; *People v. Azevedo* (1984) 161 Cal.App.3d 235, 240 [207 Cal.Rptr. 270] [same].) The Supreme Court has questioned the continuing validity of these holdings in light of its holding in *Rubalcava*. (*In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].) This issue is currently pending before the Supreme Court. (*People v. King* (Dec. 17, 2004, S129052) 2004 DJDAR 14927.)~~

In element 3 of the instruction, the court should give alternative 3B if the object has no innocent uses, inserting the appropriate description of the weapon. If the object has innocent uses, the court should give alternative 3A. The court may choose not to give element 3 if the court concludes that a previous case holding that the prosecution does not need to prove knowledge is still valid authority. However, the committee would caution against this approach in light of *Rubalcava* and *In re Jorge M.* (See *People v. Schaefer* (2004) 118 Cal.App.4th 893, 904–905 [13 Cal.Rptr.3d 442] [observing that, since *In re Jorge M.*, it is unclear if the prosecution must prove that the defendant knew shot-gun was "sawed off" but that failure to give instruction was harmless if error].)

2701. Violation of Court Order: Protective Order or Stay Away (Pen. Code, §§ 166(c)(1), 273.6)

The defendant is charged [in Count __] with violating a court order [in violation of _____ *<insert appropriate code section[s]>***].**

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

1. **A court [lawfully] issued a written order that the defendant** _____ *<insert description of content of order>***;**

2. **The court order was a (protective order/stay-away court order/**_____ *<insert other description of order from Pen. Code, § 166(c)(3) or § 273.6(c)>***), issued [in a criminal case involving domestic violence and] under** _____ *<insert code section under which order made>***;**

3. **The defendant knew of the court order;**

4. **The defendant had the ability to follow the court order;**

AND

<For violations of Pen. Code, § 166(c)(3), choose "willfully;" for violations of Pen. Code § 273.6(c) choose "intentionally" for the scienter requirement>

5. **The defendant (willfully/intentionally) violated the court order.**

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

[The People must prove that the defendant knew of the court order and that (he/she) had the opportunity to read the order or to otherwise become familiar with what it said. But the People do not have to prove that the defendant actually read the court order.]

[*Domestic violence* means abuse committed against (an adult/a fully emancipated minor) who is a (spouse[,]/ [or] former spouse[,]/ [or] cohabitant[,]/ [or] former cohabitant[,]/ [or] person with whom the defendant has had a child[,]/ [or] person who dated or is dating the defendant[,]/ [or] person who was or is engaged to the defendant).

Abuse **means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else.]**

[The term *cohabitants* means two unrelated persons living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) the parties' holding themselves out as (husband and wife/domestic partners), (5) the continuity of the relationship, and (6) the length of the relationship.]

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

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

In order for a defendant to be guilty of violating Penal Code section 166(a)(4), the court order must be "lawfully issued." (Pen. Code, § 166(a)(4); *People v. Gonzalez* (1996) 12 Cal.4th 804, 816–817 [50 Cal.Rptr.2d 74, 910 P.2d 1366].) The defendant may not be convicted for violating an order that is unconstitutional, and the defendant may bring a collateral attack on the validity of the order as a defense to this charge. (*People v. Gonzalez, supra,* 12 Cal.4th at pp. 816–818; *In re Berry* (1968) 68 Cal.2d 137, 147 [65 Cal.Rptr. 273, 436 P.2d 273].) The defendant may raise this issue on demurrer but is not required to. (*People v. Gonzalez, supra,* 12 Cal.4th at pp. 821, 824; *In re Berry, supra,* 68 Cal.2d at p. 146.) The legal question of whether the order was lawfully issued is the type of question normally resolved by the court. (*People v. Gonzalez, supra,* 12 Cal.4th at pp. 816–820; *In re Berry, supra,* 68 Cal.2d at p. 147.) If, however, there is a factual issue regarding the lawfulness of the court order and the trial court concludes that the issue must be submitted to the jury, give the bracketed word "lawfully" in element 1. The court must also instruct on the facts that must be proved to establish that the order was lawfully issued.

In element 2, give the bracketed phrase "in a criminal case involving domestic violence" if the defendant is charged with a violation of Penal Code section 166(c)(1). In such cases, also give the bracketed definition of "domestic violence" and the associated terms.

In element 2, if the order was not a "protective order" or "stay away order" but another type of qualifying order listed in Penal Code section 166(c)(3) or 273.6(c), insert a description of the type of order from the statute.

In element 2, in all cases, insert the statutory authority under which the order was issued. (See Pen. Code, §§ 166(c)(1) & (3), 273.6(a) & (c).)

Give the bracketed paragraph that begins with "The People must prove that the defendant knew" on request. (*People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941 [47 Cal.Rptr. 670]; *People v. Brindley* (1965) 236 Cal.App.2d Supp. 925, 927–928 [47 Cal.Rptr. 668], both decisions affd. *sub nom. People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943 [47 Cal.Rptr. 679].)

If the prosecution alleges that physical injury resulted from the defendant's conduct, in addition to this instruction, give CALCRIM No. 2702, *Violation of Court Order: Protective Order or Stay Away—Physical Injury*. (Pen. Code, §§ 166(c)(2), 273.6(b).)

If the prosecution charges the defendant with a felony based on a prior conviction and a current offense involving an act of violence or credible threat of violence, in addition to this instruction, give CALCRIM No. 2703, *Violation of Court Order: Protective Order or Stay Away—Act of Violence*. (Pen. Code, §§ 166(c)(4), 273.6(d).) The jury also must determine if the prior conviction has been proved unless the defendant stipulates to the truth of the prior. (See CALCRIM Nos. 3100–3103 on prior convictions.)

AUTHORITY

- Elements ▸ Pen. Code, §§ 166(c)(1), 273.6.
- Willfully Defined ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Order Must Be Lawfully Issued ▸ Pen. Code, § 166(a)(4); *People v. Gonzalez* (1996) 12 Cal.4th 804, 816–817 [50 Cal.Rptr.2d 74, 910 P.2d 1366]; *In re Berry* (1968) 68 Cal.2d 137, 147 [65 Cal.Rptr. 273, 436 P.2d 273].
- Knowledge of Order Required ▸ *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979 [168 P.2d 497].
- Proof of Service Not Required ▸ *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979 [168 P.2d 497].

- Must Have Opportunity to Read but Need Not Actually Read Order ‣ *People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941 [47 Cal.Rptr. 670]; *People v. Brindley* (1965) 236 Cal.App.2d Supp. 925, 927–928 [47 Cal.Rptr. 668], both decisions affd. *sub nom. People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943 [47 Cal.Rptr. 679].
- Ability to Comply With Order ‣ *People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4 [184 Cal.Rptr. 604].
- General-Intent Offense ‣ *People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4 [184 Cal.Rptr. 604].
- Abuse Defined ‣ Pen. Code, § 13700(a).
- Cohabitant Defined ‣ Pen. Code, § 13700(b).
- Domestic Violence Defined ‣ Evid. Code, § 1109(d)(3); Pen. Code, § 13700(b); see *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1139 [83 Cal.Rptr.2d 320] [spousal rape is higher level of domestic violence].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 30.

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 63.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest,* § 11.02[1] (Matthew Bender).

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

COMMENTARY

Penal Code section 166(c)(1) also includes protective orders and stay aways "issued as a condition of probation after a conviction in a criminal proceeding involving domestic violence . . . ." However, in *People v. Johnson* (1993) 20 Cal.App.4th 106, 109 [24 Cal.Rptr.2d 628], the court held that a defendant cannot be prosecuted for contempt of court under Penal Code section 166 for violating a condition of probation. Thus, the committee has not included this option in the instruction.

LESSER INCLUDED OFFENSES

If the defendant is charged with a felony based on a prior conviction and the allegation that the current offense involved an act of violence or credible threat of violence (Pen. Code, §§ 166(c)(4), 273.6(d)), then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the additional allegations have or have not been proved. If the jury finds that the either allegation was not proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

See the Related Issues section of CALCRIM No. 2700, *Violation of Court Order*.

2840. Evidence of Uncharged Tax Offense: Failed to File Previous Returns

The People presented evidence that the defendant did not file [a] tax return[s] for [a] year[s] not charged in this case.

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant did not file [a] tax return[s] for (that/those) year[s]. Proof by a preponderance of the evidence is a different standard of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

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

If you conclude that the defendant did not file [a] tax return[s] for (that/those) year[s], you may, but are not required to, consider that evidence for the limited purpose of deciding whether:

<A. Intent>
[The defendant acted with the intent to _____ *<insert specific intent required to prove the offense alleged>* **in this case](./;)**

[OR]

<B. Accident or Mistake>
[The defendant's alleged actions were not the result of mistake or accident.]

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

If you conclude that the defendant did not file [a] tax return[s] for (that/those) year[s], that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of _____ *<insert charged offense>***. The People must still prove (the/each)~~each element of _____ <insert charged offense>~~ _____ (charge/ [and] allegation) beyond a reasonable doubt.**

[Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.]

New January 2006

BENCH NOTES

Instructional Duty

The court must give this instruction on request when evidence of other offenses has been introduced under Evidence Code section 1101(b). (Evid. Code, § 1101(b); *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. Collie* (1981) 30 Cal.3d 43, 63–64 [177 Cal.Rptr. 458, 634 P.2d 534].)

Evidence of the failure of the defendant to file tax returns in previous years may be admitted as evidence of prior illegal acts tending to show intent or lack of accident or mistake. (*United States v. Fingado* (10th Cir. 1991) 934 F.2d 1163, 1165–1166.)

The court **must** identify for the jury what issue the evidence has been admitted for: to prove mental state, to prove lack of accident or mistake, or to prove both.

