70. Service Provider for Juror With Disability: Beginning of Trial

---

During trial, _____ *<insert name or number of juror>* **will be assisted by (a/an) _____** *<insert description of service provider, e.g., sign language interpreter>***. The _____** *<insert description of service provider>* **is not a member of the jury and is not to participate in the deliberations in any way other than as necessary to provide the service to _____** *<insert name or number of juror>***.**

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction if a juror will be using the assistance of a service provider. (Code Civ. Proc., § 224(b).)

AUTHORITY

Juror Not Incompetent Due to Disability ▸ Code Civ. Proc., § 203(a)(6).
Juror May Use Service Provider ▸ Code Civ. Proc., § 224.
Court Must Instruct on Use of Service Provider ▸ Code Civ. Proc., § 224(b).

7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 331, 340.

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STAFF NOTES

Code of Civil Procedure, § 203(a)(6), in relevant part:

> All persons are eligible and qualified to be prospective trial jurors, except the following: ... Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility.

Code of Civil Procedure, § 224:

> (a) If a party does not cause the removal by challenge of an individual juror who is deaf, hearing impaired, blind, visually impaired, or speech impaired and who requires auxiliary services to facilitate communication, the party shall (1) stipulate to the presence of a service provider in the jury room during jury deliberations, and (2) prepare and deliver to the court proposed jury instructions to the service provider.
>
> (b) As used in this section, "service provider" includes, but is not limited to, a person who is a sign language interpreter, oral interpreter, deaf-blind interpreter, reader, or speech interpreter. If auxiliary services are required during the course of jury deliberations, the court shall instruct the jury and the service provider that the service provider for the juror with a disability is not to participate in the jury's deliberations in any manner except to facilitate communication between the juror with a disability and other jurors.
>
> (c) The court shall appoint a service provider whose services are needed by a juror with a disability to facilitate communication or participation. A sign language interpreter, oral interpreter, or deaf-blind interpreter appointed pursuant to this section shall be a qualified interpreter, as defined in subdivision (f) of Section 754 of the Evidence Code. Service providers appointed by the court under this subdivision shall be compensated in the same manner as provided in subdivision (i) of Section 754 of the Evidence Code.

Source of Instruction

This instruction is taken from CACI 110.

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71. Duty to Abide by Translation Provided in Court

Some testimony (will/may) be given in _____ *<insert name or description of language other than English>*. **An interpreter will provide a translation for you at the time that the testimony is given. You must rely on the translation provided by the interpreter, even if you understand the language spoken by the witness. Do not retranslate any testimony for other jurors. If you believe the court interpreter translated testimony incorrectly, let me know immediately by writing a note and giving it to the (clerk/bailiff).**

BENCH NOTES

Instructional Duty

The committee recommends that this instruction be given whenever testimony will be received with the assistance of an interpreter, though no case has held that the court has a sua sponte duty to give the instruction. The instruction may be given at the beginning of the case, when the person requiring translation testifies, or both, at the court's discretion. If a transcript of a tape in a foreign language will be used, the court may modify this instruction. (See Ninth Circuit Manual of Model Jury Instructions, Criminal Cases, Instruction No. 2.8 (2003).) If the court chooses, the instruction may also be modified and given again at the end of the case, with all other instructions. (See Ninth Circuit Manual of Model Jury Instructions, Criminal Cases, Instruction No. 3.20 (2003).)

It is misconduct for a juror to retranslate for other jurors testimony that has been translated by the court-appointed interpreter. (*People v. Cabrera* (1991) 230 Cal.App.3d 300, 303.) "If [the juror] believed the court interpreter was translating incorrectly, the proper action would have been to call the matter to the trial court's attention, not take it upon herself to provide her fellow jurors with the 'correct' translation." (*Id.* at p. 304.)

AUTHORITY

Juror May Not Retranslate ▸ *People v. Cabrera* (1991) 230 Cal.App.3d 300, 303–304.

STAFF NOTES

Source of Instruction

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This instruction is taken from CACI 108. The Ninth Circuit also has a similar instruction that their committee recommends be given in all appropriate cases. (Ninth Circuit Manual of Model Jury Instructions, Criminal Cases, Instructions No. 1.13, 2.8, 2.9, 3.20 (2003).) The Ninth Circuit provides an instruction to be given at the beginning of the case, when the witness testifies, and at the conclusion of the case. The Ninth Circuit also has an instruction for a transcript of a tape in a foreign language.

Juror May Not Retranslate

> Ms. Leon committed misconduct when she gave her fellow jurors her own version of defendant's Spanish-language testimony. Although there are no California cases on point, we note Penal Code section 1181, subdivision 2 authorizes a new trial "[w]hen the jury has received any evidence out o court . . . ." It is well settled a juror may not conduct an independent investigation into the facts of the case [citation] or gather evidence from outside sources and bring it into the jury room. [Citation.] It is also misconduct for a juror to inject his or her own expertise into the jury's deliberation. [Citation.] . . .
> Here, Juror Leon committed misconduct by failing to rely on the court interpreter's translation, as she promised she would during voir dire. She committed further misconduct by sharing her personal translation with her fellow jurors thus introducing outside evidence into their deliberations.
>
> If Juror Leon believed the court interpreter was translating incorrectly, the proper action would have been to call the matter to the trial court's attention, not take it upon herself to provide her fellow jurors with the "correct" translation.

(*People v. Cabrera* (1991) 230 Cal.App.3d 300, 303–304.)

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72. Corporation Is a Person

The defendant in this case, _____ <*insert name of corporate defendant*>, is a corporation. Under the law, a corporation must be treated in the same way as a natural person. When I use words like *person* or *he* or *she* in these instructions to refer to the defendant, those instructions [also] apply to _____ <*insert name of corporate defendant*>.

_____

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if the defendant is a corporation.

AUTHORITY

Corporation Is a Person ▸ Pen. Code, § 7.

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

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STAFF NOTES

Penal Code, § 7, in relevant part:
"[T]he word 'person' includes a corporation as well as a natural person."

CACI 104:

> A [corporation/partnership/city/county/[*other entity*]], [*name of entity*], is a party in this lawsuit. [*Name of entity*] is entitled to the same fair and impartial treatment that you would give to an individual. You must decide this case with the same fairness that you would use if you were deciding the case between individuals.
>
> When I use words like "person" or "he" or "she" in these instructions to refer to a party, those instructions also apply to [*name of entity*].

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73. Alleged Victim Identified as John or Jane Doe

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

BENCH NOTES

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

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

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

AUTHORITY

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

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

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STAFF NOTES

Penal Code, § 293.5:

(a) Except as provided in Chapter 10 (commencing with Section 1054) of Part 2 of Title 7, or for cases in which the alleged victim of a sex offense, as specified in subdivision (e) of Section 293, has not elected to exercise his or her right pursuant to Section 6254 of the Government Code, the court, at the request of the alleged victim, may order the identity of the alleged victim in all records and during all proceedings to be either Jane Doe or John Doe, if the court finds that such an order is reasonably necessary to protect the privacy of the person and will not unduly prejudice the prosecution or the defense.

(b) If the court orders the alleged victim to be identified as Jane Doe or John Doe pursuant to subdivision (a) and if there is a jury trial, the court shall instruct the jury, at the beginning and at the end of the trial, that the alleged victim is being so identified only for the purpose of protecting his or her privacy pursuant to this section.

Pen. Code, § 293, in relevant part:

(e) For purposes of this section, sex offense means any crime listed in paragraph (2) of subdivision (f) of Section 6254 of the Government Code which is also defined in Chapter 1 (commencing with Section 261) or Chapter 5 (commencing with Section 281) of Part 1 of Title 9.

Gov. Code, § 6254(f)(2):

Subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved. The name of a victim of any crime defined by Section 220, 261, 261.5, 262, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code may be withheld at the victim's request, or at the request of the victim's parent or guardian if the victim is a minor. When a person is the victim of more than one crime, information

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> disclosing that the person is a victim of a crime defined by Section 220, 261, 261.5, 262, 264, 264.1, 273a, 273d, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code may be deleted at the request of the victim, or the victim's parent or guardian if the victim is a minor, in making the report of the crime, or of any crime or incident accompanying the crime, available to the public in compliance with the requirements of this paragraph.

Offenses Covered

Penal Code sections 261 (rape), 261.5 (unlawful sexual intercourse), 262 (rape of spouse), 264.1 (penetration with foreign object), 286 (sodomy), 288 (lewd or lascivious act), 288a (oral copulation), and 289 (penetration by force).

Instructional Requirements

> Finally, appellant challenges the portion of the statute that requires the trial judge to instruct the jury "that the alleged victim is being so identified [as Jane Doe or John Doe] only for the purpose of protecting his or her privacy pursuant to this section." (§ 293.5, subd. (b).) The jury was so instructed in this case. Appellant contends that the instruction creates the inference that the trial court believes the "alleged victim is an actual victim," thereby lightening the prosecution's burden of proof resulting in a denial of due process. He suggests that the jury should have been cautioned against drawing any inference concerning appellant's guilt from the use of a fictitious name by the alleged victim. We reject this contention.
>
> It should first be observed that the instruction does not constitute a misstatement of the facts or the law. In such a situation, if appellant desired additional or special instructions of a cautionary nature, he should have made the request. He did not do so. . . . Here, appellant complains that the instruction may have created the inference that the alleged victim was more believable; yet, he took no action in terms of proposed cautionary or clarifying language to protect against such an alleged inference.

(*People v. Ramirez* (1997) 55 Cal.App.4th 47, 57–58.)

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121. Union of Act and Intent: General Intent

Every criminal offense requires a union of act and wrongful intent.

In order to be guilty of the crime[s] of _____ ***<insert name[s] of alleged offense[s]>*** [or the allegation[s] of _____ ***<insert name[s] of enhancement[s]>***], a person must not only commit the prohibited act [or fail to do the required act], but must do so intentionally or on purpose. However, it is not required that he or she intend to break the law.

BENCH NOTES

Instructional Duty

The court has a sua sponte **duty to give this instruction in every case in which a general-intent crime or enhancement is charged or is presented to the jury as a lesser offense. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923.)** Do not **give this instruction if the case involves only specific-intent offenses. (*People v. Hill* (1967) 67 Cal.2d 105, 117; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 586–587; see Instruction 122, Union of Act and Intent: Specific Intent or Specific Mental State.) If the case involves both general- and specific-intent offenses, the court may give Instruction 123, Union of Act and Intent: General and Specific Intent Together, in place of this instruction.**

The court should specify for the jury which offenses are general-intent offenses by inserting the names of the offenses where indicated in the instruction. (*People v. Hill, supra,* 67 Cal.2d at p. 118.)

If the defendant is charged with aiding and abetting or conspiracy to commit a general-intent offense, the court must instruct on the specific intent required for aiding and abetting or conspiracy. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1120; *People v. Bernhardt, supra,* 222 Cal.App.2d at pp. 586–587.)

Defenses—Instructional Duty

"A person who commits a prohibited act 'through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence' has not committed a crime." (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 [quoting Pen. Code, § 26].) Similarly, an honest and reasonable mistake of fact may negate general criminal intent. (*People v.*

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***Hernandez* (1964) 61 Cal.2d 529, 535–536.) If there is sufficient evidence of these or other defenses, such as unconsciousness, the court has a** sua sponte **duty to give the appropriate defense instructions. (See Defenses and Insanity, Instruction 600 et seq.)**

AUTHORITY

Statutory Authority ▸ Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
Instructional Requirements ▸ *People v. Hill* (1967) 67 Cal.2d 105, 117; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 586–587; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923.
History of General-Intent Requirement ▸ *Morissette v. United States* (1952) 342 U.S. 246; see also *People v. Garcia* (2001) 25 Cal.4th 744, 754.

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

RELATED ISSUES

Sex Registration and Knowledge of Legal Duty

The offense of failure to register as a sex offender requires proof that the defendant actually knew of his or her duty to register. (*People v. Garcia* (2001) 25 Cal.4th 744, 754.) For the charge of failure to register, it is error to give an instruction on general criminal intent that informs the jury that a person is "acting with general criminal intent, even though he may not know that his act or conduct is unlawful." (*People v. Barker* (Aug. 31, 2004, S115438) __ Cal.4th__, __; *People v. Edgar* (2002) 104 Cal.App.4th 210, 219; *People v. Poslof* (June 9, 2004, E033503) __ Cal.App.4th __, __.) The court should consider whether it is more appropriate to give Instruction 122, Union of Act and Intent: Specific Intent or Mental State, or to give a modified version of this instruction. If the court chooses to give a modified version of this instruction, the court should delete the last sentence and adding the following:

> In this case, the People must prove that the defendant actually knew (he/she) had a duty to register as a sex offender under Penal Code section 290 [within five working days of (his/her) birthday] wherever (he/she) (resided/ [or] was located).

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STAFF NOTES

Pen. Code, § 20:

> In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.

Union of Act and Wrongful Intent Required and Must Instruct Jury On

> Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. . .
>
> Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury.

(*Morissette v. United States* (1952) 342 U.S. 246, 251–252, 274.)

> That the statute contains no reference to knowledge or other language of mens rea is not itself dispositive. The requirement that, for a criminal conviction, the prosecution prove some form of guilty intent, knowledge, or criminal negligence is of such long standing and so fundamental to our criminal law that penal statutes will often be construed to contain such an element despite their failure expressly to state it. Generally, the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence. [Citation.] In other words, **there must be a union of act and wrongful intent, or criminal negligence**. [Citations.] So basic is this requirement that it is an invariable element of every crime unless excluded expressly or by necessary implication.

(*People v. Garcia* (2001) 25 Cal.4th 744, 754.)

> The commissioners who drafted section 20 made it abundantly clear that **the word "intent" in that section means wrongful intent**. n5
>
> n5 The commissioners' annotation to section 20 of the California Penal Code of 1872 quoted with approval the following statement from 1 Bishop's Criminal Law, section 227: "'There is only one criterion by which the guilt of men is to be tested. It is whether the mind is criminal. . . . It is,

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> therefore, a principle of our legal system, as probably of every other, that the essence of the offense is the wrongful intent, without which it cannot exist." (Cited in *People* v. *Vogel*, 46 Cal.2d 798, 801, fn. 2.)

(*People v. Wilson* (1967) 66 Cal.2d 749, 760.)

> Defendant alleges two instances of instructional error. First, the court failed to instruct regarding the required criminal intent. (CALJIC No. 3.30.) . . .
>
> As with any crime or public offense, in order to prove a violation of section 12021, subdivision (a), the prosecution must prove, beyond a reasonable doubt, a union, or joint operation of act and intent. (§ 20.) No specific criminal intent is required for this crime; general intent to commit the proscribed act is sufficient to sustain a conviction. [Citations.] The act proscribed by section 12022, subdivision (a) is possession of a firearm. Therefore, whether possession is actual or constructive, it must be intentional.
>
> **Wrongful intent** must be shown with regard to the possession and custody elements of the crime of being a felon in possession of a firearm. [Citation.] A person who commits a prohibited act "through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence" has not committed a crime. (§ 26.) Thus, a felon who acquires possession of a firearm through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent. . . .
>
> The failure to read the instruction was not harmless. Defendant's theory was that the prosecution failed to prove a joint union of possession and intent, i.e., a knowing, intentional exercise of control over the gun. The general intent instruction was critical to the jury's understanding of the defense.

(*People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923.)

When Instruction on General and Specific Intent Required

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> It has frequently been held to be error to instruct the jury on general intent in a case where the crime charged requires a specific intent. . . .
> As a matter of law in the abstract, it is true, of course, that no specific intent crime can be committed without general intent, that is, without the defendant having voluntarily done the proscribed acts, as, in burglary, entry into a building or structure. [Citations.] Accordingly, this court has previously stated that it is permissible to instruct the jury on general intent in such cases if that instruction is clearly qualified by a specific intent instruction which leaves no doubt in the jury's mind that specific intent is not to be automatically inferred from the doing of the physical acts involved in the crime. . . .
> In cases where a specific intent crime alone is charged, the general intent instruction should only be given where some evidence suggests that defendant's acts may not have been voluntary or intentional, or where defendant raises the issue or requests a general intent instruction. [Citation.] And when both instructions must be given, the court should take care to clearly explain to the jury that the specific intent is not to be automatically inferred from the defendant's voluntarily doing the proscribed acts but is a question of fact for the jury to be determined from all the evidence before it, including those reasonable inferences the jury wishes to draw.
>
> In cases where the defendant is tried simultaneously for multiple crimes, some requiring specific intent, others only general intent, the court should limit the application of the general intent instruction to those crimes not requiring specific intent, unless general intent becomes a contested issue in proving specific intent crimes. [Citations.]

(*People v. Hill* (1967) 67 Cal.2d 105, 117–119; see also *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 586–587.)

When Knowledge of Legal Duty Required

In *People v. Edgar* (2002) 104 Cal.App.4th 210, 219, the defendant was charged with failing to register pursuant to Penal Code section 290. The court reversed the conviction because the trial court failed to instruct that actual knowledge of the duty to register was an element of the offense. The court noted that the failure to instruct on this element was compounded by the CALJIC instruction on general intent:

> The jury was further instructed, pursuant to CALJIC No. 3.30, that violation of section 290 is a general intent crime and that "[g]eneral intent does not require an intent to violate the law. When a person

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> intentionally does that which the law declares to be a crime, he is acting with general criminal intent, even though he may not know that his act or conduct is unlawful." . . .
>
> [L]ike the "ignorance of the law is no excuse" instruction (CALJIC No. 4.36) given in *Garcia*, the general intent instruction given here (CALJIC No. 3.30) "on its face would allow the jury to convict [appellant] of failing to register even if he were unaware of his obligation to do so." (*People v. Garcia* [2001] 25 Cal.4th [744,] 754.) We therefore find that the instructions given in this case also were erroneous in that they failed to clearly state that a conviction required actual knowledge of the duty to register.

