JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
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Report

TO: Members of the Judicial Council

FROM: Advisory Committee on Criminal Jury Instructions
Hon. Sandra L. Margulies, Chair
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DATE: October 10, 2008

SUBJECT: Criminal Jury Instructions: Approve Publication of Revisions and Additions (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 December December 9, 2008, 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 the 2009 edition of the *Judicial Council of California Criminal Jury Instructions (CALCRIM).*

A table of contents and the full text of the proposed additions and revisions to the criminal jury instructions are attached at pages 5–132.

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 April 25, 2008, meeting.

The advisory committee drafted and edited 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.

The following 28 instructions are included in this proposal:
101, 200, 358, 420, 570, 571, 593, 600, 763, 945, 1162, 1400, 1401, 1804, 2240, 2350, 2351, 2352, 2542, 3131, 3161, 3162, 3163, 3453, 3456, 3457, 3458, and 3471. Of these, 3 are newly drafted and 24 are revised. In addition, the Judicial Council's Rules and Projects Committee (RUPRO) has given final approval to additional revised instructions under a delegation of authority from the council to RUPRO.[1]

The instructions were revised or added based on comments or suggestions from judges, attorneys, AOC staff, and committee members, as well as on recent developments in the law.

The following are representative examples of the proposed revisions in this set of instructions:

CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion—Lesser Included Offense*, was revised because of concern that the original draft could raise doubt in a juror's mind about whether the state of mind required for voluntary manslaughter was that an average person similarly situated would have been provoked to kill, or whether provocation resulting in passion rather than judgment was sufficient. The committee clarified that the latter is required.

CALCRIM No. 600, *Attempted Murder*, was revised in response to a case that has since been taken up for review by the California Supreme Court, *People v. Stone* (2008) 160 Cal.App.4th 937. As a result, all but one of the proposed changes initially circulated was withdrawn pending the Supreme Court's decision in *Stone.*

CALCRIM No. 763, *Death Penalty: Factors to Consider–Not Identified as Aggravating or Mitigating*, was revised to clarify that "violent criminal activity" only includes crimes directed at a person, not at animals or personal property.

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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 and additions or changes to the Directions for Use. RUPRO has already given final approval to 31 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.

CALCRIM No. 1804, *Theft by False Pretenses,* was revised to delete the fourth element requiring that the defendant intend to permanently deprive the owner of his property, because it was incorrect.

The committee added three newly drafted instructions on mentally disordered offenders and extension of commitment to a juvenile facility, namely, CALCRIM Nos. 3456, *Initial Commitment of Mentally Disordered Offender as Condition of Parole*; 3457, *Extension of Commitment as Mentally Disordered Offender*, and 3458, *Extension of Commitment to Juvenile Authority Facility.*

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 were circulated for public comment. The committee evaluated all comments and made some changes to the instructions based on them. A chart summarizing all of the comments and committee responses is attached at pages 128–153.

Many of the comments asked for detailed and specific changes to the bench notes of jury instructions, such as changing a description of a case holding in the authority section or adding another case to support a point of law. As indicated on the chart, the committee made many of these changes.

Two commentators disagreed with the committee's revision of CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion.* They wanted to add a third iteration of the legal requirement that a similarly situated average person would have been provoked to respond "rashly and without deliberation." Because the instruction already has similar language in both elements two and three, the committee concluded that the language need not be repeated in a subsequent paragraph explaining provocation.

Implementation Requirements and Costs

There are no significant implementation costs. Under the publication agreement, the official publisher, LexisNexis Matthew Bender, will make copies of 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.

Attachments

CRIMINAL JURY INSTRUCTIONS (CALCRIM)
JC REPORT
TABLE OF CONTENTS

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

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

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

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

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

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

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

During the trial, do not speak to any party, witness, or lawyer involved in the trial. Do not listen to anyone who tries to talk to you about the case or about any of the people or subjects involved in it. If someone asks you about the case, tell him or her that you cannot discuss it. If that person keeps talking to you about the case, you must end the conversation.

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

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

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

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

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

You must reach your verdict without any consideration of punishment.

New January 2006; Revised June 2007, April 2008

BENCH NOTES

Instructional Duty

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

Do not instruct a jury in the penalty phase of a capital case that they cannot consider sympathy. (*People v. Easley* (1982) 34 Cal.3d 858, 875–880.) Instead of this instruction, CALCRIM 761 is the proper introductory instruction for the penalty phase of a capital case.

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

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

AUTHORITY

- Statutory Admonitions ▸ Pen. Code, § 1122.
- Avoid Discussing the Case ▸ *People v. Pierce* (1979) 24 Cal.3d 199 [155 Cal.Rptr. 657, 595 P.2d 91]; *In re Hitchings* (1993) 6 Cal.4th 97 [24 Cal.Rptr.2d 74, 860 P.2d 466]; *In re Carpenter* (1995) 9 Cal.4th 634, 646–658 [38 Cal.Rptr.2d 665, 889 P.2d 985].
- Avoid News Reports ▸ *People v. Holloway* (1990) 50 Cal.3d 1098, 1108–1111 [269 Cal.Rptr. 530, 790 P.2d 1327], disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830 [38 Cal.Rptr.2d. 394, 889 P.2d 588].
- Judge's Conduct as Indication of Verdict ▸ *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].
- No Bias, Sympathy, or Prejudice ▸ *People v. Hawthorne* (1992) 4 Cal.4th 43, 73 [14 Cal.Rptr.2d 133, 841 P.2d 118].
- No Independent Research ▸ *People v. Karis* (1988) 46 Cal.3d 612, 642 [250 Cal.Rptr. 659, 758 P.2d 1189]; *People v. Castro* (1986) 184 Cal.App.3d 849, 853 [229 Cal.Rptr. 280]; *People v. Sutter* (1982) 134 Cal.App.3d 806, 820 [184 Cal.Rptr. 829].
- This Instruction Upheld ▸ *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1182–1183 [67 Cal.Rptr.3d 871].

Secondary Sources

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

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

RELATED ISSUES

Admonition Not to Discuss Case With Anyone

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

> It is troubling that during deliberations not one but two jurors had conversations with their pastors that ultimately addressed the issue being resolved at the penalty phase in this case. Because jurors instructed not to speak to anyone about the case except a fellow juror during deliberations . . . . may assume such an instruction does not apply to confidential relationships, we recommend the jury be expressly instructed that they may not speak to anyone about the case, except a fellow juror during deliberations, and that this includes, but is not limited to, spouses, spiritual leaders or advisers, or therapists. Moreover, the jury should also be instructed that if anyone, other than a fellow juror during deliberations, tells a juror his or her view of the evidence in the case, the juror should report that conversation immediately to the court.

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

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

Jury Misconduct

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

200. Duties of Judge and Jury

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

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

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

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

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

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

Some of these instructions may not apply, depending on your findings about the facts of the case. [Do not assume just because I give a particular instruction that I am suggesting anything about the facts.] After you have decided what the facts are, follow the instructions that do apply to the facts as you find them.

New January 2006; Revised June 2007, April 2008

BENCH NOTES

Instructional Duty

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

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

Do not instruct a jury in the penalty phase of a capital case that they cannot consider sympathy. (*People v. Easley* (1982) 34 Cal.3d 858, 875–880.) Instead of this instruction, CALCRIM 761 is the proper introductory instruction for the penalty phase of a capital case.
~~Do not give the paragraph that begins "Do not let bias," in the penalty phase of a capital trial.~~

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

AUTHORITY

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

1040, 1046 [25 Cal.Rptr.2d 602]; *People v. Shaw* (1965) 237 Cal.App.2d 606, 623 [47 Cal.Rptr. 96].

- Follow Applicable Instructions ▸ *People v. Palmer* (1946) 76 Cal.App.2d 679, 686–687 [173 P.2d 680].
- No Bias, Sympathy, or Prejudice ▸ Pen. Code, § 1127h; *People v. Hawthorne* (1992) 4 Cal.4th 43, 73 [14 Cal.Rptr.2d 133, 841 P.2d 118].
- This Instruction Upheld ▸ *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1185 [67 Cal.Rptr.3d 871].

Secondary Sources

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

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

RELATED ISSUES

Jury Misconduct

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

358. Evidence of Defendant's Statements

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

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

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

~~The court has a **sua sponte** duty to give the bracketed cautionary instruction for evidence of out-of-court oral statements made by the defendant. (*People v. Beagle* (1972) 6 Cal.3d 441, 455–456 [99 Cal.Rptr. 313, 492 P.2d 1].) The only exception to this is in the penalty phase of a capital trial; then, there is no sua sponte duty to instruct, although the bracketed paragraph should be given if requested. (*People v. Livaditis* (1992) 2 Cal.4th 759, 784 [9 Cal.Rptr.2d 72, 831 P.2d 297].)~~

The court has a **sua sponte** duty to give this instruction when there is evidence ~~that defendant made an admission or confession before trial~~ of an out-of-court oral statement by the defendant. ~~It need not be given when there is no evidence of an admission or confession made before or after the crime.~~

In addition, ~~T~~the court has a **sua sponte** duty to give the bracketed cautionary instruction when there is evidence of an incriminating out-of-court oral statement made by the defendant. (*People v. Beagle* (1972) 6 Cal.3d 441, 455–456 [99 Cal.Rptr. 313, 492 P.2d 1].) An exception is that in the penalty phase of a capital trial, the bracketed paragraph should be given only if the defense requests it. (*People v. Livaditis* (1992) 2 Cal.4th 759, 784 [9 Cal.Rptr.2d 72, 831 P.2d 297].)

The bracketed cautionary instruction is not required when the defendant's incriminating statements are written or tape-recorded. (*People v. Gardner* (1961)

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

When a defendant's statement is a verbal act, as in conspiracy cases, this instruction applies. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1224; *People v. Ramirez* (1974) 40 Cal.App.3d 347, 352; see also, e.g., *Peabody v. Phelps* (1858) 9 Cal. 213, 229 [similar, in civil cases]; but see *People v. Zichko* (2004) 118 Cal.App.4th 1055, 1057 [no sua sponte duty to instruct with CALJIC 2.71 in criminal threat case because "truth" of substance of the threat was not relevant and instructing jury to view defendant's statement with caution could suggest that exercise of "caution" supplanted need for finding guilt beyond a reasonable doubt].)~~When a defendant's statement is an element of the crime, as in conspiracy or criminal threats (Pen. Code, § 422), this instruction does~~ may ~~not apply. (*People v. Zichko* (2004) 118 Cal.App.4th 1055, 1057 [13 Cal.Rptr.3d 509]; *but see People v. Bunyard* (1988) 45 Cal. 3d 1189, 1224 and *People v. Ramirez* (1974) 40 Cal. App. 3d 347, 352.) If the jury has heard evidence of both "verbal acts" and "admissions," the court may choose to modify the instruction to distinguish between the two types of statements.~~

Related Instructions

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

AUTHORITY

- Instructional Requirements ▸ *People v. Beagle* (1972) 6 Cal.3d 441, 455–456 [99 Cal.Rptr. 313, 492 P.2d 1]; *People v. Livaditis* (1992) 2 Cal.4th 759, 784 [9 Cal.Rptr.2d 72, 831 P.2d 297].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 614, 641, 650.

1 Witkin, California Evidence (4th ed. 2000) Hearsay, § 51.

3 Witkin, California Evidence (4th ed. 2000) Presentation, § 113.

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

420. Withdrawal From Conspiracy

The defendant is not guilty of conspiracy to commit _____ *<insert target offense>* **if (he/she) withdrew from the alleged conspiracy before any overt act was committed. To withdraw from a conspiracy, the defendant must truly and affirmatively reject the conspiracy and communicate that rejection, by word or by deed, to the other members of the conspiracy known to the defendant.**

[A failure to act is not sufficient alone to withdraw from a conspiracy.]

[If you decide that the defendant withdrew from a conspiracy after an overt act was committed, the defendant is not guilty of any acts committed by remaining members of the conspiracy after (he/she) withdrew.]

~~*<Alternative A—reasonable doubt standard>*~~

~~[~~**[The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw from the conspiracy [before an overt act was committed]. If the People have not met this burden, you must find the defendant not guilty of conspiracy. [If the People have not met this burden, you must also find the defendant not guilty of the additional acts committed after (he/she) withdrew.]**~~]~~

~~*<Alternative B—preponderance standard>*~~

~~**[The defendant has the burden of proving by a preponderance of the evidence that (he/she) withdrew from the conspiracy [before an overt act was committed]. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.**~~

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if there is evidence that the defendant attempted to withdraw from the conspiracy.

~~There is no authority as to whether the defense must prove withdrawal by a preponderance of the evidence or whether the prosecution must prove beyond a~~

~~reasonable doubt that the defense is not established. The court must instruct as to which party bears the burden. (*People v. Mower* (2002) 28 Cal.4th 457, 478–479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) The committee has provided the court with both options. The committee recommends reviewing *People v. Mower*, *supra*, 28 Cal.4th at pp. 478–479, discussing affirmative defenses and burdens of proof generally.~~

AUTHORITY

- Withdrawal From Conspiracy as Defense ▸ *People v. Crosby* (1962) 58 Cal.2d 713, 731 [25 Cal.Rptr. 847, 375 P.2d 839].
- Ineffective Withdrawal ▸ *People v. Sconce* (1991) 228 Cal.App.3d 693, 701 [279 Cal.Rptr. 59]; *People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1003 [95 Cal.Rptr. 360].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, § 92.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.02[6], [7] (Matthew Bender).

421–439. Reserved for Future Use

570. Voluntary Manslaughter: Heat of Passion—Lesser Included Offense (Pen. Code, § 192(a))

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

The defendant killed someone because of a sudden quarrel or in the heat of passion if:

1. **The defendant was provoked;**

2. **As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured (his/her) reasoning or judgment;**

AND

3. **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.**

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 a murder to 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 ~~to cause a person of average disposition to act from passion rather than from judgment.~~ In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, ~~would have been provoked and~~ would have reacted from passion rather than from judgment.~~how such a person would react in the same situation knowing the same facts.~~

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

The People have the burden of proving beyond a reasonable doubt that the defendant did not 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 murder.

New January 2006

BENCH NOTES

Instructional Duty

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

Related Instructions

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

AUTHORITY

- Elements ▸ Pen. Code, § 192(a).
- Heat of Passion Defined ▸ *People v. Breverman* (1998) 19 Cal.4th 142, 163 [77 Cal.Rptr.2d 870, 960 P.2d 1094]; *People v. Valentine* (1946) 28 Cal.2d 121, 139 [169 P.2d 1]; *People v. Lee* (1999) 20 Cal.4th 47, 59 [82 Cal.Rptr.2d 625, 971 P.2d 1001].
- "Average Person" Need Not Have Been Provoked to Kill, Just to Act Rashly and Without Deliberation ▸ *People v. Najera* (2006) 138 Cal.App.4th 212, 223.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 207–219.

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

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

LESSER INCLUDED OFFENSES

- 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].

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

RELATED ISSUES

Heat of Passion: Sufficiency of Provocation—Examples

In *People v. Breverman*, sufficient evidence of provocation existed where a mob of young men trespassed onto defendant's yard and attacked defendant's car with weapons. (*People v. Breverman* (1998) 19 Cal.4th 142, 163–164 [77 Cal.Rptr.2d 870, 960 P.2d 1094].) Provocation has also been found sufficient based on the murder of a family member (*People v. Brooks* (1986) 185 Cal.App.3d 687, 694 [230 Cal.Rptr. 86]); a sudden and violent quarrel (*People v. Elmore* (1914) 167 Cal. 205, 211 [138 P. 989]); verbal taunts by an unfaithful wife (*People v. Berry* (1976) 18 Cal.3d 509, 515 [134 Cal.Rptr. 415, 556 P.2d 777]); and the infidelity of a lover (*People v. Borchers* (1958) 50 Cal.2d 321, 328–329 [325 P.2d 97]).

In the following cases, provocation has been found inadequate as a matter of law: evidence of name calling, smirking, or staring and looking stone-faced (*People v. Lucas* (1997) 55 Cal.App.4th 721, 739 [64 Cal.Rptr.2d 282]); insulting words or gestures (*People v. Odell David Dixon* (1961) 192 Cal.App.2d 88, 91 [13 Cal.Rptr. 277]); refusing to have sex in exchange for drugs (*People v. Michael Sims Dixon* (1995) 32 Cal.App.4th 1547, 1555–1556 [38 Cal.Rptr.2d 859]); a victim's resistance against a rape attempt (*People v. Rich* (1988) 45 Cal.3d 1036, 1112 [248 Cal.Rptr. 510, 755 P.2d 960]); the desire for revenge (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704 [54 Cal.Rptr.2d 608]); and a long history of criticism,

reproach and ridicule where the defendant had not seen the victims for over two weeks prior to the killings (*People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1246–1247 [7 Cal.Rptr.3d 401]). In addition the Supreme Court has suggested that mere vandalism of an automobile is insufficient for provocation. (See *People v. Breverman* (1998) 19 Cal.4th 142, 164, fn. 11 [77 Cal.Rptr.2d 870, 960 P.2d 1094]; *In re Christian S.* (1994) 7 Cal.4th 768, 779, fn. 3 [30 Cal.Rptr.2d 33, 872 P.2d 574].)

