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
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DATE: July 10, 2009

SUBJECT: Criminal Jury Instructions: Approve Publication of New and Revised Instructions (Action Required)

Issue Statement
The Advisory Committee on Criminal Jury Instructions has drafted for approval new and revised criminal jury instructions to include in the *Judicial Council of California Criminal Jury Instructions (CALCRIM).* *CALCRIM* was first published in August 2005.

Recommendation
The Advisory Committee on Criminal Jury Instructions recommends that the Judicial Council, effective August 14, 2009, approve for publication under rule 2.1050 of the California Rules of Court the criminal jury instructions prepared by the committee. On Judicial Council approval, the new and revised instructions will be officially published in a new edition of the *Judicial Council of California Criminal Jury Instructions (CALCRIM).*

The table of contents and the proposed new or substantially revised criminal jury instructions are attached at pages 6–56. The table of contents and proposed revisions to existing instructions are attached at pages 57–154.

Rationale for Recommendation
The Advisory Committee on Criminal Jury Instructions is charged with maintaining and updating *CALCRIM*. The council approved the committee's last update at its December 9, 2008, meeting.

The advisory committee drafted the new and revised instructions in this proposal and circulated them for public comment. The official publisher (LexisNexis Matthew Bender)

is preparing to publish print, HotDocs document assembly, and online versions of the new and revised instructions approved by the council.

There are 43 instructions in this proposal, including 17 drafts of new or substantially revised instructions and 26 revised instructions. In the former category are: CALCRIM Nos. 107, 209, 219, 640–643, 1195–1199, 1243, 2041–2043, and 2997. Revised instructions include CALCRIM Nos.: 104, 202, 222, 362, 520, 524, 600, 603–604, 823, 861, 875–876, 1600, 2040, 2111, 2130, 2131, 2150, 2440, 2701, 2917, 3220, 3410, 3454, and 3470.

The Judicial Council Rules and Projects Committee (RUPRO) has already approved minor changes and corrections to additional instructions under a delegation of authority from the council to RUPRO.[1]

The committee revised or added instructions based on comments or suggestions from justices, judges, and attorneys; proposals by staff and committee members; and recent developments in the law, including the following representative examples:

New CALCRIM Nos. 1195, *Contacting Minor With Intent to Commit Certain Felonies,* 1196, *Arranging Meeting With Minor for Lewd Purpose;* 1197, *Going to Meeting With Minor for Lewd Purpose;* 1198, *Engaging in Sexual Intercourse or Sodomy With Child Ten Years of Age or Younger;* and 1199, *Engaging in Oral Copulation or Sexual Penetration With Child Ten Years of Age or Younger* were added in response to recent legislation on sex crimes against minors.

The committee also added CALCRIM Nos. 2041, *Fraudulent Possession of Personal Identifying Information;* 2042, *Fraudulent Sale, Transfer or Conveyance of Personal Identifying Information;* and 2043, *Knowing Sale, Transfer or Conveyance of Personal Identifying Information to Facilitate Its Unauthorized Use* in response to new legislation on identity theft.

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[1] At its October 20, 2006 meeting, the Judicial Council delegated to RUPRO the final authority to approve nonsubstantive technical changes to jury instructions and corrections and minor substantive changes unlikely to create controversy. The council also gave RUPRO the authority to delegate to the jury instructions advisory committees the authority to review and approve nonsubstantive grammatical and typographical corrections and other similar changes to the jury instructions, which RUPRO has done.

Under the implementing guidelines that RUPRO approved on December 14, 2006, RUPRO has the final authority to approve (among other things) additional cases and statutes cited in the Sources and Authority (bench notes in *CALCRIM*) and additions or changes to the Directions for Use (Instructional Duty in *CALCRIM*). RUPRO has already given final approval to 33 instructions that have only these changes. Further, under its delegation of authority from RUPRO, the advisory committee staff has made other nonsubstantive grammatical, typographical, and technical corrections.

In response to a suggestion from a deputy district attorney, the committee drafted CALCRIM No. 219, *Reasonable Doubt in Civil Proceedings.* The current versions of the CALCRIM civil commitment instructions direct the user to CALCRIM No. 220, *Reasonable Doubt*, with the caveat that the instruction "may need to be modified." Because the presumption of innocence does not apply in civil commitment proceedings and the titles used to refer to the parties are different, the committee agreed that it would be helpful to provide an instruction for use in these cases.

The following jury instructions were substantially redrafted, so they are included with the new instructions: CALCRIM Nos. 640, *Deliberations and Completion of Verdict Forms: For Use When Jury Is Given Not Guilty Forms for Each Level of Homicide* and 641, *Deliberations and Completion of Verdict Forms: For Use When Jury Is Given Only One Not Guilty Verdict Form for Each Count (Homicide).* The committee drafted two new instructions in this category as well: 642, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Not Guilty Forms for Each Level of Homicide* and 643, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count.* These instructions make clear that the jury may not convict a defendant of both voluntary and involuntary manslaughter, and also address what a jury should do when instructed on both of those offenses as lesser included offenses. They also provide options for instructing on lesser included homicide offenses according to the method approved in *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] as well as a non-*Stone* option.

Many of the revisions of instructions were the result of new case law. For example, the committee revised CALCRIM No. 600, *Attempted Murder*, in accordance with *People v. Stone* (2009) 46 Cal.4th 131, fn. 3 [92 Cal.Rptr.3d 362, 205 P.3d 272]. In *Stone*, the Supreme Court made a direct suggestion to improve the language of CALCRIM No. 600 regarding the kill zone, which the committee followed. The *Stone* opinion also found that a person who intends to kill may be guilty of attempted murder even if that person has no specific target in mind. As a result, the committee changed the directions for filling in the blank regarding the victim of the attempted murder. It now instructs to insert the "name *or description*" of the victim.

The committee revised CALCRIM No. 1600, *Robbery*, after the Supreme Court rendered its opinion in *People v. Scott* (2009) 45 Cal.4th 743, 752. The *Scott* case found that an employee on duty has constructive possession of the employer's property during a robbery.

In *People v. Beyah* (2009) 170 Cal.App.4th 1241, 1247–1249, the Court of Appeal invited the committee to clarify that CALCRIM No. 362, *Consciousness of Guilt: False*

Statements refers to a defendant's statements made *before* trial. Otherwise the jury might conclude the admonition was directed at a defendant's trial testimony. The committee clarified that point.

Alternative Actions Considered

Rule 2.1050 of the California Rules of Court requires that the advisory committee update, amend, and add topics to *CALCRIM* on a regular basis and submit its recommendations to the council for approval. The proposed new and revised instructions are necessary to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee did not consider any alternative actions.

Comments From Interested Parties

All revisions to the criminal jury instructions in the current proposal circulated for public comment between April 1 and May 8, 2009. The committee received comments on many of the proposed revisions, but there was no instruction or group of instructions that generated a particularly large number of comments. The committee evaluated all comments and made some changes to the instructions based on them. A chart summarizing the comments and committee responses is attached at pages 155–208. One instruction, CALCRIM No. 3477, *Presumption That Resident Was Reasonably Afraid*, was withdrawn from the release based on a public comment.

CALCRIM No. 2917, *Loitering: About School*, did draw a strong comment from a criminal defense attorney urging the council to "reject this dangerous proposal." The commentator asserted that Penal Code section 653b "clearly defines" a single crime requiring both loitering and remaining or returning after a request to leave. The commentator therefore stated that both elements 1A and 1B of CALCRIM No. 2917 are required for a conviction.[2]

The committee declined to follow that comment because the Ninth Circuit, in what appears to be the only case on point, reached the opposite conclusion in reviewing a state prisoner's habeas petition. In *McSherry v. Block* (9th Cir. 1989) 880 F.2d 1049, 1053–1058, the court considered Penal Code section 653b and its precursors at length and concluded no request to leave[3] was required for a loitering conviction.[4]

[2] The committee notes that giving both elements 1A and 1B is one of three possible options in the proposed revision of the instruction. A court may also choose to give element 1A only or element 1B only, in its discretion.

[3] I.e., the same language found in element 1B of the proposed revision to CALCRIM No. 2917.

[4] The Ninth Circuit analyzed the statute to determine whether the manner of its application to the petitioner had been foreseeable and hence not a violation of the due process clause of the United States Constitution. *McSherry v. Block* (9th Cir. 1989) 880 F.2d 1049, 1053.

Indeed, the commentator's interpretation of the statute "would [have] render[ed] free from penal liability the loiterer who is not discovered by school officials and asked to leave." (*Id.* at 1058.) Moreover, as the Appellate Department of the Superior Court below noted, requiring a request to leave would "provide a privileged sanctuary for those who come onto school grounds, or adjacent areas where children congregate, to reconnoiter for or 'case' prospective victims." (*Id.*)

While the *McSherry* case may not be binding, the committee found it persuasive. The committee therefore decided to flag the issue in the bench notes, with further instructions embedded in the instruction itself above elements 1A and 1B. The final decision on how to instruct is left in the trial court's discretion until courts of review provide further guidance.

Implementation Requirements and Costs

There are no significant implementation costs. Under the publication agreement, the official publisher, LexisNexis Matthew Bender, will make copies of its supplement to the 2009 edition available to all judicial officers free of charge in both print and HotDocs document assembly software. With respect to commercial publishers, the AOC will register the copyright in this work and will continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the AOC will provide a broad public license for their noncommercial use and reproduction.

CRIMINAL JURY INSTRUCTIONS
TABLE OF CONTENTS
Proposed New Drafts

107. Pro Per Defendant

(The defendant[s]/ _____<*insert name[s] of self-represented defendant[s]*>**) (has/have) the right to be represented by an attorney in this trial, as do all criminal defendants in this country. (He/She/They) (has/have) decided instead to exercise (his/her/their) constitutional right to act as (his/her/their) own attorney in this case. Do not allow that decision to affect your verdict.**

The court applies the rules of evidence and procedure to a (self-represented defendant/ _____<*insert name[s] of self-represented defendant[s]*>**).**

New [insert date of council approval]

BENCH NOTES

Instructional Duty

This instruction may be given on request.

AUTHORITY

- Basis for Right of Self-Representation ▸ Sixth Amendment, Constitution of the United States; *Faretta v. California* (1975) 422 U.S. 806.

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000), § 248.

209. Witness Identified as John or Jane Doe

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

New [Insert date of council approval]

BENCH NOTES

Instructional Duty

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

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

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

AUTHORITY

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

Secondary Sources

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

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

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

219. Reasonable Doubt in Civil Proceedings

The fact that a petition to declare respondent a sexually violent predator has been filed is not evidence that the petition is true. You must not be biased against the respondent just because the petition has been filed and this matter has been brought to trial. The Petitioner is required to prove the allegations of the petition are true beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the allegations of the petition are true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether the Petitioner has proved the allegations of the petition are true beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the Respondent _____<*insert what must be proved in this proceeding, e.g., "is a sexually violent predator"*>**beyond a reasonable doubt, you must find the petition is not true.**

New [insert date of council approval]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct jurors in civil proceedings relating to sexually violent predators and mentally disordered offenders in the reasonable doubt standard, but not in the presumption of innocence. *People v. Beeson* (2002) 99 Cal.App.4th 1393, 1401 et seq. That duty extends to not guilty by reason of insanity extended commitment (Pen. Code, § 1026.5(b)) and juvenile delinquency extended commitment (Welf. & Inst. Code, §§ 1800 et seq.) proceedings as well.

AUTHORITY

Instructional Requirements ▸ *People v. Beeson* (2002) 99 Cal.App.4th 1393, 1401 et seq.

Related Instruction

CALCRIM No. 220, *Reasonable Doubt.*
CALCRIM No. 3453, *Extension of Commitment.*

CALCRIM No. 3454, *Commitment as Sexually Violent Predator.*
CALCRIM No. 3456, *Initial Commitment of Mentally Disordered Offender As Condition of Parole*.
CALCRIM No. 3457, *Extension of Commitment as Mentally Disordered Offender.*
CALCRIM No. 3458, *Extension of Commitment to Division of Juvenile Facilities.*

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2008 supp.) Punishment, § 640A.

640. Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With First Degree Murder and Jury Is Given Not Guilty Forms for Each Level of Homicide

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[For each count charging murder~~)~~,] (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 or not guilty of _____ <*insert second degree murder or, if the jury is not instructed on second degree murder as a lesser included offense, each form of manslaughter, voluntary and/or involuntary, on which the jury is instructed*> **only if all of you have found the defendant not guilty of first degree murder, [and I can accept a verdict of guilty or not guilty of (voluntary/involuntary/voluntary or involuntary) manslaughter only if all of you have found the defendant not guilty of both first and second degree murder].**

[As with all of 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 form[s] to me, unsigned.]

1. **If all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of first degree murder, 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 first degree murder, inform me that you cannot reach an agreement and do not complete or sign any verdict forms [for that count].**

   <*In addition to paragraphs 1-2, give the following if the jury is instructed on second degree murder as a lesser included offense.*>

[3. If all of you agree that the defendant is not guilty of first degree murder but also agree that the defendant is guilty of second degree murder, complete and sign the form for not guilty of first

degree murder and the form for guilty of second degree murder. 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 first degree murder but cannot agree whether the defendant is guilty of second degree murder, complete and sign the form for not guilty of first degree murder 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 the jury is instructed on second degree murder as the only lesser included offense. >

[5. If all of you agree that the defendant is not guilty of first degree murder and not guilty of second degree murder, complete and sign the verdict forms for not guilty of both.] Do not complete or sign any other verdict forms [for that count].]

< In addition to paragraphs 1–4, give the following if the jury is instructed on second degree murder and only one form of manslaughter (voluntary or involuntary) as lesser included offenses. >

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

7. If all of you agree that the defendant is not guilty of first degree murder, not guilty of second degree murder, and not guilty of (voluntary/involuntary) manslaughter, complete and sign the

verdict forms for not guilty of each crime. Do not complete or sign any other verdict forms [for that count].]

<In addition to paragraphs 1–4, give the following if the jury is instructed on second degree murder and <u>both</u> voluntary and involuntary manslaughter as lesser included offenses.>

[5. If all of you agree that the defendant is not guilty of first degree murder and not guilty of second degree murder, complete and sign the forms for not guilty of first degree murder and not guilty of second degree murder.

6. If all of you agree on a verdict of guilty or not guilty of voluntary or involuntary manslaughter, complete and sign the appropriate verdict form for each charge on which you agree. You may not find the defendant guilty of both voluntary and involuntary manslaughter [as to any count]. Do not complete or sign any other verdict forms [for that count].

7. If you cannot reach agreement as to voluntary manslaughter or involuntary manslaughter, inform me of your disagreement. Do not complete or sign any verdict form for any charge on which you cannot reach agreement.]

<In addition to paragraphs 1-2, give the following if the jury is not instructed on second degree murder and the jury is instructed on <u>one</u> form of manslaughter (voluntary or involuntary) as the <u>only</u> lesser included offense.>

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

5. If all of you agree that the defendant is not guilty of first degree murder or (voluntary/involuntary) manslaughter, complete and sign the verdict forms for not guilty of each crime. Do not complete or sign any other verdict forms [for that count].]

<In addition to paragraphs 1-2, give the following if the jury is instructed on both voluntary and involuntary manslaughter, but not second degree murder, as lesser included offenses.>

[3. If all of you agree that the defendant is not guilty of first degree murder, complete and sign the form for not guilty of first degree murder.

4. If all of you agree on a verdict of guilty or not guilty of voluntary or involuntary manslaughter, complete and sign the appropriate verdict form for each charge on which you agree. You may not find the defendant guilty of both voluntary and involuntary manslaughter [as to any count]. Do not complete or sign any other verdict forms [for that count].

5. If you cannot reach agreement as to voluntary manslaughter or involuntary manslaughter, inform me of your disagreement. Do not complete or sign any verdict form for any charge on which you cannot reach agreement.]

New January 2006; Revised April 2008

BENCH NOTES

Instructional Duty

In all homicide cases in which the defendant is charged with first degree murder and 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, *Deliberations and Completion of Verdict Forms: For Use When Defendant is Charged With First Degree Murder and the Jury Is Given Only One Not Guilty Form for Each Count*. (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].) 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 to follow the procedure suggested in *Stone,* the court may give this instruction or CALCRIM No. 642, *Deliberations and Completion of Verdict Forms: For Use When Defendant is Charged With Second Degree Murder and Jury is Given Not Guilty Forms for Each Level of Homicide (Stone)*, in place of this instruction.

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.)

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].)

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].
- Involuntary Manslaughter Not a Lesser Included Offense of Voluntary Manslaughter ▸ *People v. Orr* (1994) 22 Cal.App.4th 780, 784-785 [27 Cal.Rptr.2d 553].

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 Completion of Verdict Forms: For Use When Defendant Is Charged With First Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count; Not To Be Used When Both Voluntary and Involuntary Manslaughter Are Lesser Included Offenses

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[For each count charging (murder/ manslaughter),] (Y/y)ou (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 first degree murder, 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 first degree murder, inform me only that you cannot reach an agreement and do not complete or sign any verdict forms [for that count].**

<In addition to paragraphs 1-2, give the following if the jury is instructed on second degree murder as a lesser included offense.>

3. **If all of you agree that the defendant is not guilty of first degree murder but also agree that the defendant is guilty of second degree murder, complete and sign the form for guilty of second degree murder. 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 first degree murder but cannot agree whether the defendant is guilty of second degree murder, inform me that you cannot reach agreement [on that count]. Do not complete or sign any verdict forms [for that count].]

<In addition to paragraphs 1–4, give the following if the jury is instructed on second degree murder as the only lesser included offense.>

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

< In addition to paragraphs 1–4, give the following if the jury is instructed on second degree murder and only one form of manslaughter (voluntary or involuntary) as lesser included offenses. >

[5. If all of you agree that the defendant is not guilty of first degree murder and not guilty of second degree murder, but also agree that the defendant is guilty of (voluntary/involuntary) manslaughter, complete and sign the form for guilty of (voluntary/involuntary) manslaughter. 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 second degree murder, but cannot agree whether the defendant is guilty of (voluntary/involuntary) manslaughter, inform me that you cannot reach agreement [on that count]. Do not complete or sign any verdict forms [for that count].

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

<In addition to paragraphs 1-2, give the following if the jury is not instructed on second degree murder and the jury is instructed on one form of manslaughter (voluntary of involuntary) as the only lesser included offense.>

[3. If all of you agree that the defendant is not guilty of first degree murder but also agree that the defendant is guilty of (voluntary/involuntary) manslaughter, complete and sign the form for guilty of (voluntary/involuntary) manslaughter. 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 first degree murder but cannot agree whether the defendant is guilty of (voluntary/involuntary) manslaughter, inform me that you cannot reach agreement [for that count]. Do not complete or sign any verdict forms [for that count].

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

*<If the jury is instructed on **both** voluntary and involuntary manslaughter as lesser included offenses, whether the jury is instructed on second degree murder or not, the court must give the jury guilty and not guilty verdict forms as to first degree murder and all lesser crimes, and instruct pursuant to CALCRIM 640. .>*

New January 2006; Revised April 2008

BENCH NOTES

Instructional Duty

In all homicide cases in which the defendant is charged with first degree murder and 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, *Deliberations and Completion of Verdict Forms: For Use When the Defendant is Charged With First Degree Murder and the Jury Is Given Not Guilty Forms for Each Level of Homicide*. (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].)

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 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.)

If the greatest offense charged is second degree murder, the court should give CALCRIM 643, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and the Jury Is Given Only One Not Guilty Form for Each Count* instead of this instruction.

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.)

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].)

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].
- Involuntary Manslaughter Not a Lesser Included Offense of Voluntary Manslaughter ▸ *People v. Orr* (1994) 22 Cal.App.4th 780, 784-785 [27 Cal.Rptr.2d 553].

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. Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Not Guilty Forms for Each Level of Homicide

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[For each count charging second degree murder,] (Y/y)ou (have been/will be) given verdict forms for guilty and not guilty of 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 or not guilty of [voluntary] [or] [involuntary] manslaughter only if all of you have found the defendant not guilty of second degree murder.

[As with all of 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 form[s] to me, unsigned.]

1. If all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of second degree murder, 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 second degree murder, inform me that you cannot reach an agreement and do not complete or sign any verdict forms [for that count].

<In addition to paragraphs 1–2, give the following if the jury is instructed on only <u>one</u> form of manslaughter (voluntary or involuntary) as a lesser included offense.>

[3. If all of you agree that the defendant is not guilty of second degree murder but also agree that the defendant is guilty of (voluntary/involuntary) manslaughter, complete and sign the form for not guilty of second degree murder and the form for guilty of (voluntary/involuntary)

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

5. If all of you agree that the defendant is not guilty of second degree murder and not guilty of (voluntary/involuntary) manslaughter, complete and sign the verdict forms for not guilty of both.]

<In addition to paragraphs 1–2, give the following if the jury is instructed on both voluntary and involuntary manslaughter as lesser included offenses.>

[3. If all of you agree that the defendant is not guilty of second degree murder, complete and sign the form for not guilty of second degree murder.

4. If all of you agree on a verdict of guilty or not guilty of voluntary manslaughter or involuntary manslaughter, complete and sign the appropriate verdict form for each charge on which you agree. Do not complete or sign any other verdict forms [for that count]. You may not find the defendant guilty of both voluntary and involuntary manslaughter [as to any count].

5. If you cannot reach agreement as to voluntary manslaughter or involuntary manslaughter, inform me of your disagreement. Do not complete or sign any verdict form for any charge on which you cannot reach agreement.]

New January 2006; Revised April 2008

BENCH NOTES

Instructional Duty

In all homicide cases in which second degree murder is the greatest offense charged and one or more lesser offense is submitted to the jury, the court has a **sua sponte** duty to give this 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].) 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. 643, *Deliberations and Completion of Verdict Forms: For Use When Defendant is Charged With Second Degree Murder and the Jury is Given Only One Not Guilty Verdict Form for Each Count (Homicide)* in place of this instruction.

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.)

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.)

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].
- Involuntary Manslaughter Not a Lesser Included Offense of Voluntary Manslaughter ▸ *People v. Orr* (1994) 22 Cal.App.4th 780, 784-785 [27 Cal.Rptr.2d 553].

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).

643. Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count; Not To Be Used When Both Voluntary and Involuntary Manslaughter Are Lesser Included Offenses

[For each count charging second degree murder),] (Y/y)ou (have been/will be) given verdict forms for guilty of second degree murder, guilty of (voluntary /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 (voluntary/involuntary) manslaughter only if all of you have found the defendant not guilty of second degree murder.

[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 second degree murder, 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 second degree murder, 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 second degree murder, but also agree that the defendant is guilty of (voluntary/involuntary) manslaughter, complete and sign the form for guilty of (voluntary/involuntary) manslaughter. 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 second degree murder and cannot agree whether the defendant is guilty**

of (voluntary/involuntary) manslaughter, inform me that you cannot reach agreement [on that count]. Do not complete or sign any other verdict forms [for that count].]