The paragraph that begins with "If you conclude that the defendant did not file" has been included to prevent jury confusion over the standard of proof. (See *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1013 [130 Cal.Rptr.2d 254, 62 P.3d 601] [instruction on Evidence Code section 1108 evidence sufficient where it advised jury that prior offense alone not sufficient to convict; prosecution still required to prove all elements beyond a reasonable doubt].)

Related Instructions

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

AUTHORITY

- Evidence of Prior Uncharged Acts ▸ Evid. Code, § 1101(b).
- Standard of Proof Preponderance of Evidence ▸ *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708].
- Previous Failure to File Tax Returns ▸ *United States v. Fingado* (1991) 934 F.2d 1163, 1165–1166.

Secondary Sources

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, §§ 140.02[5], 140.03 (Matthew Bender).

RELATED ISSUES

See Bench Notes and Related Issues section in CALCRIM No. 375, *Evidence of Uncharged Offenses of Prove Identity, Intent, or Common Plan, etc.*

3402. Duress or Threats

The defendant is not guilty of _____ *<insert crime[s]>* **if (he/she) acted under duress. The defendant acted under duress if, because of threat or menace, (he/she) believed that (his/her/ [or] someone else's) life would be in immediate danger if (he/she) refused a demand or request to commit the crime[s]. The demand or request may have been express or implied.**

The defendant's belief that (his/her/ [or] someone else's) life was in immediate danger must have been reasonable. When deciding whether the defendant's belief was reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in the same position as the defendant would have believed.

A threat of future harm is not sufficient; the danger to life must have been immediate.

[The People must prove beyond a reasonable doubt that the defendant did not act under duress. If the People have not met this burden, you must find the defendant not guilty of _____ *<insert crime[s]>***.]**

[This defense does not apply to the crime of _____ *<insert charge[s] of murder; see Bench Notes>***.]**

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

~~The court has a **sua sponte** duty to instruct on a defense when defendant is relying on this defense and, or if there is substantial evidence supporting the defense and it is not inconsistent with the defendant's theory of the case.~~The court ~~must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case. Use this instruction if there is evidence tending to show that the defendant acted under duress. *People v. Neidinger* (2006) 40 Cal.4th 67, 76 [51 Cal.Rptr.3d 45, 146 P.3d 502~~ The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the

defendant is relying on it or it is not inconsistent with the defendant's theory of the case. ~~Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt;~~

~~].~~ ~~See People v. Breverman (1998) 19 Cal.4th 142, 156 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [addressing court's sua sponte instructional duties on defenses and lesser included offenses generally]; People v. Sedeno (1974) 10 Cal.3d 703, 716–717 [112 Cal.Rptr. 1, 518 P.2d 913], overruled by Breverman, supra, on a different point; see also *People v. Subielski* (1985) 169 Cal.App.3d 563, 566–567 [211 Cal.Rptr. 579][no sua sponte duty because evidence did not support complete duress].) Fear of great bodily harm can also raise the defense of duress. (See *People v. Otis* (1959) 174 Cal.App.2d 119, 124 [344 P.2d 342]; *United States v. Bailey* (1980) 444 U.S. 394, 409 [100 S.Ct. 624, 62 L.Ed.2d 575].~~

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389-390; *People v. Breverman* (1998) 19 Cal.4th 142, 157.~~.~~)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982-983.)

Fear of great bodily harm can also raise the defense of duress. (See *People v. Otis* (1959) 174 Cal.App.2d 119, 124 [344 P.2d 342]; *United States v. Bailey* (1980) 444 U.S. 394, 409 [100 S.Ct. 624, 62 L.Ed.2d 575; cf. *People v. Subielski* (1985) 169 Cal.App.3d 563, 566–567 [211 Cal.Rptr. 579][duress cannot be based on fear of some unspecified injury].)

~~Use this instruction if there is evidence tending to show that the defendant acted under duress. *People v. Neidinger* (2006) 40 Cal.4th 67, 76 [51 Cal.Rptr.3d 45, 146 P.3d 502].~~

As provided by statute, duress is not a defense to crimes punishable by death. (Pen. Code, § 26(6); *People v. Anderson* (2002) 28 Cal.4th 767, 780 [122 Cal.Rptr.2d 587, 50 P.3d 368] [duress is not a defense to any form of murder].) If such a crime is charged, the court should instruct, using the last bracketed paragraph, that the defense is not applicable to that count. However, "duress can, in effect, provide a defense to murder on a felony-murder theory by negating the underlying felony." (*Id.* at p. 784.) If the defendant is charged with felony-murder,

the court should instruct that the defense of duress does apply to the underlying felony.

Related Instructions
The defense of duress applies when the threat of danger is immediate and accompanied by a demand, either direct or implied, to commit the crime. (*People v. Heath* (1989) 207 Cal.App.3d 892, 899–901 [255 Cal.Rptr. 120]; *People v. Steele* (1988) 206 Cal.App.3d 703, 706 [253 Cal.Rptr. 773].) If the threat is of future harm or there is no implicit or explicit demand that the defendant commit the crime, the evidence may support instructing on the defense of necessity. (See CALCRIM No. 3403, *Necessity*.)

AUTHORITY

- Instructional Requirements ▸ Pen. Code, § 26(6).
- Burden of Proof ▸ *People v. Graham* (1976) 57 Cal.App.3d 238, 240 [129 Cal.Rptr. 31].
- Difference Between Necessity and Duress ▸ *People v. Heath* (1989) 207 Cal.App.3d 892, 897–902 [255 Cal.Rptr. 120].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 53–54.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.05[1] (Matthew Bender).

RELATED ISSUES

Necessity Distinguished
Although evidence may raise both necessity and duress defenses, there is an important distinction between the two concepts. With necessity, the threatened harm is in the immediate future, thereby permitting a defendant to balance alternative courses of conduct. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1009–1013 [138 Cal.Rptr. 515].) Necessity does not negate any element of the crime, but rather represents a public policy decision not to punish a defendant despite proof of the crime. (*People v. Heath* (1989) 207 Cal.App.3d 892, 901 [255 Cal.Rptr. 120].) The duress defense, on the other hand, does negate an element of the crime. The defendant does not have the time to form the criminal intent because of the immediacy of the threatened harm. (*Ibid*.)

Duress Cannot Reduce Murder to Manslaughter

Duress cannot reduce murder to manslaughter. (*People v. Anderson* (2002) 28 Cal.4th 767, 783–785 [122 Cal.Rptr.2d 587, 50 P.3d 368] [only the Legislature can recognize killing under duress as new form of manslaughter].)

Mental State or Intent

Evidence of duress may be relevant to determining whether the defendant acted with the required mental state, even if insufficient to constitute a complete defense. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 99–100 [17 Cal.Rptr.3d 710, 96 P.3d 30] [noting that court properly instructed that duress may be considered on the question of whether the defendant acted with the proper mental state].)

Great Bodily Harm

Penal Code section 26(6) discusses life-endangering threats and several older cases have outlined the defense of duress in the literal language of the statute. However, some cases have concluded that fear of great bodily harm is sufficient to raise this defense. (Compare *People v. Hart* (1950) 98 Cal.App.2d 514, 516 [220 P.2d 595] and *People v. Lindstrom* (1932) 128 Cal.App. 111, 116 [16 P.2d 1003] with *People v. Otis* (1959) 174 Cal.App.2d 119, 124 [344 P.2d 342]; see also 1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 59 [discussing this split]; but see *People v. Subielski* (1985) 169 Cal.App.3d 563, 566–567 [211 Cal.Rptr. 579] [court rejects defense of duress because evidence showed defendant feared only a beating].) It is clear, however, that threats of great bodily harm are sufficient in the context of necessity. (*People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831 [118 Cal.Rptr. 110]; *People v. Pena* (1983) 149 Cal.App.3d Supp. 14, 27 [197 Cal.Rptr. 264].)

Third Person Threatened

In *People v. Pena* (1983) 149 Cal.App.3d Supp. 14, 21–25 [197 Cal.Rptr. 264], the court held that the defenses of necessity and duress may be based on threats of harm to a third party. Although *Pena* is regarded as a necessity case, its discussion of this point was based on out-of-state and secondary authority involving the defense of duress. (See *People v. Heath* (1989) 207 Cal.App.3d 892, 898 [255 Cal.Rptr. 120] [acknowledging that though *Pena* uses the terms necessity and duress interchangeably, it is really concerned with the defense of necessity].) No other California cases discuss threats made to a third party and duress. (See also 1 Witkin and Epstein, California Criminal Law (3d ed. 2000) Defenses, § 60 [discussing *Pena* on this point].)

3403. Necessity

The defendant is not guilty of _____ <*insert crime[s]*> if (he/she) acted because of legal necessity.

In order to establish this defense, the defendant must prove that:

1. **(He/She) acted in an emergency to prevent a significant bodily harm or evil to (himself/herself/ [or] someone else);**

2. **(He/She) had no adequate legal alternative;**

3. **The defendant's acts did not create a greater danger than the one avoided;**

4. **When the defendant acted, (he/she) actually believed that the act was necessary to prevent the threatened harm or evil;**

5. **A reasonable person would also have believed that the act was necessary under the circumstances;**

AND

6. **The defendant did not substantially contribute to the emergency.**

The defendant has the burden of proving this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each of the six listed items is true.

New January 2006

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a sua sponte duty to instruct on a defense if there is substantial evidence supporting it and either the

defendant is relying on it or it is not inconsistent with the defendant's theory of the case. ~~Substantial evidence means evidence of necessity, which, if believed, would be sufficient for a reasonable jury to find that the defendant has shown the defense to be more likely than not.~~

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389-390; *People v. Breverman* (1998) 19 Cal.4th 142, 157.)

Substantial evidence means evidence of necessity, which, if believed, would be sufficient for a reasonable jury to find that the defendant has shown the defense to be more likely than not.