(*Id.* at pp. 218–219.)

The court reached the opposite conclusion in *People v. Barker* (2003) 107 Cal.App.4th 147, 157–158, [Review granted and depublished, June 11, 2003, S115438]:

> Moreover, unlike in *Garcia*, the jury in this case was not instructed that "ignorance of the law is no excuse." (CALJIC No. 4.36; *Garcia, supra,* 25 Cal.4th at pp. 751, 754.) Contrary to appellants assertion, the instruction on general criminal intent given pursuant to CALJIC No. 3.30 did not so instruct the jury. CALJIC No. 3.30 does state that so long as an accused *intentionally* does that which the law declares criminal, he "is acting with general criminal intent, even though [he][she] may not know that [his][her] act or conduct is unlawful." However, this is a very different statement than one implying that a person accused of willfully failing to perform a legally required act need not know of the obligation he is legally required to perform, such as the duty to update a sex offender registration. CALJIC No. 3.30 does not convert a general intent offense into a strict liability one as to which ignorance of the law is no excuse; it simply states that a defendant need not *intend to violate the law* to be guilty. . . . There was therefore no error in instructing the jury, in effect, that appellant did not have to intend to violate section 290 to be convicted of failing to register.

Mental State of Aider and Abettor

> The statement that an aider and abettor may not be guilty of a greater offense than the direct perpetrator, although sometimes true in individual cases, is not universally correct. Aider and abettor liability

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> is premised on the combined acts of all the principals, but on the aider and abettor's own mens rea. If the mens rea of the aider and abettor is more culpable than the actual perpetrator's, the aider and abettor may be guilty of a more serious crime than the actual perpetrator.

(*People v. McCoy* (2001) 25 Cal.4th 1111, 1120.)

Mental State of Conspirator

> For these reasons it is often said that conspiracy is a 'specific intent' crime. [Citations.] This specific intent of the conspirators must be proved in each case by the prosecution and will not be presumed from the mere commission of an unlawful act. [Citations.] Therefore, even though a conspiracy has as its object the commission of an offense which can be committed without any specific intent, there is no criminal conspiracy absent a specific intent to violate the law. That is, to uphold a conviction for conspiracy to commit a 'public welfare offense' there must be a showing that the accused knew of the law and intended to violate it.

(*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 586–587.)

Evid. Code, § 668:

> An unlawful intent is presumed from the doing of an unlawful act. This presumption is inapplicable in a criminal action to establish the specific intent of the defendant where specific intent is an element of the crime charged.

Evid. Code, § 665:

> A person is presumed to intend the ordinary consequences of his voluntary act. This presumption is inapplicable in a criminal action to establish the specific intent of the defendant where specific intent is an element of the crime charged.

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

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Every criminal offense requires a union of act and wrongful intent.

In order to be guilty of the crime[s] of _____ ***<insert name[s] of alleged offense[s]>*** [or the allegation[s] of _____ ***<insert name[s] of enhancement[s]>***], a person must not only commit the prohibited act [or fail to do the required act] intentionally or on purpose, but must do so with a specific intent or mental state. The intent or mental state and the act required for (this/each of these) offense[s] are stated in the instruction for (that/each) offense.

BENCH NOTES

Instructional Duty

For every specific-intent crime or enhancement, the committee has included the intent or mental state required in the instruction for that crime. The committee therefore believes that this instruction is not required when only specific-intent crimes or enhancements are charged. (*People v. Ford* (1964) 60 Cal.2d 772, 792–793 [must instruct on specific intent required for crime]; but see *People v. Turner* (1971) 22 Cal.App.3d 174, 184 [court erred in failing to instruct on joint operation of act and specific intent, citing *Ford*].) However, the committee has provided this instruction in the event that the instruction is requested or the court concludes that the instruction is required.

Do not **give this instruction if the case involves only general-intent offenses. (See Instruction 121, Union of Act and Intent: General Intent.) If the case involves both general- and specific-intent offenses, the court may give Instruction 123, Union of Act and Intent: General and Specific Intent Together, in place of this instruction.**

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

If the defendant is charged with aiding and abetting or conspiracy to commit a general-intent offense, the court must instruct on the specific intent required for aiding and abetting or conspiracy. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1120; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 586–587.)

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Defenses—Instructional Duty

Evidence of voluntary intoxication or mental impairment may be admitted to show that the defendant did not form the required mental state. (See *People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432.) The court has no sua sponte duty to instruct on these defenses; however, the trial court must give these instructions on request if supported by the evidence. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119; see Defenses and Insanity, Instruction 600 et seq.)

AUTHORITY

Statutory Authority ▸ Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
Instructional Requirements ▸ *People v. Ford* (1964) 60 Cal.2d 772, 792–793; *People v. Turner* (1971) 22 Cal.App.3d 174, 184; *People v. Hill* (1967) 67 Cal.2d 105, 117.

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

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STAFF NOTES

See Notes to Instruction 122.

Instruction on Specific Intent Required

> Defendant contends that the court erred in failing to give on its own motion an instruction that conviction of the crime of robbery required proof of a specific intent to steal, i.e., to permanently deprive an owner of his property [Citation.] While the jury were instructed as to the *acts* necessary to commit this offense (as set forth in Pen. Code, § 211), defendant did not offer and the court did not give a further instruction defining the required concomitant *intent*. The importance of giving the latter instruction, however, was emphasized in *People* v. *Sanchez* (1950) 35 Cal.2d 522, 526, where we also restated the principle that it is the trial court's duty "to see to it that the jury are adequately informed on the law governing all elements of the case submitted to them to an extent necessary to enable them to perform their function in conformity to the applicable law." [Citations.] As one of the essential elements of robbery is a specific intent to steal [citations,] it follows that it was the trial court's duty in the case at bench to so instruct the jury even without a request therefor by defendant.

(*People v. Ford* (1964) 60 Cal.2d 772, 792–793.)

> At oral argument, defendant for the first time indicated that no instruction on the concurrence of act and specific intent was given. Both offenses charged required the specific intent to defraud. Consequently, even in absence of a request, an instruction on the subject should have been given by the court on its own motion [Citing *Ford, supra*] and the omission was error. However, the joint operation of the requisite conduct and the specific intent to defraud were overwhelmingly established by the possession of the check, its endorsement and the reception of the money for it. We think it inconceivable that the jury could have arrived at a contrary verdict even if the specific intent instruction prescribed in CALJIC No. 3.31 had been given. Thus, the failure to do so was not prejudicial.

(*People v. Turner* (1971) 22 Cal.App.3d 174, 184.)

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123. Union of Act and Intent: General and Specific Intent Together

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Every criminal offense requires a union of act and wrongful intent.

There are two classes of offenses: (1) those requiring general criminal intent; and (2) those requiring a specific intent or mental state.

The following offense[s] (is/are) [a] general-intent offense[s]: _____ ***<insert name[s] of alleged offense[s] and enhancement[s]>***. In order to be guilty of (this/these) offense[s], a person must not only commit the prohibited act [or fail to do the required act], but must do so intentionally or on purpose.

The following offense[s] (is/are) [a] specific-intent offense[s]: _____ ***<insert name[s] of alleged offense[s] and enhancement[s]>***. In order to be guilty of (this/these) offense[s], a person must not only commit the prohibited act [or fail to do the required act] intentionally or on purpose, but must do so with a specific intent or mental state. The intent or mental state and the act required for (this/each of these) offense[s] are stated in the instruction for (that/each) offense.

For either class of offense, it is not required that a person intend to break the law.

BENCH NOTES

Instructional Duty

The court has a sua sponte **duty to instruct on the joint union of act and intent. (*People v. Ford* (1964) 60 Cal.2d 772, 792–793; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923.) The court may give this instruction in cases in which both general- and specific-intent offenses are charged or presented to the jury as lesser offenses, rather than giving both Instruction 121 and Instruction 122.** Do not **give this instruction if the case involves only general-intent offenses or only specific-intent offenses. (See Instruction 121, Union of Act and Intent: General Intent, and Instruction 122, Union of Act and Intent: Specific Intent or Specific Mental State.)**

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

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If the defendant is charged with aiding and abetting or conspiracy to commit a general-intent offense, the court must instruct on the specific intent required for aiding and abetting or conspiracy. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1120; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 586–587.)

AUTHORITY

Statutory Authority ▸ Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
Instructional Requirements ▸ *People v. Hill* (1967) 67 Cal.2d 105, 117; *People v. Ford* (1964) 60 Cal.2d 772, 792–793; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 920–923.
History of General-Intent Requirement ▸ *Morissette v. United States* (1952) 342 U.S. 246; see also *People v. Garcia* (2001) 25 Cal.4th 744, 754.

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

RELATED ISSUES

See the Bench Notes and Related Issues sections of Instruction 121, Union of Act and Intent: General Intent, and Instruction 122, Union of Act and Intent: Specific Intent or Specific Mental State.

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STAFF NOTES

See Notes to Instructions 121 and 122.

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124. Union of Act and Intent: Criminal Negligence

In order to be guilty of the offense[s] of _____ ***<insert name[s] of alleged offense[s]>***, a person must do an act [or fail to do an act] with (criminal/gross) negligence as defined in the instructions on that crime.

BENCH NOTES

Instructional Duty
This instruction is provided for the court to use when instructing on an offense for which criminal or gross negligence is an element. For each offense requiring criminal negligence, the committee has included the negligence element and definition in the instruction on that offense. The committee therefore believes that this instruction is not required when only offenses requiring negligence are presented to the jury. However, this instruction may be useful when the case involves general- or specific-intent offenses in addition to criminal negligence offenses. Do not **give this instruction if only general- or specific-intent offenses are presented to the jury. (*People v. Lara* (1996) 44 Cal.App.4th 102, 110.)**

The court must specify for the jury which offenses require criminal negligence by inserting the names of the offenses where indicated in the instruction. (See *People v. Hill* (1967) 67 Cal.2d 105, 118.)

The court should select either "criminal" or "gross" based on the words used in the instruction on the elements of the underlying offense.

AUTHORITY

Statutory Authority ▸ Pen. Code, § 20; see also Evid. Code, §§ 665, 668.
Criminal or Gross Negligence Defined ▸ *People v. Penny* (1955) 44 Cal.2d 861, 879; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 20.

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STAFF NOTES

Pen. Code, § 20:

> In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.

Error to Give If Intent Required

> Where, as here, the defendant is charged with a general intent crime, instruction on "criminal negligence" is erroneous. We recommend to the CALJIC committee to expressly so advise the trial courts in its use note. The courts have long recognized that "... the reference to 'criminal negligence' should be omitted [from jury instructions] where it is not an issue in the particular case."

(*People v. Lara* (1996) 44 Cal.App.4th 102, 110.)

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125. Union of Act and Intent: Strict-Liability Crime

In order to be guilty of the offense[s] of _____ ***<insert name[s] of alleged offense[s]>***, a person only needs to do the prohibited act [or to fail to do the required act]. The commission of the act alone is enough. The People do not need to prove any intent or other mental state.

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use when instructing on a strict-liability offense. The committee does not believe that the instruction is required. However, the instruction may be useful when the case also involves general-intent, specific-intent, or criminal negligence offenses. Do not **give this instruction unless the court is completely certain that the offense is a strict-liability offense. For a discussion of the rarity of strict-liability offenses in modern criminal law, see *People v. Garcia* (2001) 25 Cal.4th 744, 754, and *People v. Simon* (1995) 9 Cal.4th 493, 519–522.**

The court must specify for the jury which offenses are strict-liability offenses by inserting the names of the offenses where indicated in the instruction. (See *People v. Hill* (1967) 67 Cal.2d 105, 118.)

AUTHORITY

Strict-Liability Offenses Discussed ▸ *People v. Garcia* (2001) 25 Cal.4th 744, 754; *People v. Simon* (1995) 9 Cal.4th 493, 519–522.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 17–19.

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128. Multiple Defendants

Because more than one defendant is on trial here, I am going to remind you which individuals are charged with which crimes.

_____ is charged with _____.
_____ is charged with _____.

You must separately consider the evidence as it applies to each defendant. You must decide the charges for each defendant separately. If you cannot reach a verdict on (all/both) of the defendants, or on all of the charges against any one defendant, you must give your verdict on any defendant or charge on which you have unanimously agreed.

Unless I tell you otherwise, all instructions apply to each defendant.

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction if multiple defendants are on trial. (*People v. Mask* (1986) 188 Cal.App.3d 450, 457; *People v. Fulton* (1984) 155 Cal.App.3d 91, 101.)

AUTHORITY

Separate Verdicts When Multiple Defendants ▸ Pen. Code, §§ 970, 1160.
Instructional Duty ▸ *People v. Mask* (1986) 188 Cal.App.3d 450, 457; *People v. Fulton* (1984) 155 Cal.App.3d 91, 101.

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

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STAFF NOTES

Pen. Code, § 970:

> When several defendants are named in one accusatory pleading, any one or more may be convicted or acquitted.

Pen. Code, § 1160:

> On a charge against two or more defendants jointly, if the jury cannot agree upon a verdict as to all, they may render a verdict as to the defendant or defendants in regard to whom they do agree, on which a judgment must be entered accordingly, and the case as to the other may be tried again.
>
> Where two or more offenses are charged in any accusatory pleading, if the jury cannot agree upon a verdict as to all of them, they may render a verdict as to the charge or charges upon which they do agree, and the charges on which they do not agree may be tried again.

Singular Includes Plural

The last sentence of this instruction reads: "Unless I tell you otherwise, all instructions apply to each defendant." This is intended to make clear that even though the instruction is written in the singular "defendant," it applies to all defendants charged. (See CACI 103; CALJIC 1.11.)

Structure

Currently, the first part of this instruction is contained Instruction 120, Evidence. Staff recommends making this separate instruction to cover multiple defendants. If the committee prefers to keep the first part of the instruction in Instruction 120, the committee will then have to select another place in the introductory instructions for the last sentence, quoted above.

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150. Defendant Physically Restrained

The fact that physical restraints have been placed on [the] defendant [_____ <*insert name of defendant if multiple defendants in case*>] is not evidence. Do not speculate about the reason. You must completely disregard this circumstance in deciding the issues in this case. Do not consider it for any purpose or discuss it during your deliberations.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if a defendant has been restrained in a manner that is visible to the jury. (*People v. Duran* (1976) 16 Cal.3d 282, 291–292.) If the restraints are not visible, **do not** give this instruction unless requested by the defense.

The court must find a "manifest need for such restraints" and the record must clearly disclose the reasons the restraints were used. (*People v. Duran, supra,* 16 Cal.3d at pp. 290–291.) "The imposition of physical restraints in the absence of a record showing . . . violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion." (*Id.* at p. 291.) The court must make the determination based on facts, not rumor, and may not delegate the decision to law enforcement personnel. (*People v. Mar* (2002) 28 Cal.4th 1201, 1218.) The reasons supporting physical restraints must relate to the individual defendant. The court cannot rely on the nature of the charges, the courtroom design, or the lack of sufficient staff. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1213; *People v. Cunningham* (2001) 25 Cal.4th 926, 986–987; *People v. Seaton* (2001) 26 Cal.4th 598, 652.)

The use of stun belts is subject to the same requirements. (*People v. Mar, supra,* 28 Cal.4th at pp. 1205–1206.) In addition, the Supreme Court has urged "great caution" in using stun belts at all, stating that, prior to using such devices, courts must consider the psychological impact, risk of accidental activation, physical dangers, and limited ability to control the level of shock delivered. *(Ibid.)*

AUTHORITY

Instructional Duty ▸ *People v. Duran* (1976) 16 Cal.3d 282, 291–292.

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Requirements Before Used ▸ *People v. Duran* (1976) 16 Cal.3d 282, 290–292; *People v. Mar* (2002) 28 Cal.4th 1201, 1218.
Use of Stun Belts ▸ *People v. Mar* (2002) 28 Cal.4th 1201, 1205–1206.

5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trials, §§ 11–16.

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STAFF NOTES

Use of Restraints and Instructional Duty

> [A] defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints. . . .
>
> We further conclude that in any case where physical restraints are used those restraints should be as unobtrusive as possible, although as effective as necessary under the circumstances. . . .
>
> The showing of nonconforming behavior in support of the court's determination to impose physical restraints must appear as a matter of record and, except where the defendant engages in threatening or violent conduct in the presence of the jurors, must otherwise be made out of the jury's presence. The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion. In those instances when visible restraints must be imposed the court shall instruct the jury *sua sponte* that such restraints should have no bearing on the determination of the defendant's guilt. However, when the restraints are concealed from the jury's view, this instruction should not be given unless requested by defendant since it might invite initial attention to the restraints and thus create prejudice which would otherwise be avoided.

(*People v. Duran* (1976) 16 Cal.3d 282, 290–292 [footnotes omitted].)