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

*<If the jury is instructed on **both** voluntary and involuntary manslaughter as lesser included offenses, this instruction may not be used. The court must give the jury guilty and not guilty verdict forms as to second degree murder and each form of manslaughter, and must instruct pursuant to CALCRIM 642..>*

New January 2006; Revised April 2008

BENCH NOTES

Instructional Duty

In all homicide cases in which the greatest offense charged is second degree murder and one or more lesser offense is submitted to the jury, the court has a **sua sponte** duty to give this instruction or CALCRIM No. 642, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Not Guilty Forms for Each Level of Homicide.* (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].)

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 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. 642 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.)

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.)

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].
- Involuntary Manslaughter Not a Lesser Included Offense of Voluntary Manslaughter ▸ *People v. Orr* (1994) 22 Cal.App.4th 780, 784-785 [27 Cal.Rptr.2d 553].

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).

644–699. Reserved for Future Use

1195. Contacting Minor with Intent to Commit Certain Felonies (Pen. Code, § 288.3(a))

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

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

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

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

AND

3. **The defendant knew or reasonably should have known that the person was a minor.**

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

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

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

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

New [insert date of council approval]

BENCH NOTES

Instructional Duty

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

.

The court has a **sua sponte** duty to define the elements of the underlying/target sex offense. (See *People v. Hughes* (2002) 27 Cal.4th 287, 349 [116 Cal.Rptr.2d 401, 39 P.3d 432 and *People v. May* (1989) 213 Cal.App.3d 128, 129 [261 Cal.Rptr. 502].)

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

AUTHORITY

- Elements and Enumerated Offenses ▸ Pen. Code, § 288.3(a).
- Calculating Age ▸ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849-850 [21 Cal.Rptr.2d 273, 855 P.2d 391].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2008 supp.) Chapter VI. Sex Offenses and Crimes Against Decency § 54B.

1196. Arranging Meeting with Minor for Lewd Purpose (Pen. Code, § 288.4(a)(1))

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

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

1. **The defendant arranged a meeting with (a minor / [or] a person (he/she) believed to be a minor);**

2. **When the defendant did so, (he/she) was motivated by an unnatural or abnormal sexual interest in children;**

[AND]

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

[AND

4. **When the defendant did so, (he/she) had a prior conviction for _____**<*insert description and code section for offense listed in subdivision (c) of Penal Code section 290*>**.]**

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

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

[*Lewd and lascivious behavior* includes any touching of a person with the intent to sexually arouse the perpetrator or the other person. The touching need not be done in a lewd or sexual manner. Lewd or lascivious behavior includes touching any part of the person's body, either on the bare skin or through the clothes the person is wearing. [A lewd or lascivious act includes causing someone to touch his or her own body or someone else's body at the instigation of the perpetrator who has the required intent.]]

New [insert date of council approval]

BENCH NOTES

Instructional Duty

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

The court has a sua sponte duty to instruct on the good faith belief that the victim was not a minor as a defense for certain sex crimes with minors, including statutory rape, when that defense is supported by evidence. Until courts of review clarify whether this defense is available in prosecutions for violations of Pen. Code, § 288.4(a)(1), the court will have to exercise its own discretion. Suitable language for such an instruction is found in CALCRIM No. 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older.*

AUTHORITY

- Elements and Enumerated Offenses ▸ Pen. Code, § 288.4.
- Lewd Defined ▸ See *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256-257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].
- Calculating Age ▸ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849-850 [21 Cal.Rptr.2d 273, 855 P.2d 391].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2008 supp.) Chapter VI. Sex Offenses and Crimes Against Decency § 54A.

1197. Going to Meeting with Minor for Lewd Purpose (Pen. Code, § 288.4(b))

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

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

1. **The defendant arranged a meeting with (a minor/ [or] a person (he/she) believed to be a minor);**

2. **When the defendant did so, (he/she) was motivated by an unnatural or abnormal sexual interest in children;**

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

AND

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

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

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

[*Lewd and lascivious behavior* includes any touching of a person with the intent to sexually arouse the perpetrator or the other person. The touching need not be done in a lewd or sexual manner. Lewd or lascivious behavior includes touching any part of the person's body, either on the bare skin or through the clothes the person is wearing. [A lewd or lascivious act includes causing someone to touch his or her own body or someone else's body at the instigation of the perpetrator who has the required intent.]]

New [insert date of council approval]

BENCH NOTES

Instructional Duty

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

The court has a sua sponte duty to instruct on the good faith belief that the victim was not a minor as a defense for certain sex crimes with minors, including statutory rape, when that defense is supported by evidence. Until courts of review clarify whether this defense is available in prosecutions for violations of Pen. Code, § 288.4(b), the court will have to exercise its own discretion. Suitable language for such an instruction is found in CALCRIM No. 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older.*

AUTHORITY

- Elements and Enumerated Offenses ▸ Pen. Code, § 288.4.
- Lewd Defined ▸ See *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256-257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].
- Calculating Age ▸ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849-850 [21 Cal.Rptr.2d 273, 855 P.2d 391].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2008 supp.) Chapter VI. Sex Offenses and Crimes Against Decency § 54A.

1198. Engaging in Sexual Intercourse or Sodomy with Child Ten Years of Age or Younger (Pen. Code, § 288.7(a))

The defendant is charged [in Count __] with engaging in (sexual intercourse/ [or] sodomy) with a child ten years of age or younger [in violation of Penal Code section 288.7(a)].

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

1. **The defendant engaged in an act of (sexual intercourse/ [or] sodomy) with _____** *<insert name of complaining witness>***;**

2. **When the defendant did so, _____** *<insert name of complaining witness>* **was ten years of age or younger;**

3. **At the time of the act, the defendant was at least 18 years old.**

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

[*Sodomy* is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.]]

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

New [insert date of council approval]

BENCH NOTES

Instructional Duty

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

AUTHORITY

- Elements ‣ Pen. Code, § 288.7(a).
- 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].
- Sodomy Defined ‣ Pen. Code, § 286(a); see *People v. Singh* (1923) 62 Cal.App. 450, 452 [217 P. 121] [ejaculation is not required].
- Calculating Age ‣ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849-850 [21 Cal.Rptr.2d 273, 855 P.2d 391].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2008 supp.) Chapter VI. Sex Offenses and Crimes Against Decency §§ 21, 27.

1199. Engaging in Oral Copulation or Sexual Penetration with Child Ten Years of Age or Younger (Pen. Code, § 288.7(b))

The defendant is charged [in Count __] with engaging in (oral copulation/ [or] sexual penetration) with a child ten years of age or younger [in violation of Penal Code section 288.7(b)].

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

1. **The defendant engaged in an act of (oral copulation/ [or] sexual penetration) with _____** <*insert name of complaining witness*>**;**

2. **When the defendant did so, _____** <*insert name of complaining witness*> **was ten years of age or younger;**

3. **At the time of the act, the defendant was at least 18 years old.**

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

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

[*Sexual penetration* means (penetration, however slight, of the genital or anal opening of the other person/ [or] causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, however slightly, his or her own genital or anal opening) for the purpose of sexual abuse, arousal, or gratification by any foreign object, substance, instrument, or device, or by any unknown object.]

[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]

[An *unknown object* includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object penetrated the opening.]

[A *foreign object, substance, instrument, or device* includes any part of the body except a sexual organ.]

New [insert date of council approval]

BENCH NOTES

Instructional Duty

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

AUTHORITY

- Elements ▸ Pen. Code, § 288.7(b).
- Sexual Penetration Defined ▸ Pen. Code, § 289(k)(1); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].
- Unknown Object Defined ▸ Pen. Code, § 289(k)(3).
- Foreign Object, Substance, Instrument, or Device Defined ▸ Pen. Code, § 289(k)(2); *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [a finger is a "foreign object"].
- Oral Copulation Defined ▸ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].
- Calculating Age ▸ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849-850 [21 Cal.Rptr.2d 273, 855 P.2d 391].
- Sexual Abuse Defined ▸ . *People v. White* (1986) 179 Cal.App.3d 193, 205-206 [224 Cal.Rptr. 467].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2008 supp.) Chapter VI. Sex Offenses and Crimes Against Decency §§ 33, 48.

1243. Human Trafficking (Pen. Code, § 236.1(a), (c))

The defendant is charged [in Count __] with human trafficking [in violation of Penal Code section 236.1].

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

1. **The defendant either deprived another person of personal liberty or violated that other person's personal liberty;**

[AND]

2. **When the defendant did so, (he/she) intended to (obtain forced labor or services/(commit/ [or] maintain) a [felony] violation of (_____ <*insert appropriate code section[s]*>);**

[AND

3. **When the defendant did so, the other person was under 18 years of age.]**

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

***Deprivation or violation of personal liberty*, as used here, includes substantial and sustained restriction of another's liberty accomplished through** _____<*insert terms that apply from statutory definition, i.e.: fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person*> **under circumstances in which the person receiving or perceiving the threat reasonably believes that it is likely that the person making the threat would carry it out.**

[*Forced labor or services,* as used here, means labor or services that are performed or provided by a person and are obtained or maintained through force, fraud, or coercion, or equivalent conduct that would reasonably overbear the will of the person.]

[*Duress* means a direct or implied threat of force, violence, danger, hardship, or retribution that is enough to cause a reasonable person of ordinary sensitivity to do [or submit to] something that he or she would not otherwise

do [or submit to]. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the other person and (his/her) relationship to the defendant.]

[*Duress* includes knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or immigration document of the victim.]

[*Violence* means using physical force that is greater than the force reasonably necessary to restrain someone.]

[*Menace* means a verbal or physical threat of harm[, including use of a deadly weapon]. The threat of harm may be express or implied.]

New [insert date of council approval]

BENCH NOTES

Instructional Duty

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

If necessary, insert the correct Penal Code section into the blank provided in element two and give the corresponding CALCRIM instruction.

Give bracketed element three if the defendant is charged with a violation of Pen. Code, § 236.1(c).

This instruction is based on the language of the statute effective January 1, 2006, and only applies to crimes committed on or after that date.

The court is not required to instruct sua sponte on the definition of "duress," "menace," or "violence" and Penal Code section 236.1 does not define these terms. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress]). Optional definitions are provided for the court to use at its discretion.

The definition of "duress" is based on *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071] in the context of lewd acts on a child, and *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]. In *People v. Leal, supra,* 33 Cal.4th at pp. 1004–1010, the court held that the statutory definition of "duress" contained in Penal Code sections 261 and 262 does not apply to the use of that term in any other statute.

AUTHORITY

- Elements and Definitions ▸ Pen. Code, §§ 236.1.
- Menace Defined [in context of false imprisonment] ▸ *People v. Matian* (1995) 35 Cal.App.4th 480, 484–486 [41 Cal.Rptr.2d 459].
- Violence Defined [in context of false imprisonment] ▸ *People v. Babich* (1993) 14 Cal.App.4th 801, 806 [18 Cal.Rptr.2d 60].
- Duress Defined [in context of lewd acts on child] ▸ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221].
- Calculating Age ▸ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849-850 [21 Cal.Rptr.2d 273, 855 P.2d 391].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (2008 Supp.) Crimes Against the Person, §§ 78A.

2041. Fraudulent Possession of Personal Identifying Information (Pen. Code, § 530.5(c)(1), (2) or (3))

The defendant is charged [in Count __] with the fraudulent possession of personal identifying information [with a prior conviction for the same offense][in violation of Penal Code section 530.5(c) ((1)/(2)/(3))].

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

1. **The defendant acquired or kept the personal identifying information of (another person/ten or more other persons);**

[AND]

2. **The defendant did so with the intent to defraud another person(;/.)**

<Give paragraph 3 if defendant is charged with having a prior conviction and has not stipulated to that conviction.>
[AND

3. **The defendant has a prior conviction for _____*<insert prior conviction suffered pursuant to Penal Code section 530.5>*.]**

A person intends to *defraud* if he or she intends to deceive another person in order to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,] [or] something [else] of value), or to cause damage to a legal, financial, or property right.

***Personal identifying information* includes a person's (name [;]/ [and] address[;]/ [and] telephone number[;]/ [and] health insurance identification number[;]/ [and] taxpayer identification number[;]/ [and] school identification number[;]/ [and] state or federal driver's license number or identification number[;]/ [and] social security number[;]/ [and] place of employment[;]/ [and] employee identification number[;]/ [and] mother's maiden name[;]/ [and] demand deposit account number[;]/ [and] savings account number[;]/ [and] checking account number[;]/ [and] PIN (personal identification number) or password[;]/ [and] alien registration number[;]/ [and] government passport number[;]/ [and] date of birth[;]/ [and] unique biometric data such as fingerprints, facial-scan identifiers, voice print, retina or iris image, or other unique physical representation[;]/ [and] unique**

electronic data such as identification number, address, or routing code, telecommunication identifying information or access device[;]/ [and] information contained in a birth or death certificate[;]/ and credit card number) or an equivalent form of identification.

[As used here, the term "person" means a human being, whether living or dead, or a firm, association, organization, partnership, business trust, company, corporation, limited liability company, public entity or any other legal entity.]

It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.

New [insert council approval date]

BENCH NOTES

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

Give the bracketed sentence that begins with "As used here" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

In the definition of personal identifying information, give the relevant items based on the evidence presented.

AUTHORITY

- Elements ▸ Pen. Code, § 530.5(c).
- Personal Identifying Information Defined ▸ Pen. Code, § 530.55(b).
- Person Defined ▸ Pen. Code, § 530.55(a).
- Intent to Defraud—Defined ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity ▸ Pen. Code, § 8.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (2008 Supp.) Crimes Against Property, § 209A.

2042. Fraudulent Sale, Transfer or Conveyance of Personal Identifying Information (Pen. Code, § 530.5(d)(1))

The defendant is charged [in Count __] with the fraudulent (sale/ [or] transfer/ [or] conveyance) of personal identifying information [in violation of Penal Code section 530.5(d)(1)].

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

1. **The defendant (sold/ [or] transferred/ [or] conveyed) the personal identifying information of another person;**

AND

2. **The defendant did so with the intent to defraud.**

A person intends to *defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,] [or] something [else] of value), or to cause damage to a legal, financial, or property right.

***Personal identifying information* includes a person's (name [;]/ [and] address[;]/ [and] telephone number[;]/ [and] health insurance identification number[;]/ [and] taxpayer identification number[;]/ [and] school identification number[;]/ [and] state or federal driver's license number or identification number[;]/ [and] social security number[;]/ [and] place of employment[;]/ [and] employee identification number[;]/ [and] mother's maiden name[;]/ [and] demand deposit account number[;]/ [and] savings account number[;]/ [and] checking account number[;]/ [and] PIN (personal identification number) or password[;]/ [and] alien registration number[;]/ [and] government passport number[;]/ [and] date of birth[;]/ [and] unique biometric data such as fingerprints, facial-scan identifiers, voice print, retina or iris image, or other unique physical representation[;]/ [and] unique electronic data such as identification number, address, or routing code, telecommunication identifying information or access device[;]/ [and] information contained in a birth or death certificate[;]/ and credit card number) or an equivalent form of identification.**

[As used here, the term "person" means a human being, whether living or dead, or a firm, association, organization, partnership, business trust,

company, corporation, limited liability company, public entity or any other legal entity.]

It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.

New [insert council approval date]

BENCH NOTES

Instructional Duty

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

Give the bracketed sentence that begins with "As used here" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

In the definition of personal identifying information, give the relevant items based on the evidence presented.

AUTHORITY

- Elements ▸ Pen. Code, § 530.5(d).
- Personal Identifying Information Defined ▸ Pen. Code, § 530.55(b).
- Person Defined ▸ Pen. Code, § 530.55(a).
- Intent to Defraud—Defined ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity ▸ Pen. Code, § 8.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (2008 Supp.) Crimes Against Property, § 209A.

2043. Knowing Sale, Transfer, or Conveyance of Personal Identifying Information to Facilitate Its Unauthorized Use (Pen. Code, § 530.5(d)(2))

The defendant is charged [in Count __] with the knowing (sale/ [or] transfer [or] conveyance) of personal identifying information [in violation of Penal Code section 530.5(d)(2)].

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

1. **The defendant (sold/ [or] transferred/ [or] conveyed) the personal identifying information of (a specific person/ _____**<*insert name of victim*>**;**

AND

2. **When the defendant did so, (he/she) knew that the personal identifying information would be used to obtain or attempt to obtain (credit/ [or] goods/ [or] services/ [or] real property/ [or] medical information) [[or]** _____*insert other unlawful purpose>* **]~~]~~ without the consent of that specific person.**

Personal identifying information **includes a person's (name [;]/ [and] address[;]/ [and] telephone number[;]/ [and] health insurance identification number[;]/ [and] taxpayer identification number[;]/ [and] school identification number[;]/ [and] state or federal driver's license number or identification number[;]/ [and] social security number[;]/ [and] place of employment[;]/ [and] employee identification number[;]/ [and] mother's maiden name[;]/ [and] demand deposit account number[;]/ [and] savings account number[;]/ [and] checking account number[;]/ [and] PIN (personal identification number) or password[;]/ [and] alien registration number[;]/ [and] government passport number[;]/ [and] date of birth[;]/ [and] unique biometric data such as fingerprints, facial-scan identifiers, voice print, retina or iris image, or other unique physical representation[;]/ [and] unique electronic data such as identification number, address, or routing code, telecommunication identifying information or access device[;]/ [and] information contained in a birth or death certificate[;]/ and credit card number) or an equivalent form of identification.**

[As used here, the term "person" means a human being, whether living or dead, or a firm, association, organization, partnership, business trust, company, corporation, limited liability company, public entity or any other legal entity.]

New [insert council approval date]

BENCH NOTES

Instructional Duty

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

~~Give CALCRIM No. 2040, Unauthorized Use of Personal Identifying Information, with this instruction unless it is being given for another charge.~~

Give the bracketed sentence that begins with "As used here" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

In the definition of personal identifying information, give the relevant items based on the evidence presented.

The definition of unlawful purpose is not limited to acquiring information for financial motives, and may include any unlawful purpose for which the defendant may have acquired the personal identifying information, such as using the information to facilitate violation of a restraining order. (*See, e.g., People v. Tillotson* (2007) 157 Cal. App. 4th 517, 533.)

AUTHORITY

- Elements ▸ Pen. Code, § 530.5(d)(2).
- Personal Identifying Information Defined ▸ Pen. Code, § 530.55(b).
- Person Defined ▸ Pen. Code, § 530.55(~~g~~a).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (2008 Supp.) Crimes Against Property, § 209A.

2997. Money Laundering (Pen. Code, § 186.10)

The defendant is charged [in Count __] with money laundering [in violation of Penal Code section 186.10].

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

1. **The defendant (conducted/ [or] attempted to conduct) one or more financial transactions involving at least one monetary instrument through at least one financial institution;**

   <Give 2A when only one transaction is alleged. >

   [2A. The financial transaction involved [a] monetary instrument[s] with a total value of more than $5,000;]

   <Give 2B and/or 2C as appropriate when multiple transactions are alleged.>

   [2B. The defendant (conducted/ [or] attempted to conduct) the financial transactions within a seven-day period and the monetary instrument[s] involved had a total value of more than $5,000;]

   [OR]

   [2C. The defendant (conducted/ [or] attempted to conduct) the financial transactions within a 30-day period and the monetary instrument[s] involved had a total value of more than $25,000;]

   [AND]

   <Give 3A, 3B or both, as appropriate>
   [3A. When the defendant did so, (he/she) intended to (promote/ [or] manage/ [or] establish/ [or] carry on/ [or] facilitate) criminal activity;]

   [OR]

[3B. The defendant knew that the monetary instrument[s] represented the proceeds of criminal activity or (was/were) derived directly or indirectly from the proceeds of criminal activity(;/.)]

[AND]

<Give element 4 as appropriate if the defendant is an attorney>

[4. The attorney defendant accepted a fee for representing a client in a criminal investigation or proceeding and accepted the monetary instrument with the intent to disguise or aid in disguising the source of the funds or the nature of the criminal activity.]

[AND

(4./5.) The [total] value of the [attempted] transaction[s] was more than _____<*inserted alleged minimum value*> **but less than _____**<*insert alleged top limit*>**.]**

Conducting **includes, but is not limited to, initiating, participating in, or concluding a transaction.**

Financial institution **means (any national bank or banking institution/ _____**<*insert appropriate entity from Pen. Code, §§ 186.9(b)*>) **located or doing business in the state of California.**

A *transaction* includes the (deposit/ [or] withdrawal/ [or] transfer/ [or] bailment/ [or] loan/ [or] pledge/ [or] payment/ [or] exchange) of (currency/ [or] a monetary instrument/ [or] the electronic, wire, magnetic, or manual transfer) of funds between accounts by, through, or to, a financial institution.

A *monetary instrument* means (money of the United States of America/ [or] _____<*insert appropriate item from Pen. Code, §§ 186.9(d)*>**.**

Criminal activity **means a (criminal offense punishable under the laws of the state of California by [death or] imprisonment in the state prison/ [or] a criminal offense committed in another jurisdiction under the laws of that jurisdiction punishable by death or imprisonment for a term exceeding one year).**

[*Foreign bank draft* means a bank draft or check issued or made out by a foreign (bank/ [or] savings and loan/ [or] casa de cambio/ [or] credit union/ [or] currency dealer or exchanger/ [or] check cashing business/ [or] money transmitter/ [or] insurance company/ [or] investment or private bank) [or any other foreign financial institution that provides similar financial services,] on an account in the name of the foreign bank or foreign financial institution held at a bank or other financial institution located in the United States or a territory of the United States.]

New [insert date of council approval]

BENCH NOTES

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

If the definition of proceeds is an issue, see *United States v. Santos* (2008) __U.S. __, 128 S.Ct. 2020, 2022, 170 L.Ed.2d 912, holding that "proceeds" in the federal money laundering statute means "profits" in the context of an illegal gambling scheme.

AUTHORITY

- Elements ▸ Pen. Code, § 186.10; *People v. Mays* (2007) 148 Cal.App.4th 13, 29.
- Definitions ▸ Pen. Code, §§ 186.9.
- Definition of Proceeds ▸ *United States v. Santos* (2008) __U.S. __, 128 S.Ct. 2020, 2022, 170 L.Ed.2d 912.

Secondary Sources
2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 155.

2998–3099. Reserved for Future Use

CRIMINAL JURY INSTRUCTIONS
TABLE OF CONTENTS
Proposed Revisions to Existing Instructions

Instruction Number	Instruction Title
3220	Amount of Loss
3410	Statute of Limitations
3454	Commitment as Sexually Violent Predator
3470	Right to Self-Defense or Defense of Another (Non-Homicide)

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~~ record be read to you. You must accept the court reporter's ~~notes~~ record as accurate.

New January 2006; Revised April 2008

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].
- This Instruction Upheld ▸ *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1183 [67 Cal.Rptr.3d 871].

Secondary Sources

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

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. You must accept the court reporter's record as accurate.

Please do not remove your notes from the jury room.

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

New January 2006; Revised June 2007, April 2008

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).

222. Evidence

You must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom [or during a jury view]. "Evidence" is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence.