~~The court has a **sua sponte** duty to instruct on necessity when there is sufficient evidence supporting each of the factors establishing the defense. (*People v. Pepper* (1996) 41 Cal.App.4th 1029, 1035 [48 Cal.Rptr.2d 877] [no duty to instruct sua sponte where evidence did not, as a matter of law, support this defense]; see *In re Eichorn* (1998) 69 Cal.App.4th 382, 389 [81 Cal.Rptr.2d 535] [defendant requested instruction on necessity and court, citing *Pepper*, *supra*, held that "an instruction on necessity was required," where sufficient evidence established the defense].)~~

Related Instructions

If the threatened harm was immediate and accompanied by a demand to commit the crime, the defense of duress may apply. (See CALCRIM No, 3402, *Duress or Threats*.)

AUTHORITY

- Instructional Requirements ▸ *People v. Pena* (1983) 149 Cal.App.3d Supp. 14 [197 Cal.Rptr. 264]; *People v. Pepper* (1996) 41 Cal.App.4th 1029, 1035 [48 Cal.Rptr.2d 877]; *People v. Kearns* (1997) 55 Cal.App.4th 1128, 1135–1136 [64 Cal.Rptr. 2d 654].
- Burden of Proof ▸ *People v. Waters* (1985) 163 Cal.App.3d 935, 938 [209 Cal.Rptr. 661]; *People v. Condley* (1977) 69 Cal.App.3d 999, 1008 [138 Cal.Rptr. 515].
- Difference Between Necessity and Duress ▸ *People v. Heath* (1989) 207 Cal.App.3d 892, 897–902 [255 Cal.Rptr. 120].

Secondary Sources

1 Witkin and Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 55–60.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.05[2], 73.18 (Matthew Bender).

RELATED ISSUES

Duress Distinguished

Although a defendant's evidence may raise both necessity and duress defenses, there is an important distinction between the two concepts. With necessity, the threatened harm is in the immediate future, thereby permitting a defendant to balance alternative courses of conduct. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1009–1013 [138 Cal.Rptr. 515].) Necessity does not negate any element of the crime, but rather represents a public policy decision not to punish a defendant despite proof of the crime. (*People v. Heath* (1989) 207 Cal.App.3d 892, 901 [255 Cal.Rptr. 120].) The duress defense, on the other hand, does negate an element of the crime. The defendant does not have the time to form the criminal intent because of the immediacy of the threatened harm. (*Ibid.*)

Abortion Protests

The defense of necessity is not available to one who attempts to interfere with another person's exercise of a constitutional right (e.g., demonstrators at an abortion clinic). (*People v. Garziano* (1991) 230 Cal.App.3d 241, 244 [281 Cal.Rptr. 307].)

Economic Necessity

Necessity caused by economic factors is valid under the doctrine. A homeless man was entitled to an instruction on necessity as a defense to violating an ordinance prohibiting sleeping in park areas. Lack of sleep is arguably a significant evil and his lack of economic resources prevented a legal alternative to sleeping outside. (*In re Eichorn* (1998) 69 Cal.App.4th 382, 389–391 [81 Cal.Rptr.2d 535].)

Medical Necessity

There is a common law and statutory defense of medical necessity. The common law defense contains the same requirements as the general necessity defense. (See *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1538 [66 Cal.Rptr.2d 559].) The statutory defense relates specifically to the use of marijuana and is based on Health and Safety Code section 11362.5, the "Compassionate Use Act," but see *Gonzales v. Raich* (2005) 545 U.S. 1 [125 S.Ct. 2195, 162 L.Ed.2d 1] [medical necessity defense not available].

3404. Accident (Pen. Code, § 195)

<General or Specific Intent Crimes>
[The defendant is not guilty of _____ *<insert crime[s]>* **if (he/she) acted [or failed to act] without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of _____** *<insert crime[s]>* **unless you are convinced beyond a reasonable doubt that (he/she) acted with the required intent.]**

<Criminal Negligence Crimes>
[The defendant is not guilty of _____ *<insert crime[s]>* **if (he/she) acted [or failed to act] accidentally without criminal negligence. You may not find the defendant guilty of _____** *<insert crime[s]>* **unless you are convinced beyond a reasonable doubt that (he/she) acted with criminal negligence. *Criminal negligence* is defined in another instruction.]**

New January 2006

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case.

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389-390; *People v. Breverman* (1998) 19 Cal.4th 142, 157.)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982-983.)
~~There is no **sua sponte** duty to instruct on accident; however; the court must give this instruction on request when evidence of accident or misfortune has been introduced. (*People v. Acosta* (1955) 45 Cal.2d 538, 544 [290 P.2d 1].)~~

When instructing on the defense of accident and misfortune, only the mental state relevant to the crime charged should be included in the instruction. (*People v. Lara* (1996) 44 Cal.App.4th 102, 109 [51 Cal.Rptr.2d 402] [trial court erred in instructing on criminal negligence in battery case because battery is a general intent crime].) Give the first paragraph if the defense is raised to a general or specific intent crime. Give the second paragraph if the defense is raised to a crime that is committed by criminal negligence. In either case, the court should insert the specific crime in the space provided. If both intent and negligence crimes are charged, instruct with both paragraphs.

Related Instructions

If murder is charged, see CALCRIM No. 510, *Excusable Homicide: Accidental*.

AUTHORITY

- Instructional Requirements ▸ Pen. Code, §§ 26(5), 195.
- Burden of Proof ▸ *People v. Black* (1951) 103 Cal.App.2d 69, 79 [229 P.2d 61]; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217].
- Misfortune as Accident ▸ *People v. Gorgol* (1953) 122 Cal.App.2d 281, 308 [265 P.2d 69].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 241.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.01[5] (Matthew Bender).

RELATED ISSUES

Misfortune Defined

"'Misfortune' when applied to a criminal act is analogous [to] the word 'misadventure' and bears the connotation of accident while doing a lawful act." (*People v. Gorgol* (1953) 122 Cal.App.2d 281, 308 [265 P.2d 69].)

3406. Mistake of Fact

The defendant is not guilty of _____ <*insert crime[s]*> **if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact.**

If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit _____ <*insert crime[s]*>**.**

If you find that the defendant believed that _____ <*insert alleged mistaken facts*> **[and if you find that belief was reasonable], (he/she) did not have the specific intent or mental state required for _____** <*insert crime[s]*>**.**

If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for _____ <*insert crime[s]*>**, you must find (him/her) not guilty of (that crime/those crimes).**

New January 2006

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case.

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389-390; *People v. Breverman* (1998) 19 Cal.4th 142, 157.)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982-983.)

~~The court has a **sua sponte** duty to instruct on mistake of fact if substantial evidence supports this defense. (*People v. Lucero* (1988) 203 Cal.App.3d 1011, 1018 [250 Cal.Rptr. 354].) This instruction also must be given on request, if supported by the evidence. (*People v. Goodman* (1970) 8 Cal.App.3d 705, 709 [87 Cal.Rptr. 665], disapproved on other grounds by *People v. Beagle* (1972) 6 Cal.3d 441, 452 [99 Cal.Rptr. 313, 492 P.2d 1].)~~

If the defendant is charged with a general intent crime, the trial court must instruct with the bracketed language requiring that defendant's belief be both actual and reasonable.

If the intent at issue is specific criminal intent, do not use the bracketed language requiring the belief to be reasonable.

Mistake of fact is not a defense to the following crimes under the circumstances described below:

1. Involuntary manslaughter (*People v. Velez* (1983) 144 Cal.App.3d 558, 565–566 [192 Cal.Rptr. 686] [mistake of fact re whether gun could be fired]).
2. Furnishing marijuana to a minor (Health & Saf. Code, § 11352; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760–762 [77 Cal.Rptr. 59]).
3. Selling narcotics to a minor (Health & Saf. Code, § 11353; *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454] [specific intent for the crime of selling narcotics to a minor is the intent to sell cocaine, not to sell it to a minor]).
4. Aggravated kidnapping of a child under the age of 14 (Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206]).
5. Unlawful sexual intercourse or oral copulation by person 21 or older with minor under the age of 16 (Pen. Code, §§ 261.5(d), 288a(b)(2); *People v. Scott* (2000) 83 Cal.App.4th 784, 800–801 [100 Cal.Rptr.2d 70]).
6. Lewd and lascivious conduct with a child under the age of 14 (Pen. Code, § 288(a); *People v. Olsen* (1984) 36 Cal.3d 638, 645–646 [205 Cal.Rptr. 492, 685 P.2d 52]).

AUTHORITY

- Instructional Requirements ▸ Pen. Code, § 26(3).
- Burden of Proof ▸ *People v. Mayberry* (1975) 15 Cal.3d 143, 157 [125 Cal.Rptr 745, 542 P.2d 1337].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 39.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.06 (Matthew Bender).

RELATED ISSUES

Mistake of Fact Based on Involuntary Intoxication

A mistake of fact defense can be based on involuntary intoxication. (*People v. Scott* (1983) 146 Cal.App.3d 823, 829–833 [194 Cal.Rptr. 633].) In *Scott*, the court held that the defendant was entitled to an instruction on mistake of fact, as a matter of law, where the evidence established that he unknowingly and involuntarily ingested a hallucinogen. As a result he acted under the delusion that

he was a secret agent in a situation where it was necessary to steal vehicles in order to save his own life and possibly that of the President. The court held that although defendant's mistake of fact was irrational, it was reasonable because of his delusional state and had the mistaken facts been true, his actions would have been justified under the doctrine of necessity. The court also stated that mistake of fact would not have been available if defendant's mental state had been caused by voluntary intoxication. (*Id.* at pp. 829–833; see also *People v. Kelly* (1973) 10 Cal.3d 565, 573 [111 Cal.Rptr. 171, 516 P.2d 875] [mistake of fact based on voluntary intoxication is not a defense to a general intent crime].)