Heat of Passion: Types of Provocation

Heat of passion does not require anger or rage. It can be "any violent, intense, high-wrought or enthusiastic emotion." (*People v. Breverman* (1998) 19 Cal.4th 142, 163–164 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Heat of Passion: Defendant Initial Aggressor

"[A] defendant who provokes a physical encounter by rude challenges to another person to fight, coupled with threats of violence and death to that person and his entire family, is not entitled to claim that he was provoked into using deadly force when the challenged person responds without apparent (or actual) use of such force." (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303, 1312–1313 [7 Cal.Rptr.3d 161].)

Heat of Passion: Defendant's Own Standard

Unrestrained and unprovoked rage does not constitute heat of passion and a person of extremely violent temperament cannot substitute his or her own subjective standard for heat of passion. (*People v. Valentine* (1946) 28 Cal.2d 121, 139 [169 P.2d 1] [court approved admonishing jury on this point]; *People v. Danielly* (1949) 33 Cal.2d 362, 377 [202 P.2d 18]; *People v. Berry* (1976) 18 Cal.3d 509, 515 [134 Cal.Rptr. 415, 556 P.2d 777].) The objective element of this form of voluntary manslaughter is not satisfied by evidence of a defendant's "extraordinary character and environmental deficiencies." (*People v. Steele* (2002) 27 Cal.4th 1230, 1253 [120 Cal.Rptr.2d 432, 47 P.3d 225] [evidence of intoxication, mental deficiencies, and psychological dysfunction due to traumatic experiences in Vietnam are not provocation by the victim].)

Premeditation and Deliberation—Heat of Passion Provocation

Provocation and heat of passion that is insufficient to reduce a murder to manslaughter may nonetheless reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [156 P.2d 7] [provocation raised reasonable doubt about the idea of premeditation or deliberation].) There is, however, no sua sponte duty to instruct the jury on this issue because provocation in this context is a defense to the element of deliberation, not an element of the crime, as it is in the manslaughter context. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 32–33 [60 Cal.Rptr.2d 366], disapproved on other grounds in *People v. Gonzalez* (2003) 31

Cal.4th 745, 752 [3 Cal.Rptr.3d 676, 74 P.3d 771].) On request, give CALCRIM No. 522, *Provocation: Effect on Degree of Murder*.

Fetus

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

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

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

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

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

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

AND

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

BUT

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

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

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

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

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

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

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

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

New January 2006

BENCH NOTES

Instructional Duty

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

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

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 by *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. (See *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 No. 505, *Justifiable Homicide: Self-Defense or Defense of Another;*

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

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

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

AUTHORITY

- Elements ▸ Pen. Code, § 192(a).
- Imperfect Self-Defense Defined ▸ *People v. Flannel* (1979) 25 Cal.3d 668, 680–683 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531]; *In re Christian S.* (1994) 7 Cal.4th 768, 773 [30 Cal.Rptr.2d 33, 872 P.2d 574]; see *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197–198 [272 Cal.Rptr. 693] [insufficient evidence to support defense of another person].
- Imperfect Defense of Others ▸ *People v. Michaels* (2002) 28 Cal.4th 486, 529–531 [122 Cal.Rptr.2d 285, 49 P.3d 1032].
- ~~Imperfect Self-Defense Not Available if Defendant's Conduct Creates Circumstances Where Victim Is Legally Justified in Resorting to Self-Defense~~Imperfect Self-Defense May be Available When Defendant Set in Motion Chain of Events Leading to Victim's Attack, but Not When Victim

was Legally Justified in Resorting to Self-Defense ‣ *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179-1180.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 210.

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

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

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

LESSER INCLUDED OFFENSES

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

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

RELATED ISSUES

Battered Woman's Syndrome

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

Blakeley *Not Retroactive*

The decision in *Blakeley*—that one who, acting with conscious disregard for life, unintentionally kills in imperfect self-defense is guilty of voluntary manslaughter—may not be applied to defendants whose offense occurred prior to *Blakeley*'s June 2, 2000, date of decision. (*People v. Blakeley* (2000) 23 Cal.4th 82, 91–93 [96 Cal.Rptr.2d 451, 999 P.2d 675].) If a defendant asserts a killing was

done in an honest but mistaken belief in the need to act in self-defense and the offense occurred prior to June 2, 2000, the jury must be instructed that an unintentional killing in imperfect self-defense is involuntary manslaughter. (*People v. Johnson* (2002) 98 Cal.App.4th 566, 576–577 [119 Cal.Rptr.2d 802]; *People v. Blakeley, supra,* 23 Cal.4th at p. 93.)

Inapplicable to Felony Murder

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

Fetus

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

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

Reasonable Person Standard Not Modified by Evidence of Mental Impairment

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

593. Misdemeanor Vehicular Manslaughter~~—Ordinary Negligence~~ (Pen. Code § 192(c)(2))

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

<Introductory Sentence: Alternative A—Charged Offense>
[The defendant is charged [in Count __] with vehicular manslaughter [in violation of Penal Code section 192(c)(2)].]

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

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

1. **While (driving a vehicle/operating a vessel), the defendant committed (an otherwise lawful act with ordinary negligence[,]/ [or] a misdemeanor[,]/ [or] an infraction);**

2. **The (negligent act[,]/ [or] misdemeanor[,]/ [or] infraction) was dangerous to human life under the circumstances of its commission;**

3. **The (negligent act[,]/ [or] misdemeanor[,]/ [or] infraction) caused the death of another person.**
   ~~The defendant (drove a vehicle/operated a vessel);~~

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

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

~~**AND**~~

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

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

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

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

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

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

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

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

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

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

New January 2006

BENCH NOTES

Instructional Duty

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

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

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

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr.

438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, harmless error if was required].) A unanimity instruction is included in a bracketed paragraph for the court to use at its discretion.In the definition of ordinary negligence, the court should use the entire phrase "harm to oneself or someone else" if the facts of the case show a failure by the defendant to prevent harm to him- or herself rather than solely harm to another.

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

AUTHORITY

- Vehicular Manslaughter Without Gross Negligence ‣ Pen. Code, § 192(c)(2).
- Vehicular Manslaughter During Operation of a Vessel Without Gross Negligence ‣ Pen. Code, § 192.5(b).
- Unlawful Act Dangerous Under the Circumstances of Its Commission ‣ *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374].
- Specifying Predicate Unlawful Act ‣ *People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688].
- Elements of Predicate Unlawful Act ‣ *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Unanimity Instruction ‣ *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481[76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].
- Ordinary Negligence ‣ Pen. Code, § 7, subd. 2; Rest.2d Torts, § 282.
- Causation ‣ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Imminent Peril/Sudden Emergency Doctrine ‣ *People v. Boulware* (1940) 41 Cal.App.2d 268, 269 [106 P.2d 436].

Secondary Sources

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

Person, §§ 238–245.

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

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

RELATED ISSUES

See the Related Issues section to CALCRIM No. 592, *Gross Vehicular Manslaughter*.

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 in a particular zone of harm or "kill zone." In order to convict the defendant of the attempted murder of _____ <*insert name 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 of victim charged in attempted murder count[s] on concurrent-intent theory*>, or intended to kill anyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill _____ <*insert name of victim charged in attempted murder count[s] on*

concurrent-intent theory> **or intended to kill** _____ *<insert name of primary target alleged>* **by ~~harming~~ killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of** _____ *<insert name 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

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 ~~penultimate~~ 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 everyone in the zone. (*People v. ~~Jomo K.~~ 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." ~~[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.* at p. 33~~1~~29.) ~~In such cases,~~

> ~~[t]he defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim.~~

~~(*Id.* at p. 330, quoting *Ford v. State* (1993) 330 Md. 682, 717 [625 A.2d 984].)~~ 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].

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.*)

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

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

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

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

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

The factors are:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

New January 2006; Revised August 2006, June 2007, April 2008

BENCH NOTES

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

Although not required, "[i]t is . . . the better practice for a court to instruct on all the statutory penalty factors, directing the jury to be guided by those that are applicable on the record." (*People v. Marshall* (1990) 50 Cal.3d 907, 932 [269 Cal.Rptr. 269, 790 P.2d 676], cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110 [111. S.Ct. 1023, 112 L.Ed.2d 1105]; *People v. Miranda* (1987) 44 Cal.3d 57, 104–105 [241 Cal.Rptr. 594, 744 P.2d 1127]; *People v. Melton* (1988) 44 Cal.3d 713, 770 [244 Cal.Rptr. 867, 750 P.2d 741].) The jury must be instructed to consider only those factors that are "applicable." (*Williams v. Calderon* (1998) 48 F.Supp.2d 979, 1023.)

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

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

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

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

AUTHORITY

- Death Penalty Statute ▸ Pen. Code, § 190.3.
- Jury Must Be Instructed to Consider Any Mitigating Evidence and Sympathy ▸ *Lockett v. Ohio* (1978) 438 U.S. 586, 604–605 [98 S.Ct. 2954, 57 L.Ed.2d 973]; *People v. Benson* (1990) 52 Cal.3d 754, 799 [276 Cal.Rptr. 827, 802 P.2d 330]; *People v. Easley* (1983) 34 Cal.3d 858, 876 [196 Cal.Rptr. 309, 671 P.2d 813].
- Should Instruct on All Factors ▸ *People v. Marshall* (1990) 50 Cal.3d 907, 932 [269 Cal.Rptr. 269, 790 P.2d 676], cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110 [111 S.Ct. 1023, 112 L.Ed.2d 1105].
- Must Instruct to Consider Only "Applicable Factors" ▸ *Williams v. Calderon* (1998) 48 F.Supp.2d 979, 1023; *People v. Marshall* (1990) 50 Cal.3d 907, 932 [269 Cal.Rptr. 269, 790 P.2d 676], cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110 [111 S.Ct. 1023, 112 L.Ed.2d 1105].
- Mitigating Factor Must Be Supported by Evidence ▸ *Delo v. Lashley* (1993) 507 U.S. 272, 275, 277 [113 S.Ct. 1222, 122 L.Ed.2d 620].
- Aggravating and Mitigating Defined ▸ *People v. Dyer* (1988) 45 Cal.3d 26, 77–78 [246 Cal.Rptr. 209, 753 P.2d 1]; *People v. Adcox* (1988) 47 Cal.3d 207, 269–270 [253 Cal.Rptr. 55, 763 P.2d 906].
- On Request Must Instruct to Consider Only Statutory Aggravating Factors ▸ *People v. Hillhouse* (2002) 27 Cal.4th 469, 509 [117 Cal.Rptr. 2d 45, 40 P.3d 754], cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114

[123 S.Ct. 869, 154 L.Ed.2d 789]; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, fn. 14 [270 Cal.Rptr. 451, 792 P.2d 251].

- Mitigating Factors Are Examples ‣ *People v. Melton* (1988) 44 Cal.3d 713, 760 [244 Cal.Rptr. 867, 750 P.2d 741]; *Belmontes v. Woodford* (2003) 350 F.3d 861, 897].
- Must Instruct to Not Double-Count ‣ *People v. Melton* (1988) 44 Cal.3d 713, 768 [244 Cal.Rptr. 867, 750 P.2d 741].
- Threats of Violence Must Be Directed at Persons ‣ *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1016 [30 Cal.Rptr.2d 818, 874 P.2d 248].

Secondary Sources

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

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

COMMENTARY

Aggravating and Mitigating Factors—Need Not Specify

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

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

supra, 17 Cal.4th at p. 1269, decided prior to *Hillhouse*, the Supreme Court held that the trial court properly instructed the jury that "*only* factors (a), (b) and (c) of section 190.3 could be considered in aggravation . . . " (italics in original).

945. ~~Simple~~ Battery Against Peace Officer (Pen. Code, §§ 242, 243(b), (c)(2))

The defendant is charged [in Count __] with battery against a peace officer [in violation of Penal Code section 243].

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

1. _____ *<Insert officer's name, excluding title>* **was a peace officer performing the duties of (a/an)** _____ *<insert title of peace officer specified in Pen. Code, § 830 et seq.>***;**

2. **The defendant willfully [and unlawfully] touched** _____ *<insert officer's name, excluding title>* **in a harmful or offensive manner;**

[AND]

3. **When the defendant acted, (he/she) 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 4 when instructing on felony battery against a peace officer>

[AND

4. _____ *<insert officer's name, excluding title>* was injured as a result of the touching(;/.)]

<Give element ~~4~~5 when instructing on self-defense or defense of another.>

[AND

~~4.~~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.

<Do not give this paragraph when instructing on felony battery against a peace officer>
[The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

<Give this definition when instructing on felony battery against a peace officer>
[An *injury* is any physical injury that requires professional medical treatment. The question whether an injury requires such treatment cannot be answered simply by deciding whether or not a person sought or received treatment. You may consider those facts, but you must decide this question based on the nature, extent, and seriousness of the injury itself.]

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

[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>*.**]**

[It does not matter whether _____ *<insert officer's name, excluding title>* **was actually on duty at the time.]**

[A _____ *<insert title of peace officer specified in Pen. Code, § 830 et seq.>* **is also performing the duties of a peace officer if (he/she) is in a police uniform and performing the duties required of (him/her) as a peace officer and, at the same time, is working in a private capacity as a part-time or casual private security guard or (patrolman/patrolwoman).]**

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

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

New January 2006; Revised August 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 45, the bracketed words "and unlawfully" in element 2, 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.

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

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].)

Give the bracketed language about a peace officer working in a private capacity if relevant. (Pen. Code, § 70.)

AUTHORITY

- Elements ▸ Pen. Code, §§ 242, 243(b), (c)(2); see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- 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].
- Physical Injury Defined ▸ Penal Code, § 243(f)(5); *People v. Longoria* (1995) 34 Cal.App.4th 12, 17-18.
- 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, § 5.

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

LESSER INCLUDED OFFENSES

- Assault ▸ Pen. Code, § 240.
- Assault on Specified Victim ▸ Pen. Code, § 241(b).
- Battery ▸ Pen. Code, § 242.

- Misdemeanor Battery on Specified Victim ▸ Pen. Code, § 243(b).
- Resisting Officer ▸ Pen. Code, § 148.

RELATED ISSUES

See the Related Issues sections to CALCRIM No. 960, *Simple Battery* and 2670, *Lawful Performance: Peace Officer*.

1162. Soliciting Lewd Conduct in Public (Pen. Code, § 647(a))

The defendant is charged [in Count __] with soliciting another person to engage in lewd conduct in public [in violation of Penal Code section 647(a)].

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

1. **The defendant requested [or _____** *<insert other synonyms for "solicit," as appropriate>***] that another person engage in the touching of ((his/her) own/ [or] another person's) genitals, buttocks, or female breast;**

2. **The defendant requested that the other person engage in the requested conduct in (a public place/ [or] a place open to the public [or in public view]);**

3. **When the defendant made the request, (he/she) was in (a public place/ [or] a place open to the public [or in public view]);**

4. **The defendant intended for the conduct to occur in (a public place/ [or] a place open to the public [or in public view]);**

5. **When the defendant made the request, (he/she) did so with the intent to sexually arouse or gratify (himself/herself) or another person, or to annoy or offend another person;**

[AND]

6. **The defendant knew or reasonably should have known that someone was likely to~~might~~ be present who could be offended by the requested conduct(;/.)**

<Give element 7 when instructing that person solicited must receive message; see Bench Notes.>
[AND

7. **The other person received the communication containing the request.]**

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

[As used here, a *public place* is a place that is open and accessible to anyone who wishes to go there.]

New January 2006; Revised August 2006

BENCH NOTES

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

One court has held that the person solicited must actually receive the solicitous communication. (*People v. Saephanh* (2000) 80 Cal.App.4th 451, 458–459 [94 Cal.Rptr.2d 910].) In *Saephanh*, the defendant mailed a letter from prison containing a solicitation to harm the fetus of his girlfriend. (*Id.* at p. 453.) The letter was intercepted by prison authorities and, thus, never received by the intended person. *(Ibid.)* If there is an issue over whether the intended person actually received the communication, give bracketed element 7.

AUTHORITY

- Elements ▸ Pen. Code, § 647(a); *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257 [158 Cal.Rptr. 330, 599 P.2d 636]; *People v. Rylaarsdam* (1982) 130 Cal.App.3d Supp. 1, 8–9 [181 Cal.Rptr. 723].
- Willfully Defined ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Likely Defined ▸ *People v. Lake* (2007) 156 Cal.App.4th Supp. 1.
- Solicitation Requires Specific Intent ▸ *People v. Norris* (1978) 88 Cal.App.3d Supp. 32, 38 [152 Cal.Rptr. 134].
- Solicitation Defined ▸ *People v. Superior Court* (1977) 19 Cal.3d 338, 345–346 [138 Cal.Rptr. 66, 562 P.2d 1315].
- Person Solicited Must Receive Communication ▸ *People v. Saephanh* (2000) 80 Cal.App.4th 451, 458–459 [94 Cal.Rptr.2d 910].
- "Lewd" and "Dissolute" Synonymous ▸ *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Lewd Conduct Defined ▸ *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].