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

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

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

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

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

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

There is no sua sponte duty to instruct on these evidentiary topics; however, instruction on these topics has been approved. (*People v. Barajas* (1983) 145 Cal.App.3d 804, 809 [193 Cal.Rptr. 750]; *People v. Samayoa* (1997) 15 Cal.4th 795, 843–844 [64 Cal.Rptr.2d 400, 938 P.2d 2]; *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [47 Cal.Rptr.2d 516, 906 P.2d 478].)

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

AUTHORITY

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

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000), §§ 636, 643.

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

RELATED ISSUES

Non-Testifying Courtroom Conduct

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

362. Consciousness of Guilt: False Statements

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

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

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on consciousness of guilt when there is evidence that the defendant intentionally made a false statement from which such an inference could be drawn. (*People v. Atwood* (1963) 223 Cal.App.2d 316, 333–334 [35 Cal.Rptr. 831]; see also *People v. Edwards* (1992) 8 Cal.App.4th 1092, 1103–1104 [10 Cal.Rptr.2d 821] [approving instruction on this point].)

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

AUTHORITY

- Instructional Requirements ▸ *People v. Atwood* (1963) 223 Cal.App.2d 316, 333 [35 Cal.Rptr. 831]; see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 102–103 [17 Cal.Rptr.3d 710, 96 P.3d 30].

Secondary Sources

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

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.13[1], Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][c] (Matthew Bender).

COMMENTARY

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

RELATED ISSUES

Evidence

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

Un-Mirandized Voluntary Statement

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

363–369. Reserved for Future Use

520. Murder With Malice Aforethought (Pen. Code, § 187)

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

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

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

[AND]

2. **When the defendant acted, (he/she) had a state of mind called malice aforethought(;/.)**

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

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

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

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

The defendant acted with *implied malice* if:

1. **(He/She) intentionally committed an act;**

2. **The natural and probable consequences of the act were dangerous to human life;**

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

AND

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

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

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

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

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

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

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

If you conclude that the defendant owed a duty to _____ <*insert name of decedent*>**, and the defendant failed to perform that duty, (his/her) failure to act is the same as doing a negligent or injurious act.]**

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the first two elements of the crime. If there is sufficient evidence of excuse or justification, the court has a **sua sponte**

duty to include the third, bracketed element in the instruction. (*People v. Frye* (1992) 7 Cal.App.4th 1148, 1155–1156 [10 Cal.Rptr.2d 217].) The court also has a **sua sponte** duty to give any other appropriate defense instructions. (See CALCRIM Nos. 505–627, and CALCRIM Nos. 3470–3477.)

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

If the prosecution's theory of the case is that the defendant committed murder based on his or her failure to perform a legal duty, the court may give the bracketed portion that begins, "(A/An) _____<*insert description of person owing duty*> has a legal duty to." Review the Bench Notes to CALCRIM No. 582, *Involuntary Manslaughter: Failure to Perform Legal Duty—Murder Not Charged*.

Related Instructions

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

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

If there is an issue regarding a superseding or intervening cause, give the appropriate portion of CALCRIM No. 620, *Causation: Special Issues*.

AUTHORITY

- Elements ▸ Pen. Code, § 187.
- Malice ▸ Pen. Code, § 188; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1217–1222 [264 Cal.Rptr. 841, 783 P.2d 200]; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103–105 [13 Cal.Rptr.2d 864, 840 P.2d 969]; *People v. Blakeley* (2000) 23 Cal.4th 82, 87 [96 Cal.Rptr.2d 451, 999 P.2d 675].
- Causation ▸ *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274].

- Fetus Defined ▸ *People v. Davis* (1994) 7 Cal.4th 797, 814–815 [30 Cal.Rptr.2d 50, 872 P.2d 591]; *People v. Taylor* (2004) 32 Cal.4th 863, 867 [11 Cal.Rptr.3d 510, 86 P.3d 881].
- Ill Will Not Required for Malice ▸ *People v. Sedeno* (1974) 10 Cal.3d 703, 722 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Breverman* (1998) 19 Cal.4th 142, 163 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- This Instruction Affirmed ▸ *People v. Genovese* (2008) 168 Cal.App.4th 817 [85 Cal.Rptr.3d 664].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 91–97.

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

LESSER INCLUDED OFFENSES

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

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

RELATED ISSUES

Causation—Foreseeability

Authority is divided on whether a causation instruction should include the concept of foreseeability. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 362–363 [43 Cal.Rptr.2d 135]; *People v. Temple* (1993) 19 Cal.App.4th 1750, 1756 [24 Cal.Rptr.2d 228] [refusing defense-requested instruction on foreseeability in favor

of standard causation instruction]; but see *People v. Gardner* (1995) 37 Cal.App.4th 473, 483 [43 Cal.Rptr.2d 603] [suggesting the following language be used in a causation instruction: "[t]he death of another person must be foreseeable in order to be the natural and probable consequence of the defendant's act"].) It is clear, however, that it is error to instruct a jury that foreseeability is immaterial to causation. (*People v. Roberts* (1992) 2 Cal.4th 271, 315 [6 Cal.Rptr.2d 276, 826 P.2d 274] [error to instruct a jury that when deciding causation it "[w]as immaterial that the defendant could not reasonably have foreseen the harmful result"].)

Second Degree Murder of a Fetus

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

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

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

To prove this allegation the People must prove that:

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

[AND]

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

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

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

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

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

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

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

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

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

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

OR

3. **Fires the weapon.]**

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

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

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

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

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

New January 2006

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (See *People v. Marshall* (2000) 83 Cal.App.4th 186,

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

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

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

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

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

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

The court may give the bracketed sentence that begins, "The duties of a _____ <*insert title . . . .*> include," on request. The court may insert a description of the officer's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

AUTHORITY

- Second Degree Murder of a Peace Officer ▸ Pen. Code, § 190(b) & (c).
- Personally Used Deadly Weapon ▸ Pen. Code, § 12022.
- Personally Used Firearm ▸ Pen. Code, § 12022.5.
- Personal Use ▸ Pen. Code, § 1203.06(b)(2).

Secondary Sources

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

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

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

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

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

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

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

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

AND

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

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

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

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

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

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

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

New January 2006; Revised December 2008

BENCH NOTES

Instructional Duty

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

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

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

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

Related Instructions

CALCRIM Nos. 3470–3477, Defense Instructions.

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

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

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

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

AUTHORITY

- Attempt Defined ▸ Pen. Code, §§ 21a, 663, 664.
- Murder Defined ▸ Pen. Code, § 187.
- Specific Intent to Kill Required ▸ *People v. Guerra* (1985) 40 Cal.3d 377, 386 [220 Cal.Rptr. 374, 708 P.2d 1252].
- Fetus Defined ▸ *People v. Davis* (1994) 7 Cal.4th 797, 814–815 [30 Cal.Rptr.2d 50, 872 P.2d 591]; *People v. Taylor* (2004) 32 Cal.4th 863, 867 [11 Cal.Rptr.3d 510, 86 P.3d 881].
- Kill Zone Explained ▸ *People v. Stone* (2009) 46 Cal.4th 131 [92 Cal.Rptr.3d 362, 205 P.3d 272]. ~~___ Cal.4th ___, 2009 WL 1080442 (Cal.).~~
- Killer Need Not Be Aware of Other Victims in Kill Zone ▸ *People v. Adams* (2008) 169 Cal.App.4th 1009, 1023 [86 Cal.Rptr.3d 915].

Secondary Sources

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

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

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Specific Intent Required

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

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

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

Solicitation

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

Single Bullet, Two Victims

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

No Attempted Involuntary Manslaughter

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

Transferred and Concurrent Intent

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

603. Attempted Voluntary Manslaughter: Heat of Passion—Lesser Included Offense (Pen. Code §§ 21a, 192, 664)

An attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter if the defendant attempted to kill someone because of a sudden quarrel or in the heat of passion.

The defendant attempted to kill someone because of a sudden quarrel or in the heat of passion if:

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

2. **The defendant intended to kill that person;**

3. **The defendant attempted the killing because (he/she) was provoked;**

4. **The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment;**

AND

5. **The attempted killing was a rash act done under the influence of intense emotion that obscured the defendant's reasoning or judgment.**

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

In order for heat of passion to reduce an attempted murder to attempted voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

It is not enough that the defendant simply was provoked. The defendant is not allowed to set up (his/her) own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of

average disposition would have been provoked and how such a person would react in the same situation knowing the same facts.

[If enough time passed between the provocation and the attempted killing for a person of average disposition to "cool off" and regain his or her clear reasoning and judgment, then the attempted murder is not reduced to attempted voluntary manslaughter on this basis.]

The People have the burden of proving beyond a reasonable doubt that the defendant did not attempt to kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of attempted ~~voluntary manslaughter~~ murder.

New January 2006

BENCH NOTES

Instructional Duty

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

Related Instructions

CALCRIM No. 511, *Excusable Homicide: Accident in the Heat of Passion*.

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

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

AUTHORITY

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

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 208.

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

RELATED ISSUES

Specific Intent to Kill Required

> An attempt to commit a crime requires an intention to commit the crime and an overt act towards its completion. Where a person intends to kill another person and makes an unsuccessful attempt to do so, his intention may be accompanied by any of the aggravating or mitigating circumstances which can accompany the completed crimes. In other words, the intent to kill may have been formed after premeditation or deliberation, it may have been formed upon a sudden explosion of violence, or it may have been brought about by a heat of passion or an unreasonable but good faith belief in the necessity of self-defense.

(*People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824 [217 Cal.Rptr. 581] [citation omitted].)

No Attempted Involuntary Manslaughter

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

See the Related Issues section to CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion—Lesser Included Offense*.

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

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

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

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

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

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

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

AND

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

BUT

5. **The defendant's beliefs were unreasonable.**

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

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

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

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

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

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

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

New January 2006

BENCH NOTES

Instructional Duty

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

Perfect Self-Defense

Most courts hold that an instruction on imperfect self-defense **is required** in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant's belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. (See *People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86 [31 Cal.Rptr.2d 475], overruled in part in *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675]; see also *People v. De Leon* (1992) 10 Cal.App.4th 815, 824 [12 Cal.Rptr.2d 825].) The court in *People v. Rodriguez* disagreed, however, and found that an imperfect self-

defense instruction was not required sua sponte on the facts of the case where the defendant's version of the crime "could only lead to an acquittal based on justifiable homicide," and when the prosecutor's version of the crime could only lead to a conviction of first degree murder. (*People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1275 [62 Cal.Rptr.2d 345]; see also *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961] [in a rape prosecution, the court was not required to give a mistake-of-fact instruction where the two sides gave wholly divergent accounts with no middle ground to support a mistake-of-fact instruction].)

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

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

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

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

AUTHORITY

- Attempt Defined ▸ Pen. Code, §§ 21a, 664.
- Manslaughter Defined ▸ Pen. Code, § 192.
- Attempted Voluntary Manslaughter ▸ *People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824–825 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].
- Imperfect Self-Defense Defined ▸ *People v. Flannel* (1979) 25 Cal.3d 668, 680–683 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531]; *In re Christian S.* (1994) 7 Cal.4th 768, 773 [30 Cal.Rptr.2d 33, 872 P.2d 574]; see *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197–198 [272 Cal.Rptr. 693] [insufficient evidence to support defense of another person].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 208.

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

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

RELATED ISSUES

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

605–619. Reserved for Future Use

823. Child Abuse (Misdemeanor) (Pen. Code, § 273a(b))

The defendant is charged [in Count __] with child abuse [in violation of Penal Code section 273a(b)].

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

<Alternative 1A—inflicted pain>
[1. The defendant willfully inflicted unjustifiable physical pain or mental suffering on a child;]

<Alternative 1B—caused or permitted to suffer pain>
[1. The defendant willfully caused or permitted a child to suffer unjustifiable physical pain or mental suffering [;]

<Alternative 1C—while having custody, caused or permitted to suffer injury>
[1. The defendant, while having care or custody of a child, willfully caused or permitted the child's person or health to be injured;]

<Alternative 1D—while having custody, caused or permitted to be placed in danger>
[1. The defendant, while having care or custody of a child, willfully caused or permitted the child to be placed in a situation where the child's person or health might have been endangered;]

<Give element 2 when giving alternative 1B, 1C, or 1D.>
[AND]

[2. The defendant was criminally negligent when (he/she) caused or permitted the child to (suffer[,]/ [or] be injured[,]/ [or] be endangered)(;/.)]

<Give element 2/3 when instructing on parental right to discipline.>
[AND

(2/3). The defendant did not act while reasonably disciplining a child.]

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

A *child* is any person under the age of 18 years.

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

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

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

~~1.~~1. He or she acts in a reckless way that is a gross departure from the way an ordinarily careful person would act in the same situation;~~creates a high risk of death or great bodily harm;~~

~~AND~~
2. The person's acts amount to disregard for human life or indifference to the consequences of his or her acts;

AND

~~2.~~3. A reasonable person would have known that acting in that way would naturally and probably result in harm to others.~~create such a risk.~~

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

New January 2006; Revised August 2006

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense of disciplining a child. (*People v. Whitehurst* (1992) 9 Cal.App.4th 1045,

1049 [12 Cal.Rptr.2d 33].) Give bracketed element 2/3 and CALCRIM No. 3405, *Parental Right to Punish a Child*.

Give alternative 1A if it is alleged that the defendant directly inflicted unjustifiable physical pain or mental suffering. Give alternative 1B if it is alleged that the defendant caused or permitted a child to suffer. If it is alleged that the defendant had care or custody of a child and caused or permitted the child's person or health to be injured, give alternative 1C. Finally, give alternative 1D if it is alleged that the defendant had care or custody of a child and endangered the child's person or health. (See Pen. Code, § 273a(b).)

Give bracketed element 2 and the bracketed definition of "criminal negligence" if alternative 1B, 1C, or 1D is given alleging that the defendant committed any indirect acts. (See *People v. Valdez* (2002) 27 Cal.4th 778, 788–789 [118 Cal.Rptr.2d 3, 42 P.3d 511]; *People v. Peabody* (1975) 46 Cal.App.3d 43, 48–49 [119 Cal.Rptr. 780].)

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

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

AUTHORITY

- Elements ▸ Pen. Code, § 273a(b); *People v. Burton* (2006) 143 Cal.App.4th 447, 453-457 [49 Cal.Rptr.3d 334]; *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519]; *People v. Smith* (1984) 35 Cal.3d 798, 806 [201 Cal.Rptr. 311, 678 P.2d 886].
- Child Defined ▸ See Fam. Code, § 6500; *People v. Thomas* (1976) 65 Cal.App.3d 854, 857–858 [135 Cal.Rptr. 644] [in context of Pen. Code, § 273d].
- Willfully Defined ▸ Pen. Code, § 7(1); see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402]; *People v. Vargas* (1988) 204 Cal.App.3d 1455, 1462, 1468–1469 [251 Cal.Rptr. 904].
- Criminal Negligence Required for Indirect Conduct ▸ *People v. Valdez* (2002) 27 Cal.4th 778, 788–789 [118 Cal.Rptr.2d 3, 42 P.3d 511]; *People v. Peabody* (1975) 46 Cal.App.3d 43, 47, 48–49 [119 Cal.Rptr. 780]; see *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926] [criminal negligence for

homicide]; *Walker v. Superior Court* (1988) 47 Cal.3d 112, 135 [253 Cal.Rptr.1, 763 P.2d 852].

- General Criminal Intent Required for Direct Infliction of Pain or Suffering ▸ *People v. Sargent* (1999) 19 Cal.4th 1206, 1224 [81 Cal.Rptr.2d 835, 970 P.2d 409]; see *People v. Atkins* (1975) 53 Cal.App.3d 348, 358 [125 Cal.Rptr. 855]; *People v. Wright* (1976) 60 Cal.App.3d 6, 14 [131 Cal.Rptr. 311].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 159–165.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.13[1], 142.23[7] (Matthew Bender).

COMMENTARY

See Commentary to CALCRIM No. 821, *Child Abuse Likely to Produce Great Bodily Harm or Death*.

RELATED ISSUES

See the Related Issues section of CALCRIM No. 821, *Child Abuse Likely to Produce Great Bodily Harm or Death*.

824–829. Reserved for Future Use

861. Assault on Firefighter or Peace Officer With Stun Gun or Less Lethal Weapon~~Taser®~~ (Pen. Code, §§ 240, 244.5(c))

The defendant is charged [in Count __] with assault with a (stun gun/ [or] ~~Taser®~~less lethal weapon) on a (firefighter/peace officer) [in violation of Penal Code section 244.5(c)].

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

1. **The defendant did an act with a (stun gun/[or] ~~Taser®~~less lethal weapon) that by its nature would directly and probably result in the application of force to a person;**

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

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

4. **When the defendant acted, (he/she) had the present ability to apply force with a (stun gun/[or] ~~Taser®~~less lethal weapon) to a person;**

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

[AND]

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

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

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

[A *stun gun* is anything, except a ~~Taser®~~less lethal weapon, that is used or intended to be used as either an offensive or defensive weapon and is capable of temporarily immobilizing someone by inflicting an electrical charge.]

[A _____ is a less lethal weapon.]

[_____ is less lethal ammunition.]

[A *less lethal weapon* is any device that is either designed to or that has been converted to expel or propel less lethal ammunition by any action, mechanism, or process for the purpose of incapacitating, immobilizing, or stunning a human being through the infliction of any less than lethal impairment of physical condition, function, or senses, including physical pain or discomfort. It is not necessary that the weapon leave any lasting or permanent incapacitation, discomfort, pain, or other injury or disability in order to qualify as a *less lethal weapon*.]

[*Less lethal ammunition* is any ammunition that is designed to be used in any less lethal weapon or any other kind of weapon, including, but not limited to, firearms, pistols, revolvers, shotguns, rifles, and spring, compressed air, and compressed gas weapons. When used in a less lethal weapon or other weapon, *less lethal ammunition* is designed to immobilize or incapacitate or stun a human being by inflicting less than lethal impairment of physical condition, function, or senses, including physical pain or discomfort.]

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

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

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

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

New January 2006

BENCH NOTES

Instructional Duty

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

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

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

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

The court may give the bracketed sentence that begins, "The duties of a _____ <*insert title . . . .*> include," on request. The court may insert a description of the officer's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

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

AUTHORITY

- Elements ▸ Pen. Code, §§ 240, 244.5.
- Firefighter Defined ▸ Pen. Code, § 245.1.
- Peace Officer Defined ▸ Pen. Code, § 830 et seq.

- Willful Defined ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault ▸ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Less Lethal Weapon and Less Lethal Ammunition Defined ▸ Pen. Code, § 12601.
- ~~Taser Described ▸ See *People v. Heffner* (1977) 70 Cal.App.3d 643, 647 [139 Cal.Rptr. 45].~~

Secondary Sources

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

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

LESSER INCLUDED OFFENSES

- Assault ▸ Pen. Code, § 240.

876. Assault With Stun Gun or ~~Taser®~~Less Lethal Weapon (Pen. Code, §§ 240, 244.5(b))

The defendant is charged [in Count __] with assault with a (stun gun/[or] ~~Taser®~~less lethal weapon) [in violation of Penal Code section 244.5(b)].

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

1. **The defendant did an act with a (stun gun/[or] less lethal weapon~~Taser®~~) that by its nature would directly and probably result in the application of force to a person;**

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

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

[AND]

4. **When the defendant acted, (he/she) had the present ability to apply force with a (stun gun/[or] less lethal weapon~~Taser®~~) to a person(;/.)**

<Give element 5 when instructing on self-defense or defense of another>
[AND

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

[A stun gun is anything, except a less lethal weapon~~Taser®~~, that is used or intended to be used as either an offensive or defensive weapon and is capable of temporarily immobilizing someone by inflicting an electrical charge.]

[A *less lethal weapon* is any device that is either designed to or that has been converted to expel or propel less lethal ammunition by any action, mechanism, or process for the purpose of incapacitating, immobilizing, or stunning a human being through the infliction of any less than lethal

impairment of physical condition, function, or senses, including physical pain or discomfort. It is not necessary that the weapon leave any lasting or permanent incapacitation, discomfort, pain, or other injury or disability in order to qualify as a *less lethal weapon*.]

[*Less lethal ammunition* is any ammunition that is designed to be used in any less lethal weapon or any other kind of weapon, including, but not limited to, firearms, pistols, revolvers, shotguns, rifles, and spring, compressed air, and compressed gas weapons. When used in a less lethal weapon or other weapon, *less lethal ammunition* is designed to immobilize or incapacitate or stun a human being by inflicting less than lethal impairment of physical condition, function, or senses, including physical pain or discomfort.]

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

New January 2006

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 5 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

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

AUTHORITY

- Elements ▸ Pen. Code, §§ 240, 244.5.
- Willful Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Mental State for Assault ▸ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Less Lethal Weapon and Less Lethal Ammunition Defined ▸ Pen. Code, § 12601.

~~Taser® Described ▸ See *People v. Heffner* (1977) 70 Cal.App.3d 643, 647 [139 Cal.Rptr. 45].~~

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 52.

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

LESSER INCLUDED OFFENSES

- Assault ▸ Pen. Code, § 240.

875. Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury (Pen. Code, §§ 240, 245(a)(1)–(3) & (b))

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

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

<Alternative 1A—force with weapon>

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

<Alternative 1B—force without weapon>

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

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

2. The defendant did that act willfully;

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

[AND]

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

<Give element 5 when instructing on self-defense or defense of another>

[AND

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

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

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

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

[An *assault weapon* includes _____ *<insert names of appropriate designated assault weapons listed in Pen. Code, §§ 12276 and 12276.1>***.]**

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

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

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

AND

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

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

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 there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 4 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give element 1A if it is alleged the assault was committed with a deadly weapon, firearm, semiautomatic firearm, machine gun, an assault weapon, or .50 BMG

rifle. Give 1B if it is alleged that the assault was committed with force likely to produce great bodily injury. (See Pen. Code, § 245(a).)

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

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

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

AUTHORITY

- Elements ▸ Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- To Have Present Ability to Inflict Injury, Gun Must Be Loaded Unless Used as Club or Bludgeon ▸ *People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3 [82 Cal.Rptr.2d 413].
- This Instruction Affirmed ▸ *People v. Golde* (2008) 163 Cal.App.4th 101, 122-123 [77 Cal.Rptr.3d 120].
- Assault Weapon Defined ▸ Pen. Code, §§ 12276, 12276.1.
- Semiautomatic Firearm Defined ▸ Pen. Code, § 12126(e).
- Firearm Defined ▸ Pen. Code, § 12001(b).
- Machine Gun Defined ▸ Pen. Code, § 12200.
- .50 BMG Rifle Defined ▸ Pen. Code, § 12278.
- Willful Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault ▸ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 40–47.

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

LESSER INCLUDED OFFENSES

- Assault ▸ Pen. Code, § 240.

A misdemeanor brandishing of a weapon or firearm under Penal Code section 417 is not a lesser and necessarily included offense of assault with a deadly weapon. (*People v. Escarcega* (1974) 43 Cal.App.3d 391, 398 [117 Cal.Rptr. 595]; *People v. Steele* (2000) 83 Cal.App.4th 212, 218, 221 [99 Cal.Rptr.2d 458].)