Mistake of Fact Based on Mental Disease

Mistake of fact is not a defense to general criminal intent if the mistake is based on mental disease. (*People v. Gutierrez* (1986) 180 Cal.App.3d 1076, 1084 [225 Cal.Rptr. 885]; see *People v. Castillo* (1987) 193 Cal.App.3d 119, 124–125 [238 Cal.Rptr. 207].) In *Gutierrez*, the defendant was charged with inflicting cruel injury on a child, a general intent crime, because she beat her own children under the delusion that they were evil birds she had to kill. The defendant's abnormal mental state was caused in part by mental illness. (*People v. Gutierrez, supra,* 180 Cal.App.3d at pp. 1079–1080.) The court concluded that evidence of her mental illness was properly excluded at trial because mental illness could not form the basis of her mistake of fact defense. (*Id.* at pp. 1083–1084.)

3408. Entrapment

Entrapment is a defense. The defendant has the burden of proving this defense by a preponderance of the evidence. This is a different standard from proof beyond a reasonable doubt. To meet this burden, the defendant must prove that it is more likely than not that (he/she) was entrapped.

A person is entrapped if a law enforcement officer [or (his/her) agent] engaged in conduct that would cause a normally law-abiding person to commit the crime.

Some examples of entrapment might include conduct like badgering, persuasion by flattery or coaxing, repeated and insistent requests, or an appeal to friendship or sympathy.

Another example of entrapment would be conduct that would make commission of the crime unusually attractive to a normally law-abiding person. Such conduct might include a guarantee that the act is not illegal or that the offense would go undetected, an offer of extraordinary benefit, or other similar conduct.

If an officer [or (his/her) agent] simply gave the defendant an opportunity to commit the crime or merely tried to gain the defendant's confidence through reasonable and restrained steps, that conduct is not entrapment.

In evaluating this defense, you should focus primarily on the conduct of the officer. However, in deciding whether the officer's conduct was likely to cause a normally law-abiding person to commit this crime, also consider other relevant circumstances, including events that happened before the crime, the defendant's responses to the officer's urging, the seriousness of the crime, and how difficult it would have been for law enforcement officers to discover that the crime had been committed.

When deciding whether the defendant was entrapped, consider what a normally law-abiding person would have done in this situation. Do not consider the defendant's particular intentions or character, or whether the defendant had a predisposition to commit the crime.

[As used here, an *agent* is a person who does something at the request, suggestion, or direction of an officer. It is not necessary that the agent know

the officer's true identity, or that the agent realize that he or she is actually acting as an agent.]

If the defendant has proved that it is more likely than not that (he/she) _____ <*insert charged crime, e.g., committed embezzlement*> **because (he/she) was entrapped, you must find (him/her) not guilty of _____** <*insert charged crime*>**.**

New January 2006

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a sua sponte duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case.

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389-390; *People v. Breverman* (1998) 19 Cal.4th 142, 157.)

Substantial evidence means evidence of entrapment, which, if believed, would be sufficient for a reasonable jury to find that the defendant has shown the defense to be more likely than not.

~~The trial court has a **sua sponte** duty to instruct on entrapment if there is substantial evidence supporting the defense or and it appears that the defendant is relying on such a defense. (*People v. Watson* (2000) 22 Cal.4th 220, 222 [91 Cal.Rptr.2d 822, 990 P.2d 1031]; *People v. McIntire* (1979) 23 Cal.3d 742, 745 [153 Cal.Rptr. 237, 591 P.2d 527]; *People v. Stewart* (1976) 16 Cal.3d 133, 140 [127 Cal.Rptr. 117, 544 P.2d 1317].) This instruction must also be given on request when there is sufficient evidence. (*People v. Flannel* (1979) 25 Cal.3d 668, 684–685, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1], superseded by statute on other grounds as stated in *In re Christian S.* (1994) 7 Cal.4th 768 [30 Cal.Rptr.2d 33, 872 P.2d 574].)~~

Give the bracketed definition of an agent if agency is an issue.

In the last paragraph, enter a phrase with a verb in the first blank to state what the defendant did (e.g., "committed embezzlement" or "sold cocaine"). Enter the crime(s) in the second blank (e.g., "embezzlement" or "sale of a controlled substance").

AUTHORITY

- Instructional Requirements ▸ *People v. McIntyre* (1990) 222 Cal.App.3d 229, 232 [271 Cal.Rptr. 467]; *People v. Barraza* (1979) 23 Cal.3d 675, 689–691 [153 Cal.Rptr. 459, 591 P.2d 947].
- Burden of Proof ▸ *People v. McIntyre* (1990) 222 Cal.App.3d 229, 232 [271 Cal.Rptr. 467]; *People v. Peppars* (1983) 140 Cal.App.3d 677, 684 [189 Cal.Rptr. 879]; *People v. Barraza* (1979) 23 Cal.3d 675, 691, fn. 6 [153 Cal.Rptr. 459, 591 P.2d 947]; *In re Foss* (1974) 10 Cal.3d 910, 930–931 [112 Cal.Rptr. 649, 519 P.2d 1073].
- Definition of Agent ▸ *People v. McIntire* (1979) 23 Cal.3d 742, 748 [153 Cal.Rptr. 237, 591 P.2d 527].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 90–102.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.08, 73.18 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt,* § 141.10[2][c] (Matthew Bender).

RELATED ISSUES

Decoy Programs Permitted

The use of "ruses, stings, and decoys" to expose illicit activity does not constitute entrapment, as long as no pressure or overbearing conduct is employed by the decoy. (*Provigo Corp. v. Alcoholic Beverage Control Appeals Board* (1994) 7 Cal.4th 561, 568–570 [28 Cal.Rptr.2d 638, 869 P.2d 1163] [use of underage, but mature-looking, decoys to expose unlawful sales of alcoholic beverages to minors not entrapment; no pressure or overbearing conduct occurred, and targets could have protected themselves by routinely checking customer IDs].) The conduct of an unwitting decoy may also constitute sufficient badgering, cajoling, or

importuning that entitles the defendant to an entrapment instruction. (*Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1096–1098.)

Multiple Defenses Permitted

A defendant may assert entrapment and still deny guilt. (*People v. Perez* (1965) 62 Cal.2d 769, 775–776 [44 Cal.Rptr. 326, 401 P.2d 934].) "Although the defense of entrapment is available to a defendant who is otherwise guilty [citation], it does not follow that the defendant must admit guilt to establish the defense. A defendant, for example, may deny that he committed every element of the crime charged, yet properly allege that such acts as he did commit were induced by law enforcement officers [citation]." (*Ibid.*)

3410. Statute of Limitations

A defendant may not be convicted of _____ <*insert crime[s]*> **unless the prosecution began within __ years of the date the crime[s] ((was/were) committed/(was/were) discovered/should have been discovered). The present prosecution began on _____** <*insert date*>**.**

[A crime *should have been discovered* when the (victim/law enforcement officer) was aware of facts that would have alerted a reasonably diligent (person/law enforcement officer) in the same circumstances to the fact that a crime may have been committed.]

The People have the burden of proving by a preponderance of the evidence that prosecution of this case began within the required time. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the People must prove that it is more likely than not that prosecution of this case began within the required time. If the People have not met this burden, you must find the defendant not guilty of _____ <*insert crime[s]*>**.**

[If the People have proved that it is more likely than not that the defendant was outside of California for some period of time, you must not include that period [up to three years] in determining whether the prosecution began on time.]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the statute of limitations if the defendant is relying on such a defense ~~or~~ and there is substantial evidence supporting it. (See generally *People v. Stewart* (1976) 16 Cal.3d 133, 140 [127 Cal.Rptr. 117, 544 P.2d 1317] [discussing duty to instruct on defenses].)

The state has the burden of proving by a preponderance of the evidence that the prosecution is not barred by the statute of limitations. (*People v. Crosby* (1962) 58 Cal.2d 713, 725 [25 Cal.Rptr. 847, 375 P.2d 839].)

For most crimes, the statute begins to run when the offense is committed. If the crime is a fraud-related offense and included in Penal Code section 803, the statute

begins to run after the completion of or discovery of the offense, whichever is later. (Pen. Code, §§ 801.5, 803.) Courts interpreting the date of discovery provision have imposed a due diligence requirement on investigative efforts. (*People v. Zamora* (1976) 18 Cal.3d 538, 561 [134 Cal.Rptr. 784, 557 P.2d 75]; *People v. Lopez* (1997) 52 Cal.App.4th 233, 246 [60 Cal.Rptr.2d 511].) If one of the crimes listed in Section 803 is at issue, the court should instruct using the "discovery" language.

If there is a factual issue about when the prosecution started, the court should instruct that the prosecution begins when (1) an information or indictment is filed, (2) a complaint is filed charging a misdemeanor or infraction, (3) a case is certified to superior court, or (4) an arrest warrant or bench warrant is issued describing the defendant with the same degree of particularity required for an indictment, information, or complaint. (Pen. Code, § 804.)

Limitation Periods

No limitations period (Pen. Code, § 799):

> Embezzlement of public funds and crimes punishable by death or by life imprisonment.

Six-year period (Pen. Code, § 800):

> Felonies punishable for eight years or more, unless otherwise specified by statute.

Five-year period (Pen. Code, § 801.6):

> All other crimes against elders and dependent adults.

Four-year period (Pen. Code, §§ 801.5, 803(c)):

> Fraud, breach of fiduciary obligation, theft, or embezzlement on an elder or dependent adult, and misconduct in office.