- Public Place Defined ▸ *In re Zorn* (1963) 59 Cal.2d 650, 652 [30 Cal.Rptr. 811, 381 P.2d 635]; *People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [52 Cal.Rptr. 660]; *People v. Perez* (1976) 64 Cal.App.3d 297, 300–301 [134 Cal.Rptr. 338]; but see *People v. White* (1991) 227 Cal.App.3d 886, 892–893 [278 Cal.Rptr. 48] [fenced yard of defendant's home not a "public place"].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 46–47.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order* § 144.20 (Matthew Bender).

RELATED ISSUES

See the Related Issues sections of CALCRIM No. 1161, *Lewd Conduct in Public* and CALCRIM No. 441, *Solicitation: Elements*.

1163–1169. Reserved for Future Use

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

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

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

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

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

AND

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

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

OR

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

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

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

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

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

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

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

AND

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

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

<Give this paragraph only when the conduct that establishes the primary activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition> **[To decide whether the organization, association, or group has, as one of its primary activities, the commission of** _____ *<insert felony or felonies from Pen. Code, § 186.22(e)(1)-(25), (31)-(33)>* **please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

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

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

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

   [OR]

   <Give 1B if one or more of the crimes are in Pen. Code, § 186.22(e)(26)–(30)>

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

AND

[at least one of the following crimes:] _____*<insert one or more crimes in Pen. Code, § 186.22(e)(26)–(30)>*;

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

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

AND

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

<Give this paragraph only when the conduct that establishes the pattern of criminal gang activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition> **[To decide whether a member of the gang [or the defendant] committed** _____ *<insert felony or felonies from Pen. Code, § 186.22(e)(1)-(33)>* **please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

~~*<Give this paragraph only when the conduct that establishes the pattern of criminal gang activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition>*~~
~~**[To decide whether a member of the gang [or the defendant] committed** _____*insert felony or felonies from Pen. Code, § 186.22(e)(1)–(25), (31)–(33)>***please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**~~

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

[If you find the defendant guilty of a crime in this case, you may consider that crime in deciding whether one of the group's primary activities was

commission of that crime and whether a pattern of criminal gang activity has been proved.]

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

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

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

[To decide whether a member of the gang [or the defendant] committed _____ *<insert felony or felonies listed immediately above>*, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

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

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

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

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

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

AND

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

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

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

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

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

AND

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

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

New January 2006; Revised August 2006, June 2007

BENCH NOTES

Instructional Duty

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

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

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

In the definition of "felonious criminal conduct," insert the felony or felonies the defendant allegedly aided and abetted. (See *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].) Note that a defendant's misdemeanor conduct in the charged case, which is elevated to a felony by operation of Penal Code section 186.22(a), is not sufficient to satisfy the felonious criminal conduct requirement of an active gang participation offense charged under subdivision (a) of section 186.22 or of active gang participation charged as an element of felony firearm charges under sections 12025(b)(3) or 12031(a)(2)(C). *People v. Lamas* (2007) 42 Cal.4th 516, 524.

The court should also give the appropriate instructions defining the elements of ~~all~~ crimes inserted in the list of alleged "primary activities," or the definition of ~~"criminal street gang,"~~ "pattern of criminal gang activity~~,~~" that have not been established by prior convictions or sustained juvenile petitions. The court should also give the appropriate instructions defining the elements of all crimes inserted in the definition of "felonious criminal conduct."~~or "felonious criminal conduct."~~

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

On request, give the bracketed paragraph that begins with "If you find the defendant guilty of a crime in this case." (*People v. Sengpadychith* (2001) 26

Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].)

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

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

Defenses—Instructional Duty

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

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

Related Instructions

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

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

AUTHORITY

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

- Pattern of Criminal Gang Activity Defined ▸ Pen. Code, §§ 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236].
- Willful Defined ▸ Pen. Code, § 7(1).
- Applies to Both Perpetrator and Aider and Abettor ▸ *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436 [105 Cal.Rptr.2d 837]; *People v. Castenada* (2000) 23 Cal.4th 743, 749–750 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Felonious Criminal Conduct Defined ▸ *People v. Green* (1991) 227 Cal.App.3d 692, 704 [278 Cal.Rptr. 140].
- Separate Intent From Underlying Felony ▸ *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468 [83 Cal.Rptr.2d 307].
- Willfully Assisted, Furthered, or Promoted Felonious Criminal Conduct ▸ *People v. Salcido* (2007) 149 Cal.App.4th 356.

Secondary Sources

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

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

COMMENTARY

The jury may consider past offenses as well as circumstances of the charged crime. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322–323 [109 Cal.Rptr.2d 851, 27 P.3d 739], disapproving *In re Elodio O.* (1997) 56 Cal.App.4th 1175, 1181 [66 Cal.Rptr.2d 95], to the extent it only allowed evidence of past offenses.) A "pattern of criminal gang activity" requires two or more "predicate offenses" during a statutory time period. The charged crime may serve as a predicate offense (*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]), as can another offense committed on the same occasion by a fellow gang member. (*People v. Loeun* (1997) 17 Cal.4th 1, 9–10 [69 Cal.Rptr.2d 776, 947 P.2d 1313]; see also *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236] [two incidents each with single perpetrator, or single incident with multiple participants committing one or more specified offenses, are sufficient]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484 [67 Cal.Rptr.2d 126].) However, convictions of a perpetrator and an aider and abettor for a single crime establish only one predicate offense (*People v. Zermeno*

(1999) 21 Cal.4th 927, 931–932 [89 Cal.Rptr.2d 863, 986 P.2d 196]), and "[c]rimes occurring *after* the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity." (*People v. Duran, supra,* 97 Cal.App.4th at 1458 [original italics].)

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

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

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

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

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

1401. Felony or Misdemeanor Committed for Benefit of Criminal Street Gang (Pen. Code, § 186.22(b)(1)~~)~~(felony) and § 186.22(d)(felony or misdemeanor))

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

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

To prove this allegation, the People must prove that:

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

   AND

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

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

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

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

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

AND

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

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

<Give this paragraph only when the conduct that establishes the primary activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition>
[To decide whether the organization, association, or group has, as one of its primary activities, the commission of _____*<insert felony or felonies from Pen. Code, § 186.22(e)(1)-(25), (31)-(33)>* **please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

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

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

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

   [OR]

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

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

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

AND

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

<Give this paragraph only when the conduct that establishes the pattern of criminal gang activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition>
[To decide whether a member of the gang [or the defendant] committed _____ *<insert felony or felonies from Pen. Code, § 186.22(e)(1)-(33)>* **please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

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

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

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

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

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

New January 2006; Revised August 2006, June 2007

BENCH NOTES

Instructional Duty

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

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

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

The court should also give the appropriate instructions defining the elements of ~~all~~ crimes inserted in the list of alleged "primary activities," or the definition of ~~"criminal street gang" or~~ "pattern of criminal gang activity" that have not been established by prior convictions~~s~~ or sustained juvenile petitions.

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

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

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

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

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

AUTHORITY

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

Secondary Sources

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

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

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

RELATED ISSUES

Commission On or Near School Grounds

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

Enhancements for Multiple Gang Crimes

Separate criminal street gang enhancements may be applied to gang crimes committed against separate victims at different times and places, with multiple criminal intents. (*People v. Akins* (1997) 56 Cal.App.4th 331, 339–340 [65 Cal.Rptr.2d 338].)

Wobblers

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

Murder—Enhancements Under Penal Code section 186.22(b)(1) ~~Do~~ May Not Apply at Sentencing

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

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

1804. Theft by False Pretense (Pen. Code § 484)

The defendant is charged [in Count ___] with [grand/petty] theft by false pretense [in violation of Penal Code section 484].

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

1. **The defendant knowingly and intentionally deceived a property owner [or the owner's agent] by false or fraudulent representation or pretense;**

2. **The defendant did so intending to persuade the owner [or the owner's agent] to let the defendant [or another person] take possession and ownership of the property;**

AND

3. **The owner [or the owner's agent] let the defendant [or another person] take possession and ownership of the property because the owner [or the owner's agent] relied on the representation or pretense.~~;~~**

~~**AND**~~

~~**4.When the defendant acted, (he/she) intended (to deprive the owner of the property permanently/ [or] to remove it from the owner's [or owner's agent's] possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property).**~~

You may not find the defendant guilty of this crime unless the People have proved that:

[A. The false pretense was accompanied by either a writing or false token(;/.)]

[OR]

[(A/B). There was a note or memorandum of the pretense signed or handwritten by the defendant(;/.)]

[OR]

[(A/B/C). Testimony from two witnesses or testimony from a single witness along with other evidence supports the conclusion that the defendant made the pretense.]

[*Property* includes money, labor, and real or personal property.]

A *false pretense* is any act, word, symbol, or token the purpose of which is to deceive.

[Someone makes a false pretense if, intending to deceive, he or she does [one or more of] the following:

[1. Gives information he or she knows is false(./;)]

[OR

2. Makes a misrepresentation recklessly without information that justifies a reasonable belief in its truth(./;)]

[OR

3. Does not give information when he or she has an obligation to do so(./;)]

[OR

4. Makes a promise not intending to do what he or she promises.]]

[Proof that the representation or pretense was false is not enough by itself to prove that the defendant intended to deceive.]

[Proof that the defendant did not perform as promised is not enough by itself to prove that the defendant did not intend to perform as promised.]

[A false token is a document or object that is not authentic, but appears to be, and is used to deceive.]

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

[An owner [or an owner's agent] relies on false pretense, if the falsehood is an important part of the reason the owner [or agent] decides to give up the property. The false pretense must be an important factor, but it does not have to be the only factor the owner [or agent] considers in making the decision. [If the owner [or agent] gives up property some time after the pretense is made, the owner [or agent] must do so because he or she relies on the pretense.]]

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

New January 2006; Revised August 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of this crime, including the corroboration requirements stated in Penal Code section 532(b). (*People v. Mason* (1973) 34 Cal.App.3d 281, 286 [109 Cal.Rptr. 867] [error not to instruct on corroboration requirements].)

~~To have the requisite intent for theft, the thief 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 4.~~

Related Instructions

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

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

AUTHORITY

- Elements ▸ Pen. Code § 484; *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1842 [52 Cal.Rptr.2d 765]; see *People v. Webb* (1999) 74 Cal.App.4th 688, 693–694 [88 Cal.Rptr.2d 259] [false statement of opinion].
- Corroboration Requirements ▸ Pen. Code § 532(b); *People v. Gentry* (1991) 234 Cal.App.3d 131, 139 [285 Cal.Rptr. 591]; *People v. Fujita* (1974) 43 Cal.App.3d 454, 470–471 [117 Cal.Rptr. 757].
- Agent ▸ *People v. Britz* (1971) 17 Cal.App.3d 743, 753 [95 Cal.Rptr. 303].

- ~~Intent to Deprive Owner of Main Value ‣ *People v. Avery* (2002) 27 Cal.4th 49, 57–59 [115 Cal.Rptr.2d 403, 38 P.3d 1], disapproving, to extent it is inconsistent, *People v. Marquez* (1993) 16 Cal.App.4th 115, 123 [20 Cal.Rptr.2d 365].~~
- Reckless Misrepresentation ‣ *People v. Schmitt* (1957) 155 Cal.App.2d 87, 110 [317 P.2d 673]; *People v. Ryan* (1951) 103 Cal.App.2d 904, 908–909 [230 P.2d 359].
- Defendant Need Not Be Beneficiary of Theft ‣ *People v. Cheeley* (1951) 106 Cal.App.2d 748, 753.
- Reliance ‣ *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1842–1843 [52 Cal.Rptr.2d 765] [defining reliance]; *People v. Sanders* (1998) 67 Cal.App.4th 1403, 1413 [79 Cal.Rptr.2d 806] [reversible error to fail to instruct on reliance]; *People v. Whight* (1995) 36 Cal.App.4th 1143, 1152–1153 [43 Cal.Rptr.2d 163] [no reliance if victim relies solely on own investigation].
- Theft of Real Property by False Pretenses ‣ *People v. Sanders* (1998) 67 Cal.App.4th 1403, 1413–1417 [79 Cal.Rptr.2d 806].
- Theft by False Pretenses Includes Obtaining Loan by False Pretenses ‣ *Perry v. Superior Court of Los Angeles County* (1962) 57 Cal.2d 276, 282-283.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 12, 64.

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

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Attempted Theft by False Pretense

Reliance on the false pretense need not be proved for a person to be guilty of attempted theft by false pretense. (*People v. Fujita* (1974) 43 Cal.App.3d 454, 467 [117 Cal.Rptr. 757].)

Continuing Nature of False Pretense

Penal Code section 484 recognizes that theft by false pretense is a crime of a continuing nature and covers any "property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question." (Pen. Code, § 484(a).)

Corroboration–Defined/Multiple Witnesses

"Corroborating evidence is sufficient if it tends to connect the defendant with the commission of the crime in such a way so as to reasonably satisfy the jury that the complaining witness is telling the truth." (*People v. Fujita* (1974) 43 Cal.App.3d 454, 470 [117 Cal.Rptr. 757].) When considering if the pretense is corroborated the jury may consider "the entire conduct of the defendant, and his declarations to other persons." (*People v. Wymer* (1921) 53 Cal.App. 204, 206 [199 P. 815].) The test for corroboration of false pretense is the same as the test for corroborating the testimony of an accomplice in Penal Code section 1111. (*Ibid.*; see also *People v. MacEwing* (1955) 45 Cal.2d 218, 224 [288 P.2d 257].) To establish corroboration by multiple witnesses, the witnesses do not have to testify to the same false pretense. The requirement is satisfied as long as they testify to the same scheme or type of false pretense. (*People v. Gentry* (1991) 234 Cal.App.3d 131, 139 [285 Cal.Rptr. 591]; *People v. Ashley* (1954) 42 Cal.2d 246, 268 [267 P.2d 271].)

Distinguished from Theft by Trick

Although fraud is used to obtain the property in both theft by trick and theft by false pretense, in theft by false pretense, the thief obtains *both* possession and title to the property. For theft by trick, the thief gains only possession of the property. (*People v. Ashley* (1954) 42 Cal.2d 246, 258 [267 P.2d 271]; *People v. Randono* (1973) 32 Cal.App.3d 164, 172 [108 Cal.Rptr. 326].) False pretenses does not require that the title pass perfectly and the victim may even retain a security interest in the property transferred to the defendant. (*People v. Counts* (1995) 31 Cal.App.4th 785, 789–792 [37 Cal.Rptr.2d 425].)

Fraudulent Checks

If a check is the basis for the theft by false pretense, it cannot also supply the written corroboration required by statute. (*People v. Mason* (1973) 34 Cal.App.3d 281, 288 [109 Cal.Rptr. 867].)

Genuine Writings

A genuine writing that is falsely used is not a false token. (*People v. Beilfuss* (1943) 59 Cal.App.2d 83, 91 [138 P.2d 332] [valid check obtained by fraud not object of theft by false pretense].)

Implicit Misrepresentations
The misrepresentation does not have to be made in an express statement; it may be implied from behavior or other circumstances. (*People v. Mace* (1925) 71 Cal.App. 10, 21 [234 P. 841]; *People v. Randono* (1973) 32 Cal.App.3d 164, 174–175 [108 Cal.Rptr. 326] [analogizing to the law of implied contracts].)

Non-Performance of a Promise Is Insufficient to Prove a False Pretense
The pretense may be made about a past or present fact or about a promise to do something in the future. (*People v. Ashley* (1954) 42 Cal.2d 246, 259–265 [267 P.2d 271].) If the pretense relates to future actions, evidence of non-performance of the promise is not enough to establish the falsity of a promise. (*People v. Fujita* (1974) 43 Cal.App.3d 454, 469 [117 Cal.Rptr. 757].) The intent to defraud at the time the promise is made must be demonstrated. As the court in *Ashley* stated, "[w]hether the pretense is a false promise or a misrepresentation of fact, the defendant's intent must be proved in both instances by something more than mere proof of non-performance or actual falsity." (*People v. Ashley, supra,* 42 Cal.2d at p. 264 [court also stated that defendant is entitled to instruction on this point but did not characterize duty as sua sponte].)

See the Related Issues section under CALCRIM No. 1800, *Theft by Larceny*.

2240. Failure to Appear (Veh. Code, § 40508(a))

The defendant is charged [in Count __] with failing to appear in court [in violation of Vehicle Code section 40508(a)].

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

1. **The defendant received a citation;**

2. **In connection with that citation, the defendant (signed a written promise to appear(in court/[or] before a person authorized to receive a deposit of bail)/ [or] received a lawfully granted continuance of (his/her) promise to appear);**

AND

3. **The defendant willfully failed to appear (in court/[or] before a person authorized to receive a deposit of bail).**

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.

[It does not matter whether the defendant was found guilty of the violation of the Vehicle Code alleged in the original citation.]

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 ▸ Veh. Code, § 40508(a).
- Willfully Defined ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

Secondary Sources

4 Witkin, California Criminal Law (3d ed. 2000) Pretrial, § 50.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest,* § 11.22[2], Ch. 12, *Bail*, § 12.04 (Matthew Bender).