~~RELATED ISSUES~~

~~***Semiautomatic Firearm Need Not be Operable***~~

~~Assault with a semiautomatic weapon does not require proof that the gun was operable as a semiautomatic at the time of the assault. A person may commit an assault under Penal Code section 245(b) by using the gun as a club or bludgeon, regardless of whether he or she could also have fired it in a semiautomatic manner at that moment. (*People v. Miceli* (2002) 104 Cal.App.4th 256 [127 Cal.Rptr.2d 888].)~~

1600. Robbery (Pen. Code, § 211)

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

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

1. **The defendant took property that was not (his/her) own;**

2. **The property was taken from another person's possession and immediate presence;**

3. **The property was taken against that person's will;**

4. **The defendant used force or fear to take the property or to prevent the person from resisting;**

AND

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

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

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

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

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

[A (store/ [or] business) (employee/_____ *<insert description>*) **who is on duty has possession of the (store/ [or] business) owner's property.]**
~~**may be robbed if property of the (store/ [or] business) is taken, even though he or she does not own the property and was not, at that moment, in immediate physical control of the property. If the facts show that the (employee/_____** *<insert description>*~~**) was a representative of the owner of the property and the (employee/_____** *<insert description>*~~**) expressly or implicitly had authority over the property, then that (employee/_____** *<insert description>*~~**) may be robbed if property of the (store/ [or] business) is taken by force or fear.]**~~

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

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

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

New January 2006

BENCH NOTES

Instructional Duty

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

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

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

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

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

AUTHORITY

- Elements ▸ Pen. Code, § 211.
- Fear Defined ▸ Pen. Code, § 212; see *People v. Cuevas* (2001) 89 Cal.App.4th 689, 698 [107 Cal.Rptr.2d 529] [victim must actually be afraid].
- Immediate Presence Defined ▸ *People v. Hayes* (1990) 52 Cal.3d 577, 626–627 [276 Cal.Rptr. 874, 802 P.2d 376].
- Intent ▸ *People v. Green* (1980) 27 Cal.3d 1, 52–53 [164 Cal.Rptr. 1, 609 P.2d 468], overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99]; see *Rodriguez v. Superior Court* (1984) 159 Cal.App.3d 821, 826 [205 Cal.Rptr. 750] [same intent as theft].
- Intent to Deprive Owner of Main Value ▸ See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1] [in context of theft]; *People v. Zangari* (2001) 89 Cal.App.4th 1436, 1447 [108 Cal.Rptr.2d 250] [same].
- Possession Defined ▸ *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618].
- Constructive Possession by Employee~~Robbery of Store Employee or Contractor~~ ▸ *People v. Scott* (2009) 45 Cal.4th 743 [89 Cal.Rptr.3d 213].~~*People v. Frazer* (2003) 106 Cal.App.4th 1105, 1115–1117 [131 Cal.Rptr.2d 319]; *People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 521–522 [3 Cal.Rptr.3d 835].~~

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes--Property, § 86.

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

COMMENTARY

The instruction includes definitions of "possession," "fear," and "immediate presence" because those terms have meanings in the context of robbery that are technical and may not be readily apparent to jurors. (See *People v. McElheny* (1982) 137 Cal.App.3d 396, 403 [187 Cal.Rptr. 39]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 22].)

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

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

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

LESSER INCLUDED OFFENSES

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

- Petty Theft ▸ Pen. Code, §§ 484, 488; *People v. Covington* (1934) 1 Cal.2d 316, 320 [34 P.2d 1019].
- Petty Theft With Prior ▸ Pen. Code, §666; *People v. Villa* (2007) 157 Cal.App.4th 1429, 1433–1434 [69 Cal.Rptr.3d 282].

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

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

RELATED ISSUES

Asportation—Felonious Taking

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

Claim of Right

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

Fear

A victim's fear may be shown by circumstantial evidence. (*People v. Davison* (1995) 32 Cal.App.4th 206, 212 [38 Cal.Rptr.2d 438].) Even when the victim testifies that he or she is not afraid, circumstantial evidence may satisfy the

element of fear. (*People v. Renteria* (1964) 61 Cal.2d 497, 498–499 [39 Cal.Rptr. 213, 393 P.2d 413].)

Force—Amount

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

Force—When Applied

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

Immediate Presence

Property that is 80 feet away or around the corner of the same block from a forcibly held victim is not too far away, as a matter of law, to be outside the victim's immediate presence. (*People v. Harris* (1994) 9 Cal.4th 407, 415–419 [37 Cal.Rptr.2d 200, 886 P.2d 1193]; see also *People v. Prieto* (1993) 15 Cal.App.4th 210, 214 [18 Cal.Rptr.2d 761] [reviewing cases where victim is a distance away from property taken].) Property has also been found to be within a person's immediate presence when the victim is lured away from his or her property and force is subsequently used to accomplish the theft or escape (*People v. Webster* (1991) 54 Cal.3d 411, 440–442 [285 Cal.Rptr. 31, 814 P.2d 1273]) or when the victim abandons the property out of fear (*People v. Dominguez* (1992) 11 Cal.App.4th 1342, 1348–1349 [15 Cal.Rptr.2d 46].)

Multiple Victims

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

taken from a single victim pursuant to a single plan. (*People v. Brito* (1991) 232 Cal.App.3d 316, 325–326, fn. 8 [283 Cal.Rptr. 441].)

Value

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

2040. Unauthorized Use of Personal Identifying Information (Pen. Code, § 530.5(a))

The defendant is charged [in Count __] with the unauthorized use of someone else's personal identifying information [in violation of Penal Code section 530.5(a)].

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

1. **The defendant willfully obtained someone else's personal identifying information;**

2. **The defendant willfully used that information for an unlawful purpose;**

AND

3. **The defendant used the information without the consent of the person whose identifying information (he/she) was using.**

Personal identifying information **includes a person's (name [;]/ [and] address[;]/ [and] telephone number[;]/ [and] health insurance identification number[;]/ [and] taxpayer identification number[;]/ [and] school identification number[;]/ [and] state or federal driver's license number or identification number[;]/ [and] social security number[;]/ [and] place of employment[;]/ [and] employee identification number[;]/ [and] mother's maiden name[;]/ [and] demand deposit account number[;]/ [and] savings account number[;]/ [and] checking account number[;]/ [and] PIN (personal identification number) or password[;]/ [and] alien registration number[;]/ [and] government passport number[;]/ [and] date of birth[;]/ [and] unique biometric data such as fingerprints, facial-scan identifiers, voice print, retina or iris image, or other unique physical representation[;]/ [and] unique electronic data such as identification number, address, or routing code, telecommunication identifying information or access device[;]/ [and] information contained in a birth or death certificate[;]/ and credit card number) or an equivalent form of identification.**

[As used here, the term "person" means a human being, whether living or dead, or a firm, association, organization, partnership, business trust,

company, corporation, limited liability company, public entity or any other legal entity.]

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

An *unlawful purpose* includes unlawfully (obtaining/[or] attempting to obtain) (credit[,]/[or] goods[,]/[or] services[,]/[or] real property/ [or] medical information) in the name of the other person without the consent of that person [[or] <*insert other unlawful purpose*>].~~An *unlawful purpose* includes unlawfully (obtaining/ [or] attempting to obtain) (credit[,]/ [or] goods[,]/ [or] services[,]/ [or] medical information) in the name of the other person [[or] _____].~~

It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.
~~An *unlawful purpose* includes unlawfully (obtaining/ [or] attempting to obtain) (credit[,]/ [or] goods[,]/ [or] services[,]/ [or] medical information) in the name of the other person.~~

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.

In the definition of personal identifying information, give the relevant items based on the evidence presented.

The definition of unlawful purpose is not limited to acquiring information for financial motives, and may include any unlawful purpose for which the defendant may have acquired the personal identifying information, such as using the information to facilitate violation of a restraining order. (*See, e.g.*, *People v. Tillotson* (2007) 157 Cal. App. 4th 517, 533.)

AUTHORITY

- Elements ▸ Pen. Code, § 530.5(a).

- Personal Identifying Information Defined ▸ Pen. Code, § 530.5(b).
- Person Defined ▸ Pen. Code, § 530.5(g).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 209.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01[1], [4][h] (Matthew Bender).

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

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

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

New January 2006

BENCH NOTES

Instructional Duty

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

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

The implied consent statute states that "[t]he testing shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe the person was driving a motor vehicle in violation of Section 23140, 23152, or 23153." (Veh. Code, § 23612(a)(1)(C).) If there is a factual issue as to whether the defendant was lawfully arrested or whether the officer had reasonable cause to believe the defendant was under the influence, the court should consider whether this entire instruction, or the bracketed word "lawfully" is appropriate and/or whether the jury should be instructed on these additional issues. For an instruction on lawful arrest and reasonable cause, see CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

AUTHORITY

- Implied Consent Statute ▸ Veh. Code, § 23612.
- Instruction Constitutional ▸ *People v. Sudduth* (1966) 65 Cal.2d 543, 547 [55 Cal.Rptr. 393, 421 P.2d 401].

Secondary Sources

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

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

RELATED ISSUES

Silence

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

Inability to Complete Chosen Test

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

Conditions Placed on Test by Defendant

"It is established that a *conditional* consent to a test constitutes a refusal to submit to a test within the meaning of section 13353." (*Webb v. Miller* (1986) 187 Cal.App.3d 619, 626 [232 Cal.Rptr. 50] [request by defendant to see chart in wallet constituted refusal, italics in original]; *Covington v. Dept. of Motor Vehicles* (1980) 102 Cal.App.3d 54, 57 [162 Cal.Rptr. 150] [defendant's response that he would only take test with attorney present constituted refusal].) However, in *Ross v. Dept. of Motor Vehicles* (1990) 219 Cal.App.3d 398, 402–403 [268 Cal.Rptr. 102], the court held that the defendant was entitled under the implied consent statute to request to see the identification of the person drawing his blood. The court found the request reasonable in light of the risks of HIV infection from improper needle use. (*Id.* at p. 403.) Thus, the defendant could not be penalized for refusing to submit to the test when the technician declined to produce identification. *(Ibid.)*

Defendant Consents After Initial Refusal

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

Defendant Refuses Request for Urine Sample Following Breath Test

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

Sample Taken by Force After Refusal

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

Refusal Admissible Even If Faulty Admonition

Vehicle Code section 23612 requires a specific admonition to the defendant regarding the consequences of refusal to submit to a chemical test. If the officer fails to properly advise the defendant in the terms required by statute, the defendant may not be subject to the mandatory license suspension or the enhancement for willful refusal to complete a test. (See *People v. Brannon* (1973) 32 Cal.App.3d 971, 978 [108 Cal.Rptr. 620]; *People v. Municipal Court (Gonzales)* (1982) 137 Cal.App.3d 114, 118 [186 Cal.Rptr. 716].) However, the refusal is still admissible in criminal proceedings for driving under the influence. (*People v. Municipal Court (Gonzales)*, *supra*, 137 Cal.App.3d at p. 118.) Thus, the court in *People v. Municipal Court (Gonzales)*, *supra*, 137 Cal.App.3d at p. 118, held that the defendant's refusal was admissible despite the officer's failure to advise the defendant that refusal would be used against him in a court of law, an advisement specifically required by the statute. (See Veh. Code, § 23612(a)(4).)

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

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

To prove this allegation, the People must prove that:

1. **A peace officer asked the defendant to submit to a chemical test to determine ((his/her) blood alcohol content/ [or] whether (he/she) had consumed a drug);**

2. **The peace officer fully advised the defendant of the requirement to submit to a test and the consequences of not submitting to a test;**

[AND]

3. **The defendant willfully refused to (submit to a test/ [or] to complete the test)(./;)**

[AND

4. The peace officer lawfully arrested the defendant and had reasonable cause to believe that defendant was driving a motor vehicle in violation of Vehicle Code section 23140, 23152, or 23153.]

To have *fully advised the defendant,* the peace officer must have told (him/her) all of the following information:

1. **(He/She) may choose a blood(,/ or) breath[, or urine] test; [if (he/she) completes a breath test, (he/she) may also be required to submit to a blood [or urine] test to determine if (he/she) had consumed a drug;] [if only one test is available, (he/she) must complete the test available;] [if (he/she) is not able to complete the test chosen, (he/she) must submit to (the other/another) test;]**

2. **(He/She) does not have the right to have an attorney present before saying whether (he/she) will submit to a test, before deciding which test to take, or during administration of a test;**

3. **If (he/she) refuses to submit to a test, the refusal may be used against (him/her) in court;**

4. **Failure to submit to or complete a test will result in a fine and mandatory imprisonment if (he/she) is convicted of driving under the influence or with a blood alcohol level of 0.08 percent or more;**

AND

5. **Failure to submit to or complete a test will result in suspension of (his/her) driving privilege for one year or revocation of (his/her) driving privilege for two or three years.**

   <Short Alternative; see Bench Notes>
   [(His/Her) driving privilege will be revoked for two or three years if (he/she) has previously been convicted of one or more specific offenses related to driving under the influence or if (his/her) driving privilege has previously been suspended or revoked.]

   <Long Alternative; see Bench Notes>
   [A. (His/Her) driving privilege will be revoked for two years if (he/she) has been convicted within the previous (seven/ten) years of a separate violation of Vehicle Code section 23140, 23152, 23153, or 23103 as specified in section 23103.5, or of Penal Code section 191.5 or 192(c)(3). (His/Her) driving privilege will also be revoked for two years if (his/her) driving privilege has been suspended or revoked under Vehicle Code section 13353, 13353.1, or 13353.2 for an offense that occurred on a separate occasion within the previous (seven/ten) years;

   AND

   B. (His/Her) driving privilege will be revoked for three years if (he/she) has been convicted within the previous (seven/ten) years of two or more of the offenses just listed. (His/Her) driving privilege will also be revoked for three years if (his/her) driving privilege was previously suspended or revoked on two occasions, or if (he/she) has had any combination of two convictions,

suspensions, or revocations, on separate occasions, within the previous (seven/ten) years.]

[Vehicle Code section 23140 prohibits a person under the age of 21 from driving with a blood alcohol content of 0.05 percent or more. Vehicle Code section 23152 prohibits driving under the influence of alcohol or drugs or driving with a blood alcohol level of 0.08 percent or more. Vehicle Code section 23153 prohibits causing injury while driving under the influence of alcohol or drugs or causing injury while driving with a blood alcohol level of 0.08 percent or more. Vehicle Code section 23103 as specified in section 23103.5 prohibits reckless driving involving alcohol. Penal Code section 191.5 prohibits gross vehicular manslaughter while intoxicated, and Penal Code section 192(c)(3) prohibits vehicular manslaughter while intoxicated.]

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

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

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

The People have the burden of proving beyond a reasonable doubt that the defendant willfully refused to (submit to/ [or] complete) a chemical test to determine ((his/her) blood alcohol content/ [or] whether (he/she) had consumed a drug). If the People have not met this burden, you must find this allegation has not been proved.

New January 2006

BENCH NOTES

Instructional Duty

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

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

The implied consent statute states that "[t]he testing shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe the person was driving a motor vehicle in violation of Section 23140, 23152, or 23153." (Veh. Code, § 23612(a)(1)(C).) If there is a factual issue whether the defendant was lawfully arrested or whether the officer had reasonable cause to believe the defendant was under the influence, the court should consider whether giving bracketed element 4 is appropriate and whether the jury should be instructed on these additional issues. For an instruction on lawful arrest and reasonable cause, see CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

No reported case has established the degree of detail with which the jury must be instructed regarding the refusal admonition mandated by statute. The committee has provided several different options. The first sentence of element 5 under the definition of "fully advised" **must** be given. The court then may add either the short alternative or the long alternative or neither. If there is no issue regarding the two- and three-year revocations in the case and both parties agree, the court may choose to use the short alternative or to give just the first sentence of element 5. The court may choose to use the long alternative if there is an objection to the short version or the court determines that the longer version is more appropriate. The court may also choose to give the bracketed paragraph defining the Vehicle and Penal Code sections discussed in the long alternative at its discretion.

When giving the long version, give the option of "ten years" for the time period in which the prior conviction may be used, unless the court determines that the law prior to January 1, 2005 is applicable. In such case, the court must select the "seven year" time period.

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

AUTHORITY

- Enhancements ▸ Veh. Code, §§ 23577 & 23612.

- Statute Constitutional ‣ *Quintana v. Municipal Court* (1987) 192 Cal.App.3d 361, 366–369 [237 Cal.Rptr. 397].
- Statutory Admonitions Not Inherently Confusing or Misleading ‣ *Blitzstein v. Dept. of Motor Vehicles* (1988) 199 Cal.App.3d 138, 142 [244 Cal.Rptr. 624].

Secondary Sources

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[4][a], [b] (Matthew Bender).

RELATED ISSUES

Admonition Must Convey Strong Likelihood of Suspension

It is insufficient for the officer to advise the defendant that his or her license "could" be suspended. (*Decker v. Dept. of Motor Vehicles* (1972) 6 Cal.3d 903, 905–906 [101 Cal.Rptr. 387, 495 P.2d 1307]; *Giomi v. Dept. of Motor Vehicles* (1971) 15 Cal.App.3d 905, 907 [93 Cal.Rptr. 613].) The officer must convey to the defendant that there is a strong likelihood that his or her license will be suspended. (*Decker, supra,* 6 Cal.3d at p. 906; *Giomi, supra,* 15 Cal.App.3d at p. 907.)

Admonition Must Be Clearly Conveyed

"[T]he burden is properly placed on the officer to give the warning required by section 13353 in a manner comprehensible to the driver." (*Thompson v. Dept. of Motor Vehicles* (1980) 107 Cal.App.3d 354, 363 [165 Cal.Rptr. 626].) Thus, in *Thompson, supra,* 107 Cal.App.3d at p. 363, the court set aside the defendant's license suspension because radio traffic prevented the defendant from hearing the admonition. However, where the defendant's own "obstreperous conduct . . . prevented the officer from completing the admonition," or where the defendant's own intoxication prevented him or her from understanding the admonition, the defendant may be held responsible for refusing to submit to a chemical test. (*Morphew v. Dept. of Motor Vehicles* (1982) 137 Cal.App.3d 738, 743–744 [188 Cal.Rptr. 126]; *Bush v. Bright* (1968) 264 Cal.App.2d 788, 792 [71 Cal.Rptr. 123].)

Defendant Incapable of Understanding Due to Injury or Illness

Where the defendant, through no fault of his or her own, is incapable of understanding the admonition or of submitting to the test, the defendant cannot be penalized for refusing. (*Hughey v. Dept. of Motor Vehicles* (1991) 235 Cal.App.3d

752, 760 [1 Cal.Rptr.2d 115].) Thus, in *Hughey, supra,* 235 Cal.App.3d at p. 760, the court held that the defendant was rendered incapable of refusing due to a head trauma. However, in *McDonnell v. Dept. of Motor Vehicles* (1975) 45 Cal.App.3d 653, 662 [119 Cal.Rptr. 804], the court upheld the license suspension where defendant's use of alcohol triggered a hypoglycemic attack. The court held that because voluntary alcohol use aggravated the defendant's illness, the defendant could be held responsible for his subsequent refusal, even if the illness prevented the defendant from understanding the admonition. *(Ibid.)*

See the Related Issues section in CALCRIM No. 2130, *Refusal—Consciousness of Guilt*.

2132–2139. Reserved for Future Use

2150. Failure to Perform Duty Following Accident: Property Damage—Defendant Driver (Veh. Code, § 20002)

The defendant is charged [in Count __] with failing to perform a legal duty following a vehicle accident that caused property damage [in violation of Vehicle Code section 20002].

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

1. **While driving, the defendant was involved in a vehicle accident;**

2. **The accident caused damage to someone else's property;**

3. **The defendant knew that (he/she) had been involved in an accident that caused property damage [or knew from the nature of the accident that it was probable that property had been damaged];**

AND

4. **The defendant willfully failed to perform ~~one or more of~~ the following duties:**

   (a) To immediately stop ~~immediately~~ at the scene of the accident;

   ~~OR~~

   (b) To immediately provide the owner or person in control of the damaged property with (his/her) name and current residence address [and the name and address of the owner of the vehicle the defendant was driving].

The driver of a vehicle may provide the required information in one of two ways:

1. **The driver may locate the owner or person in control of the damaged property and give that person the information directly. On request, the driver must also show that person his or her driver's license and the vehicle registration;**

OR

2. **The driver may leave the required information in a written note in a conspicuous place on the vehicle or other damaged property. The driver must then also, without unnecessary delay, notify either the police department of the city where the accident happened or the local headquarters of the California Highway Patrol if the accident happened in an unincorporated area.**

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

The duty to *immediately stop* ~~*immediately*~~ means that the driver must stop his or her vehicle as soon as reasonably possible under the circumstances.

The driver of a vehicle must perform the duties listed regardless of how or why the accident happened. It does not matter if someone else caused the accident or if the accident was unavoidable.

You may not find the defendant guilty unless all of you agree that the People have proved that the defendant failed to perform at least one of the required duties. You must all agree on which duty the defendant failed to perform.

[To be *involved in a vehicle accident* means to be connected with the accident in a natural or logical manner. It is not necessary for the driver's vehicle to collide with another vehicle or person.]

[When providing his or her name and address, the driver is required to identify himself or herself as the driver of a vehicle involved in the accident.]

[The property damaged may include any vehicle other than the one allegedly driven by the defendant.]

[An accident causes property damage if the property damage is the direct, natural, and probable consequence of the accident and the damage would not have happened without the accident. 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 property damage. An accident causes property damage only if it is a substantial factor in causing the damage. A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the property damage.]

[If the accident caused the defendant to be unconscious or disabled so that (he/she) was not capable of performing the duties required by law, then (he/she) did not have to perform those duties at that time. [However, (he/she) was required to do so as soon as reasonably possible.]]

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 this instruction if the prosecution alleges that the defendant drove the vehicle. If the prosecution alleges that the defendant was a nondriving owner present in the vehicle or other passenger in control of the vehicle, give CALCRIM No. 2151, *Failure to Perform Duty Following Accident: Property Damage—Defendant Nondriving Owner or Passenger in Control*.

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 property damage, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of property damage, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

Give the bracketed paragraph defining "involved in a vehicle accident," if that is an issue in the case.

Give the bracketed paragraph stating that "the driver is required to identify himself or herself as the driver" if there is evidence that the defendant stopped and identified himself or herself but not in a way that made it apparent to the other parties that the defendant was the driver. (*People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546 [83 Cal.Rptr.2d 493].)

Give the bracketed sentence that begins with "The property damaged may include" if the evidence shows that the accident may have damaged only the defendant's vehicle.

Give the bracketed paragraph that begins with "If the accident caused the defendant to be unconscious" if there is sufficient evidence that the defendant was unconscious or disabled at the scene of the accident.