Court Must Make Determination Based on Specific Facts

> In applying *Duran* in subsequent cases, this court has explained that "[w]hile no formal hearing as such is necessary to fulfill the mandate of *Duran*, the court is obligated to base its determination on *facts*, not rumor and innuendo even if supplied by the defendant's own attorney." (*People v. Cox* (1991) 53 Cal.3d 618, 651-652, italics added.) Furthermore, the cases emphasize that a trial court under *Duran* is obligated to make its *own* determination of the "manifest need" for the use of such restraint as a security measure in the particular case, and may not rely solely on the judgment of jail or court security personnel in sanctioning the use of such restraints. As we explained in *People v. Hill* (1998) 17 Cal.4th 800, 841: "[*Duran*'s] emphasis that a showing exist on the record of 'manifest need'

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> for shackles presupposes that it is the trial court, not law enforcement personnel, that must make the decision an accused be physically restrained in the courtroom. A trial court abuses its discretion if it abdicates this decision-making authority to security personnel or law enforcement. (*People v. Jackson* (1993) 14 Cal.App.4th 1818, 1825 [abuse of discretion to delegate shackling decision to bailiff]; *People v. Jacla* (1978) 77 Cal. App. 3d 878, 885 [same].)" (Fn. omitted.) The record must demonstrate that the trial court independently determined on the basis of an on-the-record showing of defendant's nonconforming conduct that "there existed a manifest need to place defendant in restraints." (*Id.* at p. 842.)

(*People v. Mar* (2002) 28 Cal.4th 1201, 1218.)

Stun Belts

> [W]e conclude that the Court of Appeal in this case correctly determined that the general principles set forth in *Duran* that apply to the use of traditional types of physical restraints also apply to the use of a stun belt. Unlike the Court of Appeal, however, we further find that the trial court's ruling in this case compelling defendant to wear a stun belt while testifying on his own behalf was erroneous under *Duran*, and also conclude that this error was prejudicial. . . .
>
> In addition, to provide guidance both to the trial court in this case (should a question as to the potential use of a stun belt arise on retrial) and to other courts that may be faced with the question of the use of a stun belt in future trials, we discuss a number of distinct features and risks posed by a stun belt that properly should be taken into account by a trial court, under the *Duran* standard, before compelling a defendant to wear such a device at trial.
>
> Unlike shackles and manacles, which have been used for hundreds of years and whose operation is predictable and effects well known, the stun belt is a relatively new device with unique attributes and whose use has not been without problems or controversy. In light of the nature of the device and its effect upon the wearer when activated, requiring an unwilling defendant to wear a stun belt during trial may have significant psychological consequences that may impair a defendant's capacity to concentrate on the events of the trial, interfere with the defendant's ability to assist his or her counsel, and adversely affect his or her demeanor in the presence of the jury. In addition, past cases both in California and in other jurisdictions disclose that in a troubling number of instances the stun belt

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> has activated accidentally, inflicting a potentially injurious high-voltage electric shock on a defendant without any justification. The potential for accidental activation provides a strong reason to proceed with great caution in approving the use of this device. Further, because the stun belt poses serious medical risks for persons who have heart problems or a variety of other medical conditions, we conclude that a trial court, before approving the use of such a device, should require assurance that a defendant's medical status and history has been adequately reviewed and that the defendant has been found to be free of any medical condition that would render the use of the device unduly dangerous.
>
> Finally, inasmuch as the governing precedent establishes that even when special court security measures are warranted, a court should impose the least restrictive measure that will satisfy the court's legitimate security concerns, we conclude that a trial court, before approving the use of a stun belt, should consider whether there is adequate justification for the current design of the belt--which automatically delivers a 50,000-volt shock lasting 8 to 10 seconds, a shock that cannot be lowered in voltage or shortened in duration--as opposed to an alternative design that would deliver a lower initial shock and incorporate a means for terminating the shock earlier. Particularly in view of the number of accidental activations, we conclude that a trial court should not approve the use of this type of stun belt as an alternative to more traditional physical restraints if the court finds that these features render the device more onerous than necessary to satisfy the court's security needs.

(*People v. Mar* (2002) 28 Cal.4th 1201, 1205–1206.)

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151. Service Provider for Juror With Disability: Submission of Case to Jury

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_____ *<insert name or number of juror>* **has been assisted by (a/an) _____** *<insert description of service provider, e.g., sign language interpreter>* **to communicate and receive information. The _____** *<insert description of service provider>* **will be with you during your deliberations. You may not discuss the case with the _____** *<insert description of service provider>***. The _____** *<insert description of service provider>* **is not a member of the jury and is not to participate in the deliberations in any way other than as necessary to provide the service to _____** *<insert name or number of juror>***.**

All jurors must be able to fully participate in deliberations. In order to allow the _____ *<insert description of service provider>* **to properly assist _____** *<insert name or number of juror>***, jurors should not talk at the same time and should not have side conversations. Jurors should speak directly to _____** *<insert name or number of juror>***, not to the _____** *<insert description of service provider>***.**

[Two _____ *<insert description of service providers>* **will be present during deliberations and will take turns in assisting _____** *<insert name or number of juror>***.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if a juror will be using the assistance of a service provider in deliberations. (Code Civ. Proc., § 224(b).)

AUTHORITY

Juror Not Incompetent Due to Disability ▸ Code Civ. Proc., § 203(a)(6).
Juror May Use Service Provider ▸ Code Civ. Proc., § 224.
Court Must Instruct on Use of Service Provider ▸ Code Civ. Proc., § 224(b).

7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 331, 340.

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STAFF NOTES

Code of Civil Procedure, § 203(a)(6), in relevant part:

> All persons are eligible and qualified to be prospective trial jurors, except the following: ... Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility.

Code of Civil Procedure, § 224:

> (a) If a party does not cause the removal by challenge of an individual juror who is deaf, hearing impaired, blind, visually impaired, or speech impaired and who requires auxiliary services to facilitate communication, the party shall (1) stipulate to the presence of a service provider in the jury room during jury deliberations, and (2) prepare and deliver to the court proposed jury instructions to the service provider.
>
> (b) As used in this section, "service provider" includes, but is not limited to, a person who is a sign language interpreter, oral interpreter, deaf-blind interpreter, reader, or speech interpreter. If auxiliary services are required during the course of jury deliberations, the court shall instruct the jury and the service provider that the service provider for the juror with a disability is not to participate in the jury's deliberations in any manner except to facilitate communication between the juror with a disability and other jurors.
>
> (c) The court shall appoint a service provider whose services are needed by a juror with a disability to facilitate communication or participation. A sign language interpreter, oral interpreter, or deaf-blind interpreter appointed pursuant to this section shall be a qualified interpreter, as defined in subdivision (f) of Section 754 of the Evidence Code. Service providers appointed by the court under this subdivision shall be compensated in the same manner as provided in subdivision (i) of Section 754 of the Evidence Code.

Source of Instruction

This instruction is taken from CACI 5005, which states:

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[*Name of juror***] has been assisted by [a/an] [***insert type of service provider***] to communicate and receive information. The [***service provider***] will be with you during your deliberations. You may not discuss the case with the [***service provider***] or in any way involve the [***service provider***] in your deliberations. The [***service provider***] is not a member of the jury and is not to participate in the deliberations in any way other than as necessary to provide the service to [***name of juror***].**

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155A. Liability of Corporate Officers and Agents: Single Theory of Liability

The defendant is charged [in Count __] with _____ *<insert offense charged>* **while acting as an (officer/ [or] agent) of a corporation.**

The People must prove that the defendant was a direct participant in the crime charged. The fact that the defendant is an (officer/ [or] agent) of the corporation is not sufficient by itself to support a finding of guilt.

<Alternative A—prosecution alleges only that defendant committed prohibited act personally>
[To prove that the defendant was a direct participant in the crime charged, the People must prove that the defendant _____ *<insert description of conduct alleged in offense>***.]**

<Alternative B—prosecution alleges only that defendant had authority to control conduct of others>
[To prove that the defendant was a direct participant in the crime charged, the People must prove that:

1. **The defendant had the authority to control the _____** *<insert description of conduct alleged in offense>***;**

[AND]

2. **The defendant (failed to/authorized/caused/permitted) [the] _____** *<insert description of conduct alleged in offense>***(;/.)**

<Give element 3 if offense alleged requires knowledge or general criminal intent.>
[AND

3. **The defendant knew _____** *<insert description of knowledge about conduct alleged in offense>***(;/.)**

<Give element 4 only if offense alleged requires specific intent.>
[AND

4. **When the defendant acted, (he/she) intended to _____** *<insert description of specific intent required>***.]]**

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BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction in any case where the defendant is charged as the officer or agent of a corporation. (See *Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, 456–458; *Otis v. Superior Court* (1905) 148 Cal. 129, 131.) Repeat this instruction for each offense, inserting the specific requirements for that offense.

If the prosecution alleges that the defendant personally committed some or all of the acts alleged in the offense, give alternative A. If the prosecution's theory is solely that the defendant had control over the conduct alleged, give alternative B. If the prosecution is pursing both theories of liability, do not give this instruction. Give Instruction 155B, Liability of Corporate Officers and Agents: Two Theories of Liability.

Give element 3 if the alleged offense requires knowledge or general criminal intent by the defendant. (See *Sea Horse Ranch, supra,* 24 Cal.App.4th at pp. 456–458; *People v. Epstein* (1931) 118 Cal.App. 7, 10.) Give element 4 if specific intent is required. If a strict-liability offense is alleged, give only elements 1 and 2. (See *People v. Mathews* (1992) 7 Cal.App.4th 1052, 1062.)

Example
In *Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, the defendant was charged as the president of a corporation with involuntary manslaughter based on a horse's escape from the ranch that caused a fatal vehicle accident. The instruction in such a case could read:

> To prove that the defendant was a direct participant in the crime charged, the People must prove that:
>
> 1. The defendant had the authority to control the maintenance of the fences.
>
> 2. The defendant failed to ensure that the fences were properly maintained.
>
> AND
>
> 3. The defendant knew that horses had repeatedly escaped from the ranch due to poor maintenance of the fences.

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AUTHORITY

Liability of Corporate Officer or Agent ▸ *Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, 456–458; see *People v. Mathews* (1992) 7 Cal.App.4th 1052, 1062; *Otis v. Superior Court* (1905) 148 Cal. 129, 131.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction, §§ 95–96.

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STAFF NOTES

Liability of Corporate Officers

It is well settled that "[a]n officer of a corporation is not criminally answerable for any act of a corporation in which he [or she] is not personally a participant . . .." (*Otis v. Superior Court* (1905) 148 Cal. 129, 131; 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) § 96, pp. 110-111.) In the context of negligent homicide such an officer would be said not to be liable unless he or she was personally aware of the omissions or other behavior that gives rise to the criminal negligence. The decisions involving criminal liability of corporate officers, either expressly or impliedly, focus either on the officer's direct participation in illegal conduct, or his or her knowledge and control of the illegal behavior. The mere fact of the officer's position at the apex of the corporate hierarchy does not automatically bestow liability.

Otis held that the president and vice-president of a newspaper corporation were not liable for publication of contumacious articles simply by virtue of their high office. The court stressed that the People had to show that the officers "personally caused, or, being in control, at least permitted, the publication of the articles in question." (*Otis v. Superior Court*, *supra*, 148 Cal. at p. 131.) n4

Similarly, in *People v. International Steel Corp*. (1951) 102 Cal.App.2d Supp. 935, 942-943, a corporate officer was held criminally liable for violating an antipollution statute where he personally operated the facility which emitted the pollution (fumes from burning auto bodies), and by clear implication had knowledge of the violation. By contrast, the corporate secretary was found not liable; although he had knowledge of the burning operations, he had no control over them. "The secretary of a corporation, merely as such, is a ministerial officer, without authority to transact the business of the corporation upon his [or her] independent volition and judgment. [Citations.]" (*Ibid.*)

In *People v. Epstein* (1931) 118 Cal.App. 7, 10-11, the general manager of a loan and investment corporation was liable for improper use of depositors' funds, where he signed checks and knew of the misappropriation of the funds. By contrast, in *People v. Lieber* (1956) 146 Cal.App.2d Supp. 910, 914-915, an officer of an incorporated pharmacy was not criminally liable for illegally dispensing a narcotic when there

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> was no evidence he actively participated in the criminal conduct.
>
> More current decisions are in accord with these older cases supporting the People's position. In *People v. Conway* (1974) 42 Cal.App.3d 875, 885-886, the defendant was found liable where he was aware of the false advertising of corporate sales employees, was in a position to control the employees' conduct, and tolerated, ratified or authorized their actions. In *People v. Regan* (1979) 95 Cal.App.3d Supp. 1, 4, the court refused to predicate criminal liability on the owner of a business for the conduct of an employee off the premises: "There is nothing in the record which gives any indication that appellant had knowledge of, or participated in, the illegal conduct." In *People v. Toomey* (1985) 157 Cal.App.3d 1, 15, liability was imposed on the basis of the knowing participation of the corporate officer.

(*Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, 456–458 [footnote omitted].)

> The general rule is that where the crime charged involves guilty knowledge or criminal intent, it is essential to the criminal liability of an officer of the corporation that he actually and personally do the acts which constitute the offense, or that they be done by his direction or permission.

(*People v. Epstein* (1931) 118 Cal.App. 7, 10.)

Strict Liability Offense

> Matthews's corporate responsibility and authority were more than nominal. His responsibility and authority were real, and he exercised them commendably and effectively, albeit after January 19, 1989. Matthews is thus not a mere figurehead of the company, but is a responsible owner with "not only a positive duty to seek out and remedy violations when they occur but also ... a duty to implement measures that will insure that violations will not occur." (*Park, supra*, 421 U.S. at p. 672.)
>
> Such an affirmative duty is properly placed on corporate officers by strict liability statutes regulating the public welfare. . . .
>
> In our view, persons holding significant shares of corporate responsibility and power are subject to prosecution and conviction for strict liability crimes unless they have exercised their responsibilities and power so as to have undertaken all objectively possible means to discover,

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> prevent and remedy any and all violations of such laws. No evidence presented at the hearing below showed that Matthews had undertaken all objectively possible means to discover, prevent or remedy the criminal violations discovered pursuant to a search warrant on January 19, 1989. He was, therefore, properly subject to arrest, prosecution and conviction for these strict liability crimes.

(*People v. Mathews* (1992) 7 Cal.App.4th 1052, 1062.)

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155B. Liability of Corporate Officers and Agents: Two Theories of Liability

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The defendant is charged [in Count __] with _____ *<insert offense charged>* **while acting as an (officer/ [or] agent) of a corporation.**

The People must prove that the defendant was a direct participant in the crime charged. The fact that the defendant is an (officer/ [or] agent) of the corporation is not sufficient by itself to support a finding of guilt.

To prove that the defendant was a direct participant in the crime charged, the People must prove that the defendant _____ *<insert description of conduct alleged in offense>***, or the People must prove that:**

5. **The defendant had the authority to control the _____** *<insert description of conduct alleged in offense>***;**

[AND]

6. **The defendant (failed to/authorized/caused/permitted) [the] _____** *<insert description of conduct alleged in offense>***(;/.)**

<Give element 3 if offense alleged requires knowledge or general criminal intent.>
[AND

7. **The defendant knew _____** *<insert description of knowledge about conduct alleged in offense>***(;/.)**

<Give element 4 only if offense alleged requires specific intent.>
[AND

8. **When the defendant acted, (he/she) intended to _____** *<insert description of specific intent required>***.]**

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction in any case where the defendant is charged as the officer or agent of a corporation. (See *Sea Horse Ranch, Inc. v. Superior*

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Court (1994) 24 Cal.App.4th 446, 456–458; *Otis v. Superior Court* (1905) 148 Cal. 129, 131.) Repeat this instruction for each offense, inserting the specific requirements for that offense.

If the prosecution alleges only one theory of liability, do not give this instruction. Give Instruction 155A, Liability of Corporate Officers and Agents: Single Theory of Liability.

Give element 3 if the alleged offense requires knowledge or general criminal intent by the defendant. (See *Sea Horse Ranch, supra,* 24 Cal.App.4th at pp. 456–458; *People v. Epstein* (1931) 118 Cal.App. 7, 10.) Give element 4 if specific intent is required. If a strict-liability offense is alleged, give only elements 1 and 2. (See *People v. Mathews* (1992) 7 Cal.App.4th 1052, 1062.)

For an example of how to complete this instruction, see the Bench Notes to Instruction 155A, Liability of Corporate Officers and Agents: Single Theory of Liability.

It is unclear if the court is required to instruct on unanimity. For a discussion of instructional requirements on unanimity, see Instruction 160, Unanimity.

AUTHORITY

Liability of Corporate Officer or Agent ▸ *Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, 456–458; see *People v. Mathews* (1992) 7 Cal.App.4th 1052, 1062; *Otis v. Superior Court* (1905) 148 Cal. 129, 131.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction, §§ 95–96.

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STAFF NOTES

Liability of Corporate Officers

It is well settled that "[a]n officer of a corporation is not criminally answerable for any act of a corporation in which he [or she] is not personally a participant . . .." (*Otis v. Superior Court* (1905) 148 Cal. 129, 131; 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) § 96, pp. 110-111.) In the context of negligent homicide such an officer would be said not to be liable unless he or she was personally aware of the omissions or other behavior that gives rise to the criminal negligence. The decisions involving criminal liability of corporate officers, either expressly or impliedly, focus either on the officer's direct participation in illegal conduct, or his or her knowledge and control of the illegal behavior. The mere fact of the officer's position at the apex of the corporate hierarchy does not automatically bestow liability.