2350. Sale, Furnishing, etc., of Marijuana (Health & Saf. Code, § 11360(a))

The defendant is charged [in Count ___] with (selling/furnishing/administering/importing) marijuana, a controlled substance [in violation of Health and Safety Code section 11360(a)].

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

1. **The defendant (sold/furnished/administered/imported into California) a controlled substance;**

2. **The defendant knew of its presence;**

3. **The defendant knew of the substance's nature or character as a controlled substance;**

[AND]

4. **The controlled substance was marijuana(;/.)**

<Give element 5 when instructing on usable amount; see Bench Notes.>
[AND

5. **The controlled substance was in a usable amount.]**

[*Selling* for the purpose of this instruction means exchanging the marijuana for money, services, or anything of value.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (sold/furnished/administered/imported), only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

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

New January 2006

BENCH NOTES

Instructional Duty

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

Sale of a controlled substance does not require a usable amount. (See *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316].) When the prosecution alleges sales, do not give element 5 or the bracketed definition of "usable amount." There is no case law on whether furnishing, administering, or importing require usable quantities. (See *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907] [transportation requires usable quantity]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567] [same].) Element 5 and the definition of usable amount are provided for the court to use at its discretion.

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Until courts of review provide further clarification, the court will have to determine whether under the facts of a given case the compassionate use defense should apply pursuant to Health & Saf. Code, §§ 11362.765 and 11362.775.

AUTHORITY

- Elements ▸ Health & Saf. Code, § 11360(a); *People v. Van Alstyne* (1975) 46 Cal.App.3d 900, 906 [121 Cal.Rptr. 363].
- Knowledge ▸ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Selling ▸ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Administering ▸ Health & Saf. Code, § 11002.
- Administering Does Not Include Self-Administering ▸ *People v. Label* (1974) 43 Cal.App.3d 766, 770–771 [119 Cal.Rptr. 522].
- Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Usable Amount ▸ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Compassionate Use Defense Generally ▸ *People v. Wright* (2006) 40 Cal.4th 81; *People v. Urziceanu* (2005) 132 Cal.App.4th 747; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–100.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[c], [g]–[i], [3][a], [a.1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of Marijuana ▸ Health & Saf. Code, § 11357.
- Possession for Sale of Marijuana ▸ Health & Saf. Code, § 11359.

RELATED ISSUES

Medical Marijuana Not a Defense to Sales

The medical marijuana defense provided by Health and Safety Code section 11362.5 is not available to a charge of sales under Health and Safety Code section 11360. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].) The defense is not available even if the marijuana is provided to someone permitted to use marijuana for medical reasons (*People v. Galambos*, *supra*, 104 Cal.App.4th at pp. 1165–1167) or if the marijuana is provided free of charge (*People ex rel. Lungren v. Peron*, *supra*, 59 Cal.App.4th at p. 1389). Evidence of a compassionate use defense may be admissible if the defendant denies intent to sell and asserts such a defense to simple possession or cultivation. (See *People v. Galambos*, *supra*, 104 Cal.App.4th at p. 1165 [trial court properly instructed on medical marijuana defense to simple possession and cultivation for personal use]..) There is no case law on whether compassionate use may be raised as a defense to "furnishing" or "administering" marijuana.

2351. Offering to Sell, Furnish, etc., Marijuana (Health & Saf. Code, § 11360)

The defendant is charged [in Count ___] with offering to (sell/furnish/administer/import) marijuana, a controlled substance [in violation of Health and Safety Code section 11360].

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

1. **The defendant offered to (sell/furnish/administer/import into California) marijuana, a controlled substance;**

AND

2. **When the defendant made the offer, (he/she) intended to (sell/furnish/administer/import) the controlled substance.**

[*Selling* for the purpose of this instruction means exchanging marijuana for money, services, or anything of value.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[The People do not need to prove that the defendant actually possessed the marijuana.]

New January 2006

BENCH NOTES

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

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Until courts of review provide further clarification, the court will have to determine whether under the facts of a given case the compassionate use defense should apply pursuant to Health & Saf. Code, §§ 11362.765 and 11362.775.

AUTHORITY

- Elements ▸ Health & Saf. Code, § 11360; *People v. Van Alstyne* (1975) 46 Cal.App.3d 900, 906 [121 Cal.Rptr. 363].
- Specific Intent ▸ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Knowledge ▸ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Selling ▸ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Administering ▸ Health & Saf. Code, § 11002.
- Administering Does Not Include Self-Administering ▸ *People v. Label* (1974) 43 Cal.App.3d 766, 770–771 [119 Cal.Rptr. 522].
- Compassionate Use Defense Generally ▸ *People v. Wright* (2006) 40 Cal.4th 81; *People v. Urziceanu* (2005) 132 Cal.App.4th 747; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].

- Compassionate Use Not a Defense ▸ *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–100.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a], [g]–[j], [3][a], [a.1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of Marijuana ▸ Health & Saf. Code, § 11357.
- Possession for Sale of Marijuana ▸ Health & Saf. Code, § 11359.

RELATED ISSUES

No Requirement That Defendant Delivered or Possessed Drugs
A defendant may be convicted of offering to sell even if there is no evidence that he or she delivered or ever possessed any controlled substance. (*People v. Jackson* (1963) 59 Cal.2d 468, 469 [30 Cal.Rptr. 329, 381 P.2d 1]; *People v. Brown* (1960) 55 Cal.2d 64, 68 [9 Cal.Rptr. 816, 357 P.2d 1072].)

Medical Marijuana Not a Defense to Sales or Offering to Sell
The medical marijuana defense provided by Health and Safety Code section 11362.5 is not available to a charge of sales or offering to sell under Health and Safety Code section 11360. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].) The defense is not available even if the marijuana is provided to someone permitted to use marijuana for medical reasons (*People v. Galambos, supra*, 104 Cal.App.4th at pp. 1165–1167) or if the marijuana is provided free of charge (*People ex rel. Lungren v. Peron, supra*, 59 Cal.App.4th at p. 1389). Evidence of a compassionate use defense may be admissible if the defendant denies intent to sell and asserts such a defense to simple possession or cultivation. (See *People v. Galambos, supra*, 104 Cal.App.4th at p. 1165 [trial court properly instructed on medical marijuana defense to simple possession and cultivation for personal use]..) There is no case

~~law on whether compassionate use may be raised as a defense to "furnishing" or "administering" marijuana.~~

2352. Possession for Sale of Marijuana (Health & Saf. Code, §§ 11018, 11359)

The defendant is charged [in Count ___] with possessing for sale marijuana, a controlled substance [in violation of Health and Safety Code section 11359].

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

1. **The defendant possessed a controlled substance;**

2. **The defendant knew of its presence;**

3. **The defendant knew of the substance's nature or character as a controlled substance;**

4. **When the defendant possessed the controlled substance, (he/she) intended to sell it;**

5. **The controlled substance was marijuana;**

AND

6. **The controlled substance was in a usable amount.**

Selling **for the purpose of this instruction means exchanging the marijuana for money, services, or anything of value.**

A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted there

from), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed, only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[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.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

New January 2006

BENCH NOTES

Instructional Duty

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

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Until courts of review provide further clarification, the court will have to determine whether under the facts of a given case the compassionate use defense should apply pursuant to Health & Saf. Code, §§ 11362.765 and 11362.775.

AUTHORITY

- Elements ▸ Health & Saf. Code, § 11359.
- "Marijuana" defined ▸ Health & Saf. Code, § 11018.
- Knowledge ▸ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].

- Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Selling ▸ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Usable Amount ▸ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Compassionate Use Defense Generally ▸ *People v. Wright* (2006) 40 Cal.4th 81; *People v. Urziceanu* (2005) 132 Cal.App.4th 747; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].
- ~~Compassionate Use Not a Defense ▸ *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].~~

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 68–93.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[e], [3][a], [a.1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of Marijuana ▸ Health & Saf. Code, § 11357.

~~RELATED ISSUES~~

~~***Medical Marijuana Not a Defense to Possession for Sale***~~
~~*The medical marijuana defense provided by Health and Safety Code section 11362.5 is not available to a charge of possession for sale under Health and Safety Code section 11359.* (People v. Galambos *(2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844];* People ex rel. Lungren v. Peron *(1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].) The defense is not available even if the marijuana is provided to someone permitted to use marijuana for medical reasons* (People v. Galambos, supra, *104 Cal.App.4th at pp. 1165–1167) or if the marijuana is provided free of charge* (People ex rel. Lungren v. Peron, supra, *59 Cal.App.4th at p. 1389). Evidence of a compassionate use defense may be*

admissible if the defendant denies intent to sell and asserts such a defense to simple possession or cultivation. (See People v. Galambos, supra, *104 Cal.App.4th at p. 1165 [trial court properly instructed on medical marijuana defense to simple possession and cultivation for personal use].)*

2353–2359. Reserved for Future Use

2542. Carrying Firearm: Active Participant in Criminal Street Gang (Pen. Code, §§ 12025(b)(3), 12031(a)(2)(C))

If you find the defendant guilty of unlawfully (carrying a concealed firearm (on (his/her) person/within a vehicle)[,]/ causing a firearm to be carried concealed within a vehicle[,]/ [or] carrying a loaded firearm) [under Count[s] __], you must then decide whether the People have proved the additional allegation that the defendant was an active participant in a criminal street gang.

To prove this allegation, the People must prove that:

1. **When the defendant (carried the firearm/ [or] caused the firearm to be carried concealed in a vehicle), the defendant was an active participant in a criminal street gang;**

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

AND

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

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

    OR

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

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

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

A *criminal street gang* is any ongoing organization, association, or group of three or more persons, whether formal or informal:

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

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

AND

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

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

<Give this paragraph only when the conduct that establishes the primary activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition>
[To decide whether the organization, association, or group has, as one of its primary activities, the commission of _____ *<insert felony or felonies from Pen. Code, § 186.22(e)(1)-(25), (31)-(33)>* **please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

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

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

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

   [OR]

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

AND

[at least one of the following crimes:] _____<*insert one or more crimes in Pen. Code, § 186.22(e)(26)–(30)*>;

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

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

AND

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

<Give this paragraph only when the conduct that establishes the pattern of criminal gang activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition>
To decide whether a member of the gang [or the defendant] committed _____ *<insert felony or felonies from Pen. Code, § 186.22(e)(1)-(33)>* **please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

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

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

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

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

To decide whether a member of the gang [or the defendant] committed _____ *<insert felony or felonies listed immediately above and crimes from Pen. Code, § 186.22(e)(1)–(33) inserted in definition of pattern of criminal gang*

activity>**, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].**

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

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

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

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

AND

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

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

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

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

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

AND

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

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

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

New January 2006; Revised August 2006, June 2007

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *People v. Robles* (2000) 23 Cal.4th 1106, 1115 [99 Cal.Rptr.2d 120, 5 P.3d 176] [Pen. Code, § 12031(a)(2)(C) incorporates entire substantive gang offense defined in section 186.22(a)]; see *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give this instruction if the defendant is charged under Penal Code section 12025(b)(3) or 12031(a)(2)(C) and the defendant does not stipulate to being an active gang participant. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].) This instruction **must** be given with the appropriate instruction defining the elements of carrying a concealed firearm, CALCRIM No. 2520, 2521, or 2522, carrying a loaded firearm, CALCRIM No. 2530. The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor has been proved.

If the defendant does stipulate that he or she is an active gang participant, this instruction should not be given and that information should not be disclosed to the jury. (See *People v. Hall, supra,* 67 Cal.App.4th at p. 135.)

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

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

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

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

Note that a defendant's misdemeanor conduct in the charged case, which is elevated to a felony by operation of Penal Code section 186.22(a), is not sufficient to satisfy the felonious criminal conduct requirement of an active gang participation offense charged under subdivision (a) of section 186.22 or of active gang participation charged as an element of felony firearm charges under sections 12025(b)(3) or 12031(a)(2)(C). *People v. Lamas* (2007) 42 Cal.4th 516, 524.

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

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

On request, give the bracketed paragraph that begins with "You may not find that there was a pattern of criminal gang activity." (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [28 Cal.Rptr.2d 758]; see also Related Issues section to CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.)

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

Defenses—Instructional Duty

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

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

Related Instructions

CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.
CALCRIM No. 1401, *Felony Committed for Benefit of Criminal Street Gang*.

For additional instructions relating to liability as an aider and abettor, see series 400, Aiding and Abetting.

AUTHORITY

- Factors ▸ Pen. Code, §§ 12025(b)(3), 12031(a)(2)(C).
- Elements of Gang Factor ▸ Pen. Code, § 186.22(a); *People v. Robles* (2000) 23 Cal.4th 1106, 1115 [99 Cal.Rptr.2d 120, 5 P.3d 176].
- Factors in Pen. Code, § 12025(b) Sentencing Factors, Not Elements ▸ *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].

- Active Participation Defined ▸ Pen. Code, § 186.22(i); *People v. Salcido* (2007) 149 Cal.App.4th 356 [56 Cal.Rptr.3d 912]; *People v. Castenada* (2000) 23 Cal.4th 743, 747 [97 Cal.Rptr.2d 906, 3 P.3d 278].
- Criminal Street Gang Defined ▸ Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 [119 Cal.Rptr.2d 272].
- Pattern of Criminal Gang Activity Defined ▸ Pen. Code, §§ 186.22(e), (j); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [279 Cal.Rptr. 236].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 23–28, 154, 185.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* §§ 144.01[1][d], 144.03[2] (Matthew Bender).

RELATED ISSUES

Gang Expert Cannot Testify to Defendant's Knowledge or Intent
In *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658 [126 Cal.Rptr.2d 876], the court held it was error to permit a gang expert to testify that the defendant knew there was a loaded firearm in the vehicle:

> [The gang expert] testified to the subjective *knowledge and intent* of each occupant in each vehicle. Such testimony is much different from the *expectations* of gang members in general when confronted with a specific action…. ¶… [The gang expert] simply informed the jury of his belief of the suspects' knowledge and intent on the night in question, issues properly reserved to the trier of fact. [The expert's] beliefs were irrelevant.

(*Ibid*. [emphasis in original].)

See also the Commentary and Related Issues sections of the Bench Notes for CALCRIM No. 1400, *Active Participation in Criminal Street Gang*.

3131. Personally Armed With Firearm (Pen. Code, §§ 1203.06(b)(3), 12022(c), 12022.3(b))

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of _____ *<insert name[s] of alleged lesser offense[s]>*__,__ **you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant was personally armed with a firearm ~~during~~ in the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

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

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

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

A person is *armed* with a firearm when that person:

1. **Carries a firearm or has a firearm available for use in either offense or defense in connection with the crime[s] charged;**

   AND

2. **Knows that he or she is carrying the firearm or has it available for use.**

<If there is an issue in the case over whether the defendant was armed with the firearm "~~during~~ in the commission of" the offense, see Bench Notes.>

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

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

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

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

In the definition of "armed," the court may give the bracketed phrase "or has a firearm available" on request if the evidence shows that the firearm was at the scene of the alleged crime and "available to the defendant to use in furtherance of the underlying felony." (*People v. ~~Marvin~~ Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; see also *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274] [language of instruction approved; sufficient evidence defendant had firearm available for use]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214] [evidence that firearm was two blocks away from scene of rape insufficient to show available to defendant].)

If the case involves an issue of whether the defendant was armed "during the commission of" the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

If the defendant is charged with being ineligible for probation under Penal Code section 1203.06 for being armed during the commission of the offense and having been convicted of a specified prior crime, the court should also give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, with this instruction unless the defendant has stipulated to the prior conviction or the court has granted a bifurcated trial.

AUTHORITY

- Enhancement ▸ Pen. Code, §§ 1203.06(b)(3), 12022(c), 12022.3(b).
- Firearm Defined ▸ Pen. Code, § 12001(b).
- Armed ▸ *People v. Pitto* (2008) 43 Cal.4th 228, 236-240; *People v. Bland* (1995) 10 Cal.4th 991, 997–998 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v.*

Jackson (1995) 32 Cal.App.4th 411, 419–422 [38 Cal.Rptr.2d 214]; *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [278 Cal.Rptr. 274].

- Personally Armed ‣ *People v. Smith* (1992) 9 Cal.App.4th 196, 203–208 [11 Cal.Rptr.2d 645].
- Must Be Personally Armed for Enhancement Under Penal Code Section 12022.3 ‣ *People v. Rener* (1994) 24 Cal.App.4th 258, 267 [29 Cal.Rptr.2d 392]; *People v. Reed* (1982) 135 Cal.App.3d 149, 152–153 [185 Cal.Rptr. 169].
- Defendant Not Present When Drugs and Weapon Found ‣ *People v. ~~Marvin~~ Bland* (1995) 10 Cal.4th 991, 995 [43 Cal.Rptr.2d 77, 898 P.2d 391].
- Facilitative Nexus ‣ *People v. Pitto* (2008) 43 Cal.4th 228, 236-240.
- Firearm Need Not Be Operable ‣ *People v. Nelums* (1982) 31 Cal.3d 355, 360 [182 Cal.Rptr. 515, 644 P.2d 201].
- Firearm Need Not Be Loaded ‣ See *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795 [286 Cal.Rptr. 887].
- "In Commission of" Felony ‣ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 311, 320, 329.

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

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.31 (Matthew Bender).