Three-year period (Pen. Code, § 801, 802(b)):

> All other felonies, unless otherwise specified by statute, and misdemeanors committed upon a minor under the age of 14. Note: "If the offense is an alternative felony/misdemeanor 'wobbler' initially charged as a felony, the three-year statute of limitations applies, without regard to the ultimate reduction to a misdemeanor after the filing of the complaint [citation]." (*People v. Mincey* (1992) 2 Cal.4th 408, 453 [6 Cal.Rptr.2d 822, 827 P.2d 388].)

Two-year period (Pen. Code, § 802(c)):

> Misdemeanors under Business and Professions Code section 729.

One-year period (Pen. Code, § 802(a)):

Misdemeanors. Note: "If the initial charge is a felony but the defendant is convicted of a necessarily included misdemeanor, the one-year period for misdemeanors applies." (*People v. Mincey* (1992) 2 Cal.4th 408, 453 [6 Cal.Rptr.2d 822, 827 P.2d 388]; Pen. Code, § 805(b); see also 1 Witkin & Epstein, California. Criminal Law (3d ed. 2000) Defenses, § 220.)

AUTHORITY

- Instructional Requirements ▸ Pen. Code, § 799 et seq.; *People v. Stewart* (1976) 16 Cal.3d 133, 140 [127 Cal.Rptr. 117, 544 P.2d 1317].
- Tolling the Statute ▸ Pen. Code, § 803.
- Burden of Proof ▸ *People v. Lopez* (1997) 52 Cal.App.4th 233, 250 [60 Cal.Rptr.2d 511]; *People v. Zamora* (1976) 18 Cal.3d 538, 565 [134 Cal.Rptr. 784, 557 P.2d 75]; *People v. Crosby* (1962) 58 Cal.2d 713, 725 [25 Cal.Rptr. 847, 375 P.2d 839].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 214–228.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 40, *Accusatory Pleadings*, § 40.09 (Matthew Bender).

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.09 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 124, *Jurisdiction and Disposition Hearings,* § 124.04 (Matthew Bender).

RELATED ISSUES

Burden of Proof

At trial, the prosecutor bears the burden of proving by a preponderance of the evidence that the prosecution began within the required time. However, at a pre-trial motion to dismiss, the defendant has the burden of proving that the statute of limitations has run as a matter of law. (*People v. Lopez* (1997) 52 Cal.App.4th 233, 249–251 [60 Cal.Rptr.2d 511].) The defendant is entitled to prevail on the motion only if there is no triable issue of fact. (*Id*. at p. 249.)

Computation of Time

To determine the exact date the statute began to run, exclude the day the crime was completed. (*People v. Zamora* (1976) 18 Cal.3d 538, 560 [134 Cal.Rptr. 784, 557 P.2d 75].)

Felony Murder

Felony-murder charges and felony-murder special circumstances allegations may be filed even though the statute of limitations has run on the underlying felony. (*People v. Morris* (1988) 46 Cal.3d 1, 14–18 [249 Cal.Rptr. 119, 756 P.2d 843], disapproved of on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535 [37 Cal.Rptr.2d 446, 887 P.2d 527].)

Offense Completed

When an offense continues over a period of time, the statutory period usually does not begin until after the last overt act or omission occurs. (*People v. Zamora* (1976) 18 Cal.3d 538, 548 [134 Cal.Rptr. 784, 557 P.2d 75] [last act of conspiracy to burn insured's property was when fire was ignited and crime was completed; last act of grand theft was last insurance payment].)

Waiving the Statute of Limitations

A defendant may affirmatively, but not inadvertently, waive the statute of limitations. (*People v. Williams* (1999) 21 Cal.4th 335, 338, 340–342 [87 Cal.Rptr.2d 412, 981 P.2d 42]; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1089–1090 [130 Cal.Rptr.2d 717] [defendant did not request or acquiesce to instruction on time-barred lesser included offense].)

3411–3424. Reserved for Future Use

3425. Unconsciousness

The defendant is not guilty of _____ <*insert crime[s]*> **if (he/she) acted while legally unconscious. Someone is legally unconscious when he or she is not conscious of his or her actions. [Someone may be unconscious even though able to move.]**

Unconsciousness may be caused by (a blackout[,]/ [or] an epileptic seizure[,]/ [or] involuntary intoxication[,]/ [or] sleepwalking[,]/ or _____ <*insert a similar condition*>**).**

The People must prove beyond a reasonable doubt that the defendant was conscious when (he/she) acted. If there is proof beyond a reasonable doubt that the defendant acted as if (he/she) were conscious, you should conclude that (he/she) was conscious. If, however, based on all the evidence, you have a reasonable doubt that (he/she) was conscious, you must find (him/her) not guilty.

New January 2006

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case.

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389-390; *People v. Breverman* (1998) 19 Cal.4th 142, 157.)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982-983.)

~~The court has a **sua sponte** duty to instruct on unconsciousness if the defendant is relying on this defense or if there is substantial evidence supporting the defense and it is not inconsistent with the defendant's theory of the case. (See *People v.*~~

~~*Breverman* (1998) 19 Cal.4th 142, 156 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [addressing court's sua sponte instructional duties on defenses and lesser included offenses generally]; *People v. Sedeno* (1974) 10 Cal.3d 703, 716–717 [112 Cal.Rptr. 1, 518 P.2d 913] [duty to instruct on unconsciousness], overruled by *Breverman*, *supra*, 19 Cal.4th 142, on different grounds.)~~

Because there is a presumption that a person who appears conscious is conscious (*People v. Hardy* (1948) 33 Cal.2d 52, 63–64 [198 P.2d 865]), the defendant must produce sufficient evidence raising a reasonable doubt that he or she was conscious before an instruction on unconsciousness may be given. (*Ibid.*; *People v. Kitt* (1978) 83 Cal.App.3d 834, 842 [148 Cal.Rptr. 447], disapproved on other grounds by *People v. Cooper* (1991) 53 Cal.3d 771, 836 [281 Cal.Rptr. 90, 809 P.2d 865] [presumption of consciousness goes to the defendant's burden of producing evidence].)

AUTHORITY

- Instructional Requirements ▸ Pen. Code, § 26(4); *People v. Stewart* (1976) 16 Cal.3d 133, 140 [127 Cal.Rptr. 117, 544 P.2d 1317].
- Burden of Proof ▸ Pen. Code, § 607; *People v. Hardy* (1948) 33 Cal.2d 52, 64 [198 P.2d 865]; *People v. Cruz* (1978) 83 Cal.App.3d 308, 330–331 [147 Cal.Rptr. 740].
- Unconsciousness Defined ▸ *People v. Newton* (1970) 8 Cal.App.3d 359, 376 [87 Cal.Rptr. 394]; *People v. Heffington* (1973) 32 Cal.App.3d 1, 9 [107 Cal.Rptr. 859].
- Unconscious State: Blackouts ▸ *People v. Cox* (1944) 67 Cal.App.2d 166, 172 [153 P.2d 362].
- Unconscious State: Epileptic Seizures ▸ *People v. Freeman* (1943) 61 Cal.App.2d 110, 115–116 [142 P.2d 435].
- Unconscious State: Involuntary Intoxication ▸ *People v. Heffington* (1973) 32 Cal.App.3d 1, 8 [107 Cal.Rptr. 859]; see *People v. Hughes* (2002) 27 Cal.4th 287, 343–344 [116 Cal.Rptr.2d 401, 39 P.3d 432] [jury was adequately informed that unconsciousness does not require that person be incapable of movement].
- Unconscious State: Somnambulism or Delirium ▸ *People v. Methever* (1901) 132 Cal. 326, 329 [64 P. 481], overruled on other grounds in *People v. Gorshen* (1953) 51 Cal.2d 716 [336 P.2d 492].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d Ed. 2000) Defenses, §§ 31, 34.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.01[4] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 124, *Jurisdiction and Disposition Hearings,* § 124.04 (Matthew Bender).

COMMENTARY

The committee did not include an instruction on the presumption of consciousness. There is a judicially created presumption that a person who acts conscious is conscious. (*People v. Hardy* (1948) 33 Cal.2d 52, 63–64 [198 P.2d 865].) Although an instruction on this presumption has been approved, it has been highly criticized. (See *People v. Kitt* (1978) 83 Cal.App.3d 834, 842–843 [148 Cal.Rptr.

447], disapproved on other grounds by *People v. Cooper* (1991) 53 Cal.3d 771, 836 [281 Cal.Rptr. 90, 809 P.2d 865] [acknowledging instruction and suggesting modification]; *People v. Cruz* (1978) 83 Cal.App.3d 308, 332 [147 Cal.Rptr. 740] [criticizing instruction for failing to adequately explain the presumption].)

The effect of this presumption is to place on the defendant a burden of producing evidence to dispel the presumption. (*People v. Cruz, supra,* 83 Cal.App.3d at pp. 330–331; *People v. Kitt, supra,* 83 Cal.App.3d at p. 842, disapproved on other grounds by *People v. Cooper* (1991) 53 Cal.3d 771, 836 [281 Cal.Rptr. 90, 809 P.2d 865]; and see *People v. Babbitt* (1988) 45 Cal.3d 660, 689–696 [248 Cal.Rptr. 69, 755 P.2d 253] [an instruction on this presumption "did little more than guide the jury as to how to evaluate evidence bearing on the defendant's consciousness and apply it to the issue."].) However, if the defendant produces enough evidence to warrant an instruction on unconsciousness, the rebuttable presumption of consciousness has been dispelled and no instruction on its effect is necessary. The committee, therefore, concluded that no instruction on the presumption of consciousness was needed.