Otis held that the president and vice-president of a newspaper corporation were not liable for publication of contumacious articles simply by virtue of their high office. The court stressed that the People had to show that the officers "personally caused, or, being in control, at least permitted, the publication of the articles in question." (*Otis v. Superior Court*, *supra*, 148 Cal. at p. 131.) n4

Similarly, in *People v. International Steel Corp*. (1951) 102 Cal.App.2d Supp. 935, 942-943, a corporate officer was held criminally liable for violating an antipollution statute where he personally operated the facility which emitted the pollution (fumes from burning auto bodies), and by clear implication had knowledge of the violation. By contrast, the corporate secretary was found not liable; although he had knowledge of the burning operations, he had no control over them. "The secretary of a corporation, merely as such, is a ministerial officer, without authority to transact the business of the corporation upon his [or her] independent volition and judgment. [Citations.]" (*Ibid.*)

In *People v. Epstein* (1931) 118 Cal.App. 7, 10-11, the general manager of a loan and investment corporation was liable for improper use of depositors' funds, where he signed checks and knew of the misappropriation of the funds. By contrast, in *People v. Lieber* (1956) 146 Cal.App.2d Supp. 910, 914-915, an officer of an incorporated pharmacy was not criminally liable for illegally dispensing a narcotic when there

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> was no evidence he actively participated in the criminal conduct.
>
> More current decisions are in accord with these older cases supporting the People's position. In *People v. Conway* (1974) 42 Cal.App.3d 875, 885-886, the defendant was found liable where he was aware of the false advertising of corporate sales employees, was in a position to control the employees' conduct, and tolerated, ratified or authorized their actions. In *People v. Regan* (1979) 95 Cal.App.3d Supp. 1, 4, the court refused to predicate criminal liability on the owner of a business for the conduct of an employee off the premises: "There is nothing in the record which gives any indication that appellant had knowledge of, or participated in, the illegal conduct." In *People v. Toomey* (1985) 157 Cal.App.3d 1, 15, liability was imposed on the basis of the knowing participation of the corporate officer.

(*Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, 456–458 [footnote omitted].)

> The general rule is that where the crime charged involves guilty knowledge or criminal intent, it is essential to the criminal liability of an officer of the corporation that he actually and personally do the acts which constitute the offense, or that they be done by his direction or permission.

(*People v. Epstein* (1931) 118 Cal.App. 7, 10.)

Strict Liability Offense

> Matthews's corporate responsibility and authority were more than nominal. His responsibility and authority were real, and he exercised them commendably and effectively, albeit after January 19, 1989. Matthews is thus not a mere figurehead of the company, but is a responsible owner with "not only a positive duty to seek out and remedy violations when they occur but also ... a duty to implement measures that will insure that violations will not occur." (*Park, supra*, 421 U.S. at p. 672.)
>
> Such an affirmative duty is properly placed on corporate officers by strict liability statutes regulating the public welfare. . . .
>
> In our view, persons holding significant shares of corporate responsibility and power are subject to prosecution and conviction for strict liability crimes unless they have exercised their responsibilities and power so as to have undertaken all objectively possible means to discover,

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> prevent and remedy any and all violations of such laws. No evidence presented at the hearing below showed that Matthews had undertaken all objectively possible means to discover, prevent or remedy the criminal violations discovered pursuant to a search warrant on January 19, 1989. He was, therefore, properly subject to arrest, prosecution and conviction for these strict liability crimes.

(*People v. Mathews* (1992) 7 Cal.App.4th 1052, 1062.)

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160. Unanimity

The defendant is charged with _____ *<insert description of alleged offense>* **[in Count __] [sometime during the period of _____ to _____].**

The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give a unanimity instruction if the prosecution presents evidence of multiple acts to prove a single count. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132; *People v. Diedrich* (1982) 31 Cal.3d 263, 282; *People v. Madden* (1981) 116 Cal.App.3d 212, 218; *People v. Alva* (1979) 90 Cal.App.3d 418, 426.) The committee has addressed unanimity in those instructions where the issue is most likely to arise. If a case raises a unanimity issue and other instructions do not adequately cover the point, give this instruction.

The Supreme Court has stated the rule as follows: "[W]hen the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty." (*People v. Russo, supra,* 25 Cal.4th at p. 1132; see also *People v. Sutherland* (1993) 17 Cal.App.4th 602, 618–619 [unanimity required in forgery case where prosecution alleges forgery of multiple documents under single count, but not where defendant charged with forging and uttering single document].)

The court has no sua sponte duty to instruct on unanimity if the offense constitutes a "continuous course of conduct." (*People v. Maury* (2003) 30 Cal.4th 342, 423; *People v. Madden, supra,* 116 Cal.App.3d at p. 218.) "This exception arises in two contexts. The first is when the acts are so closely connected that they form part of one and the same transaction, and thus one offense. The second is when . . . the

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statute contemplates a continuous course of conduct of a series of acts over a period of time." (*People v. Napoles* (2002) 104 Cal.App.4th 108, 115–116 [quoting *People v. Avina* (1993) 14 Cal.App.4th 1303, 1309; internal quotation marks and citations omitted].) The court should carefully examine the statute under which the defendant is charged, the pleadings, and the evidence presented to determine whether the offense constitutes a continuous course of conduct. (*Ibid.* [noting that child abuse may be a continuous course of conduct or a single, isolated incident]; see also *People v. Madden, supra,* 116 Cal.App.3d at p. 218 [distinguishing "continuous crime spree" and finding repeated sexual offenses did not constitute continuous course of conduct]; *People v. Wolfe* (2003) 114 Cal.App.4th 177, 185 [unanimity instruction required where acts fragmented in time or space]; *People v. Rae* (2002) 102 Cal.App.4th 116, 123 [elder abuse offense did constitute continuous course of conduct]; *People v. Cortez* (1992) 6 Cal.App.4th 1202, 1209 [kidnapping is a continuous course of conduct].)

In addition, "where the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place, the [unanimity] instruction is not necessary to the jury's understanding of the case." (*People v. Beardslee* (1991) 53 Cal.3d 68, 93; see also *People v. Champion* (1995) 9 Cal.4th 879, 932 [questioned on unrelated issue in *People v. Ray* (1996) 13 Cal.4th 313, 369, fn. 2].) However, the court should use caution in applying this exception. (See *People v. Brown* (1996) 42 Cal.App.4th 1493, 1500–1501; *People v. Wolfe, supra,* 114 Cal.App.4th at p. 185.) The better practice is to provide a unanimity instruction to the jury when evidence has been admitted of separate acts that could form the basis for one charge.

The jury need not unanimously agree on whether the defendant was an aider and abettor of a direct perpetrator of the offense. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1024–1026; *People v. Beardslee, supra,* 53 Cal.3d at p. 93.)

The jury need not unanimously agree on which provocative act the defendant committed when the charge is with provocative-act murder. (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 591.)

In a conspiracy case, the jury need not unanimously agree on what overt act was committed or who was part of the conspiracy. (*People v. Russo, supra,* 25 Cal.4th at pp. 1135–1136.) However, if a conspiracy case involves an issue about the statute of limitations or evidence of withdrawal by the defendant, a unanimity instruction may be required. (*Id.* at p. 1136, fn. 2.)

In a child molestation case, if the evidence has been presented in the form of "generic testimony" about recurring events without specific dates and times, the

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court should determine whether it is more appropriate to give Instruction 161, Unanimity: When Generic Testimony of Offense Presented. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322.) See discussion below in Related Issues section.

If the prosecution elects one act among many as the basis for the offense, do not give this instruction. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536.) Give Instruction 162, Unanimity: When Prosecution Elects One Act Among Many.

Give the bracketed "sometime during the period" if the information alleges that the charged event happened during a period of time rather than on a single date.

AUTHORITY

Unanimity Required ▸ Cal. Const., art. I, § 16; *People v. Russo* (2001) 25 Cal.4th 1124, 1132.

Instruction Required If Multiple Acts Could Support Single Charge ▸ *People v. Russo* (2001) 25 Cal.4th 1124, 1132; *People v. Diedrich* (1982) 31 Cal.3d 263, 282; *People v. Madden* (1981) 116 Cal.App.3d 212, 218; *People v. Alva* (1979) 90 Cal.App.3d 418, 426.

Continuous Course of Conduct ▸ *People v. Maury* (2003) 30 Cal.4th 342, 423; *People v. Napoles* (2002) 104 Cal.App.4th 108, 115–116; *People v. Madden* (1981) 116 Cal.App.3d 212, 218; *People v. Wolfe* (2003) 114 Cal.App.4th 177, 185.

Acts Substantially Identical in Nature ▸ *People v. Beardslee* (1991) 53 Cal.3d 68, 93; see also *People v. Champion* (1995) 9 Cal.4th 879, 932 [questioned on unrelated issue in *People v. Ray* (1996) 13 Cal.4th 313, 369, fn. 2].

Aider and Abettor v. Direct Perpetrator ▸ *People v. Jenkins* (2000) 22 Cal.4th 900, 1024–1026; *People v. Beardslee* (1991) 53 Cal.3d 68, 93.

Provocative-Act Murder ▸ *People v. Briscoe* (2001) 92 Cal.App.4th 568, 591.

Conspiracy ▸ *People v. Russo* (2001) 25 Cal.4th 1124, 1135–1136.

Generic Testimony ▸ *People v. Jones* (1990) 51 Cal.3d 294, 321–322.

Must Instruct on Election by Prosecutor ▸ *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536.

5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, §§ 644–648.

RELATED ISSUES

Cases Based on Generic Testimony

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In *People v. Jones* (1990) 51 Cal.3d 294, the court analyzed the due process concerns raised when a witness testifies to numerous, repeated acts of child molestation over a period of time, but the witness is unable to give specifics on time and date. The court held that prosecutions based on this type of evidence satisfied due process where the testimony met specified criteria. (*Id.* at p. 316.) The court then addressed what type of unanimity instruction is required in such cases:

> In a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction should be given. (See, e.g., *People v. Gordon* [(1985)] 165 Cal. App.3d [839,] 855–856 [defendant raised separate defenses to the two offenses at issue].) But when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim.

(*Id.* at pp. 321–322; *People v. Matute* (2002) 103 Cal.App.4th 1437, 1448.) If the court concludes that the modified jury instruction is appropriate, do not give this instruction. Give Instruction 161, Unanimity: When Generic Testimony of Offense Presented.

Instruction That Unanimity Not Required

In *People v. Culuko* (2000) 78 Cal.App.4th 307, 321–323, the court held that an instruction stating that the jurors need not agree on whether the defendant was an aider and abettor or a principal was a correct statement of the law and not error to give. However, in *People v. Napoles* (2002) 104 Cal.App.4th 108, 119, the court found that the nonunanimity instruction given in that case was erroneous. The court cautioned against giving any nonunanimity instruction in a case involving a continuous course of conduct offense. (*Id.* at p. 119, fn. 6.) The court stated that if a nonunanimity instruction must be given, the following language would be appropriate:

> The defendant is accused of having [ ], [in count] by having engaged in a course of conduct between [date] and [date]. The People must prove beyond a reasonable doubt that the defendant engaged in this course of conduct. Each juror must agree that defendant engaged in acts or omissions that prove the required

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> course of conduct. As long as each of you is convinced beyond a reasonable doubt that the defendant committed some acts or omissions that prove the course of conduct, you need not all rely on the same acts or omissions to reach that conclusion.

(Ibid.)

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STAFF NOTES

General Rule—Instruction Required if Multiple Acts Showing Multiple Crimes

> In a criminal case, a jury verdict must be unanimous. [Citations.] . . . Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.] . . .
>
> On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the "theory" whereby the defendant is guilty. [Citations.]

(*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

> The key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a "particular crime" [citation,] it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed her guilty of another. But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate "when conviction on a single count could be based on two or more discrete criminal events," but not "where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event." [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction.

(*People v. Russo* (2001) 25 Cal.4th 1124, 1134–1135.)

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Instruction Required—Acts Fragmented as to Time or Space

> We believe the trial court here erred by failing to give a unanimity instruction. As in *Crawford*, defendant's possession of the various firearms was "fragmented as to space." Here, moreover, it was fragmented as to time. And, again as in *Crawford*, the circumstances surrounding the possession of the different firearms were significantly different.

(*People v. Wolfe* (2003) 114 Cal.App.4th 177, 185.)

Instruction Not Required—Continuous Course of Conduct

> A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses. [Citations.] A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged. [Citation.] Here, the evidence did not reflect multiple independent acts, any of which could have led to Weeden's death. Rather, the evidence showed that the ligature strangulation contributed, at least in part, to her death. The prosecution contended that defendant committed both acts and that Weeden's death was caused by strangulation or strangulation in combination with the blow to the head. Defendant did not contest that Weeden's death was caused, at least in part, by the strangulation. Instead, he claimed that a man named Morris strangled her and that Morris forced him to throw a rock at her. Thus, the two theories were based on a continuous course of conduct, whose acts were so closely connected in time as to form part of one transaction. [Citations.]

(*People v. Maury* (2003) 30 Cal.4th 342, 423.)

> Even when the prosecution proves more unlawful acts than were charged, no unanimity instruction is required where the acts proved constitute a continuous course of conduct. [Citation.] '"This exception arises in two contexts. The first is when the acts are so closely connected that they form part of one and the same transaction, and thus one offense. [Citation.] The second is when . . . the statute contemplates a continuous course of conduct of a series of acts over a period of time. [Citation.] [P] This second category of the continuous course of conduct exception has been applied to a limited number of varying crimes, including . . . child abuse [citation].'

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> [Citation.]" [Citation.] In *People v. Rae* (2002) 102 Cal.App.4th 116, this court explained that this second category requires an examination of the statutory language at issue in order " ' "to determine whether the Legislature intended to punish individual acts or entire wrongful courses of conduct." ' [Citation.] When the language of the statute focuses on the goal or effect of the prohibited crime, the offense is a continuing one. [Citation.]" (*Id.* at p. 123.) With each category of the continuous course of conduct exception, no unanimity instruction is required because the multiple acts constitute a single criminal event. [Citations.]
>
> Of course, child abuse is not invariably charged as a course of conduct offense; one act or omission constituting abuse may be sufficient for conviction. *Russo* is instructive in determining whether a unanimity instruction is required. . . .
>
> Two related factors contribute to our decision that the purpose behind the unanimity instruction would not be served by requiring it in this case. First, when the accusatory pleading alleges one violation of Penal Code section 273a, subdivision (a) (hereafter section 273a(a)) for misconduct occurring between two specified dates, "[t]he issue before the jury [is] whether the accused was guilty of the course of conduct, not whether he had committed a particular act on a particular day." (*People v. Ewing* (1977) 72 Cal. App. 3d 714, 717.) Second, "[w]here . . . the evidence establishes a pattern of physical trauma inflicted upon a child within a relatively short period of time, *a single course of conduct is involved* and no justification exists for departing from the well-established rule . . . that jury unanimity is not required as to the underlying conduct constituting the violation of section 273a." (*People v. Vargas, supra,* 204 Cal. App. 3d at p. 1464.)

(*People v. Napoles* (2002) 104 Cal.App.4th 108, 115–116 [emphasis in original, footnote omitted.)

> Conceptually, the exception of continuous conduct resulting in but one offense is quite limited. There is a fundamental difference between a continuous crime spree and continuous conduct resulting in one specific offense. The continuous conduct exception only really applies, if at all, to those types of offenses where the statute defining the crime may be interpreted as applying, on occasion, to an offense which may be continuous in nature such as failure to provide, child abuse, contributing to

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> the delinquency of a minor, driving under the influence and the like ([citations omitted] (pandering); (child abuse); (possession of a destructive device); (concealing stolen property); (contributing to the delinquency of a minor, but see (driving under the influence); (unlicensed fruit dealer); (failure to provide for minor child); (multiple acts to cause an abortion)). Insofar as cases cited herein might be read as holding that multiple sex offenses constitute a continuous course of conduct or a single act, we disagree. Multiple sex acts cannot be held to be continuous conduct on a theory of there being but one act of sexual abuse. In *People* v. *Perez* (1979) 23 Cal.3d 545, the defendant committed numerous sexual offenses upon a single victim during an uninterrupted period of some 45-60 minutes. Our Supreme Court held that the defendant could be convicted and punished for each separate act/offense. (*Id*., at pp. 552-554; see also *People* v. *Clem* (1980) 104 Cal.App.3d 337, 346-347.) So also in the instant case. Each appellant here could have been (and Madden in fact was) charged with several sexual offenses. The problem is that insofar as the charges of oral copulation are concerned, the jury was not told all of the jurors had to agree on a specific act.

(*People v. Madden* (1981) 116 Cal.App.3d 212, 218 [footnote omitted].)