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

AUTHORITY

- Elements ▸ Veh. Code, § 20002; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1123, fn. 10 [43 Cal.Rptr.2d 681, 899 P.2d 67].
- Knowledge of Accident ▸ *People v. Carbajal* (1995) 10 Cal.4th 1114, 1123, fn. 10 [43 Cal.Rptr.2d 681, 899 P.2d 67].
- Willful Failure to Perform Duty ▸ *People v. Crouch* (1980) 108 Cal.App.3d Supp. 14, 21–22 [166 Cal.Rptr. 818].
- Duty Applies Regardless of Fault for Accident ▸ *People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914].
- Involved Defined ▸ *People v. Bammes* (1968) 265 Cal.App.2d 626, 631 [71 Cal.Rptr. 415]; *People v. Sell* (1950) 96 Cal.App.2d 521, 523 [215 P.2d 771].
- Immediately Stopped Defined ▸ *People v. Odom* (1937) 19 Cal.App.2d 641, 646–647 [66 P.2d 206].
- Statute Does Not Violate Fifth Amendment Privilege ▸ *California v. Byers* (1971) 402 U.S. 424, 434 [91 S.Ct. 1535, 29 L.Ed.2d 9].
- Must Identify Self as Driver ▸ *People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546 [83 Cal.Rptr.2d 493].
- Unanimity Instruction Required ▸ *People v. Scofield* (1928) 203 Cal. 703, 710 [265 P. 914].
- Unconscious Driver Unable to Comply at Scene ▸ *People v. Flores* (1996) 51 Cal.App.4th 1199, 1204 [59 Cal.Rptr.2d 637].
- Offense May Occur on Private Property ▸ *People v. Stansberry* (1966) 242 Cal.App.2d 199, 204 [51 Cal.Rptr. 403].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 246–252.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.03 (Matthew Bender).

2440. Maintaining a Place for Controlled Substance Sale or Use (Health & Saf. Code, § 11366)

The defendant is charged [in Count __] with (opening/ [or] maintaining) a place for the (sale/ [or] use) of a (controlled substance/ [or] narcotic drug) [in violation of Health and Safety Code section 11366].

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

1. **The defendant (opened/ [or] maintained) a place;**

   AND

2. **The defendant (opened/ [or] maintained) the place with the intent to (sell[,]/ [or] give away[,]/ ~~[or] use[,]/~~ [or] allow others to use) a (controlled substance/ [or] narcotic drug), specifically _____** *<insert name of drug>***, on a continuous or repeated basis at that place.**

New January 2006

BENCH NOTES

Instructional Duty

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

AUTHORITY

- Elements ▸ Health & Saf. Code, § 11366.
- Purpose Must Be Continuous or Repetitive Use of Place for Illegal Activity ▸ *People v. Horn* (1960) 187 Cal.App.2d 68, 72 [9 Cal.Rptr. 578]; *People v. Holland* (1958) 158 Cal.App.2d 583, 588–589 [322 P.2d 983].
- Jury Must Be Instructed on Continuous or Repeated Use ▸ *People v. Shoals* (1992) 8 Cal.App.4th 475, 490 [10 Cal.Rptr.2d 296].
- "Opening" and "Maintaining" Need Not Be Defined ▸ *People v. Hawkins* (2004) 124 Cal.App.4th 675, 684 [21 Cal.Rptr.3d 500].

- Violations Are Crimes of Moral Turpitude Involving Intent to Corrupt Others, So Solo Use of Drugs Not Covered by Section 11366 ▸ *People v. Vera* (1999) 69 Cal.App.4th 1100, 1102-1103 [82 Cal.Rptr.2d 128].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 118.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][n] (Matthew Bender).

RELATED ISSUES

Corpus Delicti Includes Intent

"[T]he perpetrator's purpose of continuously or repeatedly using a place for selling, giving away, or using a controlled substance is part of the corpus delicit of a violation of Health and Safety Code section 11366." (*People v. Hawkins* (2004) 124 Cal.App.4th 675, 681 [21 Cal.Rptr.3d 500].)

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 description of other type of order>***), issued under** _____ *<insert code section under which order made>* **[in a pending criminal proceeding involving domestic violence/as a condition of probation after a conviction for (domestic violence/elder abuse/dependent adult abuse)].** ~~**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/elder abuse/dependent adult abuse) 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.]

[*(Elder/ [or] (D/d)ependent adult) abuse* means that under circumstances or conditions likely to produce great bodily harm or death, the defendant:

1. **Willfully caused or permitted any (elder/dependent adult) to suffer;**

OR

2. **Inflicted on any elder or dependent adult unjustifiable physical pain or mental suffering;**

OR

3. **Having the care or custody of any (elder/dependent adult), willfully caused or permitted the person or health of the (elder/dependent adult) to be injured;**

OR

4. **Willfully caused or permitted the (elder/dependent adult) to be placed in a situation in which (his/her) person or health was endangered.][~~(Elder/Dependent person) abuse is defined in another instruction to which you should refer.~~]**

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

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

New January 2006; Revised June 2007, April 2008

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.)

Related Instruction
CALCRIM No. 831, Abuse of Elder or Dependent Adult (Pen. Code, § 368(c)).

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].
- Abuse of Elder or Dependent ~~Person~~Adult Defined ▸ Penal Code, § 368.

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*.

2917. Loitering: About School (Pen. Code, § 653~~g~~b)

The defendant is charged [in Count __] with loitering at or near (a school children attend/ [or] a public place where children normally congregate) [in violation of Penal Code section 653~~g~~b].

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

<If the court concludes that both loitering as defined in 1A and the conduct defined in 1B are required pursuant to the statute, give both 1A and 1B if the defendant is charged with the conduct described in 1B. Otherwise, g~~G~~ive either 1A or 1B, as appropriate.>

1A. The defendant delayed, lingered, or idled at or near (a school children attend/ [or] a public place where children normally congregate);

[1B. The defendant entered, reentered, or remained at (a school children attend/ [or] a public place where children normally congregate) within 72 hours after having been asked to leave by (the chief administrative official of that school/ _____ <insert name of other official named in Penal Code section 653(b)>)];

~~3~~2. The defendant did not have a lawful purpose for being at or near the (school/ [or] public place);

AND

3. The defendant intended to commit a crime if the opportunity arose.

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 a nonbinding opinion, *McSherry v. Block* (1989) 880 F.2d 1049, 1058, the Ninth Circuit discussed the problem caused by amending the precursor of Penal Code section 653b by adding the language described by paragraph 1B, namely, that it made it possible to "read the ["]request to leave["] language as modifying the loitering provision which has been in the statute all along." The Ninth Circuit determined that no request to leave was necessary for a loitering conviction. *Id.* The court relied on the depublished opinion of the Appellate Department in the case below, which had determined that the "request to leave" language applies only to the vagrancy and not to the loitering provision of the statute. *Id.* at 1053.

In the absence of binding authority on how to resolve an apparent ambiguity in the statute, the court must exercise its own discretion to determine whether loitering is required if the defendant is charged with the conduct described in paragraph 1B, or whether paragraphs 1A and 1B define separate ways in which this offense may be commited.

AUTHORITY

- Elements ▸ Pen. Code, § 653~~g~~b.
- Specific Intent to Commit Crime Required ▸ *In re Christopher S.* (1978) 80 Cal.App.3d 903, 911 [146 Cal.Rptr. 247]; *People v. Hirst* (1973) 31 Cal.App.3d 75, 82–83 [106 Cal.Rptr. 815]; *People v. Frazier* (1970) 11 Cal.App.3d 174, 183 [90 Cal.Rptr. 58]; *Mandel v. Municipal Court* (1969) 276 Cal.App.2d 649, 663 [81 Cal.Rptr. 173].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 52.

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

RELATED ISSUES

Activity Protected by First Amendment

In *Mandel v. Municipal Court* (1969) 276 Cal.App.2d 649, 670–674 [81 Cal.Rptr. 173], the court held that the defendant could not be convicted of loitering near a school for an unlawful purpose when the defendant was giving the students leaflets protesting the war and calling for a student strike. (See also *People v. Hirst* (1973) 31 Cal.App.3d 75, 85–86 [106 Cal.Rptr. 815].)

2918–2928. Reserved for Future Use

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

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

To prove this allegation, the People must prove that:

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

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

AND

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

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

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

AND

B. **Each crime arose from a common scheme or plan.]**

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

[When computing the amount of loss according to this instruction, do not count any taking, damage, or destruction more than once simply because it is mentioned in more than one count, if the taking, damage, or destruction

mentioned in those counts refers to the same taking, damage, or destruction with respect to the same victim.]

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

New January 2006

BENCH NOTES

Instructional Duty

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

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

AUTHORITY

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

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 292.

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

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

COMMENTARY

Penal Code section 12022.6 applies to "any person [who] takes, damages, or destroys any property . . . ." The statute does not explicitly include vicarious liability but also does not use the term "personally" to limit the scope of liability. In *People v. Fulton* (1984) 155 Cal.App.3d 91, 102 [201 Cal.Rptr. 879], the Fourth Appellate District of the Court of Appeal interpreted this language to mean that the statute did not require that the defendant personally take, damage, or destroy the property, but provided for vicarious liability. In reaching this conclusion, the court relied on the reasoning of *People v. Le* (1984) 154 Cal.App.3d 1 [200 Cal.Rptr. 839], which held that an enhancement for being armed with a firearm under Penal Code section 12022.3(b) allowed for vicarious liability despite the fact that the statute does not explicitly include vicarious liability. The *Fulton* court also disagreed with the holding of *People v. Reed* (1982) 135 Cal.App.3d 149 [185 Cal.Rptr. 169], which held that Penal Code section 12022.3(b) did not include vicarious liability. However, the *Fulton* decision failed to consider the Supreme Court opinion in *People v. Walker* (1976) 18 Cal.3d 232, 241–242 [133 Cal.Rptr. 520, 555 P.2d 306], which held that an enhancement does not provide for vicarious liability unless the underlying statute contains an explicit statement that vicarious liability is included within the statute's scope. Moreover, the Supreme Court has endorsed the *Reed* opinion and criticized the *Le* opinion, noting that *Le* also failed to consider the holding of *Walker*. (*People v. Piper* (1986) 42 Cal.3d 471, 477, fn. 5 [229 Cal.Rptr. 125, 722 P.2d 899].) Similarly, the Fifth Appellate District of the Court of Appeal has observed that "the weight of authority has endorsed the analysis in *Reed*" and rejected the holding of *Le*. (*People v. Rener* (1994) 24 Cal.App.4th 258, 267 [29 Cal.Rptr.2d 392] [holding that Pen. Code, §12022.3(a) & (b) does not include vicarious liability].) Thus, although no case has explicitly overruled *Fulton*, the holding of that case appears to be contrary to the weight of authority.

RELATED ISSUES

"Take"

As used in Penal Code section 12022.6, "take" does not have the same meaning as in the context of theft. (*People v. Kellett* (1982) 134 Cal.App.3d 949, 958–959 [185 Cal.Rptr. 1].) The defendant need not intend to permanently deprive the

owner of the property so long as the defendant intends to take, damage, or destroy the property. *(Ibid.)* Moreover, the defendant need not actually steal the property but may "take" it in other ways. (*People v. Superior Court (Kizer)* (1984) 155 Cal.App.3d 932, 935 [204 Cal.Rptr. 179].) Thus, the enhancement may be applied to the crime of receiving stolen property *(ibid.)* and to the crime of driving a stolen vehicle (*People v. Kellett, supra,* 134 Cal.App.3d at pp. 958–959).

"Loss"

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

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; Revised April 2008

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 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].)

Do not give this instruction in cases in which the statute of limitations had already expired under the pre-2009 version of Penal Code section 804(c).

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~~the defendant is arraigned on a complaint that charges the defendant with a felony, 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

3454. Commitment as Sexually Violent Predator (Welf. & Inst. Code, §§ 6600, 6600.1)

The petition alleges that _____ <*insert name of respondent*> is a sexually violent predator.

To prove this allegation, the People must prove beyond a reasonable doubt that:

1. **(He/She) has been convicted of committing sexually violent offenses against one or more victims;**

2. **(He/She) has a diagnosed mental disorder;**

[AND]

3. **As a result of that diagnosed mental disorder, (he/she) is a danger to the health and safety of others because it is likely that (he/she) will engage in sexually violent predatory criminal behavior(;/.)**

<Give element 4 when evidence has been introduced at trial on the issue of amenability to voluntary treatment in the community.>

[AND

4 It is necessary to keep (him/her) in custody in a secure facility to ensure the health and safety of others.]

The term *diagnosed mental disorder* includes conditions either existing at birth or acquired after birth that affect a person's ability to control emotions and behavior and predispose that person to commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others.

A person is *likely to engage in sexually violent predatory criminal behavior* if there is a substantial, serious, and well-founded risk that the person will engage in such conduct if released into the community.

The likelihood that the person will engage in such conduct does not have to be greater than 50 percent.

Sexually violent criminal behavior is *predatory* if it is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or a person with whom a relationship has been established or promoted for the primary purpose of victimization.

_____ *<insert name[s] of crime[s] enumerated in Welf. & Inst. Code, § 6600(b)>* **(is/are) [a] *sexually violent offense[s]* when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the victim or another person or threatening to retaliate in the future against the victim or any other person.**

[_____ *<insert name[s] of crime[s] enumerated in Welf. & Inst. Code, § 6600(b)>* **(is/are) also [a] *sexually violent offense[s]* when the offense[s] (is/are) committed on a child under 14 years old.]**

As used here, a *conviction* for committing a sexually violent offense is one of the following:

<Give the appropriate bracketed description[s] below.>

<A. Conviction With Fixed Sentence>
[A prior [or current] conviction for one of the offenses I have just described to you that resulted in a prison sentence for a fixed period of time.]

<B. Conviction With Indeterminate Sentence>
[A conviction for an offense that I have just described to you that resulted in an indeterminate sentence.]

<C. Conviction in Another Jurisdiction>
[A prior conviction in another jurisdiction for an offense that includes all of the same elements of one of the offenses that I have just described to you.]

<D. Conviction Under Previous Statute>
[A conviction for an offense under a previous statute that includes all of the elements of one of the offenses that I have just described to you.]

<E. Conviction With Probation>
[A prior conviction for one of the offenses that I have just described to you for which the respondent received probation.]

<F. Acquittal Based on Insanity Defense>
[A prior finding of not guilty by reason of insanity for one of the offenses that I have just described to you.]

<G. Conviction as Mentally Disordered Sex Offender>
[A conviction resulting in a finding that the respondent was a mentally disordered sex offender.]

<H. Conviction Resulting in Commitment to Department of Youth Authority Pursuant to Welfare and Institutions Code section 1731.5 >
[A prior conviction for one of the offenses that I have just described to you for which the respondent was committed to the Department of Youth Authority pursuant to Welfare and Institutions Code section 1731.5.]

You may not conclude that _____ *<insert name of respondent>* **is a sexually violent predator based solely on (his/her) alleged prior conviction[s] without additional evidence that (he/she) currently has such a diagnosed mental disorder.**

In order to prove that _____ *<insert name of respondent>* **is a danger to the health and safety of others, the People do not need to prove a recent overt act committed while (he/she) was in custody. A *recent overt act* is a criminal act that shows a likelihood that the actor may engage in sexually violent predatory criminal behavior.**

New January 2006; Revised August 2006, June 2007

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a respondent is a sexually violent predator.

If evidence is presented about amenability to voluntary treatment, the court has a **sua sponte** duty to give bracketed element 4. (*People v. Grassini* (2003) 113 Cal.App.4th 765, 777 [6 Cal.Rptr.3d 662]; *People v. Calderon* (2004) 124 Cal.App.4th 80, 93 [21 Cal.Rptr.3d 92].) Evidence of involuntary treatment in the community is inadmissible at trial because it is not relevant to any of the SVP requirements. (*People v. Calderon, supra,* 124 Cal.App.4th at 93.)

The court also **must give** CALCRIM No. 219, *Reasonable Doubt in Civil Proceedings*; 222, *Evidence*; 226, *Witnesses*; 3550, *Pre-Deliberation Instructions*;

and any other relevant posttrial instructions. These instructions may need to be modified.

Jurors instructed in these terms must necessarily understand that one is not eligible for commitment under the SVPA unless his or her capacity or ability to control violent criminal sexual behavior is seriously and dangerously impaired. No additional instructions or findings are necessary. *People v. Williams* (2003) 31 Cal.4th 757, 776–777 [3 Cal.Rptr.3d 684, 74 P.3d 779] (interpreting Welfare and Institutions Code section 6600, the same statute at issue here).

But see *In re Howard N.* (2005) 35 Cal.4th 117, 137-138 [24 Cal.Rptr.3d 866, 106 P.3d 305], which found in a commitment proceeding under a different code section, i.e., Welfare and Institutions Code section 1800, that when evidence of inability to control behavior was insufficient, the absence of a specific "control" instruction was not harmless beyond a reasonable doubt. Moreover, *In re Howard N.* discusses *Williams* extensively without suggesting that it intended to overrule *Williams*. *Williams* therefore appears to be good law in proceedings under section 6600.

AUTHORITY

- Elements and Definitions ▸ Welf. & Inst. Code, §§ 6600, 6600.1.
- Unanimous Verdict, Burden of Proof ▸ *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Likely Defined ▸ *People v. Roberge* (2003) 29 Cal.4th 979, 988 [129 Cal.Rptr.2d 861, 62 P.3d 97].
- Predatory Acts Defined ▸ *People v. Hurtado* (2002) 28 Cal.4th 1179, 1183 [124 Cal.Rptr.2d 186, 52 P.3d 116].
- Must Instruct on Necessity for Confinement in Secure Facility ▸ *People v. Grassini* (2003) 113 Cal.App.4th 765, 777 [6 Cal.Rptr.3d 662].
- Determinate Sentence Defined ▸ Pen. Code, § 1170.
- Impairment of Control ▸ *In re Howard N.* (2005) 35 Cal.4th 117, 128–130 [24 Cal.Rptr.3d 866, 106 P.3d 305].
- Amenability to Voluntary Treatment ▸ *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 256 [127 Cal.Rptr.2d 177, 57 P.3d 654].

- Need for Treatment and Need for Custody not the Same ▸ *People v. Ghillotti* (2002) 27 Cal.4th 888, 927 [119 Cal.Rptr.2d 1, 44 P.3d 949].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 193.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 104, *Parole,* § 104.06 (Matthew Bender).

RELATED ISSUES

Different Proof Requirements at Different Stages of the Proceedings
Even though two concurring experts must testify to commence the petition process under Welfare and Institutions Code section 6001, the same requirement does not apply to the trial. (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1064 [123 Cal.Rptr.2d 253].)

Masturbation Does Not Require Skin-to-Skin Contact
Substantial sexual conduct with a child under 14 years old includes masturbation where the touching of the minor's genitals is accomplished through his or her clothing. (*People v. Lopez* (2004) 123 Cal.App.4th 1306, 1312 [20 Cal.Rptr.3d 801]; *People v. Whitlock* (2003) 113 Cal.App.4th 456, 463 [6 Cal.Rptr.3d 389].) "[T]he trial court properly instructed the jury when it told the jury that '[t]o constitute masturbation, it is not necessary that the bare skin be touched. The touching may be through the clothing of the child.' " (*People v. Lopez, supra,* 123 Cal.App.4th at p. 1312.)

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, April 2008

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case.

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v.*

Gonzales (1999) 74 Cal.App.4th 382, 389–390 [88 Cal.Rptr.2d 111]; *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982–983 [38 Cal.Rptr.3d 624, 127 P.3d 40].)

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*.
CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute: Self–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].
- Temporary Possession of Firearm by Felon in Self-Defense ▸ *People v. King* (1978) 22 Cal.3d 12, 24 [148 Cal.Rptr. 409, 582 P.2d 1000].
- Duty to Retreat Limited to Felon in Possession Cases ▸ *People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1343–1346 [29 Cal.Rptr.3d 226].
- Inmate Self-Defense ▸ *People v. Saavedra* (2007) 156 Cal.App.4th 561.
- 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*.

CALCRIM 09-01
New and Revised CALCRIM Instructions
All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Summary of Comment	Committee Response
General Comment	Orange County Bar Association, by Michael G. Yoder, President	Agrees with all proposed new instructions and revisions to existing instructions.	No response required.
General Comment	Michael M. Roddy, Executive Officer, Superior Court of California, County of San Diego	Agrees with proposed changes.	No response required.
General Comment	Superior Court of Sacramento County, Robert Turner, Research & Evaluation Division	Takes no position.	No response required.
104, 222, Evidence, Note Taking	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	The commentators agree with deleting the last sentence, "You must accept the court reporter's notes as accurate." (See comment to CALCRIM No. 202 proposed revision, next.) However, the commentators recommend keeping the first two sentences ("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."). The commentators would retain the first sentence because it explains the second. Although to some extent the second sentence is repeated in CALCRIM No. 202, there is a difference between asking for a read-back "if you decide that it is necessary" and "if there is a disagreement." The former formulation is the more accurate and thorough, because the jury may ask for a read-back if no one can remember or they are not sure, as well as when they have conflicting memories. Additionally, CALCRIM Nos. 104 and 222 seem to be more logical places for stating the availability	The committee carefully considered this comment but prefers the language in the instruction as revised.

Instruction	Commentator	Summary of Comment	Committee Response
		of a read-back, since that right applies even if no one takes notes.	
202, Note Taking	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	The commentators have no objection to the proposed deletion of the penultimate sentence ("It is the record that must guide your deliberations, not your notes."). However, the commentators respectfully disagree with the addition of the last sentence, "You must accept the court reporter's record as accurate." "In our view, the last sentence seems legally dubious, even though it is carried over from current CALCRIM Nos. 104 and 222 and even though it has been upheld in *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1183, cited in the bench notes. *Ibarra* rejected a challenge to this sentence in CALCRIM No. 104 and agreed with the underlying principle that jurors' notes should yield when they conflict with those of the reporter. In support of this conclusion it offered a rather feeble technical reason (the defendant had cited no case supporting his argument, although he had in fact cited a Supreme Court case) and a somewhat better policy reason – "jurors . . . free to rely on their own recollection of the testimony even if it conflicts with the reporter's notes . . . could all too easily exacerbate the difficulties that arise when hostile jurors express a fixed view of the case early in deliberations and when strongly opinionated jurors cause other jurors to conclude they could not deliberate further with those jurors." (*People v. Ibarra*, supra, 156 Cal.App.4th at p. 1183, internal	The committee carefully considered these comments but prefers the language in the revised instruction.