RELATED ISSUES

Defendant Not Present When Drugs and Weapon Found

In *People v. Bland* (1995) 10 Cal.4th 991, 995 [43 Cal.Rptr.2d 77, 898 P.2d 391], the defendant was convicted of possession of a controlled substance and an enhancement for being armed during that offense despite the fact that he was not present when the police located the illegal drugs and firearm. The Court held that there was sufficient evidence to support the arming enhancement, stating:

> [W]hen the prosecution has proved a charge of felony drug possession, and the evidence at trial shows that a firearm was found in close proximity to the illegal drugs in a place frequented by the defendant, a jury may reasonably infer: (1) that the defendant knew of the firearm's presence; (2) that its presence together with the drugs was not accidental or coincidental; and (3) that, at some point during the period of illegal drug possession, the defendant had the firearm close at hand and thus available for immediate use to aid in the drug offense. These reasonable inferences, if not refuted by defense evidence, are sufficient to warrant a determination that the defendant was "armed with a firearm in the commission" of a felony within the meaning of section 12022.

(*Ibid*.)

The *Bland* case did not state that the jury should be specifically instructed in these inferences, and it appears that no special instruction was given in *Bland*. If the prosecution requests a special instruction on this issue, the court may consider using the following language:

> If the People have proved that a firearm was found close to the _____ <*insert type of controlled substance allegedly possessed*> in a place where the defendant was frequently present, you may but are not required to conclude that:
>
> 1. The defendant knew the firearm was present;
>
> 2. It was not accidental or coincidental that the firearm was present together with the drugs;
>
> AND
>
> 3. During at least part of the time that the defendant allegedly possessed the illegal drug, (he/she) had the firearm close at hand and available for immediate use to aid in the drug offense.
>
> If you find beyond a reasonable doubt that the evidence supports these conclusions, you may but are not required to conclude that the defendant was personally armed with a firearm ~~during~~ in the commission [or attempted commission] of the _____ <*insert name of alleged offense*>] [or the lesser crime of _____ <*insert name of alleged lesser offense*>].

Multiple Defendants—Single Weapon

Two or more defendants may be personally armed with a single weapon at the same time. (*People v. Smith* (1992) 9 Cal.App.4th 196, 205 [11 Cal.Rptr.2d 645].) It is for the jury to decide if the firearm was readily available to both defendants for use in offense or defense. *(Ibid.)*

For enhancements charged under Penal Code section 12022.3, see also the Related Issues section of CALCRIM No. 3130, *Personally Armed With Deadly Weapon*.

~~Definition of "during the commission of"~~
~~See CALCRIM No. 3261.~~

3161. Great Bodily Injury: Causing Victim to Become Comatose or Paralyzed (Pen. Code, § 12022.7(b))

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ *<insert name[s] of alleged lesser offense[s]>***], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally inflicted great bodily injury that caused _____** *<insert name of injured person>* **to become (comatose/ [or] permanently paralyzed). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

To prove this allegation, the People must prove that:

1. **The defendant personally inflicted great bodily injury on _____** *<insert name of injured person>* **during the commission [or attempted commission] of the crime;**

[AND]

2. **The defendant's acts caused _____** *<insert name of injured person>* **to (become comatose due to brain injury/ [or] suffer permanent paralysis)(./;)**

<Give element 3 when instructing on whether injured person was an accomplice.>
[AND

3. **_____** *<insert name of injured person>* **was not an accomplice to the crime.]**

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

[*Paralysis* is a major or complete loss of motor function resulting from injury to the nervous system or to a muscular mechanism.]

<Group Assault>
[If you conclude that more than one person assaulted _____ *<insert name of injured person>* **and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily**

injury on _____ <*insert name of injured person*> **if the People have proved that:**

1. **Two or more people, acting at the same time, assaulted _____** <*insert name of injured person*> **and inflicted great bodily injury on (him/her);**

2. **The defendant personally used physical force on _____** <*insert name of injured person*> **during the group assault;**

AND

[3A. The amount or type of physical force the defendant used on _____ <*insert name of injured person*> **was enough that it alone could have caused _____** <*insert name of injured person*> **to suffer great bodily injury(;/.)]**

[OR]

[3B. The physical force that the defendant used on _____ <*insert name of injured person*> **was sufficient in combination with the force used by the others to cause _____** <*insert name of injured person*> **to suffer great bodily injury.**

[The defendant must have applied substantial force to _____ <*insert name of injured person*>**. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]**

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

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

AND

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

<If there is an issue in the case over whether the defendant inflicted the injury "during the commission of" the offense, see Bench Notes.>

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

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

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

The bracketed section beneath the heading "Group Assault" is designed to be used in cases where the evidence shows a group assault.

If the court gives bracketed element 3 instructing that the People must prove that the person assaulted "was not an accomplice to the crime," the court should also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

The jury must determine whether an injury constitutes "great bodily injury." (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If the case involves an issue of whether the defendant inflicted the injury "during the commission of" the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancement ▸ Pen. Code, § 12022.7(b).
- Great Bodily Injury Defined ▸ Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Must Personally Inflict Injury ▸ *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Group Beating Instruction ▸ *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762].
- Accomplice Defined ▸ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- "In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 288–291.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.35 (Matthew Bender).

RELATED ISSUES

Coma Need Not Be Permanent

In *People v. Tokash* (2000) 79 Cal.App.4th 1373, 1378 [94 Cal.Rptr. 2d 814], the court held that an enhancement under Penal Code section 12022.7(b) was proper where the victim was maintained in a medically induced coma for two months following brain surgery necessitated by the assault.

See the Related Issues section of CALCRIM No. 3160, *Great Bodily Injury*.

3162. Great Bodily Injury: Age of Victim (Pen. Code, § 12022.7(c) & (d))

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ *<insert name[s] of alleged lesser offense[s]>***], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally inflicted great bodily injury on someone who was (under the age of 5 years/70 years of age or older). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

To prove this allegation, the People must prove that:

1. **The defendant personally inflicted great bodily injury on _____** *<insert name of injured person>* **during the commission [or attempted commission] of the crime;**

[AND]

2. **At that time, _____** *<insert name of injured person>* **was (under the age of 5 years/70 years of age or older)(./;)**

<Give element 3 when instructing on whether injured person was an accomplice.>

[AND

3. **_____** *<insert name of injured person>* **was not an accomplice to the crime.]**

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

[Committing the crime of _____ *<insert sexual offense charged>* **is not by itself the infliction of great bodily injury.]**

<Group Assault>
[If you conclude that more than one person assaulted _____ *<insert name of injured person>* **and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily**

injury on _____ <*insert name of injured person*> **if the People have proved that:**

1. **Two or more people, acting at the same time, assaulted _____** <*insert name of injured person*> **and inflicted great bodily injury on (him/her);**

2. **The defendant personally used physical force on _____** <*insert name of injured person*> **during the group assault;**

AND

[3A. The amount or type of physical force the defendant used on _____ <*insert name of injured person*> **was enough that it alone could have caused _____** <*insert name of injured person*> **to suffer great bodily injury(;/.)]**

[OR]

[3B. The physical force that the defendant used on _____ <*insert name of injured person*> **was sufficient in combination with the force used by the others to cause _____** <*insert name of injured person*> **to suffer great bodily injury.**

The defendant must have applied substantial force to _____ <*insert name of injured person*>**. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]**

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

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

AND

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

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

<If there is an issue in the case over whether the defendant inflicted the injury "during the commission of" the offense, see Bench Notes.>

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

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

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

Give the bracketed sentence that begins with "Committing the crime of" if the defendant is charged with a sexual offense. (*People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100] [injury must be more than that which is present in every offense of rape].)

The bracketed section beneath the heading "Group Assault" is designed to be used in cases where the evidence shows a group assault. If the court gives bracketed element 3 instructing that the People must prove that the person assaulted "was not an accomplice to the crime," the court should also give the bracketed definition of "accomplice." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

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

The jury must determine whether an injury constitutes "great bodily injury." (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If the case involves an issue of whether the defendant inflicted the injury "during the commission of" the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancements ▸ Pen. Code, § 12022.7(c) & (d).
- Great Bodily Injury Defined ▸ Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Must Personally Inflict Injury ▸ *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Sex Offenses—Injury Must Be More Than Incidental to Offense ▸ *People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Group Beating Instruction ▸ *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762].
- Accomplice Defined ▸ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- "In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 288–291.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.35 (Matthew Bender).

RELATED ISSUES

See the Related Issues section of CALCRIM No. 3160, *Great Bodily Injury*.

3163. Great Bodily Injury: Domestic Violence (Pen. Code, § 12022.7(e))

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally inflicted great bodily injury on _____ <*insert name of injured person*> during the commission [or attempted commission] of that crime, under circumstances involving domestic violence. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

[The People must also prove that _____ <*insert name of injured person*> was not an accomplice to the crime.]

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

***Domestic violence* means abuse committed against (an adult/a fully emancipated minor) who is a (spouse[,]/ [or] former spouse[,]/ [or] cohabitant[,]/ [or] former cohabitant[,]/ [or] person with whom the defendant has had a child[,]/ [or] person with whom the defendant is having or has had a dating relationship[,]/ [or] person who was or is engaged to the defendant).**

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

[The term *dating relationship* means frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement independent of financial considerations.]

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

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

[Committing the crime of _____ *<insert sexual offense charged>* **is not by itself the infliction of great bodily injury.]**

<Group Assault>
[If you conclude that more than one person assaulted _____ *<insert name of injured person>* **and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily injury on _____** *<insert name of injured person>* **if the People have proved that:**

1. **Two or more people, acting at the same time, assaulted _____** *<insert name of injured person>* **and inflicted great bodily injury on (him/her);**

2. **The defendant personally used physical force on _____** *<insert name of injured person>* **during the group assault;**

AND

[3A. The amount or type of physical force the defendant used on _____ *<insert name of injured person>* **was enough that it alone could have caused _____** *<insert name of injured person>* **to suffer great bodily injury(;/.)]**

[OR]

[3B. The physical force that the defendant used on _____ *<insert name of injured person>* **was sufficient in combination with the force used by the others to cause _____** *<insert name of injured person>* **to suffer great bodily injury.**

[The defendant must have applied substantial force to _____ *<insert name of injured person>***. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]**

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

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

AND

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

<If there is an issue in the case over whether the defendant inflicted the injury "during the commission of" the offense, see Bench Notes.>

[The person who was injured does not have to be a person with whom the defendant had a relationship.]

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

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

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

Give the bracketed sentence that begins with "Committing the crime of" if the defendant is charged with a sexual offense. (*People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100] [injury must be more than that which is present in every offense of rape].)

The bracketed section beneath the heading "Group Assault" is designed to be used in cases where the evidence shows a group assault

The jury must determine whether an injury constitutes "great bodily injury." (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If the case involves an issue of whether the defendant inflicted the injury "during the commission of" the offense, the court may give CALCRIM No. 3261, *During Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancement ▸ Pen. Code, § 12022.7(e).
- Great Bodily Injury Defined ▸ Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Dating Relationship Defined ▸ Fam. Code, § 6210; Pen. Code, § 243(f)(10).
- Must Personally Inflict Injury ▸ *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- General Intent Only Required ▸ *People v. Carter* (1998) 60 Cal.App.4th 752, 755–756 [70 Cal.Rptr.2d 569].
- Sex Offenses—Injury Must Be More Than Incidental to Offense ▸ *People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Group Beating Instruction ▸ *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762].
- "In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 288–291.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.35 (Matthew Bender).

RELATED ISSUES

Person Who Suffers Injury Need Not Be "Victim" of Domestic Abuse
Penal Code section 12022.7(e) does not require that the injury be inflicted on the "victim" of the domestic violence. (*People v. Truong* (2001) 90 Cal.App.4th 887, 899 [108 Cal.Rptr.2d 904].) Thus, the enhancement may be applied where "an angry husband physically abuses his wife and, as part of the same incident, inflicts great bodily injury upon the man with whom she is having an affair." (*Id.* at p. 900.)

See also the Related Issues section of CALCRIM No. 3160, *Great Bodily Injury*.

3453. Extension of Commitment (Pen. Code, § 1026.5(b)(1))

_____ *<insert name of respondent>* **has been committed to a mental health facility. You must decide whether (he/she) currently poses a substantial danger of physical harm to others as a result of a mental disease, defect, or disorder. That is the only purpose of this proceeding. You are not being asked to decide _____** *<insert name of respondent>***'s mental condition at any other time or whether (he/she) is guilty of any crime.**

To prove that _____ *<insert name of respondent>* **currently poses a substantial danger of physical harm to others as a result of a mental disease, defect, or disorder, the People must prove beyond a reasonable doubt that:**

1. **(He/She) suffers from a mental disease, defect, or disorder;**

[AND]

2. **As a result of (his/her) mental disease, defect, or disorder , (he/she) now:**

    a. **Poses a substantial danger of physical harm to others(;/.)**

[AND

    b. **Has serious difficulty in controlling (his/her) dangerous behavior.]**

[Control of a mental condition through medication is a defense to a petition to extend commitment. To establish this defense, _____ *<insert name of respondent>* **must prove by a preponderance of the evidence that:**

1. **(He/She) no longer poses a substantial danger of physical harm to others because (he/she) is now taking medicine that controls (his/her) mental condition;**

AND

2. **(He/She) will continue to take that medicine in an unsupervised environment.**

Proof by *a preponderance of the evidence* is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.]

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the standard for extending commitment, including the constitutional requirement that the person be found to have a disorder that seriously impairs the ability to control his or her dangerous behavior. (People v. Sudar (2007) 158 Cal.App.4th 655, 663 [70 Cal.Rptr.3d 190].) ~~.~~

Give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*, and CALCRIM No. 3550, *Pre-Deliberation Instructions*, as well as any other relevant posttrial instructions, such as CALCRIM No. 222, *Evidence*, or CALCRIM No. 226, *Witnesses*.

The~~A~~ constitutional requirement for an involuntary civil commitment is that the person be found to have a disorder that seriously impairs the ability to control his or her dangerous behavior. (*Kansas v. Crane* (2002) 534 U.S. 407, 412–413 [122 S.Ct. 867, 151 L.Ed.2d 856]; *In re Howard N.* (2005) 35 Cal.4th 117, 128 [24 Cal.Rptr.3d 866, 106 P.3d 305].) This requirement applies to an extension of a commitment after a finding of not guilty by reason of insanity. (*People v. Zapisek* (2007) 147 Cal.App.4th 1151, 1159–1165 [54 Cal.Rptr.3d 873]; *People v. Bowers* (2006) 145 Cal.App.4th 870, 878 [52 Cal.Rptr.3d 74]; *People v. Galindo* (2006) 142 Cal.App.4th 531 [48 Cal.Rptr.3d 241].)

~~If the evidence raises a reasonable doubt about the serious impairment of the ability to control behavior, the court must instruct on that requirement using the optional bracketed element 2b. (See *In re Howard N.* (2005) 35 Cal.4th 117, 137–138 [24 Cal.Rptr.3d 866, 106 P.3d 305] [Youth Authority extended detention under Welf. & Inst. Code, section 1800 reversed for failure to instruct on impaired ability to control behavior]; cf. *People v. Williams* (2003) 31 Cal.4th 757, 774–777 [3 Cal.Rptr.3d 684, 74 P.3d 779] [jury instructed in the language of the SVPA would necessarily understand this requirement, and no further instruction is needed]).~~

AUTHORITY

- Instructional Requirements ▸ Pen. Code, § 1026.5(b)(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].
- Affirmative Defense of Medication ‣ *People v. Bolden* (1990) 217 Cal.App.3d 1591, 1600–1602 [266 Cal.Rptr. 724].
- Serious Difficulty Controlling Dangerous Behavior ‣ *People v. Sudar* (2007) 158 Cal.App.4th 655, 662-663 [applying the principles of *Kansas v. Crane* and *In re Howard N.*].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 693.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 86, *Insanity Trial*, § 86.10[7] (Matthew Bender).

RELATED ISSUES

Extension of Commitment

The test for extending a person's commitment is not the same as the test for insanity. (*People v. Superior Court (Williams)* (1991) 233 Cal.App.3d 477, 490 [284 Cal.Rptr. 601].) The test for insanity is whether the accused "was incapable of knowing or understanding the nature and quality of his or her act or of distinguishing right from wrong at the time of the commission of the offense." (Pen. Code, § 25(b); *People v. Skinner* (1985) 39 Cal.3d 765 [217 Cal.Rptr. 685, 704 P.2d 752.) In contrast, the standard for recommitment under Penal Code section 1026.5(b) is whether a defendant, "by reason of a mental disease, defect, or disorder [,] represents a substantial danger of physical harm to others." (*People v. Superior Court, supra,* 233 Cal.App.3d at pp. 489–490; see *People v. Wilder* (1995) 33 Cal.App.4th 90, 99 [39 Cal.Rptr. 2d 247].)