Instruction Not Required—Aider and Abettor or Perpetrator

> "It is settled that as long as each juror is convinced beyond a reasonable doubt that defendant is guilty of murder as that offense is defined by statute, it need not decide unanimously by which theory he is guilty. [Citations.] More specifically, the jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator. . . . [P] . . . [P] Not only is there no unanimity requirement as to the theory of guilt, the individual jurors themselves need not choose among the theories, so long as each is convinced of guilt. Sometimes, as probably occurred here, the jury simply cannot decide beyond a reasonable doubt exactly who did what. There may be a reasonable doubt that the defendant was the direct perpetrator, and a similar doubt that he was the aider and abettor, but no such doubt that he was one or the other." (*People v. Santamaria* (1994) 8 Cal. 4th 903, 918-919; see also *People v. Beardslee* (1991) 53 Cal. 3d 68, 92.) Defendant contends that different facts would support aiding and abetting liability and liability as a direct perpetrator, but, as we have explained, the jury need not unanimously agree "on the precise factual details of how a killing under one or the other theory occurred in order to convict

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> defendant of first degree murder." [Citation.] Naturally, in order to return a guilty verdict, the jury must agree unanimously that each element of the charged crime has been proved, but the factors that establish aiding and abetting liability are not included as elements of the crime of murder. [Citations.]
>
> The United States Supreme Court also has explained that the jury need not agree on the means by which a crime has been committed, stating that it is appropriate that " 'different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.' " [Citation.]
>
> Defendant contends that the circumstances in support of his potential accomplice liability--that he was far from the scene when the murder occurred but had aided and abetted in it--were so distinct from the circumstances in support of his potential direct liability--that he had been at the scene and had pulled the trigger--as to constitute two "discrete criminal events" requiring the unanimity instruction. He relies upon authority indicating that the unanimity instruction is required if there are multiple acts shown that could have been charged as separate offenses. [Citation.] In the present case, defendant's conduct as an aider and abettor or as a direct perpetrator could result only in one criminal act and one charge. Under these circumstances, "[j]urors need not unanimously agree on whether the defendant is an aider and abettor or a principal even when different evidence and facts support each conclusion." [Citations.]

(*People v. Jenkins* (2000) 22 Cal.4th 900, 1024–1026; see also *People v. Maury* (2003) 30 Cal.4th 342, 423.)

Instruction Not Required—Overt Act or Identity of Conspirators

> In this case, the question thus becomes whether the evidence suggested two discrete crimes, i.e., two discrete conspiracies, or merely possible uncertainty on how the defendant is guilty of a particular conspiracy. The overt act, although necessary to establish a punishable conspiracy, need not itself be criminal. [Citations.] If only one agreement existed, only one conspiracy occurred, whatever the precise overt act or acts may have been. The evidence here showed but one agreement, and hence but one conspiracy--the

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> agreement by defendant and at least one other person (Morris or Andrews or both) to murder David. Although the jury had to find at least one overt act, whether it was one or another of several possible acts only concerns the way in which the crime was committed, i.e., the theory of the case, not whether discrete crimes were committed. Thus, if the jurors disagreed as to what overt act was committed, and agreed only that *an* overt act was committed, they would still have unanimously found defendant guilty of a particular conspiracy. No danger exists that some jurors would think she was guilty of one conspiracy and others would think she was guilty of a different one.
>
> Moreover, any one of the conspirators, and not necessarily the charged defendant, may commit the overt act to consummate the conspiracy. [Citations.] Disagreement as to who the coconspirators were or who did an overt act, or exactly what that act was, does not invalidate a conspiracy conviction, as long as a unanimous jury is convinced beyond a reasonable doubt that a conspirator did commit some overt act in furtherance of the conspiracy. When two or more persons combine to commit a crime, the jury need not agree on exactly who did what as long as it is convinced a particular defendant committed the crime regardless of what that defendant's precise role may have been. Sometimes there may be uncertainty as to which of two persons did what, but no doubt that each, or at least a particular defendant, was guilty of the crime. . . .
>
> n2 In some cases, the trial court may have to give some form of a unanimity instruction. For example, if there is a question regarding the statute of limitations, the court might have to require the jury to agree an overt act was committed within the limitations period [citation] or if evidence existed that the defendant had withdrawn from the conspiracy, the court might have to require the jury to agree an overt act was committed before the withdrawal. No such circumstance exists here, so we do not consider these questions.

(*People v. Russo* (2001) 25 Cal.4th 1124, 1135–1137.)

Instruction Not Required—Provocative Act

The jury also does not have to be unanimous as to which provocative act the defendant committed when charged with provocative act murder. (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 591.)

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Instruction Not Required—Jurors Could Not Reasonably Conclude One Act Committed But Not Another

> In this case, the rape victim testified that defendant Ross raped her twice, but the two rapes were virtually identical. After raping Taylor in the bathroom, Ross left, returning shortly thereafter to rape her again. Ross offered no evidence tending to show that he committed one of the rapes but not the other; rather, his counsel argued that he did not participate in any of the crimes occurring in the Taylor home. Thus, once a juror determined that defendant Ross committed one of the two rapes, it is inconceivable that the juror would not also conclude that Ross also committed the second rape of the same victim.
>
> In [*People v. Beardslee* (1991) 53 Cal.3d 68, 93], we held that under circumstances such as those described above, a trial court need not give a unanimity instruction. We explained: "'A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged.' [Citations.] '[W]here the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place, the instruction is not necessary to the jury's understanding of the case.' " [Citations.] Because in this case any juror believing that defendant Ross committed one of the two rapes testified to by Mary Taylor would inexorably believe that he also committed the other, the trial court did not err in failing to give a unanimity instruction.

(*People v. Champion* (1995) 9 Cal.4th 879, 932 [questioned on unrelated issue in *People v. Ray* (1996) 13 Cal.4th 313, 369, fn. 2.][footnote omitted].)

> [I]n cases in which the evidence indicates the jurors might disagree as to the particular act that the defendant committed, the court should deliver the standard unanimity instruction. (*People v. Jones*, *supra*, 51 Cal. 3d at p. 321.) However, in ruling that refusal to give a unanimity instruction was prejudicial error where two separate counts of bribery were proven under the umbrella of a single count, our Supreme Court went on to state that "[t]his is not a case where the jury's verdict implies that it did not believe the only defense offered." (*People v. Diedrich* (1982) 31 Cal. 3d 263, 282-283.)
>
> Seizing on this language, some courts have carved out an exception

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> to the sua sponte obligation to instruct on unanimity. In *People v. Gonzalez* the court explained: "A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged. This danger, however, does not automatically arise in every case where a confused and distraught victim happens to recall additional instances of the sex crime charged. Rather, the possibility of disagreement exists where the defendant is accused of a number of unrelated incidents, such as alleged rapes at different times or places, leaving the jurors free to believe different parts of the testimony and yet convict the defendant. . . . Disagreement may also exist where the defendant offers a defense which could be accepted or rejected as to some but not all of the acts." (*People v. Gonzalez* (1983) 141 Cal. App. 3d 786, 791-792, disapproved on other grounds in *People v. Kurtzman* (1988) 46 Cal. 3d 322, 330.)
>
> In the same vein, the reviewing court in *People v. Schultz* (1987) 192 Cal. App. 3d 535, 539-540 concluded that a unanimity instruction is unnecessary, and failure to instruct is not error, noting that "[i]n order for the unanimity instruction to be significant, there must be evidence from which reasonable jurors could *both* accept *and* reject the occurrence of at least the same number of acts as there are charged crimes." (See also *People v. Meyer* (1988) 197 Cal. App. 3d 1307, 1311-1312, original italics.)
>
> Under similar circumstances other courts have treated failure to give unanimity instructions as harmless error. (*People v. Deletto* (1983) 147 Cal. App. 3d 458, 464-474; see also *People v. Kaurish* (1990) 52 Cal. 3d 648, 694-695.)
>
> Because of the changes in Latina's testimony concerning the lewd incidents occurring on the second day, as well as the fact that she revealed the third incident for the first time at trial, we conclude it was error to omit a unanimity instruction. The question is whether that error was harmless. We conclude it was.

(*People v. Brown* (1996) 42 Cal.App.4th 1493, 1500–1501 [footnote omitted].)

Generic Testimony—Modified Instruction Required

In *People v. Jones* (1990) 51 Cal.3d 294, the court addressed the constitutional issues raised in cases involving “residential child molesters.” Specifically, the court analyzed the due process concerns when a witness testifies to numerous,

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repeated acts of child molestation over a period of time, but the witness is unable to give specifics as to time, date and place. The court held that prosecutions based on this type of evidence satisfied due process where the testimony met the following criteria:

> The victim, of course, must describe *the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., "twice a month" or "every time we went camping"). Finally, the victim must be able to describe *the general time period* in which these acts occurred (e.g., "the summer before my fourth grade," or "during each Sunday morning after he came to live with us"), to assure the acts were committed within the applicable limitation period. Additional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction.

(*Id.* at p. 316 [emphasis in original].)

The court then addressed the question of what type of unanimity instruction should be given in such cases:

> As for the necessity of a unanimous jury on specific charges, we acknowledge that the requirement of unanimity in criminal cases is of constitutional origin. (See Cal. Const., art. I, § 16.) The standard unanimity instruction codifies that principle. (See CALJIC No. 4.71.5.) But we reject the contention that jury unanimity is necessarily unattainable where testimony regarding repeated identical offenses is presented in child molestation cases. In such cases, although the jury may not be able to readily distinguish between the various acts, it is certainly capable of unanimously agreeing that they took place in the number and manner described.
>
> As previously stated, even generic testimony describes a repeated series of *specific*, though indistinguishable, acts of molestation. (*Ante*, pp. 313-314.) The unanimity instruction assists in focusing the jury's attention on each such act related by the victim and

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> charged by the People. We see no constitutional impediment to allowing a jury, so instructed, to find a defendant guilty of more than one indistinguishable act, providing the three minimum prerequisites heretofore discussed are satisfied. . . .
>
> In a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction should be given. (See, e.g., *People* v. *Gordon, supra*, 165 Cal. App.3d at pp. 855-856 [defendant raised separate defenses to the two offenses at issue].) But when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim.
>
> As pointed out recently in *People* v. *Moore, supra*, 211 Cal. App.3d at page 1414, because credibility is usually the "true issue" in these cases, "the jury either will believe the child's testimony that the consistent, repetitive pattern of acts occurred or disbelieve it. In either event, a defendant will have his unanimous jury verdict [citation] and the prosecution will have proven beyond a reasonable doubt that the defendant committed a specific act, for if the jury believes the defendant committed all the acts it necessarily believes he committed each specific act [citations]."

(*Id.* at pp. 321–322; see also *People v. Matute* (2002) 103 Cal.App.4th 1437, 1448.)

Non-Unanimity Instruction

In *People v. Culuko* (2000) 78 Cal.App.4th 307, 321–323, the court held that the following “non-unanimity” instruction was a correct statement of the law and not error:

> Those who aid and abet a crime and those who directly perpetrate the crime are principals and equally guilty of the commission of that crime. You need not unanimously agree, nor individually determine, whether a defendant is an aider and abettor or a direct perpetrator.
>
> The individual jurors themselves need not choose among the

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> theories, so long as each is convinced of guilt. There may be a reasonable doubt that the defendant was the direct perpetrator, and a similar doubt that he was the aider and abettor, but no such doubt that he was one or the other.

However, in *People v. Napoles* (2002) 104 Cal.App.4th 108, 117–119, the court held that the non-unanimity instruction given was error:

> At the prosecutor's behest, the court instructed the jury that: "The crime charged, or the lesser included offense, may be violated by a single act or by a series of acts. It is not necessary for all of the jurors to agree that a defendant committed the same act or acts or omission or omissions." . . .
>
> Here, the charge and the evidence clearly presented a course of conduct for the jury's consideration. The non-unanimity instruction, however, "unpackaged" the course of conduct by informing the jurors that the defendants could be convicted for a *single* act (or omission), and then informed them that unanimous agreement on the specific act or omission found unlawful was unnecessary. . . . [W]e conclude the court erred in giving this particular non-unanimity instruction.
>
> n.7 In child abuse cases where a course of conduct is prosecuted and juror unanimity is not required, it would seem the wiser course to give no instruction, rather than attempt a direction on non-unanimity. . . . However, we recognize that, on occasion, it will be appropriate to inform the jury that unanimity is not required. In such a situation, we believe the following language would be appropriate: "The defendant is accused of having violated Penal Code section 273a, subdivision (a), child abuse, [in count] by having engaged in a course of conduct between [date] and [date]. The People must prove beyond a reasonable doubt that the defendant engaged in this course of conduct. Each juror must agree that defendant engaged in acts or omissions that prove the required course of conduct. As long as each of you is convinced beyond a reasonable doubt that the defendant committed some acts or omissions that prove the course of conduct, you need not all rely on the same acts or omissions to reach that conclusion."

(*People v. Napoles* (2002) 104 Cal.App.4th 108, 117–119 [footnote 6 omitted].)

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Must Instruct on Election by Prosecutor

> Appellant here contends that while the prosecution did make an election as to the threat upon which it based its section 422 allegation, the election was only communicated to the judge and opposing counsel, but never to the jury. Thus, he claims that the judge should have given CALJIC No. 4.72, n4 which would have informed the jury of the prosecution's selection of the 11 a.m. threat as the basis for the section 422 charge, and instructed that it could only convict if it found that appellant had committed the single act relied upon by the prosecution to prove its case. . . .
>
> n4 CALJIC No. 4.72 provides: "The People have elected to rely on the acts testified as to having occurred on the day of __, 19__, as constituting the crime charged against the defendant. [P] You must not find the defendant guilty of the offense charged against [him] [her] unless you find that [he] [she] committed this crime at that particular time, regardless of your belief as to [his] [her] commission of the crime at some other time."
>
> It is possible to parse the prosecution's closing argument in a manner which suggests that more emphasis was placed on the 11 a.m. event than on the others. However, even assuming that this was so, we find that the argument did not satisfy the requirement that the jury either be instructed on unanimity or informed that the prosecution had elected to seek conviction *only* for the 11 a.m. event, so that a finding of guilt could only be returned if each juror agreed that the crime was committed at that time. Because the prosecutor did not directly inform the jurors of his election and of their concomitant duties, it was error for the judge to refuse a unanimity instruction in the first instance and to disregard his sua sponte duty thereafter.

(*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534–1536.)

Election Required on Demand

> We therefore follow *Castro*, holding that where several distinct potentially criminal acts are shown, and only one charged, the defendant is entitled, at the commencement of trial (or as soon as practically possible), to a prosecutorial election upon demand. We do not hold that an election is required in every criminal case involving multiple acts, nor that refusal to require one would be

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> prejudicial error in all cases. First, election is only required on demand. Second, an election cannot be required where none is possible, as where the evidence is completely generic, or where the various acts do not constitute distinct potential crimes but rather one continuous course of criminal conduct. Finally, refusal will only be prejudicial if an election would have made some significant difference in the trial, whether through the exclusion of evidence, allowing a focused defense, or in some other respect that materially implicates the right to be advised of the charges.

(*People v. Salvato* (1991) 234 Cal.App.3d 872, 882.)

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161. Unanimity: When Generic Testimony of Offense Presented

The defendant is charged with _____ *<insert description[s] of alleged offense[s]>* **[in Count[s] __] sometime during the period of _____ to _____.**

The People have presented evidence of more than one act to prove that the defendant committed (this/these) offense[s]. You must not find the defendant guilty unless:

1. You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed [for each offense];

OR

2. You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period [and have proved that the defendant committed at least the number of offenses charged].

BENCH NOTES

Instructional Duty

In *People v. Jones* (1990) 51 Cal.3d 294, the court analyzed the due process concerns raised when a witness testifies to numerous, repeated acts of child molestation over a period of time, but the witness is unable to give specifics on time and date. The court held that prosecutions based on this type of evidence satisfied due process where the testimony met specified criteria. (*Id.* at p. 316.) The court then addressed what type of unanimity instruction is required in such cases:

> In a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction should be given. (See, e.g., *People v. Gordon* [(1985)] 165 Cal. App.3d [839,] 855–856 [defendant raised separate defenses to the two offenses at issue].) But when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of

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> them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim.

(*Id.* at pp. 321–322; *People v. Matute* (2002) 103 Cal.App.4th 1437, 1448.) If the court concludes that the modified jury instruction is appropriate, give this instruction. If the court determines that the standard unanimity instruction is appropriate, give Instruction 160, Unanimity.

Give the bracketed portions when the defendant is charged with numerous charges for the same offense alleged to have occurred during the specified time period. (See *People v. Matute, supra,* 103 Cal.App.4th at p. 1448 [15 rapes charged during 15 months].)

AUTHORITY

Unanimity Required ▸ Cal. Const., art. I, § 16; *People v. Russo* (2001) 25 Cal.4th 1124, 1132.

Instruction Required If Multiple Acts Could Support Single Charge ▸ *People v. Russo* (2001) 25 Cal.4th 1124, 1132; *People v. Diedrich* (1982) 31 Cal.3d 263, 282; *People v. Madden* (1981) 116 Cal.App.3d 212, 218; *People v. Alva* (1979) 90 Cal.App.3d 418, 426.

Generic Testimony ▸ *People v. Jones* (1990) 51 Cal.3d 294, 321–322.

5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 648.

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STAFF NOTES

Generic Testimony—Modified Instruction Required

In *People v. Jones* (1990) 51 Cal.3d 294, the court addressed the constitutional issues raised in cases involving "residential child molesters." Specifically, the court analyzed the due process concerns when a witness testifies to numerous, repeated acts of child molestation over a period of time, but the witness is unable to give specifics as to time, date and place. The court held that prosecutions based on this type of evidence satisfied due process where the testimony met the following criteria:

> The victim, of course, must describe *the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., "twice a month" or "every time we went camping"). Finally, the victim must be able to describe *the general time period* in which these acts occurred (e.g., "the summer before my fourth grade," or "during each Sunday morning after he came to live with us"), to assure the acts were committed within the applicable limitation period. Additional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction.