Instruction	Commentator	Summary of Comment	Committee Response
		quotation marks and citations omitted.) The first reason, the absence of authority on the point, is not particularly surprising, since the CALCRIM instructions were fairly new when *Ibarra* was decided. For that matter, the opinion cited no case holding the same as it did. As to the second reason, the commentators certainly agree that the jurors should be told the reporter's notes are an official record of the proceedings and that they should be strongly encouraged to accept the notes of a trained professional over their own. That policy makes sense and far more often than not would lead to a better and more accurate understanding of the testimony. But it is one thing to say they "normally should" and another to say they "always must." What if the jurors all are convinced the reporter is wrong after the read-back refreshes their memories? Reporter's transcripts not infrequently contain errors. (E.g., *People v. Huggins* (2006) 38 Cal.4th 175, 190-191; *People v. Harrison* (2005) 35 Cal.4th 208, 226; *People v. Catlin* (2001) 26 Cal.4th 81, 167; *People v. Lucas* (1995) 12 Cal.4th 415, 469; *In re Cowan* (1991) 230 Cal.App.3d 1281, 1284 fn.2; *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 355; see also Cal. Rules of Court, rules 8.155(b) & (c), 8.340(b) & (c), 8.406(e), 8.416(d), 8.613-8.625 [procedures for correcting record].) While it is appropriate to presume the transcript or reporter's notes are correct in the absence of	

Instruction	Commentator	Summary of Comment	Committee Response
		evidence to the contrary, to reflect reality the presumption must necessarily be rebuttable. The language in CALCRIM No. 202 is absolute and irrebuttable. *Ibarra* does not bind the CALCRIM Committee to leave the language as it is; it does not mandate the use of "must," but merely upholds it with little discussion. Alternative, less dogmatic language might be: ". . . you may ask that the court reporter's record be read to you. The reporter is a trained professional who has made word-for-word notes of the testimony. You should regard those notes as the official record of the proceedings."	
107, Pro Per Defendant (new)	San Diego County District Attorney's Office by Craig Fisher, Deputy District Attorney	Delete the language about a defendant's constitutional rights. The attempt to explain to jurors those rights is unnecessary to the gist of the instructions and could even be confusing. Simply say in the first sentence: "The defendant[s] _____<*insert name[s] of self-represented defendant[s]*> (has/have) decided to exercise (his/her/their) right to act as (his/her/their) own attorney in this case. Do not . . . ."	The committee carefully considered this comment, but prefers the language in the revised instruction.
	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	The commentators have no objection to the substance of the instruction, but do suggest the language of the first paragraph be revised slightly, to keep the focus of the instruction on the defendant's self-representation and the fact it is a right: Like all criminal defendants in this country (the defendant[s]/ _____<*insert name[s] of self-represented defendant[s]*>) (has/have) a constitutional right to be represented by an attorney or to	The committee agrees with the comment regarding the second paragraph, and has made the suggested revision. It prefers to retain the language of the first paragraph.

Instruction	Commentator	Summary of Comment	Committee Response
		choose instead to act as (his/her/their) own (attorney/attorneys). (He/She/They) (has/have) decided to represent (himself /herself/ themselves) in this case. Do not allow that decision to affect your verdict**.** As to the second paragraph, to forestall any misinterpretation that the jury is to determine whether the defendant is adhering to the rules of evidence and procedure, it might be reworded slightly: The court applies the rules of evidence and procedure to a (self-represented defendant/ _____<*insert name[s] of self-represented defendant[s]*>).	
219, Reasonable Doubt in Civil Proceedings (new)	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	"We recommend no change to the instruction itself, as it appears to describe the state's burden accurately." However, the commentators recommend that with appropriate modifications, the committee import aspects of the criminal reasonable doubt instructions found in CALCRIM Nos. 103 and 220 into this new instruction on reasonable doubt in civil commitment proceedings, including provisions that (i) allegations in the petition are not proof, (ii) the jury should not be biased because of the allegations, and (iii) the allegations in the petition are not presumed to be true. They acknowledge that these provisions may not be constitutionally *required* in civil commitment cases (see *People v. Beeson* (2002) 99 Cal.App.4th	The committee agrees in part with the proposed language and disagrees in other respects. It agrees to revise the first paragraph so that the criminal and civil reasonable doubt instructions track each other more closely. As revised, the first paragraph now reads: "The fact that a petition to declare respondent a sexually violent predator has been filed is not evidence that the petition is true. You must not be biased against the respondent just because the petition has been filed and this matter has been brought to trial." The committee disagrees with the suggested language regarding the presumption that the petition is not true.

Instruction	Commentator	Summary of Comment	Committee Response
		1393), but the commentators believe they are legally correct and that provide some important nuances to the concept of reasonable doubt that the jury probably would not otherwise appreciate. Thus, the commentators recommend adding the following language to the instruction: The Respondent has denied the allegations of the petition. The fact a petition has been filed is not evidence that the allegations in it are true. You must not be biased against the Respondent just because a petition has been filed. The allegations in a _____<*insert type of proceeding, e.g., "sexually violent predator"*> proceeding are presumed to be not true. This presumption requires that the Petitioner prove the allegations true beyond a reasonable doubt. Whenever I tell you the Petitioner must prove something, I mean the Petitioner must prove it beyond a reasonable doubt [unless I specifically tell you otherwise]. In the Instructional Duty section, the committee notes that the court has a sua sponte duty to give this instruction in sexually violent predator (SVP) and mentally disordered offender (MDO) civil commitment proceedings. As authority for this duty, the committee cites *People v. Beeson* (2002) 99 Cal.App.4th 1393, an MDO case. Because other civil commitment statutes impose	The *Beeson* case clearly stands for the proposition that the correct instruction only includes reference to the burden of proof, not the presumption that the petition is not true. The committee agrees with the suggestions for cross references in the bench notes. There should be one standard instruction for all civil proceedings that require proof beyond a reasonable doubt.

Instruction	Commentator	Summary of Comment	Committee Response
		the same burden of proof on the state, the Instructional Duty section should state the duty to give this instruction in not guilty by reason of insanity (NGI) extended commitment (Pen. Code, § 1026.5, subd. (b)) and juvenile delinquency extended commitment (Welf. & Inst. Code, §§ 1800 et seq.) proceedings as well. For the same reason, CALCRIM No. 3453 (NGI) and CALCRIM No. 3458 (juvenile delinquency) should be added to the Related Instruction list in the Authority section of this instruction. (See also comments to CALCRIM Nos. 3453 and 3458.)"	
362, Consciousness of Guilt: False Statements	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	(1) The commentators have no objection to the proposed addition "before this trial." (2) The commentators question the statement in the bench notes that the trial court has a sua sponte duty to give this instruction when the evidence supports it. In light of recent Supreme Court authority (discussed below), a more accurate statement would be: "Under some evidentiary circumstances, the trial court may have a sua sponte duty to give this instruction." (3) The proposed addition "before this trial" is consistent with *People v. Beyah* (2009) 170 Cal.App.4th 1241, 1251: "[W]e do not endorse the use of CALCRIM No. 362 when the basis for an inference of guilt is false or misleading statements in a defendant's trial testimony, rather than false or misleading statements made prior to trial. The commentators further invite the CALCRIM Committee to clarify its intended use of the instruction."	No response necessary. The remaining comments go beyond the scope of material that circulated for public comment and will be considered at a future committee meeting.

Instruction	Commentator	Summary of Comment	Committee Response
		The commentators note that *Beyah* did cite several cases upholding the application of consciousness of guilt instructions to trial testimony. (*People v. Showers* (1968) 68 Cal.2d 639, 643; *People v. Amador* (1970) 8 Cal.App.3d 788; *People v. Foster* (1953) 115 Cal.App.2d 866. However, as *Amador* pointed out, such instruction is appropriate only in unusual cases: "[N]o inference of consciousness of guilt can be drawn from the mere fact that the jury, in order to convict, must have disbelieved defendant's [testimony]; only where the false statement or testimony is intentional rather than merely mistaken and where such statement or testimony suggests that the defendant has no true exculpatory explanation can it be considered as an admission of guilt. [Citation.] Here defendant did not simply deny his guilt; he ventured upon an explanation so unusual that the triers of fact could conclude that it was an intentional fabrication indicating consciousness of guilt and the absence of any true exculpatory explanation"].) (*Amador*, at pp. 791-792, quoting *People v. Wayne* (1953) 41 Cal.2d 814, 823 [overruled on other grounds in *People v. Sharer* (1964) 61 Cal.2d 869, 874, and *People v. Bonelli* (1958) 50 Cal.2d 190, 197].) The commentators assume the proposed change to CALCRIM No. 362 accepts *Beyah*'s	

Instruction	Commentator	Summary of Comment	Committee Response
		invitation to clarify the normal intended use of the instruction. In the unusual case where the trial testimony gives rise to the inference of consciousness of guilt, an appropriate instruction may be fashioned and given on request. (4) In stating that the trial court has a sua sponte duty to give this instruction when the evidence supports it, the bench notes cite *People v. Atwood* (1963) 223 Cal.App.2d 316, 333-334. Recently, however, the Supreme Court stated in *People v. Najera* (2008) 43 Cal.4th 1132, 1139, fn. 3: *Atwood* . . . found that the trial court had a sua sponte duty to instruct on adoptive admissions and false statements indicating a consciousness of guilt "under the particular evidentiary circumstances of the case." . . . We do not read *Atwood* as imposing a categorical duty on trial courts to instruct on these issues. In light of *Najera*, a more accurate statement for the bench notes would be: "Under some evidentiary circumstances the trial court may have a sua sponte duty to give this instruction," with citations to *Atwood* and *Najera*. *Najera* also cited *People v. Carter* (2003) 30 Cal.4th 1166, 1197-1198, which disapproved *Atwood* and other cases on the related question of whether a trial court has a sua sponte duty to instruct on adoptive admissions. Although not part	

Instruction	Commentator	Summary of Comment	Committee Response
		of the invitation to comment, the commentators point out that the bench notes to CALCRIM Nos. 357 and 371 likewise cite *Atwood* without qualification as authority for a sua sponte instructional duty. The commentators suggest they be modified to reflect the narrow construction the Supreme Court has given that case.	
520, Murder With Malice Aforethought	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	The commentators recommend that the proposed new entry in the "Authority" section, citing *People v. Pool* (2008) 166 Cal.App.4th 904, be combined with the existing entry in the "Related Issues" section captioned "Second Degree Murder of a Fetus," which cites *People v. Taylor* (2004) 32 Cal.4th 863. Placement of such a combined entry is discussed below. Both *Pool* and *Taylor* are cited for the same holding, that a defendant does not need to know a woman he kills is pregnant to be guilty of murdering her fetus. *Pool* merely applies *Taylor* to a different set of facts, murder by strangulation instead of murder by shooting. The commentators would recommend placing the combined entry in the "Authority" section, since that section also includes citations to decisions defining what a fetus is for purposes of the crime.	The committee carefully considered this comment but believes the citations are sufficient.
600, Attempted Murder	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	(1) "Name of alleged victim" should be replaced by phraseology such as "designation of alleged victim" or "name or description of alleged victim," because in light of *People v. Stone* (No. S162675, April 23, 2009) __ Cal.4th ___ [2009 Cal. LEXIS 3979, 2009 WL 1080442], attempted murder doesn't necessarily require a specifically	The committee agrees with the first two comments and has made the suggested revisions. The committee carefully considered comments 3–5, but believes no further revisions are appropriate at this time.

Instruction	Commentator	Summary of Comment	Committee Response
		named victim. (2) In the eighth line of this paragraph of the instruction, the word "anyone" is replaced by "everyone," so as to read "... intended to kill everyone within the kill zone." This proposal is correct in light of *Stone*. For clarity and continuity, and to preclude ambiguity and ensure conformance with *Stone*, the same change of "anyone" to "everyone" should also be made in the second line (first sentence) of this paragraph, so as to read, "...at the same time intend to kill everyone ..." (3) The commentators believe that the phrase "kill zone" is unduly and needlessly inflammatory when given to a jury, which the commentators consider particularly problematic given the Supreme Court's admonition that this kind of instruction isn't even required. The commentators understand its use as a legal shorthand in caselaw beginning with *Bland*, but as is often made clear in judicial authority, language taken directly from judicial opinions is not always appropriate for jury instructions. (*E.g., People v. Wagner* (2009) 170 Cal.App.4th 499, 508, and authority cited.) The commentators would substitute a neutral, noninflammatory phrase such as "area of danger"; correspondingly, in the first sentence, the commentators would change "in a particular zone of harm or 'kill zone'" to "in a particular area of danger." However, because attorneys and judges have become familiar with the phrase "kill zone," the commentators would also add a Bench Note	

Instruction	Commentator	Summary of Comment	Committee Response
		which states that the phrase "area of danger" refers to what has also been called the "kill zone" in prior judicial opinions. (4) If the proposal in (3) above were not adopted, then the phrase "kill zone" should be defined for the jury. Otherwise, the jury hears language dealing with a seemingly amorphous concept, which is also a legal term of art, and it doesn't know what this language means. If the proposal in (3) above were adopted, a neutral, noninflammatory, plain-language phrase such as "area of danger" may be clear enough not to require specific definition. (5) This instruction could be affected by the Supreme Court's decision in *People v. Perez* (No. B198165, Aug. 21, 2008; unpublished), rev. gtd. (No. S167051, Nov. 19, 2008).	
603, Attempted Voluntary Manslaughter: Heat of Passion – Lesser Included Offense	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	In lieu of the last paragraph of the instruction as modified in the current proposal, the commentators recommend substituting the following as the last paragraph of the instruction: "The People have the burden of proving beyond a reasonable doubt that the defendant ~~did not attempt to kill as the result of a sudden quarrel or in the heat of passion~~ attempted to kill someone and that the attempt was not the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, leaving you with a reasonable doubt whether the defendant acted with the express malice required for attempted murder, you must find the defendant not guilty of attempted murder.	The suggestion for revisions to additional instructions falls outside the scope of the current invitation to comment and the committee will consider it at its next meeting.

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Instruction	Commentator	Summary of Comment	Committee Response
		Both the current and proposed paragraphs are confusing and ambiguous. A significant part of the problem is the placement of the first word "not," which seems to modify "attempt to kill someone" as well as "as a result of a sudden quarrel or heat of passion." The proposed revision addresses the correct crime, but does not eliminate the confusion and ambiguity. For the future, the Committee may wish to address the question of whether the paragraph that begins "In order for heat of passion to reduce ..." should instead begin "In order for a sudden quarrel or heat of passion to reduce ..."	
604, Attempted Voluntary Manslaughter: Imperfect Self-Defense – Lesser Included Offense	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	(1) In light of *Stone*, since attempted murder does not require a specifically named victim, the commentators are not aware that imperfect self-defense can only be invoked when there is a specifically named victim. Consequently, akin to their recommendation for CALCRIM No. 600, "name of alleged victim" should be replaced by phraseology such as "designation of alleged victim" or "name or description of alleged victim." (2) In the second, third and fourth paragraphs from the end, all of which deal with antecedent threats, the phrase "alleged victim" is inaccurate because the antecedent threat relevant to imperfect self-defense can come from someone who is not the alleged victim of the attempted homicide or someone associated with the alleged victim. Because the doctrine of transferred intent is	The committee agrees with comment 1 and has made the suggested revision because of the need to conform this instruction to the *Stone* case. Comment 2 falls outside the scope of the current invitation to comment and the committee will consider it at its next meeting.

Instruction	Commentator	Summary of Comment	Committee Response
		inapplicable to attempted homicide, in light of "kill zone" cases such as *Bland* and *Stone*, situations may arise where (for example) the defendant may believe he is trying to kill X who had threatened him in the past; but due to mistake of fact, poor aim, or some other reason, the victim of his attempted homicide is actually Y. The doctrine of imperfect self-defense is not precluded in such situations, merely because the alleged victim of the attempted homicide is not the same person as (or is not an associate of) the one who had made the antecedent threats. To account for this type of situation, while still covering the more typical imperfect self-defense situation which is addressed by the current instruction, the commentators would add the word "intended" between the words "alleged" and "victim," wherever they appear.	
	Stephen Greenberg, Nevada City (no further information provided)	"The single proposed modification takes care of only one of two errors, but the other is quite significant: Element 5 requires both of the defendant's beliefs (in imminence and necessity) to be unreasonable. Compare CALCRIM No. 571, the analogous instruction re murder: element 3 requires either or both of the beliefs to be unreasonable. The imperfect defense theory is independent of the victim's death, so one of these instructions must be erroneous. Logically, it must be 604: where any aspect of what would otherwise be perfect defense is unreasonable, the defendant's actual beliefs still mitigate malice."	This comment falls outside the scope of the current invitation to comment and the committee will consider it at its next meeting.
640, Deliberations and Completion of	Appointed Counsel Projects in the Court of	Concurs in proposed draft.	No response required.

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Instruction	Commentator	Summary of Comment	Committee Response
Verdict Forms: For Use When Defendant Is Charged With First Degree Murder and Jury Is Given Not Guilty Forms for Each Level of Homicide	Appeal and Supreme Court by Michelle May		
641, Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With First Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count; Not to Be Used When Both Voluntary and Involuntary Manslaughter Are Lesser Included Offenses	California Public Defenders Association by Michael McMahon	This instruction and CALCRIM No. 643 are used when the jury is given only one "not guilty" verdict form for each count. Unlike CALCRIM Nos. 640 and 642 (which are used when the jury is given "not guilty" verdict forms for each level of homicide), CALCRIM Nos. 641 and 643 allow for implied acquittals on the greater offense[s] when the jury returns a guilty verdict on a lesser offense. The problem with CALCRIM Nos. 641 and 643 is that the court and parties are left wondering what level of homicide (i.e., first degree murder, second degree murder or manslaughter) the jury is stuck on if they hang. In other words, if the jury cannot reach agreement about the defendant's guilty of a particular level of homicide, these instructions direct them to provide the court with information (i.e., that they "cannot reach agreement") that is ambiguous and possibly misleading, because it does not explain what level of homicide their disagreement concerns, or whether they have concluded that the defendant is not guilty of one or more greater levels of homicide (i.e., first and/or second degree murder), even though that may be the case.	The committee carefully considered this comment but chose to retain the current language of the bench notes.

Instruction	Commentator	Summary of Comment	Committee Response
		The bench notes should explain that when the jury informs the court that they cannot reach agreement, the court should ask the jurors which level of offense their disagreement concerns, and, if it is a lesser offense than that charged, provide the jurors with the opportunity to acquit of the greater offense[s] by giving the applicable CALCRIM No. 640 or 642 along with the verdict forms of guilty/not guilty for each offense greater than the offense on which the jurors are unable to agree.	
642, Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Not Guilty Forms for Each Level of Homicide	California Public Defenders Association by Michael McMahon	Paragraph 5 should be moved up to paragraph 4, to be in a comparable place as the same admonition in CALCRIM No. 640. Otherwise, its utility in preventing juror confusion about returning guilty verdicts on both voluntary and involuntary manslaughter as lesser offenses to second degree murder might be diminished.	The committee agrees with this comment and has made the suggested revision.
	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	Concurs in proposed draft.	No response required.
	Katherine Lynn, Managing Attorney, Court of Appeal, Second Appellate District, not on behalf of the court	In the last paragraph numbered 5, the sentence "You may not find the defendant guilty of both voluntary and involuntary manslaughter [as to any count]" should be deleted from the last paragraph numbered 5 and moved to the last paragraph numbered 4, cf. CALCRIM No. 640.	The committee agrees with this comment and has made the suggested revision.
643, Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With	California Public Defenders Association by Michael McMahon	This instruction needs to advise jurors about what to do if they all agree the defendant is not guilty of second degree murder, but cannot reach agreement about whether the defendant is guilty of the lesser offense of (voluntary or involuntary) manslaughter. Proposed CALCRIM instructions	The committee agrees with this comment and has made the suggested revision.

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Instruction	Commentator	Summary of Comment	Committee Response
Second Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count; Not to Be Used When Both Voluntary and Involuntary Manslaughter Are Lesser Included Offenses		nos. 640, 641 and 642 do this. When the jury acquits of murder and hangs on manslaughter, CALCRIM 640 and 642 tell them to complete and sign the verdict forms for not guilty of murder (all available levels), leave the remaining verdict forms for that count blank, and inform the court they cannot reach further agreement.	
	Katherine Lynn, Managing Attorney, Court of Appeal, Second Appellate District, not on behalf of the court	There is no provision in CALCRIM No. 643 for the situation in which the jury agrees that the defendant is not guilty of second degree murder but is unable to reach a verdict on voluntary/involuntary manslaughter. (See comparable provision in CALCRIM No. 641, element 4).	The committee agrees with this comment and has made the suggested revision.
823, Child Abuse (Misdemeanor)	San Diego County District Attorney's Office by Craig Fisher, Deputy District Attorney	Delete the word "Misdemeanor" from the title of the instruction to avoid suggesting the potential punishment to jurors.	The committee notes that the word "misdemeanor" is included to distinguish this instruction from the felony offense for the convenience of the user. In any case, the titles of the instructions are not intended for jurors' eyes, but rather to assist courts and attorneys in selecting the appropriate instructions. A court may delete the term if it chooses to include titles of instructions in the instructions read to the jury and is concerned about potential prejudice.
	Los Angeles County Public Defender by Albert Menaster, Head Deputy of the Appellate Branch	This instruction should either retain the current language or replace it with language directly from the *Burton* and *Valdez* cases cited in the bench notes. The proposed revision is improper and will mislead juries. The commentators suggest that if the instruction must be revised, it must state the following:	The committee carefully considered this suggestion but decided to retain the proposed revision except for one modification in response to comment 2 submitted by the Appointed Counsel Projects in the Court of Appeal and Supreme Court, below.

Instruction	Commentator	Summary of Comment	Committee Response
		Criminal negligence is aggravated, culpable, gross or reckless conduct that is such a departure from that of the ordinarily prudent or careful person under the same circumstances as to be incompatible with a proper regard for human life. Under the criminal negligence standard, if a reasonable person in the defendant's position would have been aware of the risk involved, then you may presume the defendant had such an awareness. In other words, a person is criminally negligent when that person's conduct toward a child is such a departure from that of the ordinarily prudent or careful person as to be incompatible with a proper regard for human life.	
	California Public Defenders Association by Michael McMahon	Concurs and joins in the comments provided by the Office of the Los Angeles County Public Defender.	See response above.
	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	(1) The notations indicate that the sentence "*Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment" has been both deleted and added. If the proposal is to delete the sentence, the commentators suggest that it remain in the instruction. (See, e.g., *Williams v. Garcetti* (1993) 5 Cal.4th 561, 574.) (2) The proposed amendments delete the requirement that the prosecution must show "a high risk of death or great bodily harm." The commentators agree that this requirement should	Comment 1: No response required because language was retained. Comment 2: The committee agrees to add the word "gross" before "departure" and delete the word "different." Comment 3: The committee will address this issue in the next cycle of comments because it falls outside the scope of this invitation to comment.

Instruction	Commentator	Summary of Comment	Committee Response
		be deleted as it is not an element of misdemeanor child endangerment. However, the commentators do have a suggested modification to the proposed substitute language. With the proposed changes, the first enumerated element describing when criminal negligence occurs states: "He or she acts in a reckless way that is different from the way an ordinarily careful person would act in the same situation." This sentence appears to describe criminal negligence as acting in a manner which is merely different from the way an ordinarily careful person would act. In discussing criminal negligence, the California Supreme Court held in *People v. Valdez* (2002) 27 Cal.4th 778, 790: "[T]he conduct prohibited by section 273a, subdivision (a), or any statute requiring criminal negligence, is not 'accidental,' but a *gross departure* from the conduct of an ordinarily prudent person." (Emphasis supplied.) Similarly, the California Supreme Court has observed that the criminal negligence standard requires that "the defendant's conduct. . . go beyond that required for civil liability and must amount to a 'gross' or 'culpable' departure from the required standard of care.'" (*Williams v. Garcetti*, *supra*, 5 Cal.4th at p. 73, quoting *People v. Peabody* (1975) 46 Cal.App.3d 43, 47.) Accordingly, the choice of the word "different" in the proposed amendment understates the degree to which the defendant's behavior must depart from the conduct of an ordinarily careful person.	