RELATED ISSUES

Inability to Remember

Generally, a defendant's inability to remember or his hazy recollection does not supply an evidentiary foundation for a jury instruction on unconsciousness. (*People v. Heffington* (1973) 32 Cal.App.3d 1, 10 [107 Cal.Rptr. 859]); *People v. Sameniego* (1931) 118 Cal.App. 165, 173 [4 P.2d 809] ["The inability of a defendant . . . to remember . . . is of such common occurrence and so naturally accountable for upon the normal defects of memory, or, what is more likely, the intentional denial of recollection, as to raise not even a suspicion of declarations having been made while in an unconscious condition."].) In *People v. Coston* (1947) 82 Cal.App.2d 23, 40–41 [185 P.2d 632], the court stated that forgetfulness may be a factor in unconsciousness; however, "there must be something more than [the defendant's] mere statement that he does not remember what happened to justify a finding that he was unconscious at the time of that act."

Two cases have held that a defendant's inability to remember warrants an instruction on unconsciousness. (*People v. Bridgehouse* (1956) 47 Cal.2d 406, 414 [303 P.2d 1018] and *People v. Wilson* (1967) 66 Cal.2d 749, 761–762 [59 Cal.Rptr. 156, 427 P.2d 820].) Both cases were discussed in *People v. Heffington* (1973) 32 Cal.App.3d 1 [107 Cal.Rptr. 859], but the court declined to hold that *Bridgehouse* and *Wilson* announced an "ineluctable rule of law" that "a defendant's inability to remember or his 'hazy' recollection supplies an evidentiary foundation for a jury instruction on unconsciousness." (*Id.* at p. 10.) The court stated that, "[b]oth [cases] were individualized decisions in which the

court examined the record and found evidence, no matter how incredible, warranting the instruction." (*Ibid*.)

Intoxication–Involuntary versus Voluntary

Unconsciousness due to involuntary intoxication is a complete defense to a criminal charge under Penal Code section 26, subdivision (4). (*People v. Heffington* (1973) 32 Cal.App.3d 1, 8 [107 Cal.Rptr. 859].) Unconsciousness due to voluntary intoxication is governed by Penal Code section 22, rather than section 26, and is not a defense to a general intent crime. (*People v. Chaffey* (1994) 25 Cal.App.4th 852, 855 [30 Cal.Rptr.2d 757; see CALCRIM No. 3426, *Voluntary Intoxication*.)

Mental Condition

A number of authorities have stated that a conflict exists in California over whether an unsound mental condition can form the basis of a defense of unconsciousness. (See *People v. Lisnow* (1978) 88 Cal.App.3d Supp. 21, 23 [151 Cal.Rptr. 621]; 1 Witkin California Criminal Law (3d ed. 2000) Defenses, § 32 [noting the split and concluding that the more recent cases permit the defense for defendants of unsound mind]; Annot., Automatism or Unconsciousness as a Defense or Criminal Charge (1984) 27 A.L.R.4th 1067, § 3(b) fn. 7.)

3450. Insanity: Determination, Effect of Verdict (Pen. Code, §§ 25, 25.5)

You have found the defendant guilty of _____ <*insert crime[s]*>. Now you must decide whether (he/she) was legally insane when (he/she) committed the crime[s].

The defendant must prove that it is more likely than not that (he/she) was legally insane when (he/she) committed the crime[s].

The defendant was legally insane if:

1. **When (he/she) committed the crime[s], (he/she) had a mental disease or defect;**

AND

2. **Because of that disease or defect, (he/she) did not know or understand the nature and quality of (his/her) act or did not know or understand that (his/her) act was morally or legally wrong.**

None of the following qualify as a mental disease or defect for purposes of an insanity defense: personality disorder, adjustment disorder, seizure disorder, or an abnormality of personality or character made apparent only by a series of criminal or antisocial acts.

[Special rules apply to an insanity defense involving drugs or alcohol. Addiction to or abuse of drugs or intoxicants, by itself, does not qualify as legal insanity. This is true even if the intoxicants cause organic brain damage or a settled mental disease or defect that lasts after the immediate effects of the intoxicants have worn off. Likewise, a temporary mental condition caused by the recent use of drugs or intoxicants is not legal insanity.]

[If the defendant suffered from a settled mental disease or defect caused by the long-term use of drugs or intoxicants, that settled mental disease or defect combined with another mental disease or defect may qualify as legal insanity. A *settled mental disease or defect* is one that remains after the effect of the drugs or intoxicants has worn off.]

You may consider any evidence that the defendant had a mental disease or defect before the commission of the crime[s]. If you are satisfied that (he/she)

had a mental disease or defect before (he/she) committed the crime[s], you may conclude that (he/she) suffered from that same condition when (he/she) committed the crime[s]. You must still decide whether that mental disease or defect constitutes legal insanity.

[If you find the defendant was legally insane at the time of (his/her) crime[s], (he/she) will not be released from custody until a court finds (he/she) qualifies for release under California law. Until that time (he/she) will remain in a mental hospital or outpatient treatment program, if appropriate. (He/She) may not, generally, be kept in a mental hospital or outpatient program longer than the maximum sentence available for (his/her) crime[s]. If the state requests additional confinement beyond the maximum sentence, the defendant will be entitled to a new sanity trial before a new jury. Your job is only to decide whether the defendant was legally sane or insane at the time of the crime[s]. You must not speculate as to whether (he/she) is currently sane or may be found sane in the future. You must not let any consideration about where the defendant may be confined, or for how long, affect your decision in any way.]

[You may find that at times the defendant was legally sane and at other times was legally insane. You must determine whether (he/she) was legally insane when (he/she) committed the crime.]
~~**[If you conclude that at times the defendant was legally sane and at other times the defendant was legally insane, you must assume that (he/she) was legally sane when (he/she) committed the crime[s].]**~~

[If you conclude that the defendant was legally sane at the time (he/she) committed the crime[s], then it is no defense that (he/she) committed the crime[s] as a result of an uncontrollable or irresistible impulse.]

If, after considering all the evidence, all twelve of you conclude the defendant has proved that it is more likely than not that (he/she) was legally insane when (he/she) committed the crime[s], you must return a verdict of not guilty by reason of insanity.

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on insanity when the defendant has entered a plea of not guilty by reason of insanity. (Pen. Code, § 25.)

Give the bracketed paragraph that begins with "Special rules apply" when the sole basis of insanity is the defendant's use of intoxicants. (Pen. Code, § 25.5; *People v. Robinson* (1999) 72 Cal.App.4th 421, 427–428 [84 Cal.Rptr.2d 832].) If the defendant's use of intoxicants is not the sole basis or causative factor of insanity, but rather one factor among others, give the bracketed paragraph that begins with "If the defendant suffered from a settled mental." (*Id*. at p. 430, fn. 5.)

Do **not** give CALCRIM No. 224, *Circumstantial Evidence: Sufficiency of Evidence*, or CALCRIM No. 225, *Circumstantial Evidence: Intent or Mental State*. These instructions have "no application when the standard of proof is preponderance of the evidence." (*People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1274 [18 Cal.Rptr.3d 286].)

There is no sua sponte duty to inform the jury that an insanity verdict would result in the defendant's commitment to a mental hospital. However, this instruction must be given on request. (*People* v. *Moore* (1985) 166 Cal.App.3d 540, 556 [211 Cal.Rptr. 856]; *People* v. *Kelly* (1992) 1 Cal.4th 495, 538 [3 Cal.Rptr.2d 677, 822 P.2d 385].)

If the court conducts a bifurcated trial on the insanity plea, the court **must** also give the appropriate posttrial instructions such as CALCRIM No. 3550, *Pre-Deliberation Instructions*; CALCRIM No. 222, *Evidence*; and CALCRIM No. 226, *Witnesses*. (See *In Re Ramon M.* (1978) 22 Cal.3d 419, 427, fn. 10 [149 Cal.Rptr. 387, 584 P.2d 524].) These instructions may need to be modified.

AUTHORITY

- Instructional Requirements ▸ Pen. Code, §§ 25, 25.5; *People v. Skinner* (1985) 39 Cal.3d 765 [217 Cal.Rptr. 685, 704 P.2d 752].
- Burden of Proof ▸ Pen. Code, § 25(b).
- Commitment to Hospital ▸ Pen. Code, §§ 1026, 1026.5; *People* v. *Moore* (1985) 166 Cal.App.3d 540, 556 [211 Cal.Rptr. 856]; *People* v. *Kelly* (1992) 1 Cal.4th 495, 538 [3 Cal.Rptr.2d 677, 822 P.2d 385].
- Excluded Conditions ▸ Pen. Code, § 25.5.
- Anti-social Acts ▸ *People v. Fields* (1983) 35 Cal.3d 329, 368–372 [197 Cal.Rptr. 803, 673 P.2d 680]; *People v. Stress* (1988) 205 Cal.App.3d 1259, 1271 [252 Cal.Rptr. 913].
- Long-Term Substance Use ▸ *People v. Robinson* (1999) 72 Cal.App.4th 421, 427 [84 Cal.Rptr.2d 832].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 7–16.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.02 (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 86, *Insanity Trial,* § 86.01A (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 124, *Jurisdiction and Disposition Hearings,* § 124.04 (Matthew Bender).

RELATED ISSUES

Bifurcated Proceedings

The defendant has a right to bifurcated proceedings on the questions of sanity and guilt. (Pen. Code, § 1026.) When the defendant enters *both* a "not guilty" and a "not guilty by reason of insanity" plea, the defendant must be tried first with respect to guilt. If the defendant is found guilty, he or she is then tried with respect to sanity. The defendant may waive bifurcation and have both guilt and sanity tried at the same time. (Pen. Code, § 1026(a).)

Extension of Commitment

The test for extending a person's commitment is not the same as the test for insanity. (*People v. Superior Court (Williams)* (1991) 233 Cal.App.3d 477, 490 [284 Cal.Rptr. 601].) The test for insanity is whether the accused "was incapable of knowing or understanding the nature and quality of his or her act or of distinguishing right from wrong at the time of the commission of the offense." (Pen. Code, § 25(b); *People v. Skinner* (1985) 39 Cal.3d 765, 768 [217 Cal.Rptr. 685, 704 P.2d 752].) In contrast, the standard for recommitment under Penal Code section 1026.5, subdivision (b), is whether a defendant, "by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others." (*People v. Superior Court, supra,* 233 Cal.App.3d at pp. 489–490; *People v. Wilder* (1995) 33 Cal.App.4th 90, 99 [39 Cal.Rptr.2d 247].)