3456. Initial Commitment of Mentally Disordered Offender As Condition of Parole

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The petition alleges that _____<*insert name of respondent*> **is a mentally disordered offender.**

To prove this allegation, the People must prove beyond a reasonable doubt that at the time of (his/her) hearing before the Board of Parole Hearings:

1. **(He/She) was convicted of _____**<*specify applicable offense(s) from Penal Code section 2962, subdivision (e)(2)*> **and received a prison sentence for a fixed period of time;**

2. **(He/She) had a severe mental disorder;**

3. **The severe mental disorder was one of the causes of the crime for which (he/she) was sentenced to prison or was an aggravating factor in the commission of the crime;**

4. **(He/She) was treated for the severe mental disorder in a state or federal prison, a county jail, or a state hospital for 90 days or more within the year before (his/her) parole release date;**

5. **The severe mental disorder either was not in remission, or could not be kept in remission without treatment;**

AND

6. **Because of (his/her) severe mental disorder, (he/she) represented a substantial danger of physical harm to others.**

A *severe mental disorder* is an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or that grossly impairs his or her behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. [It does not include (a personality or adjustment disorder/ [or] epilepsy/ [or] mental retardation or other developmental disabilities/ [or] addiction to or abuse of intoxicating substances).]

***Remission* means that the external signs and symptoms of the severe mental disorder are controlled by either psychotropic medication or psychosocial support.**

[A severe mental disorder cannot be *kept in remission without treatment* if during the year before the Board of Parole hearing, [on _____*<****insert date of hearing, if desired****>***],** **the person:**

<Give one or more alternatives, as applicable >

[1. Was physically violent except in self-defense; [or]]

[2. Made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family; [or]]

[3. Intentionally caused property damage; [or]]

[4. Did not voluntarily follow the treatment plan.]]

[A person has voluntarily followed the treatment plan if he or she has acted as a reasonable person would in following the treatment plan.]

[A *substantial danger of physical harm* does not require proof of a recent overt act.]

You will receive [a] verdict form[s] on which to indicate your finding whether the allegation that _____*<****insert name of respondent****>*** **is a mentally disordered offender is true or not true. To find the allegation true or not true, all of you must agree. You may not find it to be true unless all of you agree the People have proved it beyond a reasonable doubt.**

New [insert month and year of council approval]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a respondent is a mentally disordered offender.

Give this instruction for an initial commitment as a condition of parole. For recommitments, give CALCRIM No. 3457, *Extension of Commitment as Mentally Disordered Offender*.

The court also **must give** CALCRIM No. 220, *Reasonable Doubt*; 222, *Evidence*; 226, *Witnesses*; 3550, *Pre-Deliberation Instructions*; and any other relevant posttrial instructions. These instructions may need to be modified.

Case law provides no direct guidance about whether a finding of an enumerated act is necessary to show that the disorder cannot be kept in remission without treatment or whether some alternative showing, such as medical opinion or non-enumerated conduct evidencing lack of remission, would suffice. One published case has said in dictum that "the option of 'cannot be kept in remission without treatment' requires a further showing that the prisoner, within the preceding year, has engaged in violent or threatening conduct or has not voluntarily followed the treatment plan." (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1161, fn. 4). The *Buffington* case involved a sexually violent predator.

AUTHORITY

- Elements and Definitions ▸ Pen. Code, §§ 2962, 2966(b); *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2.
- Unanimous Verdict, Burden of Proof ▸ Pen. Code, § 2966(b); *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Institutions That May Fulfill the 90-Day Treatment Requirement ~~of Treatment~~ ▸ Pen. Code, § 2981.
- Treatment Must Be for Serious Mental Disorder Only ▸ *People v. Sheek* (2004) 122 Cal.App.4th 1606, 1611.
- Definition of Remission ▸ Pen. Code, § 2962(a).
- Need for Treatment Established by One Enumerated Act ▸ *People v. Burroughs* (2005) 131 Cal.App.4th 1401, 1407.
- Evidence of Later Improvement Not Relevant ▸ Pen. Code, § 2966(b); *People v. Tate* (1994) 29 Cal.App.4th 1678.
- Board of Parole Hearings ▸ Pen. Code, § 5075.

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 639.

3457. Extension of Commitment as Mentally Disordered Offender

The petition alleges that _____<*insert name of respondent*> **is a mentally disordered offender.**

To prove this allegation, the People must prove beyond a reasonable doubt that [at the time of (his/her) hearing before the Board of Prison Terms]:

1. **(He/She) (has/had) a severe mental disorder;**

2. **The severe mental disorder (is/was) not in remission or (cannot/could not) be kept in remission without continued treatment;**

AND

3. **Because of (his/her) severe mental disorder, (he/she) (presently represents/represented) a substantial danger of physical harm to others.**

A *severe mental disorder* is an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or that grossly impairs his or her behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. [It does not include (a personality or adjustment disorder/epilepsy/mental retardation or other developmental disabilities/addiction to or abuse of intoxicating substances).]

***Remission* means that the external signs and symptoms of the severe mental disorder are controlled by either psychotropic medication or psychosocial support.**

[A serious mental disorder cannot be kept in remission without treatment if, during the period of the year prior to _____<*insert the date the trial commenced*> **the person:**

<Give one or more alternatives, as applicable >

[1. Was physically violent except in self-defense; [or]]

[2. Made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family; [or]]

[3. Intentionally caused property damage; [or]

[4. Did not voluntarily follow the treatment plan.]]

[A person has voluntarily followed the treatment plan if he or she has acted as a reasonable person would in following the treatment plan.]

[A *substantial danger of physical harm* does not require proof of a recent overt act.]

You will receive [a] verdict form[s] on which to indicate your finding whether the allegation that _____<*insert name of respondent*> **is a mentally disordered offender is true or not true. To find the allegation true or not true, all of you must agree. You may not find it to be true unless all of you agree the People have proved it beyond a reasonable doubt.**

New [insert month and year of council approval]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a respondent is a mentally disordered offender.

Give this instruction for a successive commitment. For an initial commitment as a condition of parole, give CALCRIM No. 3456, *Initial Commitment of Mentally Disordered Offender as Condition of Parole.*

The court also **must give** CALCRIM No. 220, *Reasonable Doubt*; 222, *Evidence*; 226, *Witnesses*; 3550, *Pre-Deliberation Instructions*; and any other relevant posttrial instructions. These instructions may need to be modified.

Give the bracketed language in the sentence beginning with "To prove this allegation" for an on-parole recommitment pursuant to Penal Code section 2966. For a recommitment after the parole period pursuant to Penal Code sections 2970 and 2972, omit the bracketed phrase and use the present tense.

Give the bracketed language in the sentence beginning with 'To prove this allegation' and use the past tense for an on-parole recommitment pursuant to Penal Code section

2966. For a recommitment after the parole period pursuant to Penal Code sections 2970 and 2972, omit the bracketed phrase and use the present tense.

Case law provides no direct guidance about whether a finding of an enumerated act is necessary to show that the disorder cannot be kept in remission without treatment or whether some alternative showing, such as medical opinion or non-enumerated conduct evidencing lack of remission, would suffice. One published case has said in dictum that "the option of 'cannot be kept in remission without treatment' requires a further showing that the prisoner, within the preceding year, has engaged in violent or threatening conduct or has not voluntarily followed the treatment plan." (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1161, fn. 4). The *Buffington* case involved a sexually violent predator.

The committee found no case law addressing the issue of whether or not instruction about an affirmative obligation to provide treatment exists. ~~Accordingly, it provided the bracketed language regarding treatment that the court may choose to use in its discretion.~~

AUTHORITY

- Elements and Definitions ▸ Pen. Code, §§ 2966, 2970, 2972; *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2.
- Unanimous Verdict, Burden of Proof ▸ Pen. Code, § 2972(a); *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Treatment Must Be for Serious Mental Disorder Only ▸ *People v. Sheek* (2004) 122 Cal.App.4th 1606, 1611.
- Definition of Remission ▸ Pen. Code, § 2962(a).
- Recommitment Must Be for the Same Disorder As That for Which the Offender Received Treatment ▸ *People v. Garcia* (2005) 127 Cal.App.4th 558, 565.

Secondary Sources

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

3458. Extension of Commitment to Division of Juvenile Facilities (Welf. & Inst. Code, § 1800).

The petition alleges that ______<insert name of respondent>_ **is physically dangerous to the public because of a mental or physical deficiency, disorder, or abnormality that causes (him/her) to have serious difficulty controlling (his/her) dangerous behavior.**

To prove this petition is true, the People must prove beyond a reasonable doubt that:

1. **(He/She) has a mental or physical deficiency, disorder, or abnormality;**

2. **The mental or physical deficiency, disorder, or abnormality causes (him/her) serious difficulty in controlling (his/her) dangerous behavior;**

AND

3. **Because of (his/her) mental or physical deficiency, disorder, or abnormality, (he/she) would be physically dangerous to the public if released from custody.**

You will receive [a] verdict form[s] on which to indicate your finding whether the petition is true or not true. To find the petition true or not true, all of you must agree. You may not find it to be true unless all of you agree the People have proved it beyond a reasonable doubt.

New [insert month and year of council approval]

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 physically dangerous to the public.

The court also **must give** CALCRIM No. 220, *Reasonable Doubt*; 222, *Evidence*; 226, *Witnesses*; 3550, *Pre-Deliberation Instructions*; and any other relevant posttrial instructions. These instructions may need to be modified.

AUTHORITY

- Elements and Definitions ▸ Welf. & Inst. Code, §§ 1800 et seq.
- Unanimous Verdict, Burden of Proof ▸ Welf. & Inst. Code, § 1801.5; *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].
- Serious Difficulty in Controlling Dangerous Behavior ▸ *In re Lemanuel C.* (2007) 41 Cal.4th 33; *In re Howard N.* (2005) 35 Cal.4th 117.

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 966-967.

3471. Right to Self-Defense: Mutual Combat or Initial Aggressor

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A person who engages in mutual combat or who is the initial aggressor has a right to self-defense only if:

1. **(He/She) actually and in good faith tries to stop fighting;**

[AND]

2. **(He/She) indicates, by word or by conduct, to (his/her) opponent, in a way that a reasonable person would understand, that (he/she) wants to stop fighting and that (he/she) has stopped fighting(;/.)**

<Give element 3 in cases of mutual combat>

[AND

3. **(He/She) gives (his/her) opponent a chance to stop fighting.]**

If a person meets these requirements, (he/she) then has a right to self-defense if the opponent continues to fight.

[A fight is *mutual combat* when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self defense arose.]

[If you decide that the defendant started the fight using non-deadly force and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend (himself/herself) with deadly force and was not required to try to stop fighting.]

New January 2006; Revised 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].)

Give bracketed element 3 if the person claiming self-defense was engaged in mutual combat.

If the defendant started the fight using non-deadly force and the opponent suddenly escalates to deadly force, the defendant may defend himself or herself using deadly force. (See *People v. Quach* (2004) 116 Cal.App.4th 294, 301–302 [10 Cal.Rptr.3d 196]; *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75 [63 Cal.Rptr. 749]; *People v. Hecker* (1895) 109 Cal. 451, 464 [42 P. 307].) In such cases, give the bracketed sentence that begins with "If you decide that."

If the defendant was the initial aggressor and is charged with homicide, always give CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*, in conjunction with this instruction.

AUTHORITY

- Instructional Requirements ▸ See Pen. Code, § 197, subd. 3; *People v. Button* (1895) 106 Cal. 628, 633 [39 P. 1073]; *People v. Crandell* (1988) 46 Cal.3d 833, 871–872 [251 Cal.Rptr. 227, 760 P.2d 423]; *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75 [63 Cal.Rptr. 749].
- Escalation to Deadly Force ▸ *People v. Quach* (2004) 116 Cal.App.4th 294, 301–302 [10 Cal.Rptr.3d 196]; *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75 [63 Cal.Rptr. 749]; *People v. Hecker* (1895) 109 Cal. 451, 464 [42 P. 307]; *People v. Anderson* (1922) 57 Cal.App. 721, 727 [208 P. 204].
- Definition of Mutual Combat ▸ *People v. Ross* (2007) 155 Cal.App.4th 1033, 1045.

Secondary Sources

1 Witkin & Epstein, Caifornia. Criminal Law (3d ed. 2000) Defenses, § 75.

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

Invitation to Comment
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Commentator	General Comments	Committee Response
Superior Court of San Diego County Michael Roddy Executive Officer	Agree.	No response required.
Superior Court of Sacramento County Robert Turner	The Superior Court of California, County of Sacramento has reviewed the New and Revised CALCRIM Instructions and does not have a position at this time.	No response required.
Kimberly E. Douglas Business Owner Fontana	Our judicial system needs a change because American citizens are being picked on consistently. It's not fair that foreigners and illegal aliens are exempt from jury service, they should have to pay the same price that we do. The financial burden on business owners is unfair.	No response required.
Manuel Sillas Disabled Citizen San Diego	*The San Diego Superior Court is full of bias.	No response required.
Scott Johnson Administrative Office of the Courts San Francisco	*Jurors should be advised of their right of nullification.	No court has held that a trial court must instruct a jury on its power of nullification. See, e.g., *People v. Sanchez* (1998) 58 Cal.App.4th 1435, 1444-1445. No further response required.
Orange County Bar Association	*The OCBA agrees with all of the proposed revisions unless noted below among the specific comments.	No response required.
Superior Court of Los Angeles County	*The court agrees with all of the proposed revisions (except for CALCRIM Nos. 3456-3458 on which it makes no comment) unless noted below among the specific comments.	No response required.

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CALCRIM Instruction	Commentator	Comment	Committee Response
332 Expert Witness Testimony	Mitchell Keiter Deputy District Attorney Orange County	This change invites the jury to consider whether an expert *reasonably relied* on information rather than on whether the information was *true and accurate.* Although there are many instances in criminal law where reasonableness rather than accuracy is sufficient, such as an individual's use of self-defense or an officer's reliance on apparent consent to search, the instant context is not among them. If an expert used proper analytical methods and therefore acted reasonably, but the information (unknown to the expert) was inaccurate, the consequent opinion will be likewise flawed.	The committee agrees to revert to the original language.
	Orange County Bar Association	The instruction as presently phrased and specifically, the proposed deleted sentence has been upheld in *People v. Felix* (2008) 160 Cal.App.4th 849. There is no need to change this instruction and the proposed language does not instruct the jury in clearer terms.	The committee agrees to revert to the original language.
358 Evidence of Defendant's Statements	Criminal Defense Appellate Projects, led by the Central California Appellate Program	We would delete the first sentence of the proposed bench note, which currently reads: "The court has a sua sponte duty to give this instruction when there is evidence of an out-of-court oral statement by the defendant." This is suggested because the sentence appears mostly redundant of the next sentence [the first sentence of the next paragraph], and it doesn't include the important qualifier that evidence of statements subject to this instruction must be incriminating. The next sentence correctly states the law, and can stand on its own. We believe the proposed amendment to the last paragraph of the bench notes does not go far enough, in light of long-established California Supreme Court as well as Court of Appeal authority. We would modify it to say that the cautionary instruction does apply to evidence of statements that are elements of a crime, as follows: "When a defendant's statement is an element of the charged offense, as in conspiracy or criminal threats (Pen. Code, § 422), this instruction applies. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1224;	The committee agrees and has modified the bench note. The committee agrees with this suggestion and has revised the bench note accordingly.

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CALCRIM Instruction	Commentator	Comment	Committee Response
		People v. Ramirez (1974) 40 Cal.App.3d 347, 352; see also, e.g., *Peabody v. Phelps* (1858) 9 Cal. 213, 229 [similar, in civil cases]; but cf. *People v. Zichko* (2004) 118 Cal.App.4th 1055, 1057.)" In the alternative, the entire paragraph can be deleted, but we recommend the amendment above because of the confusion *People v. Zichko* could otherwise create in this area.	
420 Withdrawal From Conspiracy	Mitchell Keiter Deputy District Attorney Orange County	CALCRIM 420 currently recognizes the absence of clear authority as to which party bears the burden of proof in establishing whether the defendant withdrew from a conspiracy, citing *People v. Mower* (2002) 28 Cal.4th 457. The proposed revision decides that the People have the burden of proof beyond a reasonable doubt, even though the "burden of proving an exonerating fact may be imposed on a defendant if its existence is 'peculiarly' within his personal knowledge and proof of its nonexistence by the prosecution would be relatively difficult or inconvenient." (*Id*. at p. 477). The proposed revision offers no judicial or legislative authority for this unilateral decision which sharply shapes substantive law.	As set forth in the User Guide to CALCRIM in the section on p. xxv, "Burden of Production/Burden of Proof," "[t]he instructions never refer to the 'burden of producing evidence.' The drafters concluded that it is the court's decision whether the party has met the burden of production. If the burden is not met, no further instruction is necessary. The question for the jury is whether a party has met its properly allocated burden based on the evidence received."