Instruction	Commentator	Summary of Comment	Committee Response
		The commentators therefore suggest the first element of the criminal negligence description instead be amended to state: "He or she acts in a reckless way that is a gross departure from the way an ordinarily careful person would act in the same situation." (3) For future amendment cycles, the commentators suggest that parallel language be incorporated into the definition of criminal negligence in CALCRIM No. 821, and that it also include an element regarding the natural and probable consequences of the defendant's conduct, such as that currently proposed for the third element of the criminal negligence definition in CALCRIM No. 823. So the commentators suggest that in the future, the Committee consider requiring in CALCRIM No. 821 that the defendant acted "in a reckless way that is a gross departure from the way an ordinarily careful person would act in the same situation," and, in the last enumerated element, specify that "a reasonable person would have known that acting in that way would naturally and probably result in great bodily harm or death."	
861, 876, Assault on a Firefighter or Peace Officer – With Stun Gun orLess Lethal Weapon, Assault With Stun Gun or Less Lethal Weapon	California Public Defenders Association by Michael McMahon	Concurs and joins in the comments of the Los Angeles County Public Defender.	No response required except as noted below.
	Los Angeles County Public Defender by Albert Menaster, Head Deputy of the Appellate Branch	The changes are unobjectionable with one exception. There should be an "and" between the two paragraphs defining "less lethal ammunition."	No response required except to note that there is only one paragraph defining "less lethal ammunition" and it is not apparent where it would be appropriate to insert an "and" so the committee did not

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			follow that suggestion.
875, Assault With Deadly Weapon	Katherine Lynn, Managing Attorney, Court of Appeal, Second Appellate District, not on behalf of the court	A more appropriate authority for the proposition "To Have Present Ability to Inflict Injury, Gun Must Be Loaded Unless Used as Club or Bludgeon" might be *People v. Fain* (1983) 34 Cal.3d 350, 357, fn. 6: "The threat to shoot with an unloaded gun is not an assault, since the defendant lacks the present ability to commit violent injury. . . . In any case, even an unloaded gun can be used as a club or bludgeon	The committee carefully considered this comment but believes the citation in the proposed revised instruction is sufficient.
1195, Contacting Minor With Intent to Commit Certain Felonies (new)	San Diego County District Attorney's Office by Craig Fisher	Delete the reference to "Felonies" in the title and use the word "offenses" instead. This is in keeping with not interjecting any notion of potential punishment into the instructions.	The committee notes that the word "felonies" is included in the title to distinguish this instruction from misdemeanor offenses for the convenience of the user. In any case, the titles of the instructions are not intended for jurors' eyes, but rather to assist courts and attorneys in selecting the appropriate instructions. A court may delete the term if it chooses to include titles of instructions in the instructions read to the jury and is concerned about potential prejudice.
	California Public Defenders Association by Michael McMahon	The crucial element in this offense is the defendant's intent to commit an enumerated offense involving the minor whom he or she has contacted. Without this element, the conduct described in the statute is not criminal. Thus it is essential that the target "enumerated offense" not only be identified (as it is here) but also described for the jury. In other words, the trial court has a sua sponte duty to instruct on the elements of the target enumerated offense. The proposed instruction does not include either a fill-in-the-	The committee agrees with this comment and has added an appropriate admonition to the bench notes.

Instruction	Commentator	Summary of Comment	Committee Response
		blank paragraph providing for instruction on the elements of the target offense or a parenthetical directive to the trial court that this description of the target offense is required. The Bench Notes for the proposed instruction state: "Instruct on the enumerated offense as appropriate." This note does not adequately explain the extent and importance of the sua sponte duty involved. The instruction and Bench Notes should make it clear that the trial court has a sua sponte duty to describe the elements of the enumerated offense(s) that are the target of the charged violation of Penal Code section 288.3.	
	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	The commentators see several improvements that could be made to the proposed instruction. *1. Temporal Connection Not Enough* The first enumerated element requires the jury to find that the defendant contacted or communicated with the minor. The second enumerated element is: "When the defendant did so, (he/she) intended to commit _____ <*insert enumerated offense from statute*> involving that minor." The word "When" in this element does not adequately convey the required nexus between the contact or communication and the intent. By using the word "when," the instruction conveys a temporal connection, i.e. that it is sufficient if at the same time as the contact or communication the defendant had the intent to commit the target offense. But the statute requires more than a temporal connection; it requires that the purpose of	The committee carefully considered comment 1 but believes that the language in the revised instruction is sufficient. The committee carefully considered comment 2, but prefers to retain the language of the statute. In support of comment 3, the commentator cites both *People v. Hernandez* (1964) 61 Cal.2d 529, 535–536 and *People v. Winters* (1966) 242 Cal.App.2d 711, 716, for the argument that a good faith belief in age of majority should be included as a defense in this instruction, as it is in the statutory rape instructions. Indeed, both of those cases arose in the context of statutory rape, an

Instruction	Commentator	Summary of Comment	Committee Response
		the contact or communication be to commit the target offense. Consequently, the element should be modified to reflect not just a temporal connection, but also a connection with the defendant's purpose. One way to do that would be to follow the structure of CALCRIM No. 1203 — the instruction for kidnapping with intent to commit listed felonies (§ 209(b)) — which places the intent element first, and introduces the conduct element with the phrase "Acting with that intent, the defendant ...." Such a formulation more precisely conveys the full nexus required under the statute, not merely the temporal connection imparted by the word "when." Accordingly, in lieu of the first two numbered elements, the commentators recommend that the following be substituted: 1. The defendant intended to commit _____ <*insert enumerated offense from statute*> involving a minor; 2. Acting with that intent, the defendant (contacted or communicated/ [or] attempted to contact or communicate) with a minor . . . . *2. Ambiguity of the Word "Involving"* The commentators also note an ambiguity in the	offense that by definition requires intimate knowledge of and contact with the victim. In contrast, the instant offense can in theory be committed by merely contacting a victim through the Internet. Until the courts of review provide guidance about whether that defense should apply to this offense, the committee believes it should not be included. It notes further that CALJIC 10.67, the "Belief as to Age" instruction, does not list prosecutions of Penal Code section 288.3(a) among those for which that instruction must be given when justified by the evidence. In the interest of informing courts about the issue, the committee has added a clarifying bench note. The committee agrees with comment 4 and has made the suggested revisions.

Instruction	Commentator	Summary of Comment	Committee Response
		statute which was picked up by the proposed pattern instruction. Both refer to the intent to commit an enumerated offense "involving" the minor. But it is not clear whether the electorate, when it passed Proposition 83 in 2006, intended that the statute reach offenses where the minor was involved in some way other than as a victim. As worded, the instruction would seem to allow a conviction where the defendant communicated with the minor who was involved in the offense but who was not the victim of the offense, such as where the defendant obtained the minor's assistance in the commission of an enumerated offense against a third party. To convey the likely intent of the voters in enacting section 288.3, the phrase "involving that minor" in proposed element 2 could be replaced with "against that minor." Alternatively, the ambiguity discussed above could be identified in a bench note. *3. Knowledge of the Victim's Age* The third numbered element of proposed CALCRIM No. 1195 states: "3. The defendant knew or reasonably should have known that the person was a minor." This stands in contrast to other instructions which have more detailed provisions on good faith mistake regarding the victim's age. For instance, the instruction for unlawful intercourse with a minor where the defendant is 21 or older (§ 261.5, subdivisions (a) & (d)), CALCRIM No. 1070, includes this	

Instruction	Commentator	Summary of Comment	Committee Response
		optional paragraph: *<Defense: Good Faith Belief 18 or Over>* [The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the other person was age 18 or older. In order for reasonable and actual belief to excuse the defendant's behavior, there must be evidence tending to show that (he/she) reasonably and actually believed that the other person was age 18 or older. If you have a reasonable doubt about whether the defendant reasonably and actually believed that the other person was age 18 or older, you must find (him/her) not guilty.] This defense is described with slightly different language — more focused on the prosecution's burden — in the related instruction for unlawful intercourse with a minor more than three years younger (§ 261.5, subdivisions (a) and (c); CALCRIM No. 1071) and unlawful intercourse with a minor within three years of defendant's age (§ 261.5, subdivisions (a) and (b); CALCRIM No. 1072): *<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	

Instruction	Commentator	Summary of Comment	Committee Response
		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 the crime.] (The reason for the variations in those paragraphs is not apparent.) The commentators recommend use of one of these more detailed descriptions of the defense found in CALCRIM Nos. 1070-1073, rather than the terse element 3 found in the proposed new CALCRIM No. 1195. In addition, as with CALCRIM No. 1070, authority on the defense should be added to the Bench Notes section: ***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].) *4. Instructing on Target Offense* The proposed pattern instruction says nothing about instructing on the elements of the target sex offense. The instructional duty bench note, rather unhelpfully, says to "Instruct on the enumerated offense as appropriate."	

Instruction	Commentator	Summary of Comment	Committee Response
		As with other offenses committed "with the intent to commit" an enumerated offense — such as burglary (Pen. Code, § 459) or assault with intent to commit enumerated sex offenses (§ 220) — the court must instruct on the elements of the predicate or enumerated offense, and either define the elements of the other offense or inform the jury that those elements are defined in the other instruction. (*People v. May* (1989) 213 Cal.App.3d 128, 129 [261 Cal.Rptr. 502] [assault with intent to commit rape]; *People v. Hughes* (2002) 27 Cal.4th 287, 348-349 [burglary].) As the Court explained in *Hughes,* "the duty to define such so-called target offenses and instruct on their elements has become well established. [Citations.]" (*Hughes*, at p. 349.) A good model of such an instruction is CALCRIM No. 890, defining assault with intent to commit a sex offense. (Pen. Code, § 220; see also CALCRIM No. 891 [assault with intent to commit mayhem, under section 220]). For a charge of violating section 220, CALCRIM No. 890 includes a paragraph informing the jury: "To decide whether the defendant intended to commit <*specify sex offense[s] listed in Pen. Code, § 220*> please refer to Instruction[s] which define[s] (that/those) crime[s]." (See also CALCRIM No. 1700 [burglary] ["To decide whether the defendant intended to commit	

Instruction	Commentator	Summary of Comment	Committee Response
		(theft/ [or] <*insert one or more felonies*>), please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].*"*]) In addition, the instructional duty bench note in CALCRIM No. 890 states: *"*The court has a sua sponte duty to instruct on the sex offense or offense[s] alleged. (*People v. May* (1989) 213 Cal.App.3d 128, 129 [261 Cal.Rptr. 502].)*"* (See also CALCRIM No. 1700, Bench Notes, Instructional Duty [*"*[T]he court has a sua sponte duty to instruct that the defendant must have intended to commit a felony and has a sua sponte duty to define the elements of the underlying felony. (*People v. Smith* (1978) 78 Cal.App.3d 698, 706 [144 Cal.Rptr. 330]; see also *People v. Hughes* (2002) 27 Cal.4th 287, 349 [116 Cal.Rptr.2d 401, 39 P.3d 432].]*"*) CALCRIM No. 1195 should mirror Nos. 890 and 1700. Accordingly, the commentators recommend that a sentenced be added to the end of the instruction stating: *"*To decide whether the defendant intended to commit <*specify sex offense[s] listed in Pen. Code § 288.3(a)*>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].*"* In addition, the commentators recommend that the instructional duty section state that the trial court has a sua sponte duty to instruct the jury on the target offense, akin to CALCRIM Nos. 890 and	

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Instruction	Commentator	Summary of Comment	Committee Response
		1700: The court has a sua sponte duty to define the element of the underlying/target sex offense. (See *People v. Hughes* (2002) 27 Cal.4th 287, 349 [116 Cal.Rptr.2d 401, 39 P.3d 432 and *People v. May* (1989) 213 Cal.App.3d 128, 129 [261 Cal.Rptr. 502].)	
	Katherine Lynn, Managing Attorney, Court of Appeal, Second Appellate District, not on behalf of the court	In accordance with the language of the statute, the bracketed sentence in the second line of the last paragraph, beginning "That communication may take place . . .", should add the words "contact or," so the sentence would read as follows: "That contact or communication may take place . . . ." In element 1, the word "with" should be moved inside the parentheses. The sentence would read: "The defendant (contacted or communicated with/ [or] attempted to contact or communicate with) a minor;"	The committee agrees with this comment and has made the suggested revisions.
1196, Arranging Meeting With Minor for Lewd Purpose (new)	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	"1. The title, the introductory paragraph, and the first itemized element refer to "a minor." However, the third paragraph uses the term "child." For consistency, the commentators recommend that the word "child" be replaced with "minor" in the third paragraph. 2. Section 288.4, subdivision (a) applies when the defendant arranges a meeting with a minor or arranges a meeting with a person he believes is a minor. Under the former manner of violating the statute but not the latter, it would appear that a defense of mistake regarding the minor's age could lie. Accordingly, proposed	The committee agrees with comment 1 and has made the suggested revision. The committee carefully considered comment 2 and agrees to add a clarifying bench note, as it has done for CALCRIM No. 1195.

Instruction	Commentator	Summary of Comment	Committee Response
		CALCRIM No. 1196 should be amended to include a mistake defense, as described above for No. 1195. Section 288.4 is a relatively new statute, and there is no caselaw specifically analyzing whether a mistake-of-age defense is available. Moreover, section 288.4, in contrast to section 288.3, subdivision (a) (for example), does not expressly require that the defendant "know[] or reasonably should know that the person is a minor." Nonetheless, the California Supreme Court has inferred such a *mens rea* element for other sex offenses again minors, such as unlawful intercourse with a minor, in violation of section 261.5. (*People v. Hernandez* (1964) 61 Cal.2d 529, 535-536 (interpreting former section 261, subdivision (1); see also CALCRIM No. 1070.) But the Court has also held that the mistake-of-age defense does not apply in prosecutions under section 288, subdivision (a) involving victims under 14, in light of the strong public policy providing special protections to children under 14. (*People v. Olsen* (1984) 36 Cal.3d 638.) Since section 288.4 applies to minors of any age, the commentators recommend the addition of a Related Issue section noting the possible application of the mistake of age defense, but also noting the uncertainty or variability of the application of the defense: **Mistaken Belief About Victim's Age**	

Instruction	Commentator	Summary of Comment	Committee Response
		It is unclear whether the Legislature intended that a mistake-of-age defense apply to a prosecution under section 288.4. Section 288.4, in contrast to section 288.3, subdivision (a), for instance, does not expressly require that the defendant "know[] or reasonably should know that the person is a minor." However, the California Supreme Court has inferred such a *mens rea* element for other sex offenses again minors, such as unlawful intercourse with a minor in violation of section 261.5, even in the absence of an express mistake-of-age element in the statute. (*People v. Hernandez* (1964) 61 Cal.2d 529, 535-536 (interpreting former section 261(1); but see *People v. Olsen* (1984) 36 Cal.3d 638 (mistake-of-age defense does not apply in prosecutions under section 288, subdivision (a), involving victims under 14, in light of the strong public policy providing special protections to children under 14).)"	
1197, Going to Meeting With Minor for Lewd Purpose (new)	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	"The comments regarding proposed CALCRIM No. 1196 apply equally to proposed CALCRIM No. 1197. In addition, the bench notes should include a reference to the connection between subdivisions (a) and (b) of section 288.4. Subdivision (b) of section 288.4 applies to a person who violates subdivision (a) (i.e. arranges a meeting), but who also goes to the arranged meeting place. A	See responses to CALCRIM No. 1196 comments above. The committee carefully considered the comment about the connection between subdivisions (a) and (b) of Penal Code section 288.4 and decided to discuss this issue further at the next full committee meeting for discussion.

Instruction	Commentator	Summary of Comment	Committee Response
		violation of subdivision (a) is a wobbler penalized by either up to one year in county jail or 16 months, 2 years or 3 years in state prison. A violation of subdivision (b) is penalized by 2, 3 or 4 years in prison. Subdivision (a) could thus be characterized as a lesser included offense of subdivision (b). Alternatively, subdivision (b) could be considered to be an enhancement of subdivision (a), increasing the penalty upon proof of a single additional element: going to the meeting place. There is, however, no authority describing whether subdivision (b) describes a separate offense or constitutes an enhancement. Given the uncertainty of the relationship between these two subdivisions and given the complexity of possible solutions noted below, the commentators offer no proposed language to be added to the instruction. Instead, the commentators describe possible solutions. If subdivision (a)(1) is included within subdivision (b), then a Lesser Included Offense section should be added to the bench notes of CALCRIM No. 1197, instructing the judge to give both CALCRIM Nos. 1196 and 1197, and either CALCRIM No. 3517, 3518, or 3519. If subdivision (b) is a sentence enhancement, then the judge should give CALCRIM No. 1196, with the instruction that if the jury finds the defendant guilty of a violation of	

Instruction	Commentator	Summary of Comment	Committee Response
		(a)(1), it must further consider whether the defendant also actually went to the meeting. This could be accomplished in different ways: • One is by altering CALCRIM No. 1197 so that all paragraphs but the first two and element 4 are bracketed. The notes could tell the court to give only the unbracketed paragraphs if the court determines that Penal Code section 288.4, subdivision (b) creates a sentence enhancement. • Another is to include element 4 of CALCRIM No. 1197 in brackets at the end of No. 1196, with the instruction that if the jury finds the defendant guilty of arranging a meeting, it must then determine whether he/she went to the meeting. It would return a guilty verdict on the "arranging" charge and a separate finding on the "going" allegation. (CALCRIM No. 1197 would include a direction that it is not to be given if the court determines that subdivision (b) is a sentence factor.) • Still another option is to have a new, separate instruction (e.g., No. 1197A) on going to the meeting as a sentence factor. This would be analogous to such instructions as CALCRIM Nos. 601 (attempted premeditated murder), 1801 (grand theft) and 1850 (petty theft with a prior), which instruct only on the additional elements that enhance the sentence."	
1198, Sexual Intercourse or Sodomy With Child	Katherine Lynn, Managing Attorney, Court of Appeal, Second	The first sentence reads "The defendant is charged . . . with engaging in (sexual intercourse/ [or] sodomy) with a child **under ten years of age** . . .	The committee agrees with this comment and has made the suggested revision.

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Instruction	Commentator	Summary of Comment	Committee Response
(new)	Appellate District, not on behalf of the court	." The statute provides that the proscribed act be with a child "ten years of age or younger." The elements of the instruction correctly require a finding that the complaining witness was ten years old or younger. However, to avoid ambiguity, the first sentence of the instruction should be modified to provide "The defendant is charged . . . with engaging in (sexual intercourse/ [or] sodomy) with a child ten years of age or younger . . . ."	
	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	"1. For accuracy and to be consistent with the statute, the commentators suggest that in the first sentence, "a child under ten years of age" be changed to "a child ten years of age or younger." 2. The "Secondary Sources" section cites § 21 of 2 *Witkin & Epstein*, California Criminal Law (3d ed. 2008 supp.), Chapter VI, Sex Offenses and Crimes Against Decency. This section of *Witkin*, however, refers only to the punishment for sexual intercourse under Penal Code section 288.7, subdivision (a). The commentators suggest adding a citation to § 27 of that same chapter of *Witkin*, as § 27 specifies the punishment for sodomy under Penal Code section 288.7, subdivision (a)."	The committee agrees with both of these comments and has made the suggested revisions.
1199, Oral Copulation or Sexual Penetration With Child (new)	Katherine Lynn, Managing Attorney, Court of Appeal, Second Appellate District, not on behalf of the court	See comment to CALCRIM No. 1198 above. Rephrase the optional paragraph defining "sexual penetration" as follows: "[Sexual penetration means (penetration, however slight, of the genital or anal opening of the other person/ [or] causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the	The committee agrees with first comment and has made the suggested revision. The definition of "sexual penetration" occurs in other instructions that did not circulate for public comment. Accordingly, the committee will consider this issue at the next full committee meeting for discussion.

Instruction	Commentator	Summary of Comment	Committee Response
		other person to penetrate, however slightly, his or her own genital or anal opening) by any foreign object, substance, instrument, or device, or by any unknown object, for the purpose of sexual abuse, arousal, or gratification.]"	
	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	"1. For purposes of accuracy and to be consistent with the statute, the commentators suggest that in the first sentence "a child under ten years of age" be changed to "a child ten years of age or younger." 2. Under "Secondary Sources," the citation to § 21 of 2 *Witkin & Epstein*, California Criminal Law (3d ed. 2008 supp.), Chapter VI, Sex Offenses and Crimes Against Decency, should instead refer to §§ 33 and 48. Section 21 refers to the punishment for sexual intercourse under Penal Code section 288.7, subdivision (a). Section 33 refers to the age of participants in an act of oral copulation and cites Penal Code section 288.7(b). Section 48 refers to the age of participants in an act of sexual penetration and cites Penal Code section 288.7(b). 3. The commentators also suggest that the "Authority" section include a bullet point regarding "sexual abuse," like the "Authority" sections for CALCRIM 1045, et. seq.: Sexual Abuse Defined. *People v. White* (1986) 179 Cal.App.3d 193, 205-206 [224 Cal.Rptr. 467]."	The committee agrees with all of these comments and has made the suggested revisions.
1600, Robbery	Appointed Counsel Projects in the Court of	The commentators concur with this proposal. For the future, the Committee may also wish to	No further response required except to note that the additional comment will be

Instruction	Commentator	Summary of Comment	Committee Response
	Appeal and Supreme Court by Michelle May	consider addressing other questions of constructive possession in this pattern instruction. Analysis The proposed amendment is to take account of the Supreme Court's recent opinion in *People v. Scott* (2009) 45 Cal.4th 743, which held that every employee of a business who is on duty is in constructive possession of the employer's property during a robbery. The amendment correctly states the holding of *Scott* as far as it goes, and it is also correct in deleting any reference to *People v. Frazer* (2003) 106 Cal.App.4th 1105, which *Scott* overruled. The proposed amendment does not address the situation in *People v. Gilbeaux* (2003) 111 Cal.App.4th 515, and in fact deletes any reference to that case. *Gilbeaux* was a case in which the two alleged robbery victims were graveyard shift janitors employed as independent contractors while the store was closed. The Court of Appeal affirmed both convictions on the ground that the janitors had constructive possession of the store's property because of their "special relationship with [the store] that made them akin to employees . . . servants or agents of [the store] for the purpose of the robbery." The Supreme Court in the recent *Scott* opinion discussed *Gilbeaux*, apparently with approval. (*Scott*, 41 Cal.4th at pp. 753-754.) Based on *Scott* and *Gilbeaux*, it is difficult to tell whether the current CALCRIM No. 1600 is	taken up by the committee at a future meeting.