(*Id.* at p. 316 [emphasis in original].)

The court then addressed the question of what type of unanimity instruction should be given in such cases:

> As for the necessity of a unanimous jury on specific charges, we acknowledge that the requirement of unanimity in criminal cases is of constitutional origin. (See Cal. Const., art. I, § 16.) The standard unanimity instruction codifies that principle. (See CALJIC No. 4.71.5.) But we reject the contention that jury unanimity is necessarily unattainable where testimony regarding repeated identical offenses is presented in child molestation cases. In such cases, although the jury may not be able to readily distinguish

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> between the various acts, it is certainly capable of unanimously agreeing that they took place in the number and manner described.
>
> As previously stated, even generic testimony describes a repeated series of *specific*, though indistinguishable, acts of molestation. (*Ante*, pp. 313-314.) The unanimity instruction assists in focusing the jury's attention on each such act related by the victim and charged by the People. We see no constitutional impediment to allowing a jury, so instructed, to find a defendant guilty of more than one indistinguishable act, providing the three minimum prerequisites heretofore discussed are satisfied. . . .
>
> In a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction should be given. (See, e.g., *People* v. *Gordon, supra*, 165 Cal. App.3d at pp. 855-856 [defendant raised separate defenses to the two offenses at issue].) But when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim.
>
> As pointed out recently in *People* v. *Moore, supra*, 211 Cal. App.3d at page 1414, because credibility is usually the "true issue" in these cases, "the jury either will believe the child's testimony that the consistent, repetitive pattern of acts occurred or disbelieve it. In either event, a defendant will have his unanimous jury verdict [citation] and the prosecution will have proven beyond a reasonable doubt that the defendant committed a specific act, for if the jury believes the defendant committed all the acts it necessarily believes he committed each specific act [citations]."

(*Id.* at pp. 321–322; see also *People v. Matute* (2002) 103 Cal.App.4th 1437, 1448.)

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162. Unanimity: When Prosecution Elects One Act Among Many

You must not find the defendant guilty of _____ *<insert name of alleged offense>* **[in Count __], unless you all agree that the People have proved specifically that the defendant committed that offense [on] _____** *<insert date or other description of event relied on>***. [Evidence that the defendant may have committed the alleged offense (on another day/ [or] in another manner) is not sufficient for you to find (him/her) guilty of the offense charged.]**

BENCH NOTES

Instructional Duty

If the prosecutor has elected a specific factual basis for the offense alleged but evidence of multiple acts has been admitted, the court has a **sua sponte** duty to instruct on the election. (*People v. Melhado* (1998) 60 Cal.App.4th 1529,1534–1536.)

AUTHORITY

Election Required on Demand ▸ *People v. Russo* (2001) 25 Cal.4th 1124, 1132; *People v. Salvato* (1991) 234 Cal.App.3d 872, 882.

Instructional Requirements ▸ *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534–1536.

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STAFF NOTES

Must Instruct on Election by Prosecutor

> Appellant here contends that while the prosecution did make an election as to the threat upon which it based its section 422 allegation, the election was only communicated to the judge and opposing counsel, but never to the jury. Thus, he claims that the judge should have given CALJIC No. 4.72, n4 which would have informed the jury of the prosecution's selection of the 11 a.m. threat as the basis for the section 422 charge, and instructed that it could only convict if it found that appellant had committed the single act relied upon by the prosecution to prove its case. . . .
>
> n4 CALJIC No. 4.72 provides: "The People have elected to rely on the acts testified as to having occurred on the day of __, 19__, as constituting the crime charged against the defendant. [P] You must not find the defendant guilty of the offense charged against [him] [her] unless you find that [he] [she] committed this crime at that particular time, regardless of your belief as to [his] [her] commission of the crime at some other time."
>
> It is possible to parse the prosecution's closing argument in a manner which suggests that more emphasis was placed on the 11 a.m. event than on the others. However, even assuming that this was so, we find that the argument did not satisfy the requirement that the jury either be instructed on unanimity or informed that the prosecution had elected to seek conviction *only* for the 11 a.m. event, so that a finding of guilt could only be returned if each juror agreed that the crime was committed at that time. Because the prosecutor did not directly inform the jurors of his election and of their concomitant duties, it was error for the judge to refuse a unanimity instruction in the first instance and to disregard his sua sponte duty thereafter.

(*People v. Melhado* (1998) 60 Cal.App.4th 1529,1534–1536.)

Election Required on Demand

> We therefore follow *Castro*, holding that where several distinct potentially criminal acts are shown, and only one charged, the defendant is entitled, at the commencement of trial (or as soon as

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> practically possible), to a prosecutorial election upon demand. We do not hold that an election is required in every criminal case involving multiple acts, nor that refusal to require one would be prejudicial error in all cases. First, election is only required on demand. Second, an election cannot be required where none is possible, as where the evidence is completely generic, or where the various acts do not constitute distinct potential crimes but rather one continuous course of criminal conduct. Finally, refusal will only be prejudicial if an election would have made some significant difference in the trial, whether through the exclusion of evidence, allowing a focused defense, or in some other respect that materially implicates the right to be advised of the charges.

(*People v. Salvato* (1991) 234 Cal.App.3d 872, 882.)

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163. Multiple Counts: Separate Offenses

Each of the counts charged in this case is a separate crime [except for Counts __]. You must consider each count separately and return a separate verdict for each one [except for Counts __, which are explained in Instruction[s] __].

[You must also decide whether any additional allegation has been proved. This means that you must separately consider the evidence as it applies to each crime and special allegation.]

BENCH NOTES

Instructional Duty
The court should give this instruction on request if the defendant is charged with multiple counts for separate offenses. (*People v. Beagle* (1972) 6 Cal.3d 441, 456.) The court has no sua sponte duty to give this instruction. *(Ibid.)*

If the prosecution has charged, in the alternative, more than one offense for the same event, give Instruction 164, Multiple Counts: Alternative Charges for One Event. Do not give this instruction unless the case involves both charges for separate events and charges in the alternative for a single event. In such cases, the court should give both instructions, inserting where indicated in this instruction the counts that are addressed in Instruction 164.

Likewise, if the case involves lesser included offenses, the court should give either Instruction 170, Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees—Without *Stone* Instruction (Non-Homicide), or Instruction 171, Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees—With *Stone* Instruction (Non-Homicide). (*See People v. Fields* (1996) 13 Cal.4th 289, 308–311.) Do not give this instruction unless the case involves both charges for separate events and one or more charges with a lesser included offense. In such cases, the court should give both instructions, inserting where indicated in this instruction the counts that are addressed in Instruction 170 or 171.

AUTHORITY

Statutory Authority for Multiple Charges ▸ Pen. Code, § 954.
Instructional Requirements ▸ *People v. Beagle* (1972) 6 Cal.3d 441, 456.

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

STAFF NOTES

Pen. Code, § 954:

> An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count.

Instructional Requirements

> An instruction that the jury must decide each count separately on the evidence and law applicable thereto, uninfluenced by their verdict on any other count, need not be given in the absence of a request therefor.

(*People v. Beagle* (1972) 6 Cal.3d 441, 456.)

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164. Multiple Counts: Alternative Charges for One Event

<Alternative A—no lesser included offense>
[The defendant is charged in Count __ with _____ *<insert name of alleged offense, e.g., theft>* **and in Count __ with _____** *<insert name of alleged offense, e.g., receiving stolen property>***. These are alternative charges. If you find the defendant guilty of one of these charges, you must find (him/her) not guilty of the other. You cannot find the defendant guilty of both.]**

<Alternative B—lesser included offense[s] to one count>
[Alternative charges are alleged in this case. The defendant is charged in Count __ with _____ *<insert name of most serious charged offense, e.g, robbery>***. _____** *<insert name[s] of lesser included offense[s], e.g., grand theft>* **(is/are) [a] lesser included offense[s] to that charge. The defendant is also charged in Count __ with _____** *<insert name of other charged offense, e.g., receiving stolen property>***. If you find the defendant guilty of _____** *<insert name of most serious charged offense>* **or of the lesser offense[s] of _____***<insert name[s] of lesser included offense[s]>***, you must find (him/her) not guilty of _____** *<insert name of other charged offense>***. Similarly, if you find the defendant guilty of _____** *<insert name of other charged offense>***, you must find (him/her) not guilty of _____** *<insert name of most serious charged offense>* **and not guilty of the lesser offense[s] of _____** *<insert name[s] of lesser included offense[s]>***.]**

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction where the defendant is charged in the alternative with multiple counts for a single event. (See *People v. Allen* (1999) 21 Cal.4th 846, 851; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757.) When one offense is necessarily included in another, the defendant cannot be convicted of both. (*People v. Ortega* (1998) 19 Cal.4th 686, 692.) This is to be distinguished from the question of whether the defendant may be punished for two separate charges arising out of a single event. *(Ibid.)* This instruction applies only to those cases in which the defendant may be legally convicted of only one of the alternative charges.

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If the defendant is charged with multiple counts for separate offenses, give Instruction 163, Multiple Counts: Separate Offenses.

If the case involves a lesser included offense, the court should give either Instruction 170, Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees—Without *Stone* Instruction (Non-Homicide), or Instruction 171, Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees—With *Stone* Instruction (Non-Homicide). (See *People v. Fields* (1996) 13 Cal.4th 289, 308–311.) Do not give this instruction unless the case also involves alternative charges. In such cases, the court should give alternative B.

AUTHORITY

Prohibition Against Dual Conviction ▸ *People v. Ortega* (1998) 19 Cal.4th 686, 692; *People v. Sanchez* (2001) 24 Cal.4th 983, 988; *People v. Allen* (1999) 21 Cal.4th 846, 851; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757.
Instructional Requirements ▸ See *People v. Allen* (1999) 21 Cal.4th 846, 851; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757.

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

RELATED ISSUES

Dual Conviction May Not Be Based on Necessarily Included Offenses
"[T]his court has long held that multiple convictions may *not* be based on necessarily included offenses. The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense." (*People v. Ortega* (1998) 19 Cal.4th 686, 692 [emphasis in original, citations and internal quotation marks omitted]; see also *People v. Montoya* (August 9, 2004, S111662) __ Cal.4th __, __.) "In deciding whether an offense is necessarily included in another, we apply the elements test, asking whether all the legal ingredients of the corpus delicti of the lesser offense are included in the elements of the greater offense." (*People v. Montoya, supra,* __ Cal.4th at p. __ [internal quotation marks and citation omitted].)

Some courts have also applied the "accusatory pleading" test to determine whether one offense is necessarily included in another. (See *People v. Malfavon* (2002) 102 Cal.App.4th 727, 742 [court must compare "the facts actually alleged in the accusatory pleading" to determine if one offense is necessarily included in the other].) In *People v. Montoya, supra,* __ Cal.4th at p. __, however, the Supreme Court observed that the "accusatory pleading" test is generally used "to determine

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whether to instruct a jury on an uncharged lesser offense." The court further noted that "[s]ome Court of Appeal decisions have concluded that the accusatory pleading test . . . does not apply to considerations of whether multiple convictions are proper." (*Id.* at p. ___ [internal quotation marks and citation omitted].) The court declined to decide this issue. *(Ibid.)* Justice Chin, in a concurring opinion, expressed the opinion that the "accusatory pleading" test should not be used to determine whether one offense is necessarily included in another. (*Id.* at p. __.)

Dual Conviction—Examples of Offense Where Prohibited or Permitted
The courts have held that dual conviction is *prohibited* for the following offenses:

Robbery and theft ▸ *People v. Ortega* (1998) 19 Cal.4th 686, 699.
Robbery and receiving stolen property ▸ *People v. Stephens* (1990) 218 Cal.App.3d 575, 586–587.
Theft and receiving stolen property ▸ *People v. Jaramillo* (1976) 16 Cal.3d 752, 757.
Battery and assault ▸ See *People v. Ortega* (1998) 19 Cal.4th 686, 693.
Forgery and check fraud ▸ *People v. Hawkins* (1961) 196 Cal.App.2d 832, 838.
Forgery and credit card fraud ▸ *People v. Cobb* (1971) 15 Cal.App.3d 1, 4.

The courts have held that dual conviction is *permitted* for the following offenses (although dual punishment is not):

Burglary and theft ▸ *People v. Bernal* (1994) 22 Cal.App.4th 1455, 1458.
Burglary and receiving stolen property ▸ *People v.* Allen (1999) 21 Cal.4th 846, 866.
Carjacking and grand theft ▸ *People v. Ortega* (1998) 19 Cal.4th 686, 693.
Carjacking and robbery ▸ *People v. Ortega* (1998) 19 Cal.4th 686, 700.
Carjacking and unlawful taking of a vehicle ▸ *People v. Montoya* (August 9, 2004, S111662) __ Cal.4th __, __.
Murder and gross vehicular manslaughter while intoxicated ▸ *People v. Sanchez* (2001) 24 Cal. 4th 983, 988.
Murder and child abuse resulting in death ▸ *People v. Malfavon* (2002) 102 Cal.App.4th 727, 743.

Joy Riding and Receiving Stolen Property
A defendant cannot be convicted of both joy riding (Veh. Code, § 10851) and receiving stolen property (Pen. Code, § 496), unless the record clearly demonstrates that the joy riding conviction is based exclusively on the theory that the defendant drove the car, temporarily depriving the owner of possession, not on the theory that the defendant stole the car. (*People v. Allen* (1999) 21 Cal.4th 846,

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851; *People v. Jaramillo* (1976) 16 Cal.3d 752, 758–759; *People v. Austell* (1990) 223 Cal.App.3d 1249, 1252.)

Accessory and Principal

In *People v. Prado* (1977) 67 Cal.App.3d 267, 273, and *People v. Francis* (1982) 129 Cal.App.3d 241, 248, the courts held that the defendant could not be convicted as both a principal and as an accessory after the fact for the same offense. However, later opinions have criticized these cases, concluding, "there is no bar to conviction as both principal and accessory where the evidence shows distinct and independent actions supporting each crime." (*People v. Mouton* (1993) 15 Cal.App.4th 1313, 1324; *People v. Riley* (1993) 20 Cal.App.4th 1808, 1816; see also *People v. Nguyen* (1993) 21 Cal.App.4th 518, 536, fn. 6.)

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STAFF NOTES

Pen. Code, § 654:

> (a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.
>
> (b) Notwithstanding subdivision (a), a defendant sentenced pursuant to subdivision (a) shall not be granted probation if any of the provisions that would otherwise apply to the defendant prohibits the granting of probation.

Pen. Code, § 954:

> An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count.

Prohibition Against Dual Conviction—Necessarily Included Offense Test

> The issue before us concerns when a defendant may receive multiple *convictions* for offenses arising out of a single act or course of conduct. This issue must be distinguished from the closely related question of when a defendant may receive multiple *sentences* based upon a single act or course of conduct. This important distinction is reflected in the difference between sections 954 and 654. . . . [quoting statutes]

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> In *People v. Pearson* (1986) 42 Cal. 3d 351, 359, we recognized the tension between these statutes, observing: "This court has long struggled with the problem of permitting multiple convictions while protecting the defendant from multiple punishment." The solution we have adopted is, in general, to permit multiple convictions on counts that arise from a single act or course of conduct--but to avoid multiple punishment, by staying execution of sentence on all but one of those convictions. (*Id*. at p. 360.)
>
> But despite the seemingly absolute language of section 954 ("the defendant may be convicted of any number of the offenses charged"), there is an exception to the general rule permitting multiple convictions. "Although the reason for the rule is unclear, this court has long held that multiple convictions may *not* be based on necessarily included offenses. [Citations.]" (*People v. Pearson*, *supra*, 42 Cal. 3d 351, 355, italics in original.)" 'The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense.' [Citations.]" (*Ibid*.)

(*People v. Ortega* (1998) 19 Cal.4th 686, 692 [emphasis in original].) The court then held that grand theft was not necessarily included in carjacking. (*Id.* at p. 693.) The court further held that robbery does include theft, both grand and petty. (*Id.* at p. 699.) Finally, the court concluded that a defendant could be convicted of both carjacking and robbery based on the language of the carjacking statute. (*Id.* at p. 700.)

> A defendant . . . cannot be convicted of both an offense and a lesser offense necessarily included within that offense, based upon his or her commission of the identical act. [Citation.]
>
> For purposes of the rule proscribing multiple conviction, " '[u]nder California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.' " [Citation.]

(*People v. Sanchez* (2001) 24 Cal. 4th 983, 987–988.) The court then held that gross vehicular manslaughter while intoxicated is not a lesser offense included within murder. *(Ibid.)*

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> In comparing the two offenses, we must look to either the actual language of the statutes (e.g., *People v. Ortega, supra,* 19 Cal. 4th at p. 693) or " ' "the facts actually alleged in the accusatory pleading." ' " (*People v. Sanchez* (2001) 24 Cal. 4th 983, 988.) The offenses are necessarily included if, under either method of comparison, all the elements of one offense are included within those of the other " ' "such that the greater cannot be committed without also committing the lesser." ' " (*Ibid.*)

(*People v. Malfavon* (2002) 102 Cal.App.4th 727, 742.)