Legal and Moral Wrong

The wrong contemplated by the two-part insanity test refers to both the legal wrong and the moral wrong. If the defendant appreciates that his or her act is criminal but does not think it is morally wrong, he or she may still be criminally insane. (See *People v. Skinner* (1985) 39 Cal.3d 765, 777–784 [217 Cal.Rptr. 685]; see also *People v. Stress* (1988) 205 Cal.App.3d 1259, 1271–1274 [252 Cal.Rptr. 913].)

Temporary Insanity

The defendant's insanity does not need to be permanent in order to establish a defense. The relevant inquiry is the defendant's mental state at the time the offense was committed. (*People v. Kelly* (1973) 10 Cal.3d 565, 577 [111 Cal.Rptr. 171, 516 P.2d 875].)

3455. Mental Incapacity~~Idiocy~~ as a Defense (Pen. Code, §§ 25, 25.5)

You may not find the defendant guilty of _____ <*insert description of crime*> if (he/she) was legally incapable of committing a crime because of ~~idiocy~~mental incapacity.

The defendant was legally incapable of committing a crime because of mental incapacity~~idiocy~~ if at the time the crime was committed:

1. **(He/She) had a mental disease or defect;**

   AND

2. **Because of that disease or defect, (he/she) did not know or understand the nature and quality of (his/her) act or did not know or understand that (his/her) act was morally or legally wrong.**

The defendant has the burden of proving this defense by a preponderance of the evidence. [This is a different burden of proof from proof beyond a reasonable doubt.] To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that (he/she) was legally incapable of committing a crime because of mental incapacity.~~idiocy.~~

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on mental incapacity~~idiocy~~ when the defendant has raised this defense and substantial evidence supports it. (Pen. Code, § 25.) Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982-983.)

If the court grants a bifurcated trial on the defense of mental incapacity~~idiocy~~, the court must also give the appropriate posttrial instructions such as CALCRIM No. 3550, *Pre-Deliberation Instructions*; CALCRIM No. 222, *Evidence*; and CALCRIM No. 226, *Witnesses*. (See *In Re Ramon M.* (1978) 22 Cal.3d 419, 427, fn. 10 [149 Cal.Rptr. 387, 584 P.2d 524].)

If the court does not grant a bifurcated trial, give the bracketed sentence "This is a different burden of proof from proof beyond a reasonable doubt."

AUTHORITY

- Instructional Requirements ▸ Pen. Code, §§ 25, 25.5, 26.
- Burden of Proof ▸ *In re Ramon M.* (1978) 22 Cal.3d 419, 427, fn. 10 [149 Cal.Rptr. 387, 584 P.2d 524].).
- Same Test for Both Mental Incapacity~~Idiocy~~ and Insanity ▸ *In re Ramon M.* (1978) 22 Cal.3d 419, 427 [149 Cal.Rptr. 387, 584 P.2d 524].).
- Requirement of Mental Disease or Defect ▸ *People v. McCaslin* (1986) 178 Cal.App.3d 1, 8 [223 Cal.Rptr. 587].
- Incapacity Based on Mental Disease or Defect ▸ *People v. Stress* (1988) 205 Cal.App.3d 1259, 1271 [252 Cal.Rptr. 913].
- Penal Code Section 25(b) Supersedes Model Penal Code Test ▸ *People v. Phillips* (2000) 83 Cal.App.4th 170, 173 [99 Cal.Rptr.2d 448].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 2.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.01[3], 73.18 (Matthew Bender).

COMMENTARY

In *in Re Ramon M.* (1978) 22 Cal.3d 419, 427 [149 Cal.Rptr. 387, 584 P.2d 524], the Supreme Court held that the same test should apply for determining both ~~idiocy~~ mental incapacity and insanity. However, the court was applying the Model Penal Code test, which was subsequently superseded by Proposition 8 as codified in Penal Code section 25(b). The Court of Appeal in *People v. Phillips* (2000) 99 Cal.App.4th 170, 173 [83 Cal.Rptr.2d 448], expressly found that "the test for insanity as stated in section 25, subdivision (b) applies also to determine whether a person is an idiot pursuant to section 26." Accordingly, the committee followed *Phillips* in drafting this instruction.

RELATED ISSUES

Legal and Moral Wrong

The wrong contemplated by the two-part insanity test refers to both the legal wrong and the moral wrong. If the defendant appreciates that his or her act is criminal but does not think it is morally wrong, he or she may still be criminally insane. (See *People v. Skinner* (1985) 39 Cal.3d 765, 777–784 [217 Cal.Rptr. 685, 704 P.2d 752]; see also *People v. Stress* (1988) 205 Cal.App.3d 1259, 1271–1274 [252 Cal.Rptr. 913].)

Penal Code Sections 1016, 1017, 1026, 1027

The Supreme Court found in *In re Ramon M.* (1978) 22 Cal.3d 419, 427 [149 Cal.Rptr. 387, 584 P.2d 524] that the same test for legal incapacity should apply to both insanity and mental retardation. Moreover, the court concluded that the Legislature "probably intended [Pen. Code, §§ 1016, 1017, 1026, 1027] to apply to all persons who assertedly lack mental capacity to commit crime [citation]. In light of this legislative intent, and of the identity of the legal test for ~~idiocy~~ mental incapacity and insanity . . . we conclude that the term 'insanity' in Penal Code sections 1016 through 1027 refers to mental incapacity, whether arising from mental illness or mental retardation. Accordingly a defendant asserting a defense of ~~idiocy~~ mental incapacity should raise that defense by separate plea (see Pen. Code, §§ 1016, 1017), may obtain a bifurcated trial (see Pen. Code, § 1026), [and] must prove his incapacity by a preponderance of the evidence [citation] . . . ." (*Id.* at p. 427, fn. 10.)

Extension of Commitment

The test for extending a person's commitment is not the same as the test for insanity. (*People v. Superior Court (Williams)* (1991) 233 Cal.App.3d 477, 490 [284 Cal.Rptr. 601].) The test for insanity and ~~idiocy~~ mental incapacity is whether the accused "was incapable of knowing or understanding the nature and quality of his or her act or of distinguishing right from wrong at the time of the commission of the offense." (Pen. Code, § 25(b); *People v. Skinner* (1985) 39 Cal.3d 765 [217 Cal.Rptr. 685, 704 P.2d 752].) In contrast, the standard for recommitment under Penal Code section 1026.5(b) is whether a defendant, "by reason of a mental disease, defect, or disorder [,] represents a substantial danger of physical harm to others." (*People v. Superior Court, supra,* 233 Cal.App.3d at pp. 489–490; *People v. Wilder* (1995) 33 Cal.App.4th 90, 99 [39 Cal.Rptr.2d 247].)

3456–3469. Reserved for Future Use

3470. Right to Self-Defense or Defense of Another (Non-Homicide)

Self-defense is a defense to _____<*insert list of pertinent crimes charged*>. **The defendant is not guilty of (that/those crime[s]) if (he/she) used force against the other person in lawful (self-defense/ [or] defense of another). The defendant acted in lawful (self-defense/ [or] defense of another) if:**

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

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

AND

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

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

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

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

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

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

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

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

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

The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful (self-defense/ [or] defense of another). If the People have not met this burden, you must find the defendant not guilty of _____ <*insert crime(s) charged*>.

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case.

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v.*

Gonzales (1999) 74 Cal.App.4th 382, 389-390; *People v. Breverman* (1998) 19 Cal.4th 142, 157.)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982-983.)

~~The court has a **sua sponte** duty to instruct on self-defense when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case [citation]." (See *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [249 Cal.Rptr. 897] [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses].)~~

~~If there is substantial evidence of self-defense that is inconsistent with the defendant's testimony, the court must ascertain whether the defendant wants an instruction on self-defense. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 156 [77 Cal.Rptr.2d 870].) The court is then required to give the instruction if the defendant so requests. (*People v. Elize* (1999) 71 Cal.App.4th 605, 611–615 [84 Cal.Rptr.2d 35].)~~

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of "antecedent threats and assaults against the defendant on the reasonableness of defendant's conduct." (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488 [1 Cal.Rptr.3d 774].) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475 [198 Cal.Rptr. 819]; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068 [56 Cal.Rptr.2d 133, 920 P.2d 1337]; see also CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.)

Related Instructions

CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.
CALCRIM Nos. 3471–3477, Defense Instructions: Defense of Self, Another, Property.
CALCRIM No. 851, *Testimony on Intimate Partner Battering and Its Effects: Offered by the Defense*.

AUTHORITY

- Instructional Requirements ▸ *People v. Moody* (1943) 62 Cal.App.2d 18 [143 P.2d 978]; *People v. Myers* (1998) 61 Cal.App.4th 328, 335, 336 [71 Cal.Rptr.2d 518].
- Lawful Resistance ▸ Pen. Code, §§ 692, 693, 694; Civ. Code, § 50; see also *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518].
- Burden of Proof ▸ Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements ▸ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Imminence ▸ *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167] (overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [56 Cal.Rptr.2d 142, 921 P.2d 1]).
- No Duty to Retreat ▸ *People v. Hughes* (1951) 107 Cal.App.2d 487, 494 [237 P.2d 64]; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22 [132 P.2d 51].
- Reasonable Belief ▸ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1]; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 65, 66, 69, 70.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 124, *Jurisdiction and Disposition Hearings,* § 124.04 (Matthew Bender).