Instruction	Commentator	Summary of Comment	Committee Response
		accurate with respect to independent contractors. However, the current instruction is clearly inaccurate with respect to employees, and the proposal fixes that particular inaccuracy. The instruction might profit from further clarity in the future by addressing other situations of constructive possession. But for now, the proposed revision to CALCRIM No. 1600 is clearly correct so far as it goes.	
2040, Unauthorized Use of Personal Identifying Information	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	The new definition, perhaps inadvertently, leaves out the current word "unlawfully" before the list of unlawful purposes. It also omits the statutory requirement that the obtaining be "without the consent of that person." The commentators suggest: An *unlawful purpose* includes unlawfully (obtaining/[or] attempting to obtain) (credit[,]/[or] goods[,]/[or] services[,]/[or] real property/ [or] medical information) in the name of the other person without the consent of that person [[or] <*insert other unlawful purpose*>].	The committee agrees with this comment and has made the suggested revision.
2041 – 2043, New Identity Theft Instructions	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	"In these three instructions, in the definition of 'personal identifying information,' the word 'includes' should be changed to 'means,' which is the language of Penal Code section 530.55(b). The change makes the list exhaustive."	The committee notes that this definition occurs in other instructions and therefore the proposed change will be discussed at a future committee meeting.
2042, Fraudulent Sale, Transfer, or Conveyance of Personal Identifying Information	Katherine Lynn, Managing Attorney, Court of Appeal, Second Appellate District, not on behalf of the court	In the first sentence, the word "fraudulent" should be moved outside the opening parenthesis because it modifies all three options. It would then read: "The defendant is charged with the fraudulent (sale/ [or] transfer/ [or] conveyance) of personal identifying information . . . ."	The committee agrees with this comment and has made the suggested revision.

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Instruction	Commentator	Summary of Comment	Committee Response
2130, Refusal — Consciousness of Guilt	Katherine Lynn, Managing Attorney, Court of Appeal, Second Appellate District, not on behalf of the court	The proposed modification to the bench notes adds the words "entire" and "or the bracketed word 'lawfully'" to the sentence that now will read, "If there is a factual issue as to whether the defendant was lawfully arrested or whether the officer had reasonable cause to believe the defendant was under the influence, the court should consider whether this entire instruction, or the bracketed word "lawfully' are appropriate and/or whether the jury should be instructed on these additional issues." The Bench Note further observes that CALCRIM No. 2670 instructs on lawful arrest and reasonable cause. It appears that if the evidence raises factual issues as to the lawfulness of the arrest or the officer's reasonable cause to believe the defendant was under the influence, the entire instruction must still be given, and the bracketed word "lawfully" should certainly be included. The Bench Note might simply read, "If there is a factual issue as to whether the defendant was lawfully arrested or whether the officer had reasonable cause to believe the defendant was under the influence, the court should consider ~~whether this entire instruction, or the bracketed word 'lawfully' are appropriate and/or~~ whether the jury should be instructed on these additional issues." Alternately, the instruction could be structured along the lines of CALCRIM No. 2131 (Refusal to submit to chemical test – Enhancement), which (1) adds the optional paragraph "[. . .4. The peace officer lawfully arrested the defendant and had	The committee carefully considered this comment, but prefers to retain the currently proposed revisions.

Instruction	Commentator	Summary of Comment	Committee Response
		reasonable cause to believe that defendant was driving a motor vehicle in violation of Vehicle Code section 23140, 23152, or 23153],*"* and (2) states in the Bench Note that if a factual issue is presented, the court should consider whether instructing on this element is appropriate and whether the jury should be instructed on the additional issues.	
	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	(1) The commentators concur with bracketing the word "lawfully" in the instruction. The lawfulness of the arrest is a statutory requirement for loss of license. (See *Troppman v. Valverde* (2007) 40 Cal.4th 1121, 1137, fn. 12.) In many cases the lawfulness of the arrest is uncontested or the issue is tangential. The concept of a lawful arrest is difficult to explain to a jury. It seems that reference to "lawfully" would be needlessly confusing in these situations. (2) The commentators concur with the proposed bench note modifications, with one exception. It seems correct to give the court the responsibility for determining whether this instruction is appropriate in a given case. (See *People v. Sudduth* (1966) 65 Cal.2d 543 [approving instruction allowing consciousness of guilt inference from refusal to take breath test]; see also *South Dakota v. Neville* (1983) 459 U.S. 553.) The exception is that the commentators disagree with the change from "is" to "are," because it is grammatically incorrect. When the disjunctive "or" is used, the element closer to the verb governs whether the verb is singular or plural. The	No further response required to comment 1. The committee agrees with comment 2 and has made the suggested revision.

Instruction	Commentator	Summary of Comment	Committee Response
		phrase "the bracketed word 'lawfully'" is singular, and therefore the verb is singular.	
2150, Failure to Perform Duty Following Accident: Property Damage — Defendant Driver	Hon. Gerald Hermansen, Superior Court of Butte County	The proposed change does not comport with the statutory language of Vehicle Code Section 20002 in which the word "immediately" precedes the word "stop" and thus the duty is to "immediately stop" not the duty to "immediately produce identification."	The committee disagrees with this comment because the word "immediately" appears twice in Vehicle Code Section 20002, once before "stop" and again before "do either of the following: …locate and notify the owner or person in charge . . . ."
	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	(1) The commentators disagree with moving the word "immediately" in element 4(a), because the commentators cannot see a good reason for splitting an infinitive, when doing so is unnecessary to make the meaning clearer. There is no ambiguity or awkwardness in the current phrasing. The change seems to us needless and inelegant. (2) The commentators also disagree with the addition of "AND" after element 4(a), and the deletion of "OR." At first blush, the addition of "AND" may seem technically correct, since the statute provides that the driver must immediately stop and then provide information. Still, the change to "AND" is incongruous with the preamble that the driver "willfully failed to perform *one or more* of the following duties . . . ." (Emphasis added.) Since the section would be violated if the driver willfully failed to perform only one, the current "OR" seems more understandable. (3) The commentators concur with the portion of the proposal that would add "immediately" to	Comment 1: To quote Norman Lewis in *Better English*, "To deliberately split an infinitive . . . is correct and acceptable English." The committee prefers to retain the current formulation. Comment 2: The committee agrees with this comment and has made the suggested revision. Comment 3: No response required.

Instruction	Commentator	Summary of Comment	Committee Response
		modify "provide" in element 4(b), because that conforms to the language of Vehicle Code section 20002: "The driver shall also immediately do either of the following [exchange or leave information]." (Note: The split infinitive seems more appropriate in (b) than in (a). If the Committee wants the phrasing in (a) and (b) to be parallel, it could put "Immediately" at the beginning of both elements.)	
2440, Maintaining a Place for Controlled Substance Sale or Use	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	The commentators concur with this proposal, except that they would delete the phrase "Violations Are Crimes of Moral Turpitude Involving Intent To Corrupt Others," because this is not relevant to any of the elements or circumstances that may support a conviction under this code section.	No further response required except to note that the referenced entry in the authorities section justifies deleting the word "use" in element 2.
2701, Violation of Court Order: Protective Order	Katherine Lynn, Managing Attorney, Court of Appeal, Second Appellate District, not on behalf of the court	The new optional portion of the instruction states "[(Elder/Dependent person) abuse is defined in another instruction . . . .]" Since Penal Code section 166, subdivision (c)(1) uses the term "elder or dependent *adult* abuse, as does this instruction in element 2, the new optional portion of the instruction should also use the term "dependent adult," instead of "dependent person." In the Authority section, "Abuse of Elder or Dependent Person Defined" the word "Person" should be changed to "Adult," which is the term used in section 368.	The committee agrees with these comments and has made the suggested revisions.
	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	(1) The commentators suggest that element 2 be less awkwardly worded, by putting the reference to the code section right after the type of order instead of after the type of criminal proceeding.	The committee agrees with these comments and has revised element 2 accordingly and added the necessary definitions.

Instruction	Commentator	Summary of Comment	Committee Response
		(2) Also in element 2, the commentators suggest that the phrase "criminal case" be changed to "pending criminal proceeding," to conform to the statutory language. (3) The commentators read the January 1, 2009 amendment to section 166, subdivision (c)(1) – which the proposal apparently seeks to implement – as adding only (i) a reference to stay-away orders, and (ii) a provision that applies to court orders "issued as a condition of probation after a conviction in a criminal proceeding involving . . . elder or dependent adult abuse, as defined in Section 368 . . . ." Accordingly, in lieu of the current proposal and in light of these three points, the commentators would revise element 2 of CALCRIM No. 2701 to read: "The court order was a (protective order/stay-away court order/[other]), issued under _____ <*insert code section under which order made*> [(in a pending criminal proceeding involving domestic violence/as a condition of probation after a conviction for (domestic violence/elder abuse/dependent adult abuse))]." (4) The proposed new last paragraph of the instruction states: "[(Elder/Dependent person) abuse is defined in another instruction to which you should refer.]" However, the other substantive type of criminal case expressly referred to in this instruction, domestic violence abuse, is actually defined earlier in the instruction. The	

Instruction	Commentator	Summary of Comment	Committee Response
		commentators do not know why the pattern instruction should define domestic violence directly, but leave the definition of elder or dependent person abuse to another instruction – if one is defined in the instruction, why not define the other? Defining the operative phrase within the instruction seems preferable, because it eliminates confusion over how much of CALCRIM No. 831 has to be given in cases alleging violation of a court order related to an elder or dependent adult abuse case, but not actually alleging a violation of Penal Code section 368, subdivision (c). It appears to lessen confusion if counsel and the court are specifically directed to whatever instructions they are supposed to use. Accordingly, in lieu of the proposed new last paragraph of the instruction, the commentators would substitute language directly from Penal Code section 368, subdivision (c): *"[Elder/dependent care] abuse* means that under circumstances or conditions likely to produce great bodily harm or death, the defendant: (1) willfully caused or permitted any [elder/dependent adult] to suffer; or (2) inflicted on any elder or dependent adult unjustifiable physical pain or mental suffering; or (3) having the care or custody of any [elder/dependent adult], willfully caused or	

Instruction	Commentator	Summary of Comment	Committee Response
		permitted the person or health of the [elder/dependent adult] to be injured; or (4) willfully caused or permitted the [elder/dependent adult] to be placed in a situation in which [his/her] person or health was endangered.”	
2917, Loitering About School	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	The commentators believe the requirement in element 2 of the revised instruction that “The defendant did not have a lawful purpose for being at or near the (school/ [or] public place)” is an inadequate way of conveying the need to prove an *unlawful* intent, since lack of a lawful intent includes having no intent at all. (See *People v. Hirst* (1973) 31 Cal.App.3d 75, 80.) The instruction should instead convey the need for a nexus between the defendant’s presence at the *school* and the *crime*. Cases suggest the statute punishes being around the school for an unlawful *purpose.* (*People v. Frazier* (1970) 11 Cal.App.3d 174, 182-183 [statute is constitutional “only when the loitering is of such a nature that from the totality of the person’s actions and in the light of the prevailing circumstances, it may be reasonably concluded that it is being engaged in for the purpose of committing a crime as opportunity may be discovered,” internal quotation marks omitted]; see also *In re Daniel G.* (2004) 120 Cal.App.4th 824, 833; *People v. Hirst* (1973) 31 Cal.App.3d 75, 80-82.) Therefore, the commentators suggest the following	The committee believes that element 3 conveys the same meaning as the suggested revision.

Instruction	Commentator	Summary of Comment	Committee Response
		language for the second element of the revised instruction: (His/Her) purpose for being at the (school/public place) was to commit a crime if the opportunity arose.	
	Los Angeles County Public Defender by Albert Menaster, Head Deputy of the Appellate Branch	This repeats a proposal made, objected to, and rejected in 2005. The amended instruction (just like the previously rejected proposal) indicates that Penal Code section 653b can be violated in one of two ways. First that the defendant (1A) "lingered" near a school or a public place where children congregate, (2) did not have a lawful purpose for being there, and (3) was in the location to commit a crime as the opportunity arose. Second, that the defendant (1B) remained at or returned within 72 hours to a school or public place where children congregate after a request to leave by specified individuals, and (2) did not have a lawful purpose for being there, and (3) was in the location to commit a crime as the opportunity arose. However, Penal Code section 653b does not contain language which defines two such offenses. There is only one offense: loitering and remaining or returning after a request to leave. Thus, the conduct specified in both "Alternative 1A" and "Alternative 1B" must be proved before a violation of the statute may be found. To achieve this proper result, there should be no "alternative" language, and instead all four paragraphs of the instruction must be included to define the elements of the offense, and they are in current CALCRIM	In a federal case interpreting the statute, *McSherry v. Block* (1989) 880 F.2d 1049, 1053, the Ninth Circuit determined that the "1B" language applied to the vagrancy provision of the statute and not the loitering provision. But the Ninth Circuit case is not binding and the statute is ambiguous. Because it is unclear whether loitering is required if the defendant remains, etc., after being asked to leave, or whether that language was intended to define a new basis for committing this offense, the committee has decided to raise the issue in the bench notes and leave it to the courts' discretion.

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		2917. The mental state defined in 1A is that necessary for loitering. If one separates the "loitering" language of the statute from the "request to leave" portion, then nothing in the "request to leave" portion of the statute requires such a culpable mental state. Consequently, under the statute, if the 1A and 1B portions of the statute are independent, than anybody lawfully near a school or in a public place could be commanded to leave and arrested if he did not do so. It appears to have been obvious to the drafters of the amendment that such a law would be unconstitutional. In sum, the language of Penal Code section 653b clearly defines a single crime: loitering and remaining or returning after a request to leave. Even if this is not clear, and the statute is ambiguous, the statute still must be interpreted to resolve any ambiguity in favor of the accused.	
	California Public Defenders Association by Michael McMahon	Concurs and joins in the comments of the Los Angeles County Public Defender regarding the proposal's unintended effect of giving the jury a "crime," which was not criminalized by the Legislature. The Council must reject this dangerous proposal.	See response to comment above.
2997, Money Laundering (new)	Katherine Lynn, Managing Attorney, Court of Appeal, Second Appellate District, not on behalf of the court	The choices in the paragraph defining "transaction" do not precisely track the language of the statute (Pen. Code, section 186.9(c)). It appears the first set of words, from "deposit" to "exchange," are choices that precede "currency,	The committee agrees with most of the proposed changes in this comment and has made the suggested revisions with the exception of adding new parentheses around the words "([or] electronic, wire,

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		or a monetary instrument, as defined by subdivision (d).” Perhaps this can be clarified by placing a closing parenthesis after “exchange” and then starting a new set of choices, “(currency/ [or] a monetary instrument, as defined by subdivision (d)).” The words “([or] electronic, wire, magnetic, or manual transfer)” would then go in a separate set of parentheses. The bracketed paragraph defining “Foreign Bank Draft” has no closing parenthesis. It should go after “institution that provides similar financial services.” In addition, in that paragraph, the first word inside the opening parenthesis, “foreign,” seems to be intended by the language of the statute (Pen. Code, section 186.9(f)) to modify each of the types of institutions listed. Moving it outside the parenthesis, however, creates a problem because it does not modify the part of the definition “any other foreign financial institution . . .” Perhaps there is a way to set up the instruction with multiple brackets that would reflect the statutory language.	magnetic, or manual transfer).”
	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	“(1) We recommend that in lieu of the current Element 2 of the instruction, “The financial transaction[s] involved [a] monetary instrument[s] valued at more than ($5,000 within a seven-day period/[or] $25,000 within a 30-day period),” a revised version of Element 2 be substituted. Our proposed Elements 1 and 2 are set forth below for clarity, but we do not propose any revisions to Element 1. * * *	The committee agrees with comments 1 and 2 and has made the suggested revisions. It will turn to comment 3 during the next round of revisions.

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		To prove that the defendant is guilty of this crime, the People must prove that: 1. The defendant (conducted/ [or] attempted to conduct) (a/one or more/several) financial transaction[s] involving at least one monetary instrument through at least one financial institution; <Give 2A when only one transaction is alleged. > [2A. The financial transaction involved [a] monetary instrument[s] with a total value of more than $5,000;] <Give 2B and/or 2C as appropriate when multiple transactions are alleged.> [2B. The defendant (conducted/ [or] attempted to conduct) the financial transactions within a seven-day period and the monetary instrument[s] involved had a total value of more than $5,000;] [OR] [2C. The defendant (conducted/ [or] attempted to conduct) the financial transactions within a 30-day period and the monetary instrument[s] involved had a total value of more than $25,000;] [AND] * * *	

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		(2) We recommend deleting the word "from" in the definition of "criminal activity," so that this portion of the instruction reads: "Criminal activity" means a criminal offense punishable under the laws of the state of California by [death or] imprisonment in the state prison [or a criminal offense committed in another jurisdiction which, under the laws of that jurisdiction, is punishable by death or imprisonment for a term exceeding one year]. (3) We suggest the CALCRIM committee prepare a companion instruction for use in cases where a sentence enhancement under subdivision (c) is alleged. Analysis (1) The phrasing in the current instruction proposal is confusing because "$5,000 within a seven-day period" and "$25,000 within a 30-day period" are not clear monetary values (i.e., what do the time periods mean?) We believe our recommended phrasing of this element would be clearer, and that it is supported by the cited case, *People v. Mays* (2007) 148 Cal.App.4th 13, 29. (2) The definition of "criminal offense" is problematic in the statute and that problem has been carried over into the instruction. The phrase "from a criminal offense" is not parallel with anything in the first part of the sentence. This is probably a drafting error in the statute. Taking out	

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		the "from" would result in a clearer interpretation of the statutory definition than the one provided in the proposed instruction."	
3220, Amount of Loss	Katherine Lynn, Managing Attorney, Court of Appeal, Second Appellate District, not on behalf of the court	The new optional paragraph beginning "[When computing the amount of loss . . . ." may be confusing or ambiguous to jurors. Penal Code section 12022.6 provides that the enhancement may be imposed "[i]n any accusatory pleading involving multiple charges of taking, damage, or destruction . .. if the aggregate losses to the victims from all felonies exceed the amounts specified in this section and arise from a common scheme or plan." This apparently encompasses multiple losses to a single victim resulting from different takings that are charged in more than one count, for example, losses resulting from burglaries to several businesses that happen to be owned by the same victim, when each burglary is charged in a separate count. The instruction as phrased may or may not convey this to the jury. Perhaps it could be stated as follows: "[When computing the amount of loss according to this instruction, do not count any taking, damage, or destruction more than once simply because it is mentioned in more than one count, if the taking, damage, or destruction mentioned in those counts refers to the same taking, damage, or destruction with respect to the same victim.]" Similarly, the Bench Note should be modified to reflect that aggregated losses may result from multiple losses to a single victim. The last two	The committee agrees with these comments and has made the suggested revisions.

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		lines of the Bench Note could be stated as follows: ". . . and then whether the statutory threshold amount exists for all victims or for all losses to one victim cumulatively."	
	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	The commentators concur with these proposals.	No response required.
3410, Statute of Limitations	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	The commentators concur with this proposal, except for the caveat that there would have to be a Bench Note or similar proviso which states: "Do not give this instruction in cases where the statute of limitations had already expired under the pre-2009 version of Penal Code section 804(c)." Analysis The proposed revision is straightforward, except that the statutory amendment — and therefore the revised pattern instruction — cannot be applied to cases in which the statute of limitations had already expired under the pre-2009 version of Penal Code section 804(c), because that would constitute an ex post facto law. (*Stogner v. California* (2003) 539 U.S. 607.)	The committee agrees with this comment and has made the suggested revision.
3453, 3458, Extension of Commitment Instructions	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	The commentators offer a recommendation on these two instructions, though they were not specifically listed in the invitation to comment, as directly related to several instructions for which comment was solicited (proposed new/revised CALCRIM Nos. 3454, 3456 and 3457) Their recommendation is that like the proposed amendments to CALCRIM Nos. 3454, 3456 and	The committee agrees with this comment and will make the suggested revisions for the sake of consistency among the instructions

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		3457, these two instructions should be amended to reference the proposed new civil commitment reasonable doubt instruction (proposed CALCRIM No. 219). As noted in their comments on CALCRIM No. 219, the new civil commitment reasonable doubt instruction should also be given at NGI extended commitment proceedings and juvenile delinquency extended commitment proceedings. Just as the Committee proposes amending CALCRIM Nos. 3454, 3456, and 3457 to reference this new instruction in the Instructional Duty section, the Instructional Duty section in CALCRIM Nos. 3453 and 3458 should be amended to reference CALCRIM No. 219 and the sua sponte duty to instruct on reasonable doubt in civil commitment proceedings.	
3454, Commitment as Sexually Violent Predator	California Public Defenders Association by Michael McMahon	Concurs and joins in the comments of the Los Angeles County Public Defender regarding the necessary instruction on reasonable doubt.	See response below.
	Los Angeles County Public Defender by Albert Menaster, Head Deputy of the Appellate Branch	The proposed revision of this instruction would require the court to give CALCRIM 219, *Reasonable Doubt in Civil Proceedings*. Currently, the court is required to give CALCRIM 220, *Reasonable Doubt* with modification. That instruction has been approved and time tested in criminal prosecutions and civil commitment proceedings. As proposed, CALCRIM 219 erroneously eviscerates CALCRIM 220 by its substantial elimination of CALCRIM 220's first two paragraphs. Set forth below is suggested language	The committee carefully considered this comment, but believes it is properly directed to CALCRIM No. 219, above. The committee disagrees that juries must be instructed on the presumption of innocence in civil proceedings and therefore declines to adopt the proposed language. See *People v. Beeson* (2002) 99 Cal.App.4th 1393, 1401 et seq.

Instruction	Commentator	Summary of Comment	Committee Response
		for the proposed CALCRIM 219: The fact that a petition has been filed against the Respondent is not evidence that the allegations alleged in the petition are true. You must not be biased against the Respondent just because (he/she) has been detained, charged by petition, or brought to trial. A Respondent in a _____<*insert what must be proved in this proceeding, e.g., "sexually violent predator"*> commitment proceeding is presumed to be innocent. This presumption requires that the Petitioner prove the allegations of the petition true beyond a reasonable doubt. Whenever I tell you that the Petitioner must prove something, I mean Petitioner must prove it beyond a reasonable doubt [unless I specifically tell you otherwise]. Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the allegations of the petition are true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. In deciding whether the Petitioner has proved that the allegations of the petition are true beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the Respondent _____<*insert what must be proved in this proceeding, e.g., "is a*	

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		sexually violent predator"> beyond a reasonable doubt, you must find that the petition is not true.	
3477, Presumption That Resident Was Reasonably Afraid	Katherine Lynn, Managing Attorney, Court of Appeal, Second Appellate District, not on behalf of the court	The proposed modification deletes the words "/ [or] was entering" from elements 1 and 2, which formerly read: "1. An intruder unlawfully and forcibly (entered/ [or] was entering) the defendant's home; 2. The defendant knew [or reasonably believed] that an intruder unlawfully and forcibly (entered/ [or] was entering) the defendant's home;" Penal Code section 198.5, on which the instruction is based, by its terms applies to an intruder "who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence . . . ." Deletion of "was entering" appears to limit the instruction in a way that does not reflect the language of the statute. As modified, the instruction would seem to inform the jury that the presumption was only available to a defendant/resident if the intruder had *already entered* (e.g., was discovered in an interior hallway). However, the presence of the word "enters" along with "has . . .entered" in the statute seems to signal its applicability to a situation where the intruder is in the process of entering the residence. The existing instruction covers that situation.	The committee agrees with this comment and will withdraw the proposed change from consideration.
	Appointed Counsel Projects in the Court of Appeal and Supreme Court by Michelle May	The commentators concur with this proposal.	No response required.