Receiving Stolen Property and Theft Offenses

It is "a fundamental principle that one may not be convicted of stealing and of receiving the same property." (*People v.* Allen (1999) 21 Cal.4th 846, 851 [quoting *People v. Jaramillo* (1976) 16 Cal.3d 752, 757].) In 1992, the Legislature amended Penal Code section 496 to codify this principle as follows:

> A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property.

(Pen. Code, § 496; *People v. Allen, supra,* 21 Cal.4th at p. 857.) This amendment came in response to cases that had held that a defendant could not ever be convicted of receiving stolen property if there was evidence that he or she in fact stole the property. (*People v. Allen, supra,* 21 Cal.4th at pp. 857–861.) Interpreting this amendment, the Supreme Court stated, "the plain meaning of the first sentence of the 1992 amendment is that the actual thief may be convicted of violating section 496 . . . ." but may not simultaneously be convicted of both theft and receiving stolen property. (*People v. Allen, supra,* 21 Cal.4th at pp. 851, 861.) *People v. Allen, supra,* 21 Cal.4th at p. 851, reiterated the rule as explained in *People v. Jaramillo, supra,* 16 Cal.3d at p. 757:

> [W]hen an accused is convicted of grand theft auto, which *necessarily* requires a finding that the accused intended to steal, he cannot also be convicted of receiving that same stolen property. [Citation.] The common law rule bars such dual convictions. But the rule also applies when the record permits an inference which cannot be rebutted that the jury *might have* predicated its conviction of theft on a finding that the defendant stole the same property that it convicted him of receiving.

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(*People v. Allen, supra,* 21 Cal.4th at p. 851, quoting *People v. Jaramillo, supra,* 16 Cal.3d at p. 758–759 [emphasis in original, quotation marks omitted].)

Thus, a defendant cannot be convicted of both joy riding (Veh. Code, § 10851) and receiving stolen property (Pen. Code, § 496), unless the record clearly demonstrates that joy riding conviction is based exclusively on the theory that the defendant drove the car, temporarily depriving the owner of possession, not on the theory that the defendant stole the car. (*People v. Jaramillo, supra,* 16 Cal.3d at p. 758–759; *People v. Austell* (1990) 223 Cal.App.3d 1249, 1252.)

Similarly, a defendant cannot be convicted both of robbery and of receiving stolen property for property stolen in the robbery. (*People v. Stephens* (1990) 218 Cal.App.3d 575, 586–587.)

Rule Does Not Apply to Burglary

"[A] defendant may be convicted both of burglary and of violating section 496 with respect to property he stole in the burglary." (*People v.* Allen (1999) 21 Cal.4th 846, 866.) Similarly, a defendant may be convicted of burglary and theft of property from the same burglary. (*People v. Bernal* (1994) 22 Cal.App.4th 1455, 1458.) However, Penal Code section 654 prohibits double punishment in such situations.

Principal and Accessory

> The foregoing authorities, and right reason, compel a conclusion that when an accused is convicted of violation of Penal Code section 32, which necessarily requires that a *principal* have committed a specific completed felony and that he knowingly aided that principal with intent that the principal escape arrest, he cannot be convicted as a principal in that completed felony. His state of mind -- the intent required to be an accessory after the fact -- excludes that intent and state of mind required to be a principal. The requisite intent to be a principal in a robbery is to permanently deprive the owner of his property. Thus, this is a totally different and distinct state of mind from that of the accused whose intent is to aid the robber to escape. These are mutually exclusive states of mind and give rise to mutually exclusive offenses. Therefore the trial court erred in giving the challenged instruction.

(*People v. Prado* (1977) 67 Cal.App.3d 267, 273 [emphasis in original]; see also *People v. Francis* (1982) 129 Cal.App.3d 241, 248.)

People v. Mouton (1993) 15 Cal.App.4th 1313, points out, however,

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> that *Francis* and the cases following it have simply assumed, without deciding, that convictions as both a principal and as an accessory are precluded by legislative intent. (*People v. Mouton*, *supra*, 15 Cal.App.4th 1313, 1322, criticized on another point in *People v. Solis* (1993) 20 Cal.App.4th 264.) We believe that uncritical acceptance of this assumption is unwarranted. We agree with the *Mouton* court, that *Prado* should be limited to its facts (i.e., to cases in which the two convictions rest on the same acts), and that "[n]othing in section 32, defining accessories, suggests the Legislature intended as a matter of law to exclude those who, having perpetrated or intentionally assisted in the commission of a felony, *then act further to harbor, conceal or aid the escape of another of the principals*." (15 Cal.App.4th at p. 1323.) Accordingly, the defendant's conviction as an accessory in *Mouton* did not preclude retrial on the charge of murder.
>
> "[T]here is no bar to conviction as both principal and accessory where the evidence shows distinct and independent actions supporting each crime. When a felony has been completed and a person knowingly and intentionally harbors, conceals or aids the escape of one of the felons, that person is guilty as an accessory to a felony under section 32, whatever his or her prior participation in the predicate felony. (See *People v. Wallin* (1948) 32 Cal.2d 803, 806-807 [actual killer could also be liable as accessory on theory that, after completion of the murder, she encouraged another to help her avoid arrest].)" (*People v. Mouton*, *supra*, 15 Cal.App.4th 1313, 1324.)

(*People v. Riley* (1993) 20 Cal.App.4th 1808, 1816 [emphasis in original].)

> Here, (unlike *Prado*) the conviction as a principal and the conviction as an accessory depend upon entirely different conduct: Defendant's acts of obtaining the gun and speed loader, giving them to a drunk and angry Hayden, suggesting that Hayden return to the motel to retrieve his property, and driving Hayden to the motel in defendant's truck comprise the essentials of his guilt as a principal to the murder. The conviction of accessory is based on defendant's act, the following day, of attempting to dispose of the gun. This act occurred after the murder was complete.
>
> There is therefore nothing necessarily illogical or inconsistent in finding defendant guilty of both murder and accessory to murder. If

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> indeed there is a rule prohibiting conviction as both a principal and an accessory, it has nothing to do with double jeopardy; n1 defendant is not subjected to multiple punishments for the same conduct by these convictions, nor is a conviction of one an implied acquittal of the other.

(*People v. Riley*, *supra*, 20 Cal.App.4th at pp. 1814–1815.)

Divorcement Theory

In *People v. Garza* (2003) 112 Cal.App.4th 655, 664–667 [REVIEW GRANTED AND DEPUBLISHED, Jan., 14, 2004, S120551] the defendant was charged with theft of a vehicle that had been missing for two weeks and possession of that same stolen vehicle on the day he was arrested. The prosecution argued that the defendant could be convicted of both vehicle theft and receiving stolen property for the same vehicle based on the theory that the two offenses had been "divorced" by the passage of time. The Court of Appeal rejected this argument. The Supreme Court granted review without stating if this was the issue to be considered.

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165. Causation

An act causes (injury/_____ *<insert other description>***) if the (injury/_____** *<insert other description>***) is the direct, natural, and probable consequence of the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.**

<Give if multiple potential causes.>
[There may be more than one cause of (injury/_____ *<insert other description>***). An act causes (injury/_____** *<insert other description>***), only if it is a substantial factor in causing the (injury/_____** *<insert other description>***) and the (injury/_____** *<insert other description>***) would not have happened without the act. A *substantial factor* is more than a trivial or remote factor. However, it does not have to be the only factor that causes the (injury/_____** *<insert other description>***).]**

BENCH NOTES

Instructional Duty
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; *People v. Cervantes* (2001) 26 Cal.4th 860, 856–874.) The committee has addressed causation in those instructions where the issue is most likely to arise. If the particular facts of the case raise a causation issue and other instructions do not adequately cover the point, give this instruction.

If there is evidence of multiple potential causes, the court should also give the bracketed paragraph. (*People v. Sanchez* (2001) 26 Cal.4th 834, 845–849; *People v. Autry* (1995) 37 Cal.App.4th 351, 363.)

AUTHORITY

Proximate Cause ▸ *People v. Cervantes* (2001) 26 Cal.4th 860, 856–874; *People v. Roberts* (1992) 2 Cal.4th 271, 315–322.
Substantial Factor ▸ *People v. Sanchez* (2001) 26 Cal.4th 834, 845–849; *People v. Autry* (1995) 37 Cal.App.4th 351, 363.

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Independent Intervening Cause ▸ *People v. Cervantes* (2001) 26 Cal.4th 860, 856–874.

Causation Instructions ▸ *People v. Sanchez* (2001) 26 Cal.4th 834, 845–849; *People v. Roberts* (1992) 2 Cal.4th 271, 311–322; *People v. Autry* (1995) 37 Cal.App.4th 351, 363.

Instructional Duty ▸ *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, §§ 35–44.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 93.

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STAFF NOTES

This instruction is based on the causation instruction the committee has used in the other instructions.

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170. Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees —Without *Stone* Instruction (Non-Homicide)

Count __ charges that the defendant committed _____ *<insert name of greater offense, e.g., robbery>***.**

The offense of **_____** ***<insert name of first lesser offense, e.g., grand theft>***[, charged in Count __,] is a lesser offense of **_____** ***<insert name of greater offense, e.g., robbery>***.

[The offense of **_____** ***<insert name of second lesser offense, e.g., petty theft>***[, charged in Count __,] is a lesser offense of **_____** ***<insert name of first lesser offense, e.g., grand theft>***.]

You have been given one verdict form for each offense.

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

If you all agree that the People have not proved that the defendant committed any of these offenses, then you must complete each verdict form stating that (he/she) is not guilty.

If you all agree that the People have proved that the defendant is guilty of **_____** ***<insert name of greater offense, e.g., robbery>***, complete the verdict form finding the defendant guilty of that offense. Do not complete the other verdict form[s] for the lesser offense[s]. You cannot find the defendant guilty of both **_____** ***<insert name of greater offense, e.g., robbery>*** and the lesser offense[s] of **_____** ***<insert names of lesser offenses, e.g., grand theft, petty theft>***.

If you all agree that the defendant is not guilty of _____ *<insert name of greater offense, e.g., robbery>***, but you agree the People have proved that the defendant is guilty of _____** *<insert name of first lesser offense, e.g., grand theft>***, you must do two things. First, complete the verdict form finding the defendant not guilty of _____** *<insert name of greater offense, e.g., robbery>***. Then, complete the verdict form finding the defendant guilty of _____** *<insert nameof first lesser offense, e.g., grand theft>***. Do not**

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complete the verdict form finding the defendant guilty of _____ *<insert name of first lesser offense, e.g., grand theft>* **unless you all agree that the defendant is not guilty of _____** *<insert name of greater offense, e.g., robbery>***. [Do not complete the other verdict form for the other lesser offense]**

The People have the burden of proving beyond a reasonable doubt that the defendant committed _____ *<insert name of greater offense, e.g., robbery>* **rather than a lesser offense. If the People have not met this burden, you must find the defendant not guilty of _____** *<insert name of greater offense, e.g., robbery>***.**

<Second Lesser Offense>
[If you all agree that the defendant is not guilty of **_____** ***<insert name of greater offense, e.g., robbery>*** and not guilty of **_____** ***<insert name of first lesser offense, e.g., grand theft>***, but you agree the People have proved that the defendant is guilty of **_____** ***<insert name of second lesser offense, e.g., petty theft>***, you must do two things. First, complete both verdict forms finding the defendant not guilty of **_____** ***<insert name of greater offense, e.g., robbery>*** and **_____** ***<insert name of first lesser offense, e.g., grand theft>***. Second, complete the verdict form finding the defendant guilty of **_____** ***<insert name of second lesser offense, e.g., petty theft>***. Do not complete the verdict form finding the defendant guilty of **_____** ***<insert name of second lesser offense, e.g., petty theft>*** unless you all agree that the defendant is not guilty of **_____** ***<insert name of greater offense, e.g., robbery>*** and **_____** ***<insert name of first lesser offense, e.g., grand theft>***.

The People have the burden of proving beyond a reasonable doubt that the defendant committed _____ *<insert name of greater offense, e.g., robbery>* **or _____** *<insert name of first lesser offense, e.g., grand theft>* **rather than a lesser offense. If the People have not met this burden, you must find the defendant not guilty of _____** *<insert name of greater offense, e.g., robbery>* **and not guilty of _____** *<insert name of first lesser offense, e.g., grand theft>***.]**

BENCH NOTES

Instructional Duty
In all non-homicide cases where one or more lesser included offenses is submitted to the jury, whether charged or not, the court has a sua sponte **duty to give either this instruction or Instruction 171, Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees—With *Stone***

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Instruction (Non-Homicide). (*People v. Breverman* (1998) 19 Cal.4th 142, 162 [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [duty to instruct that if jury has reasonable doubt of greater offense, must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [duty to instruct that jury cannot convict of a lesser offense unless it has concluded that defendant is not guilty of the greater offense]; *People v. Marshall* (1996) 13 Cal.4th 799, 826 [duty to instruct that jury may render a verdict of partial acquittal on a greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519.)

In *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519, the Supreme Court suggested that the trial court provide the jury with verdict forms of guilty/not guilty on each of the charged and lesser offenses. The court later referred to this "as a judicially declared rule of criminal procedure." (*People v. Kurtzman* (1988) 46 Cal.3d 322, 328.) However, this is not a mandatory procedure. *(Ibid.)* If the court chooses not to follow the procedure suggested in *Stone,* the court may give this instruction. If the jury later declares that it is unable to reach a verdict on a lesser offense, then the court must provide the jury with an opportunity to acquit on the greater offense. (*People v. Marshall, supra,* 13 Cal.4th at p. 826; *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519.) In such cases, the court must give Instruction 171 and must provide the jury with verdict forms of guilty/not guilty for each offense. (*People v. Marshall, supra,* 13 Cal.4th at p. 826; *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519.)

Do not **give this instruction for charges of murder or voluntary manslaughter; give Instruction 786, Duty of Jury: Deliberations and Completion of Verdict Forms, or 787, Duty of Jury: Without *Stone* Instruction.**

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

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

The court may not control the sequence in which the jury considers the offenses. (*People v. Kurtzman, supra,* 46 Cal.3d at pp. 322, 330.)

AUTHORITY

Lesser Included Offenses—Duty to Instruct ▸ Pen. Code, § 1159; *People v. Breverman* (1998) 19 Cal.4th 142, 162.
Lesser Included Offenses—Standard ▸ *People v. Birks* (1998) 19 Cal.4th 108, 117.
Reasonable Doubt as to Degree or Level of Offense ▸ Pen. Code, § 1097; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557.
Conviction of Lesser Precludes Retrial on Greater ▸ Pen. Code, § 1023; *People v. Fields* (1996) 13 Cal.4th 289, 309–310; *People v. Kurtzman* (1988) 46 Cal.3d 322, 329.
Court May Ask Jury to Reconsider Conviction on Lesser Absent Finding on Greater ▸ Pen. Code, § 1161; *People v. Fields* (1996) 13 Cal.4th 289, 310.
Must Permit Partial Verdict of Acquittal on Greater ▸ *People v. Marshall* (1996) 13 Cal.4th 799, 826; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519.

5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, §§ 630, 631.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, § 61.

RELATED ISSUES

Duty to Instruct on Lesser
The court has a **sua sponte** duty to instruct "on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation] but not when there is no evidence that the offense was less than that charged. [Citations.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to

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request the instruction but expressly objects to its being given. [Citations.] Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154–155.)

Standard for Determining Lesser Offense
"Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 117.)

Acquittal of Greater Does Not Bar Retrial of Lesser
Where the jury acquits of a greater offense but deadlocks on the lesser, retrial of the lesser is not barred. (*People v. Smith* (1983) 33 Cal.3d 596, 602.)

Lesser Offenses Barred by Statute of Limitations
The defendant may waive the statute of limitations to obtain a jury instruction on a lesser offense that would otherwise be time-barred. (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 373.) However, the court has no sua sponte duty to instruct on a lesser that is time-barred. (*People v. Diedrich* (1982) 31 Cal.3d 263, 283.) If the court instructs on an uncharged lesser offense that is time-barred without obtaining an explicit waiver from the defendant, it is unclear if the defendant must object at that time in order to raise the issue on appeal or if the defendant may raise the issue for the first time on appeal. (See *People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1145–1151 [reasoning criticized in *People v. Smith* (2002) 76 Cal.App.4th 1182, 1193–1194].) The better practice is to obtain an explicit waiver on the statute of limitations when instructing on a time-barred lesser.

Conviction of Greater and Lesser
The defendant cannot be convicted of a greater and a lesser offense. (*People v. Moran* (1970) 1 Cal.3d 755, 763.) If the evidence supports the conviction on the greater offense, the conviction on the lesser offense should be set aside. *(Ibid.)*

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STAFF NOTES

Pen. Code § 1023:

> When the defendant is convicted or acquitted or has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal, or jeopardy is a bar to another prosecution for the offense charged in such accusatory pleading, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that accusatory pleading.

Pen. Code § 1097:

> When it appears that the defendant has committed a public offense, or attempted to commit a public offense, and there is reasonable ground of doubt in which of two or more degrees of the crime or attempted crime he is guilty, he can be convicted of the lowest of such degrees only.

Pen. Code § 1159:

> The jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense.

Pen. Code § 1161:

> When there is a verdict of conviction, in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion and direct the jury to reconsider their verdict, and if after the reconsideration, they return the same verdict, it must be entered; but when there is a verdict of acquittal, the court cannot require the jury to reconsider it. If the jury render a verdict which is neither general nor special, the court may direct them to reconsider it, and it cannot be recorded until it is rendered in some form from which it can be clearly understood that the intent of the jury is either to render a general verdict or to find the facts specially and to leave the judgment to the court.