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CALCRIM Instruction	Commentator	Comment	Committee Response
			In other words, regardless of the defendant's "burden," the People are not relieved of proving every fact beyond a reasonable doubt, as the instruction states. No authority requires instruction on a defense burden by the higher preponderance of the evidence standard, hence the bench note.
	Criminal Defense Appellate Projects, led by the Central California Appellate Program	Agree with proposed change.	No response required.
570 Voluntary Manslaughter: Heat of Passion	Mitchell Keiter Deputy District Attorney Orange County	This proposal unduly dilutes the provocation test. The current instruction directs jurors to consider the reaction of an average person based on the same circumstances. The revision asks jurors to consider only whether the average person would have reacted in passion rather than judgment. Such passion rather than judgment is necessary, but not sufficient, to negate malice. The revision suggests a binary world, in which all reactions flow either from passion or judgment, with all reactions falling on the "passion" side of the line mitigat[ing] a homicide to manslaughter. Not so. It is not enough that an average person would react from 'passion,' the provocation must be enough to produce a *homicidal*	The committee has carefully considered this comment, but believes that the revised language more accurately states the legal requirement. Moreover, elements two and three of this instruction appear to already address this

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CALCRIM Instruction	Commentator	Comment	Committee Response
		rage or passion in the average person (though not an actual homicide). (*People v. Pride* (1992) 3 Cal.4th 195, 250.) Mere passion alone is not enough as the facts of a recent case make clear: "[T]his incident began when Coss intentionally cut off the truck in which appellant was riding. While an ordinarily reasonable person might be angered [impassioned] by the act, such a person would not pursue or encourage the driver of a vehicle in which he or she was a passenger to follow the offending vehicle at a high rate of speed and engage in highly aggressive driving and abusive personal behavior." *People v. Oropeza* (2007) 151 Cal.App.4th 73, 83.) Accordingly, the current language, inviting jurors to compare the defendant's reaction to that of an average person, rather than simply whether the reaction flowed from passion or judgment, better informs jurors of the proper test.	commentator's concern.
	Criminal Defense Appellate Projects, led by the Central California Appellate Program	The proposed amendments to this instruction and to the Authority section are in response to *People v. Najera* (2006) 138 Cal.App.4th 212, 223-224. *Najera* held: "An unlawful homicide is upon "\'a sudden quarrel or heat of passion' if the killer's reason was obscured by a 'provocation' sufficient to cause an ordinary person of average disposition to act rashly and without deliberation. (Citation.) The focus is on the provocation – the surrounding circumstances – and whether it was sufficient to cause a reasonable person to act rashly. How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion." (*Ibid*., quoting *People v. Breverman* (1998) 19 Cal.4th 142, 163.) *Najera* further held that the following argument by the prosecutor incorrectly stated the law: "[W]ould a reasonable person be so	The committee has carefully considered this comment, but believes that the revised language is clear and accurately states the legal requirement.

CALCRIM Instruction	Commentator	Comment	Committee Response
		aroused as to kill somebody? That's the standard." (*Id*. at 224.) The proposed amendment to CALCRIM No. 570 does not fully convey the holding of *Najera* that the response to the provocation is not of import to the determination of whether sufficient provocation occurred. The amended paragraph reads: "It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his/her own standard of conduct. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment." We suggest two changes to the above-quoted paragraph based on *Najera*: 1.We propose addition of the following sentence at the end of the paragraph: "It is not necessary that the defendant's response to the provocation was reasonable." Without this or a similar addition to CALCRIM 570, a jury will be unaware that the objective standards identified in the instruction do not apply to the defendant's reaction to provocation. As a result, in the absence of this proposed amendment, jurors may inevitably ask themselves: "Would a reasonable person have killed under these circumstances" – to which the answer is almost always, "No." 2.We also suggest that the third sentence be amended to more closely track the language of *Najera* quoted above and to keep the jury's focus on the objective issue it must address, which is the sufficiency of the provocation, rather than the subjective question of how persons might react to the provocation. Accordingly, we recommend that the third sentence read: "The focus is on whether the provocation was sufficient to cause a person of average disposition, in the same situation and knowing the same facts, to act rashly." This amendment	

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CALCRIM Instruction	Commentator	Comment	Committee Response
		also incorporates the more commonly understood word "rashly," rather than the more unfamiliar phrase "passion rather than from judgment." Incorporating both of our suggestions, the amended paragraph would state: "It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his/her own standard of conduct. The focus is on whether the provocation was sufficient to cause a person of average disposition, in the same situation and knowing the same facts, to act rashly. It is not necessary that the defendant's response to the provocation was reasonable." Finally, our view is that the proposed amendment to the Authority section of CALCRIM No. 570, which cites *Najera*, continues to place emphasis on the defendant's conduct in response to provocation, rather than on whether the provocation was sufficient. As noted above, *Najera* held that such emphasis was misplaced. The proposed amendment states: "'Average Person' Need Not Have Been Provoked to Kill, Just to Act Rashly Without Deliberation.'" We suggest that to more accurately track the language of *Najera* and to effectuate its holding, the amendment should read: "Focus is on Whether Provocation Would Have Caused Average Person to Act Rashly; the Homicidal Response Need Not Have Been Reasonable. *People v. Najera* (2006) 138 Cal.App.4th 212, 223."	The committee does not believe this revision is necessary.

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CALCRIM Instruction	Commentator	Comment	Committee Response
571 Voluntary Manslaughter: Imperfect Self-Defense – Lesser Included Offense	Criminal Defense Appellate Projects, led by the Central California Appellate Program	One of the proposals as to this instruction is an addition to the Authority section in response to *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179-1180. Citing *In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1, *Vasquez* held: "Imperfect self-defense does not apply if a defendant's conduct creates circumstances where the victim is legally justified in resorting to self-defense against the defendant. (Citation.) But the defense is available when the victim's use of force against the defendant is unlawful, even when the defendant set in motion the chain of events that led the victim to attack the defendant." (*Vasquez*, supra, at p. 1179.) *Vasquez* further held that the trial court had erroneously refused to instruct on imperfect self-defense on the grounds that the defendant "set th[e] situation up" by carrying a gun and inviting the victim to an alley to accuse him of raping the defendant's late brother. (*Id*. at p. 1179 & fn. 3.) The Court of Appeal also concluded that the attorney general's argument that "the defense is not available to a defendant who 'induces a quarrel that leads to an adversary's attack'" interpreted imperfect self-defense too narrowly. (*Id*. at p. 1179.)" A proposed addition to the Authority section of CALCRIM No. 571 cites *Vasquez* and reads: "Imperfect Self-Defense Not Available If Defendant's Conduct Creates Circumstances Where Victim Is Legally Justified in Resorting to Self-Defense." It appears the proposed amendment conveys only part of *Vasquez*'s holding and could lead trial practitioners and trial courts to make the same mistake made in *Vasquez*. We suggest that the amendment should read: "Imperfect Self-Defense May Be Available Where Defendant Set in Motion Chain of Events Leading to the Victim's Attack, but Not Where Victim was Legally Justified in Resorting to Self-Defense. *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179-1180.	The committee agrees to change the language in the bench note for further clarity.

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CALCRIM Instruction	Commentator	Comment	Committee Response
600 Attempted Murder	Mitchell Keiter, Deputy District Attorney, Orange County	The revisions evidently derive from the Court of Appeal's decision in *People v. Stone* (2008) 160 Cal.App.4th 937. However, the Supreme Court has granted review, and will resolve two issues that the revised instructions unjustifiably assume will be determined in the defense's favor. First, the revision rejects the language that malice appears where the defendant intends to kill "anyone" in the kill zone, and instead requires an intent to kill "everyone" there. The Supreme Court will decide whether an intent to kill every single person in the kill zone is necessary, but the Court's decision in *People v. Bland* (2002) 28 Cal.4th 313, suggests it is not. *Bland* explained the "kill zone" theory of concurrent intent is not a special doctrine that legally imputes malice (like the felony-murder rule) but a "reasonable inference the jury may draw in a given case." (*Id*. at p. 331, fn. 6.) As it is merely a permissive factual inference, a defendant may have the intent to kill one or more individuals present without intending to kill everyone there. The case will also resolve the tension between the CALCRIM and CALJIC (No. 8.66) attempted murder instructions. At issue in *Stone* is whether someone who intends to kill *any* person is guilty of attempted murder, or whether his malice must have a specific target. CALJIC No. 8.66 defined attempted murder's elements in a way that favored the former interpretation: "(1) a direct but ineffectual act done towards killing another human being; and (2) the specific intent to unlawfully kill another human being." This instruction thus yielded attempted murder liability for someone whose "objective was simply a desire to kill . . . the identities (or gang affiliations) of his intended victims were irrelevant." (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467.) By contrast, CALCRIM 600 requires that (1) the defendant took at least one direct but ineffectual step toward killing another person; and (2) the defendant intended to kill *that*	The committee is withdrawing the proposed revisions pending the Supreme Court's ruling in *Stone,* with the exception of changing "harming" to "killing" and bench note revisions.

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CALCRIM Instruction	Commentator	Comment	Committee Response
		person. Under the instruction, the express malice must be toward a particular intended [victim].	
	Criminal Defense Appellate Projects, led by the Central California Appellate Program	We recommend concurrence with the entirety of this proposal. As a technical correction, we would also change the Bench notes citation of "*People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 331" to "*People v. Bland* (2002) 28 Cal.4th 313, 331," to comport with the California Style Manual.	No response required. The committee agrees to make this correction.

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CALCRIM Instruction	Commentator	Comment	Committee Response
763 Death Penalty: Factors to Consider – Not Identified as Aggravating or Mitigating	Criminal Defense Appellate Projects, led by the Central California Appellate Program	We concur with the proposed change. It is an improvement on the language of the existing instruction, because it clarifies the statutory limitation that not all activity involving the use of force or violence or the implied threat of force or violence can be used in aggravation of penalty, under Penal Code section 190.3, subdivision (b). Rather, to be admissible as aggravation under that section, such activity must be or be part of a criminal offense, and the violence must be directed against a person. The previous instruction contained an ambiguity which, in our view, could have been misunderstood as defining "violent criminal activity" as any act at all which involves force or violence, or the threat of force or violence. The proposed language corrects that problem. That said, we suggest one further change to the language. Although the term "criminal activity" is used in section 190.3(b), we suggest substituting the words "a criminal offense, to wit: Violent criminal activity is a criminal offense involving the unlawful use ...," etc. This would make clearer to lay jurors that the conduct must involve a chargeable crime. (See *People v. Lancaster* (2007) 41 Cal.4th 50, 93 ff.)	The committee carefully considered this comment but decided to retain the currently proposed revision instead.
945 Battery Against Peace Officer	Criminal Defense Appellate Projects, led by the Central California Appellate Program	The proposed change seems appropriate. It would be helpful to provide supporting authorities for the definition of "physical injury" in the notes: Penal Code section 243, subdivision (f)(5); *People v. Longoria* (1995) 34 Cal.App.4th 12, 17-18.	The committee agrees to provide the additional authority.
	Superior Court of Los Angeles County	Because of the connotation of the word "suffered", replace with "received an."	The committee has revised the language to eliminate the word "suffered."

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CALCRIM Instruction	Commentator	Comment	Committee Response
1162 Soliciting Lewd Conduct in Public	Criminal Defense Appellate Projects, led by the Central California Appellate Program	We agree with this change, which conforms with *People v. Lake* (2007) 156 Cal.App.4th Supp. 1. Citation of that case in "Authority" is needed. It would be useful to expand on the meaning of "likely." *Lake* said: "As to the degree of likelihood required, the law requires more than mere speculation. In none of the engagement or solicitation cases have the courts upheld convictions where there was only the mere 'possibility' that the offending conduct would be observed."	The committee agrees to add a citation to the *Lake* case, but believes no further definition of "likely" is necessary.
1400-1401, 2542: Criminal Street Gang Offenses	Criminal Defense Appellate Projects, led by the Central California Appellate Program	A jury considering a subdivision (a) active gang participation charge or a subdivision (b) gang enhancement must consider underlying criminal offenses in multiple contexts. We recommend that in connection with these different uses of criminal conduct the instruction direct the judge to instruct the jury that the elements of those predicate offenses will be listed in separate instructions. This could be done with a single, but complicated, paragraph in both CALCRIM Nos. 1400 and 1401, or it could be done with a separate paragraph for each different use of predicate offense. We recommend the latter. Accordingly, we recommend deleting the current paragraphs (as is proposed) and that the following paragraphs be included in the revised instructions in the indicated places: In both CALCRIM Nos. 1400 and 1401, after the paragraph starting with "In order to qualify as a primary activity ..." add a new paragraph: *"<Give this paragraph only when the conduct that establishes the primary activity, i.e., predicate offenses, has not resulted in a*	The committee agrees with these comments and has revised the instructions accordingly.

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CALCRIM Instruction	Commentator	Comment	Committee Response
		conviction or sustained juvenile petition> [To decide whether the organization, association, or group has, as one of its primary activities, the commission of _____<*insert felony or felonies from Pen. Code, § 186.22(e)(1)-(25), (31)-(33)*> please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]" In both CALCRIM Nos. 1400 and 1401, after the 4th numbered paragraph defining a "pattern of criminal activity" add a new paragraph: "<*Give this paragraph only when the conduct that establishes the pattern of criminal gang activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition*> [To decide whether a member of the gang [or the defendant] committed _____ <*insert felony or felonies from Pen. Code, § 186.22(e)(1)-(33)*> please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]" In CALCRIM No. 1400 only, after the definition of "felonious criminal conduct" (in place of the proposed to-be-deleted paragraph on page 50 of the Invitation to Comment) add this paragraph: "To decide whether a member of the gang [or the defendant] committed _____ <*insert felony or felonies listed immediately above*>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]." Bench notes to CALCRIM Nos. 1400 and 1401 address instructing on the elements of predicate offenses. In No. 1400, the bench note directs that: "The court should also give the appropriate instructions defining the elements of all crimes inserted in the definition of 'criminal street gang,' 'pattern of criminal gang activity,' or felonious	

CALCRIM Instruction	Commentator	Comment	Committee Response
		criminal conduct.'"(Invitation at p. 52.) The current No. 1401 contains a similar bench note, but without the reference to "felonious criminal conduct." But the proposed amendment to the instruction itself assumes such instructions on the elements of other crimes are not required when the other crimes are to be proven with prior convictions. Accordingly, the bench note is inaccurate when it requires instructions on elements for "*all crimes*" (emphasis added) inserted in the definitions within CALCRIM 1400. We recommend deleting the references in both notes to "all." In addition, in these bench notes the phrase "criminal street gang" is probably not specific enough because a reader might assume it refers only to the "pattern of criminal gang activity," which is part of the definition of "criminal street gang." It might be more precise to refer to the "primary activities" element, rather than to the definition of "criminal street gang." Finally, the current version of the bench note in No. 1401 ends with this caveat, "that have not been established by prior convictions." To be consistent with the proposed amendments (and our suggestions), it should state "prior conviction or sustained juvenile petition." A similar caveat should be added to the bench note to No. 1400, with regard to the use of predicate offenses to prove the "primary activity" and "pattern of criminal gang activity" elements. Accordingly, we recommend modifying the bench note to CALCRIM No. 1400 to read: "The court should also give the appropriate instructions defining the elements of all crimes inserted in the list of alleged 'primary	

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		activities,' or the definition of 'criminal street gang,' 'pattern of criminal gang activity,' or 'felonious criminal conduct' that have not been established by prior convictions or sustained juvenile petitions. The court should also give the appropriate instructions defining the elements of all crimes inserted in the definition of 'felonious criminal conduct'." We also recommend modifying the bench note to No. 1401 to read: "The court should also give the appropriate instructions defining the elements of all crimes inserted in the list of alleged 'primary activities,' or the definition of 'criminal street gang,' 'pattern of criminal gang activity' that have not been established by prior convictions or sustained juvenile petitions." Also proposed is an addition to the bench notes describing last year's California Supreme Court decision holding that a misdemeanor which is elevated to a felony because it was committed by "an active participant in a criminal street gang, as defined in subdivision (a) of section 186.22," cannot satisfy the "felonious criminal conduct" element: "Note that a defendant's misdemeanor conduct in the charged case, which is elevated to a felony by operation of Penal Code section 186.22(a), is not sufficient to satisfy the felonious criminal conduct requirement. *People v. Lamas* (2007) 42 Cal.4th 516, 524." A corresponding change needs to be made to CALCRIM No. 2542, the instruction defining active gang participation in connection with firearm offenses. In *Lamas*, the defendant was convicted under subdivision (a) of section 186.22 of a being a active gang participant and of two	

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		firearms violations which were elevated to felonies because the defendant was "an active participant in a criminal street gang, as defined in subdivision (a) of section 186.22." (Pen. Code, §§ 12031, subd. (a)(2)(C) (elevating carrying a loaded firearm in public to a felony) and 12025(b)(3) (elevating carrying a concealed weapon to a felony).) As the proposed use note for CALCRIM No. 1400 explains, the Court in *Lamas* held that the misdemeanor conduct elevated to felony cannot satisfy the felonious criminal conduct requirement to support a conviction under section 186.22. But the Court also applied the same reasoning to hold that the misdemeanor conduct cannot support the section 186.22 active participant element of the firearms offenses themselves, such that the felony firearm convictions had to be reversed in addition to the reversal of the section 186.22, subdivision (a) conviction. (*Lamas*, 42 Cal.4th at 525-527.) We recommend that the note drafted for CALCRIM No. 1400 also be added to CALCRIM No. 2542, with the addition to both use notes of a statement specifying that the misdemeanor-elevated-to-a-felony cannot be used to prove felonious criminal conduct as an element of a subdivision (a) charge or to prove the felony-elevating gang-participation element of the charged other crime: "Note that a defendant's misdemeanor conduct in the charged case, which is elevated to a felony by operation of Penal Code section 186.22(a), is not sufficient to satisfy the felonious criminal conduct requirement element of an active gang participation offense charged under subdivision (a) of section 186.22 or of active gang participation charged as an element of felony firearm charges under sections 12025(b)(3) or 12031(a)(2)(C). (*People v. Lamas* (2007) 42 Cal.4th 516, 524.)" However, more changes to CALCRIM No. 2542 may be in order. That instruction essentially repeats CALCRIM No. 1400's definition	

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		of an active participant in a criminal street gang. Accordingly, if any changes are made in the end to No. 1400, corresponding changes should be made to No. 2542. Also proposed is adding a citation to subdivision (d) of section 186.22(b)(1) to the title of CALCRIM No. 1401 such that, as amended, it would read: "1401. Felony Committed for Benefit of Criminal Street Gang (Pen. Code, § 186.22(b)(1)), 186.22(d)". Subdivision (d) creates an alternative sentencing scheme for a "public offense punishable as a felony or a misdemeanor"committed to benefit a criminal street gang. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 899.) It appears appropriate to use No. 1401 to instruct on the alternative-sentencing scheme established by subdivision (d), as the circumstances in which the alternative sentencing scheme applies under subdivision (d) are identical to those in which the subdivision (b) enhancement applies. We have two comments on the revised title. The citation to "186.22(d)" is outside the citation parenthetical. If no other changes are made to the title, the last closing parentheses mark should be moved to the end of the line to encompass the citation to 186.22(d). However, we see the need for another change which could take care of the parentheses oversight. Because a subdivision (d) finding can apply to any "public offense punishable as a felony or a misdemeanor" the current title, referencing felonies only, will no longer be accurate if No. 1401 is amended to apply to subdivision (d). We recommend the following rewording of the title to more accurately describe the application of the instruction: "1401. Felony or Misdemeanor Committed for Benefit of Criminal Street Gang (Pen. Code § 186.22(b)(1) (felony) and §186.22(d) (felony or misdemeanor))."	