RELATED ISSUES

Brandishing Weapon in Defense of Another

The defense of others is a defense to a charge of brandishing a weapon under Penal Code section 417(a)(2). (*People v. Kirk* (1986) 192 Cal.App.3d Supp. 15, 19 [238 Cal.Rptr. 42].)

Ex-Felon in Possession of Weapon

"[W]hen [an ex-felon] is in imminent peril of great bodily harm or . . . reasonably believes himself or others to be in such danger, and without preconceived design on his part a firearm is made available to him, his temporary possession of that weapon for a period no longer than that in which the necessity or apparent necessity to use it in self-defense continues, does not violate [Penal Code] section 12021. . . . [T]he use of the firearm must be reasonable under the circumstances and may be resorted to only if no other alternative means of avoiding the danger are available." (*People v. King* (1978) 22 Cal.3d 12, 24, 26 [148 Cal.Rptr. 409, 582 P.2d 1000] [error to refuse instructions on self-defense and defense of others]; see also CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute: Self–Defense*.)

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

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

3471. Right to Self-Defense: Mutual Combat or Initial Aggressor

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A person who engages in mutual combat or who ~~is the first one to use physical force~~is the initial aggressor has a right to self-defense only if:

1. **(He/She) actually and in good faith tries to stop fighting;**

[AND]

2. **(He/She) indicates, by word or by conduct, to (his/her) opponent, in a way that a reasonable person would understand, that (he/she) wants to stop fighting and that (he/she) has stopped fighting(;/.)**

<Give element 3 in cases of mutual combat>

[AND

3. **(He/She) gives (his/her) opponent a chance to stop fighting.]**

If a person meets these requirements, (he/she) then has a right to self-defense if the opponent continues to fight.

[If you decide that the defendant started the fight using non-deadly force and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend (himself/herself) with deadly force and was not required to try to stop fighting.]

New January 2006

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case.

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should

ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389-390; *People v. Breverman* (1998) 19 Cal.4th 142, 157.)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982-983.)
~~The court has a **sua sponte** duty to give defense instructions supported by the evidence and not inconsistent with the defendant's theory of the case. (*People v. Baker* (1999) 74 Cal.App.4th 243, 252 [87 Cal.Rptr.2d 803]; *People v. Barton* (1995) 12 Cal.4th 186, 195 [47 Cal.Rptr.2d 569, 906 P.2d 531].)~~

Give bracketed element 3 if the person claiming self-defense was engaged in mutual combat.

If the defendant started the fight using non-deadly force and the opponent suddenly escalates to deadly force, the defendant may defend himself or herself using deadly force. (See *People v. Quach* (2004) 116 Cal.App.4th 294, 301–302 [10 Cal.Rptr.3d 196]; *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75 [63 Cal.Rptr. 749]; *People v. Hecker* (1895) 109 Cal. 451, 464 [42 P. 307].) In such cases, give the bracketed sentence that begins with "If you decide that."

If the defendant was the initial aggressor and is charged with homicide, always give CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*, in conjunction with this instruction.

AUTHORITY

- Instructional Requirements ▸ See Pen. Code, § 197, subd. 3; *People v. Button* (1895) 106 Cal. 628, 633 [39 P. 1073]; *People v. Crandell* (1988) 46 Cal.3d 833, 871–872 [251 Cal.Rptr. 227, 760 P.2d 423]; *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75 [63 Cal.Rptr. 749].
- Escalation to Deadly Force ▸ *People v. Quach* (2004) 116 Cal.App.4th 294, 301–302 [10 Cal.Rptr.3d 196]; *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75 [63 Cal.Rptr. 749]; *People v. Hecker* (1895) 109 Cal. 451, 464 [42 P. 307]; *People v. Anderson* (1922) 57 Cal.App. 721, 727 [208 P. 204].

Secondary Sources

1 Witkin & Epstein, Caifornia. Criminal Law (3d ed. 2000) Defenses, § 75.

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

3475. Right to Eject Trespasser From Real Property

The (owner/lawful occupant) of a (home/property) may request that a trespasser leave the (home/property). If the trespasser does not leave within a reasonable time and it would appear to a reasonable person that the trespasser poses a threat to (the (home/property)/ [or] the (owner/ [or] occupants), the (owner/lawful occupant) may use reasonable force to make the trespasser leave.

Reasonable force **means the amount of force that a reasonable person in the same situation would believe is necessary to make the trespasser leave.**

[If the trespasser resists, the (owner/lawful occupant) may increase the amount of force he or she uses in proportion to the force used by the trespasser and the threat the trespasser poses to the property.]

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

The People have the burden of proving beyond a reasonable doubt that the defendant used more force than was reasonable. If the People have not met this burden, you must find the defendant not guilty of _____<*insert crime*>**.**

New January 2006

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case.

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v.*

Gonzales (1999) 74 Cal.App.4th 382, 389-390; *People v. Breverman* (1998) 19 Cal.4th 142, 157.)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982-983.)

~~The court has a **sua sponte** duty to instruct on a defense when the defendant is relying on the defense, or if there is substantial evidence supporting the defense and it is not inconsistent with the defendant's theory of the case. (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [77 Cal.Rptr. 2d 870, 960 P.2d 1094] [addressing court's sua sponte instructional duties on defenses and lesser included offenses generally].)~~

Related Instructions
CALCRIM No. 3476, *Right to Defend Real or Personal Property*.
CALCRIM No. 3477, *Presumption That Resident Was Reasonably Afraid of Death or Great Bodily Injury*.
CALCRIM No. 506, *Justifiable Homicide: Defending Against Harm to Person Within Home or on Property*.

AUTHORITY

- Instructional Requirements ▸ See *People v. Corlett* (1944) 67 Cal.App.2d 33, 51–52 [153 P.2d 595]; *People v. Teixeira* (1899) 123 Cal. 297, 298–299 [55 P. 988]; Civ. Code, § 50.
- Burden of Proof ▸ See *Boyer v. Waples* (1962) 206 Cal.App.2d 725, 727 [24 Cal.Rptr. 192] [civil action].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 78.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, §§ 73.11[1], 73.13[2] (Matthew Bender).

RELATED ISSUES

Negating Self-Defense Claim

The right to defend one's home may negate a defendant's claim of imperfect self-defense, as held in *People v. Watie* (2002) 100 Cal.App.4th 866, 878 [124 Cal.Rptr.2d 258]:

[T]he right of a victim to defend himself and his property is a relevant consideration in determining whether a defendant may prevail when he seeks to negate malice aforethought by asserting the affirmative defense of imperfect self-defense. . . [¶] . . .If [the victim] had a right to use force to defend himself in his home, then defendant had no right of self-defense, imperfect, or otherwise.

3476. Right to Defend Real or Personal Property

The owner [or possessor] of (real/ [or] personal) property may use reasonable force to protect that property from imminent harm. [A person may also use reasonable force to protect the property of a (family member/guest/master/servant/ward) from immediate harm.]

Reasonable force **means the amount of force that a reasonable person in the same situation would believe is necessary to protect the property from imminent harm.**

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

The People have the burden of proving beyond a reasonable doubt that the defendant used more force than was reasonable to protect property from imminent harm. If the People have not met this burden, you must find the defendant not guilty of _____<*insert crime*>**.**

New January 2006

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case.

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389-390; *People v. Breverman* (1998) 19 Cal.4th 142, 157.)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982-983.)
~~The court has a **sua sponte** duty to instruct on a defense when the defendant is relying on the defense, or if there is substantial evidence supporting the defense and it is not inconsistent with the defendant's theory of the case. (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [addressing court's sua sponte instructional duties on defenses and lesser included offenses generally].)~~

Related Instructions

CALCRIM No. 3475, *Right to Eject Trespasser From Real Property*.
CALCRIM No. 3477, *Presumption That Resident Was Reasonably Afraid of Death or Great Bodily Injury*.
CALCRIM No. 506, *Justifiable Homicide: Defending Against Harm to Person Within Home or on Property*.

AUTHORITY

- Instructional Requirements ▸ See Civ. Code, § 50; *Boyer v. Waples* (1962) 206 Cal.App.2d 725, 727 [24 Cal.Rptr. 192].
- Burden of Proof ▸ See *Boyer v. Waples* (1962) 206 Cal.App.2d 725, 727 [24 Cal.Rptr. 192] [civil action].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 78.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.13 (Matthew Bender).

3550. Pre-Deliberation Instructions

When you go to the jury room, the first thing you should do is choose a 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.

It is your duty to talk with one another and to deliberate in the jury room. You should try to agree on a verdict if you can. Each of you must decide the case 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. Please treat one another courteously. Your role is to be an impartial judge of the facts, not to act as an advocate for one side or the other.

As I told you at the beginning of the trial, 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.

[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 how the vote stands on the (question of guilt/[or] issues in this case) unless I ask you to do so.

Your verdict [on each count and any special findings] 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.]

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 must reach your verdict without any consideration of punishment.

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. [If you are able to reach a unanimous decision on only one or only some of the (charges/ [or] defendants), fill in (that/those) verdict form[s] only, and notify the bailiff.] Return any unsigned verdict form.

New January 2006

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).)

AUTHORITY

- Exhibits ▸ Pen. Code, § 1137.
- Questions ▸ Pen. Code, § 1138.

- Verdict Forms ▸ Pen. Code, § 1140.
- Unanimous Verdict ▸ Cal. Const., art. I, § 16; *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].
- 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].
- Do Not Consider Punishment ▸ *People v. Nichols* (1997) 54 Cal.App.4th 21, 24 [62 Cal.Rptr.2d 433].

Secondary Sources

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

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).

RELATED ISSUES

Admonition Not to Discuss Case with Anyone

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

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

his or her view of the evidence in the case, the juror should report that conversation immediately to the court.

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

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

3551–3574. Reserved for Future Use