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1804 Theft by False Pretense	Mitchell Keiter Deputy District Attorney Orange County	CALCRIM 1804 inexplicably removes part of the current instruction, which follows the common law position that the crime occurs when the defendant deprives the victim of a major portion of the property's value, even if the deprivation is not permanent. (*People v. Avery* (2002) 27 Cal.4th 49, 55-58). The revised instruction eliminates this constructive deprivation basis for conviction, without citing any supporting judicial or legislative authority.	The committee carefully considered this comment, but believes that *Avery* does not apply to theft by false pretenses.
	Criminal Defense Appellate Projects, led by the Central California Appellate Program	It is implicit in the opinion that the court accepted that obtaining a loan could constitute theft by false pretenses, but it does not appear that the court ever expressly addressed that question. Accordingly, we recommend a "See" signal before the citation to *Perry*.	The committee believes that the use of "see" as a signal in the bulleted "Authority" section is not necessary.
	Orange County Bar Association	There is no rational reason for deleting paragraph 4, wherein the statement of intent to permanently deprive is set forth. Deleting the same does not adequately instruct the jury as to the elements of the defense.	The committee carefully considered this comment, but believes that *Avery* does not apply to theft by false pretenses.
	Superior Court of Los Angeles County	*Avery* case was theft by larceny and not theft by false pretense. However, the question was: when proving theft by false pretenses, does not the prosecution need to prove intent to permanently deprive the owner of his property or is it sufficient to prove that property was taken regardless of duration. *Perry v. Superior Court of Los Angeles* (1962) 57 Cal.2d 276 addressed the three elements required: (1) that the defendant made a false pretense or representation, (2) that the representation was made with intent to defraud the owner of his property, and (3) that the owner was in fact defrauded in that he parted with his property in reliance on the representation. It relied on *People v. Jones* (1950) and *Jones* relied on *People v. Bowman* (1914) which defined "intent to defraud" as "the intent by the use of such false means to induce another to part with his possession and confide	The committee will continue to monitor case law on this issue.

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		it to defendant when he would not otherwise have done so. Neither the promise to pay, nor the intention to do so, will deprive the false and fraudulent act in obtaining it of its criminality." There does not appear to be a requirement of any duration of time. While we generally concur in the CALCRIM committee's reasoning, nevertheless, the significance of the proposed change may be grounds for further study on point.	
2350 Sale, Furnishing, etc., of Marijuana 2351 Offering to Sell, Furnish, etc., Marijuana 2352 Possession for Sale of Marijuana	Criminal Defense Appellate Projects, led by the Central California Appellate Program	Our recommendation is that the instructions themselves should offer current medical marijuana defense language and the bench notes should be expanded and updated. The proposed addition to the bench notes of a single sentence on the defense does not give adequate guidance. Further, the phrasing of that sentence implies incorrectly that the medical marijuana defense may not apply at all to the offenses of possession for sale, offering to sell, or sale of marijuana. The language of and notes to CALCRIM No. 2360 et seq. also need updating.	The committee carefully considered this comment but believes the currently proposed revision is sufficient.
	Superior Court of Los Angeles County	Under Related Issues, section titled, Medical Marijuana Not a Defense to Sales was deleted. For consistency purposes, it should also be deleted in Instructions 2351 and 2352.	The committee agrees with this comment and has made the deletions for consistency.
	Orange County Bar Association	Change made to bench note would be better phrased as: "The court must determine based upon the facts of a given case whether the compassionate use defense should apply pursuant to Health and Safety Code sections 11362.765 and 11362.775."	The committee believes the current proposed bench note is clear.
3131 Personally Armed With Firearm	Criminal Defense Appellate Projects, led by the Central California Appellate Program	In order to ensure that juries are informed of both the temporal and crime nexus components of the requirement that the firearm use occur "in the commission of" the underlying crime, we recommend that the first enumerated element be amended to include the requirement that the firearm use occur during the commission of the crime. This can	The committee carefully considered this comment but believes the instruction as

CALCRIM Instruction	Commentator	Comment	Committee Response
		be accomplished by adding to the amendment already proposed for the first enumerated element. We recommend that the element be amended to read as follows: "1. Carries a firearm or has a firearm available for use in either or offense or defense in connection with and during the commission of the crime[s] charged; . . . . " We do not disagree with the amendment of "during the commission of" to "in the commission of" in the first paragraph of CALCRIM No. 3131, so long as the enumerated elements include the temporal requirement that the defendant be armed with a firearm during the commission of the underlying offense. We also believe that corresponding changes should be made to the first enumerated elements in CALCRIM Nos. 3115 and 3116 (Pen. Code, § 12022, subds. (a)(1), (a)(2)). Under the authority of *Bland*, these elements should require the jury to find that the defendant carried a firearm or had it available for use in either offense or defense "in connection with and during the commission of the crimes charged."	currently drafted is consistent with the language of other CALCRIM instructions, including CALCRIM 3115, and also follows the language of *People v. Pitto* (2008) 43 Cal.4th 228, as well as Penal Code section 12022.
3453 Extension of Commitment	Criminal Defense Appellate Projects, led by the Central California Appellate Program	We agree with proposed amendment's removal of the brackets and deletion of the qualifying language found in the Instructional Duty section. We do, however, recommend some changes to the Instructional Duty and Authority sections. The Instructional Duty section currently includes: "A constitutional requirement for an involuntary civil commitment is that the person be found to have a disorder that seriously impairs the ability to control his or her dangerous behavior. (*Kansas v. Crane* (2002) 534 U.S. 407, 412, 413 [122 S.Ct. 867, 151 L.Ed.2d 856]; *In re Howard N.* (2005) 35 Cal.4th 117, 128 [24 Cal.Rptr.3d 866, 106 P.3d 305].) This requirement applies to an extension of a commitment after a finding of not guilty by reason of insanity. (*People v. Zapisek* (2007) 147 Cal.App.4th 1151, 1159,	No response required. The committee agrees with this comment and has made revisions accordingly.

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		1165 [54 Cal.Rptr.3d 873]; *People v. Bowers* (2006) 145 Cal.App.4th 870, 878 [52 Cal.Rptr.3d 74]; *People v. Galindo* (2006) 142 Cal.App.4th 531 [48 Cal.Rptr.3d 241].)" We recommend adding the following sentence at the end of this paragraph: "The court must instruct the jury sua sponte on this constitutional requirement. (*People v. Sudar* (2007) 158 Cal.App.4th 655, 663 [70 Cal.Rptr.3d 190].)" The newly added bullet-point at the end of the Authority section currently reads: "Serious Difficulty Controlling Behavior. *People v. Sudar* (2007) 158 Cal.App.4th 655, 665 [extending holding of *In re Howard N.* (2005) 35 Cal.4th 117 regarding necessity of finding difficulty controlling behavior pursuant to Cal. Welf. & Inst. Code § 1800 et seq. to extension of commitment pursuant to Penal Code section 1026.5(b)(1)]." Because the above-noted Instructional Duty section already contains a detailed description of the origin of the instructional requirement, and because *Sudar* is more accurately described as applying *Kansas v. Crane* rather than "extending" *Howard N.*, we recommend simply citing to *Sudar*, replacing the bracketed language referring to and describing *Howard N.* with "[applying the principles of *Kansas v. Crane* and *In re Howard N.*]." We also note the omission of the word "dangerous" from the header, a modifier required by *Kansas v. Crane*. In addition, *Sudar* stated the instructional requirement at pages 662-663, not page 665. Accordingly, we recommend revising the first Authority entry to read: "Serious Difficulty Controlling Dangerous Behavior. *People v. Sudar* (2007) 158 Cal.App.4th 655, 662-663."	

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3456 Initial Commitment of Mentally Disordered Offender as Condition of Parole	Criminal Defense Appellate Projects, led by the Central California Appellate Program	We agree with the entirety of the instructional language setting forth the six elements of an initial MDO commitment petition. Our only instructional language recommendations concern the definition of remission. The portion of the proposed instruction defining remission currently reads: "Remission means that the external signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support." (Invitation, at p. 105.) Penal Code section 2962, subdivision (a), defines remission in almost the exact same language, except the statute uses the word "overt" rather than "external" to modify the word "symptoms." We assume the committee changed "overt" to "external" in keeping with its mission to provide jurors with plain English instructions. We fully agree with the effort to give jurors a more helpful word than "overt," but respectfully suggest the word "observable" instead. We believe "observable" is modestly more understandable to a jury than both "overt" (the statutory word) and "external" (the proposed instructional word). In addition, we believe the terms "psychotropic medication" and "psychosocial support" found in the statute's definition of "remission" might be too technical for jury instructions as well. Therefore, we recommend replacing them with terms lay jurors may be more likely to understand. Because neither the statute nor the proposed instructions offer any definition of the term "psychotropic"—and because non-psychotropic medications are unlikely to control the symptoms of the types of severe mental disorders that may lead to an MDO commitment—we believe use of the term "psychotropic" may be unnecessarily confusing. Similarly, because we are concerned that the phrase	No response required. The committee carefully considered this suggestion but prefers the current language. The committee carefully considered this suggestion but prefers the current language.

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		"psychosocial support" does not fall within the knowledge of the average juror—or attorney, for that matter—we suggest replacing it with references to "social support" and "other treatment," which, we believe, would cover the broad range of considerations intended by the technical phrase found in the statute. For these reasons, we recommend that the instructional definition of remission be revised to read: "Remission means that the observable signs and symptoms of the severe mental disorder are controlled either by medication, social support, or other treatment." The instructional duty section contains the following paragraph: "Case law provides no direct guidance about whether a finding of an enumerated act is necessary to show that the disorder cannot be kept in remission without treatment or whether some alternative showing, such as medical opinion or non-enumerated conduct evidencing lack of remission would suffice." The paragraph then goes on to cite dictum from *People v. Buffington* (1999) 74 Cal.App.4th 1149, 1161, fn. 4, a sexually violent predator case. (Invitation, at p. 107.) We recommend removing this paragraph. As *Buffington* suggests, Penal Code section 2962, subdivision (a), appears to provide the sole four enumerated factors for determining whether one's severe mental disorder cannot be kept in remission without treatment. We believe the most reasonable construction of the statutory language—as *Buffington* indicates—is that it sets forth an exhaustive list of factors for the trier of fact to consider on this question. In the Authority section, under the heading "Unanimous Verdict, Burden of Proof," the committee cites to *Conservatorship of Roulet*, which is not an MDO case. We recommend keeping that citation but	The committee carefully considered this comment but prefers to retain the paragraph in question. The committee agrees to add a citation to the Penal

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		preceding it with one to Penal Code section 2966, subdivision (b), which expressly provides for juror unanimity and proof beyond a reasonable doubt at MDO initial commitment proceedings. Also in the Authority section, one of the headers currently reads: "Institutions That May Fulfill Requirement of Treatment". We recommend changing the header to "Institutions That May Fulfill The 90-Day Treatment Requirement" so that it more clearly refers to the fourth element of the main instruction. Otherwise, one might read it to refer to the institution that would provide treatment should the jury find the person to be an MDO. Lastly, in the Authority section, there is a citation to *People v. Tate* following the header, "Evidence of Later Improvement Not Relevant." That citation should be preceded by one to Penal Code section 2966, subdivision (b), which includes the following passage: "Evidence offered for the purpose of proving the prisoner's behavior or mental status subsequent to the Board of Prison Terms hearing shall not be considered."	Code. The committee agrees to revise the referenced heading. The committee agrees to add the reference to the Penal Code.
3457 Extension of Commitment as Mentally Disordered Offender	Criminal Defense Appellate Projects, led by the Central California Appellate Program	With the exception of one recommendation, we agree with the entirety of both the non-bracketed and bracketed instructional language. As with CALCRIM No. 3456, our only instructional language recommendations concern the definition of remission. For the reasons stated in connection with CALCRIM No. 3456 (see paragraph 1 of comment on CALCRIM No. 3456), we recommend that the instructional definition of "remission" in CALCRIM No. 3457 also be revised to read: "Remission means that the observable signs and symptoms of the severe mental disorder are controlled either by medication, social support, or other treatment." The Instructional Duty section also states: "Give the bracketed language in the sentence beginning with 'To prove this allegation' for an on-parole recommitment pursuant to Penal Code section 2966. For	No response required The committee carefully considered this suggestion but prefers the current language. The committee agrees to make an

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		a recommitment after the parole period pursuant to Penal Code sections 2970 and 2972, omit the bracketed phrase and use the present tense." (Invitation, at p. 110.) Just as the second sentence directs use of the "present tense" for a post-parole recommitment, we recommend adding a reference to the appropriate verb tense in the first sentence for an on-parole recommitment such that the note reads: "Give the bracketed language in the sentence beginning with 'To prove this allegation' and use the past tense for an on-parole recommitment pursuant to Penal Code section 2966. For a recommitment after the parole period pursuant to Penal Code sections 2970 and 2972, omit the bracketed phrase and use the present tense." As noted in connection with CALCRIM No. 3456, we recommend that the Instructional Duty paragraph regarding enumerated acts be deleted. (See paragraph 2 of comment on CALCRIM No. 3456.) The Instructional Duty section contains the following paragraph: "The committee found no case law addressing the issue of whether or not instruction about an affirmative obligation to provide treatment exists. Accordingly, it provided the bracketed language regarding treatment that the court may choose to use in its discretion." (Invitation, at p. 111.) It appears the draft omits the "bracketed language" to which this comment refers. In the Authority section, under the heading "Unanimous Verdict, Burden of Proof," the committee cites to *Conservatorship of Roulet*, which is not an MDO case. We recommend keeping that citation but preceding it with one to Penal Code section 2972, subdivision (a), which expressly provides for juror unanimity and proof beyond a reasonable doubt at MDO extended commitment hearings.	appropriate revision to the verb tense. See response to CALCRIM No. 3456. The committee has deleted this language from the bench note, which is now superfluous. The committee agrees to add the cite to the Penal Code.

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3458 Extension of Commitment to Division of Juvenile Facilities	Criminal Defense Appellate Projects, led by the Central California Appellate Program	We agree with the entirety of the instructional language. In the Authority section, under the heading "Unanimous Verdict, Burden of Proof," the committee cites to *Conservatorship of Roulet*, which is not a juvenile extended commitment case. We recommend keeping that citation but preceding it with one to Welfare and Institutions Code section 1801.5, which expressly provides for juror unanimity and proof beyond a reasonable doubt at juvenile extended commitment hearings. The final bullet-point at the end of the Authority section currently reads: "Serious Difficulty in Controlling Behavior. *In re Howard N.* (2005) 35 Cal.4th 117." We recommend inserting the word "dangerous" into the header so that it reads: "Serious Difficulty in Controlling Dangerous Behavior."	No response required. The committee agrees to add the cite to the Welfare and Institutions Code and to insert the word "Dangerous" into the Authority section heading.
	Orange County Bar Association	New instruction adequately conforms to Welfare and Institutions Code section 1800 and case law legal requirements. Under Authority section, bullet point "Serious Difficulty in Controlling Behavior," it is suggested that the case, *In re Lemanuel C.* (2007) 41 Cal.4th 33, be added as it is the Supreme Court's most recent discussion of the issue.	The committee agrees to add this additional case cite.