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Must Permit Partial Acquittal on Greater

> [A] trial court is constitutionally obligated to afford the jury an opportunity to render a partial verdict of acquittal on a greater offense when the jury is deadlocked only on an uncharged lesser included offense. Failure to do so will cause a subsequently declared mistrial to be without legal necessity.

(*Stone v. Superior Court* (1982) 31 Cal.3d 503, 519.)

Guilty/ Not Guilty Verdict Forms for Each Offense

> *Stone* went on to suggest a number of procedures a trial court might use in guiding a jury charged with the task of reaching a verdict on greater and lesser included offenses. It indicated as a judicially declared rule of criminal procedure that: "[para.] When a trial judge has instructed a jury on a charged offense and on an uncharged lesser included offense, one appropriate course of action would be to provide the jury with forms for a verdict of guilty or not guilty as to each offense. The jury must be cautioned, of course, that it should first decide whether the defendant is guilty of the greater offense before considering the lesser offense, and that if it finds the defendant guilty of the greater offense, or if it is unable to agree on that offense, it should not return a verdict on the lesser offense." (31 Cal.3d at p. 519.)
>
> This was not a mandatory procedure, however, and *Stone* also indicated that trial courts retained the discretion to let a case go to the jury without a specific structure for the return of verdicts.

(*People v. Kurtzman* (1988) 46 Cal.3d 322, 328.)

***Stone* Instruction Not Required at Outset**

Stone and its progeny do not require the court to inform the jury of the possibility of returning a partial verdict until the jury has declared a deadlock on the lesser included offense. (*People v. Kurtzman* (1988) 46 Cal.3d 322, 330; *People v. Marshall* (1996) 13 Cal.4th 799, 826; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519.)

Conviction of Lesser Precludes Re-trial on Greater

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> [A]n acquittal barring a second prosecution may be either express, or implied by a conviction on a lesser included offense when the jury was given the opportunity to return a verdict on the greater offense. . . . [When a jury convict's on the lesser offense, the] jury's silence on the greater does not constitute manifest necessity to discharge the jury without a verdict, and retrial of the defendant [on the greater offense] is therefore barred. By its own terms, however, *Green* does not compel the conclusion that when the jury expressly deadlocks on the greater offense but returns a verdict of conviction on the lesser, the conviction of the lesser operates as an implied acquittal of the greater. . . .
>
> [W]e conclude that, under the Fifth Amendment of the United States Constitution, when the jury expressly deadlocks on the greater offense but returns a verdict of conviction on the lesser included offense, the conviction on the lesser offense does not operate as an implied acquittal of the greater. . . .
>
> [However,] once the verdict of guilty on the lesser included offense was received by the trial court and recorded, and the jury was discharged, defendant stood convicted of the lesser included offense within the meaning of section 1023. Pursuant to that statute, when an accused is convicted of a lesser included offense, the conviction bars a subsequent prosecution for the greater offense. . . .

(*People v. Fields* (1996) 13 Cal.4th 289, 299–305.)

Instruction to Jury on Order of Returning Verdicts

> *Kurtzman* established that the jury may deliberate on the greater and lesser included offenses in whatever order it chooses, but that it must acquit the defendant of the greater offense before returning a verdict on the lesser offense. (*Id*. at p. 333.) In this manner, when the jury renders its verdict on the lesser included offense, it will also have *expressly* determined that the accused is not guilty of the greater offense. . . .
>
> [W]e encourage trial courts to continue the practice of giving the so-called *Kurtzman* instruction set forth in CALJIC No. 17.10 (1989 re-rev.) at the outset of jury deliberations. . . .
>
> When, however, the jurors express their inability to agree on a greater inclusive offense, while indicating they have reached a verdict on a lesser included offense, the trial court must caution the jury at that time that it

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> "may not return a verdict on the lesser offense unless it has agreed . . . that defendant is not guilty of the greater crime charged." (*Kurtzman*, *supra*, 46 Cal. 3d at p. 329, italics omitted.) In light of the rule established in *Kurtzman*, the trial court commits error if it receives and records a verdict of guilty on the lesser included offense without ever having given the jury an acquittal-first instruction.

(*People v. Fields* (1996) 13 Cal.4th 289, 309–310; see also *People v. Kurtzman* (1988) 46 Cal.3d 322, 329–330.)

Should Instruct Jury to Reconsider When No Acquittal on Greater

> We recognize, however, that there may be instances such as occurred here in which, contrary to the rule of *Kurtzman*, the jury renders only a verdict of guilty on the lesser included offense. If this occurs, the trial court may properly decline to receive and record this verdict of conviction pending further deliberations by the jury. More specifically, prior to discharging the jury, the trial court has the authority pursuant to section 1161 to direct the jury to reconsider its lone verdict of conviction on the lesser included offense in light of *Kurtzman* and the acquittal-first rule.

(*People v. Fields* (1996) 13 Cal.4th 289, 310.)

Deadlock on Greater—Prosecutor Elects

> Placing the onus on the People to bring an incomplete verdict of conviction to the trial court's attention prior to jury discharge is appropriate because it preserves the possibility that, after reconsideration pursuant to section 1161, the jury will decline to return the requisite verdict of acquittal of the greater offense. Should this occur, the incomplete verdict of conviction on the lesser included offense initially rendered by the jury is of no effect, and the prosecutor may move the trial court to declare a mistrial, discharge the jury, and set the entire matter for retrial. [Citations.] Alternatively, when faced with a deadlock on the greater offense and a verdict of guilt on the lesser included offense, the People may prefer to forgo the opportunity to convict the accused of the greater offense on retrial in favor of obtaining a present conviction on the lesser included offense. [Citation.] In that case, the People should move the trial court to exercise its discretion to dismiss the charge on the greater offense in furtherance of justice under section 1385. [Citations.]

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(*People v. Fields* (1996) 13 Cal.4th 289, 310.)

Duty to Instruct on Lesser Included Offense

The court has a **sua sponte** duty to instruct "on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

> Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.

(*People v. Birks* (1998) 19 Cal.4th 108, 117.)

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171. Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees —With *Stone* Instruction (Non-Homicide)

Count __ charges that the defendant committed _____ ***<insert name of greater offense, e.g., robbery>***.

The offense of _____ ***<insert name of first lesser offense, e.g., grand theft>***[, charged in Count __,] is a lesser offense of _____ ***<insert name of greater offense, e.g., robbery>***.

[The offense of _____ ***<insert name of second lesser offense, e.g., petty theft>***[, charged in Count __,] is a lesser offense of _____ ***<insert name of first lesser offense, e.g., grand theft>***.]

For each of these offenses, you have been given two separate verdict forms, one stating that the defendant is "Guilty" and the other stating that the defendant is "Not Guilty" of that offense.

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

If you all agree that the People have not proved that the defendant committed any of these offenses, then you must complete each verdict form stating that (he/she) is not guilty.

If you all agree that the People have proved that the defendant is guilty of _____ ***<insert name of greater offense, e.g., robbery>***, complete the verdict form finding the defendant guilty of that offense. Do not complete the other verdict forms for this count or for the lesser offense[s]. You cannot find the defendant guilty of both _____ ***<insert name of greater offense, e.g., robbery>*** and the lesser offense[s] of _____ ***<insert names of lesser offenses, e.g., grand theft, petty theft>***.

If you all agree that the defendant is not guilty of _____ ***<insert name of greater offense, e.g., robbery>***, but you agree the People have proved that the defendant is guilty of _____ ***<insert name of first lesser offense, e.g., grand theft>***, you must do two things. First, complete the verdict form finding the defendant not guilty of _____ ***<insert name of greater offense, e.g.,***

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robbery>. Then, complete the verdict form finding the defendant guilty of **_____** <***insert name of first lesser offense, e.g., grand theft***>. Do not complete the verdict form finding the defendant guilty of **_____** <***insert name of first lesser offense, e.g., grand theft***> unless you all agree that the defendant is not guilty of **_____** <***insert name of greater offense, e.g., robbery***>. Do not complete the other verdict forms for this count or for the lesser offense[s].

If you all agree that the People have proved that the defendant is guilty of either **_____** <***insert name of greater offense, e.g., robbery***> or **_____** <***insert name of first lesser offense, e.g., grand theft***>, but you cannot all agree on which offense they have proved, do not complete any verdict forms. Instead, the foreperson should send a note reporting that you cannot all agree on which offense has been proved.

If you all agree that the defendant is not guilty of **_____** <***insert name of greater offense, e.g., robbery***>, but you cannot all agree on whether or not the People have proved the defendant is guilty of **_____** <***insert name of first lesser offense, e.g., grand theft***>, then you must do two things. First, complete the verdict form finding the defendant not guilty of **_____** <***insert name of greater offense, e.g., robbery***>. Second, the foreperson should send a note reporting that you cannot all agree that **_____** <***insert name of first lesser offense, e.g., grand theft***> has been proved. Do not complete any other verdict forms for this count or the lesser offense[s].

The People have the burden of proving beyond a reasonable doubt that the defendant committed _____ *<insert name of greater offense, e.g., robbery>* **rather than a lesser offense. If the People have not met this burden, you must find the defendant not guilty of _____** *<insert name of greater offense, e.g., robbery>***.**

<Second Lesser Offense>

[If you all agree that the defendant is not guilty of **_____** <***insert name of greater offense, e.g., robbery***> and not guilty of **_____** <***insert name of first lesser offense, e.g., grand theft***>, but you agree that the People have proved that the defendant is guilty of **_____** <***insert name of second lesser offense, e.g., petty theft***>, you must do two things. First, complete both verdict forms finding the defendant not guilty of **_____** <***insert name of greater offense, e.g., robbery***> and **_____** <***insert name of first lesser offense, e.g., grand theft***>. Second, complete the verdict form finding the defendant guilty of **_____** <***insert name of second lesser offense, e.g., petty theft***>. Do not complete the verdict form finding the defendant guilty of **_____** <***insert name of second***

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***lesser offense, e.g., petty theft*>** unless you all agree that the defendant is not guilty of **_____ <*insert name of greater offense, e.g., robbery*>** and **_____ <*insert name of first lesser offense, e.g., grand theft*>**. Do not complete any other verdict forms for this count or for the lesser offenses.

If you all agree that the defendant is not guilty of **_____ <*insert name of greater offense, e.g., robbery*>** and **_____ <*insert name of first lesser offense, e.g., grand theft*>**, but you cannot all agree on whether or not the People have proved that the defendant is guilty of **_____ <*insert name of second lesser offense, e.g., petty theft*>**, then you must do two things. First, complete both verdict forms finding the defendant not guilty of **_____ <*insert name of greater offense, e.g., robbery*>** and **_____ <*insert name of first lesser offense, e.g., grand theft*>**. Second, the foreperson should send a note reporting that you cannot all agree that **_____ <*insert name of second lesser offense, e.g., petty theft*>** has been proved. Do not complete any other verdict forms for this count or the lesser offenses.

The People have the burden of proving beyond a reasonable doubt that the defendant committed _____ *<insert name of greater offense, e.g., robbery>* **or _____** *<insert name of first lesser offense, e.g., grand theft>* **rather than a lesser offense. If the People have not met this burden, you must find the defendant not guilty of _____** *<insert name of greater offense, e.g., robbery>* **and not guilty of _____** *<insert name of first lesser offense, e.g., grand theft>***.]**

BENCH NOTES

Instructional Duty

In all non-homicide cases where one or more lesser included offenses is submitted to the jury, whether charged or not, the court has a sua sponte **duty to give either this instruction or Instruction 170, Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees—Without *Stone* Instruction (Non-Homicide). (*People v. Breverman* (1998) 19 Cal.4th 142, 162 [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [duty to instruct that if jury has reasonable doubt of greater offense, must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [duty to instruct that jury cannot convict of a lesser offense unless it has concluded that defendant is not guilty of the greater offense]; *People v. Marshall* (1996) 13 Cal.4th 799, 826 [duty to instruct that jury may render a verdict of partial acquittal on a greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519.)**

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In *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519, the Supreme Court suggested that the trial court provide the jury with verdict forms of guilty/not guilty on each of the charged and lesser offenses. The court later referred to this "as a judicially declared rule of criminal procedure." (*People v. Kurtzman* (1988) 46 Cal.3d 322, 328.) However, this is not a mandatory procedure. *(Ibid.)* If the court chooses not to follow the procedure suggested in *Stone,* the court may give Instruction 170 in place of this instruction. If the jury later declares that it is unable to reach a verdict on a lesser offense, then the court must give this instruction, providing the jury with an opportunity to acquit on the greater offense. (*People v. Marshall, supra,* 13 Cal.4th at p. 826; *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519.)

Do not **give this instruction for charges of murder or voluntary manslaughter; give Instruction 786, Duty of Jury: Deliberations and Completion of Verdict Forms, or 787, Duty of Jury: Without *Stone* Instruction.**

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

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

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The court may not control the sequence in which the jury considers the offenses. (*People v. Kurtzman, supra,* 46 Cal.3d at pp. 322, 330.)

AUTHORITY

Lesser Included Offenses—Duty to Instruct ▸ Pen. Code, § 1159; *People v. Breverman* (1998) 19 Cal.4th 142, 162.

Lesser Included Offenses—Standard ▸ *People v. Birks* (1998) 19 Cal.4th 108, 117.

Reasonable Doubt as to Degree or Level of Offense ▸ Pen. Code, § 1097; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557.

Conviction of Lesser Precludes Retrial on Greater ▸ Pen. Code, § 1023; *People v. Fields* (1996) 13 Cal.4th 289, 309–310; *People v. Kurtzman* (1988) 46 Cal.3d 322, 329.

Court May Ask Jury to Reconsider Conviction on Lesser Absent Finding on Greater ▸ Pen. Code, § 1161; *People v. Fields* (1996) 13 Cal.4th 289, 310.

Must Permit Partial Verdict of Acquittal on Greater ▸ *People v. Marshall* (1996) 13 Cal.4th 799, 826; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519.

5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, §§ 630, 631.

5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, § 61.

RELATED ISSUES

See the Related Issues section of Instruction 170, Deliberations and Completion of Verdict Forms: Lesser Offenses or Degrees—Without *Stone* Instruction (Non-Homicide).

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STAFF NOTES

See Staff Notes to Instruction 170.

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180. Judge's Comment on the Evidence

Do not take anything I said or did during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be.

Now, I will comment on the evidence only to help you decide the issues in this case.

However, it is not my role to tell you what your verdict should be. You are the sole judges of the facts and believability of witnesses. It is up to you and you alone to decide the issues in this case. You may disregard any or all of my comments or give them whatever weight you believe is appropriate.

BENCH NOTES

Instructional Duty

If the court comments on the evidence, the court has a **sua sponte** duty to give this instruction. (Cal. Const., art. VI, § 10; Pen. Code, §§ 1127, 1093(f); *People v. Proctor* (1992) 4 Cal.4th 499, 543; *People v. Brock* (1967) 66 Cal.2d 645, 651.)

"[J]udicial comment on the evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." (*People v. Proctor, supra,* 4 Cal.4th at p. 543.)

The judge may comment on the evidence before the case is submitted to the jury or after the jury has announced it is deadlocked. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 766 [overruling *People v. Cook* (1983) 33 Cal.3d 400].)

The judge may comment on the evidence at the sanity phase of a trial. (*People v. Scott* (1960) 53 Cal.2d 558, 563–565.)

The judge may comment on the evidence at the penalty phase of a capital trial. (*People v. Friend* (1958) 50 Cal.2d 570, 579.) However, *Friend* was decided in 1958, prior to most of the modern case law on capital trials. Thus, the committee recommends proceeding with great caution prior to making any comment on the evidence in the penalty phase of a capital case.

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AUTHORITY

Judge May Comment on Evidence ▸ Cal. Const., art. VI, § 10; Pen. Code, §§ 1127, 1093(f).

Admonition Required ▸ Cal. Const., art. VI, § 10; Pen. Code, §§ 1127, 1093(f); *People v. Proctor* (1992) 4 Cal.4th 499, 543; *People v. Brock* (1967) 66 Cal.2d 645, 651.

Comments Must Not Direct Verdict and Must Be Fair ▸ *People v. Proctor* (1992) 4 Cal.4th 499, 542; *People v. Brock* (1967) 66 Cal.2d 645, 651.

Judge May Comment After Jury Declares Deadlock ▸ *People v. Rodriguez* (1986) 42 Cal.3d 730, 766.

5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, §§ 657–662.

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STAFF NOTES

Cal Const, art. VI, § 10:

The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. The appellate division of the superior court has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court in causes subject to its appellate jurisdiction.

Superior courts have original jurisdiction in all other causes .

The court may make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.

Penal Code, § 1127:

All instructions given shall be in writing, unless there is a phonographic reporter present and he takes them down, in which case they may be given orally; provided however, that in all misdemeanor cases oral instructions may be given pursuant to stipulation of the prosecuting attorney and counsel for the defendant. In charging the jury the court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case and in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses. Either party may present to the court any written charge on the law, but not with respect to matters of fact, and request that it be given. If the court thinks it correct and pertinent, it must be given; if not, it must be refused. Upon each charge presented and given or refused, the court must endorse and sign its decision and a statement showing which party requested it. If part be given and part refused, the court must distinguish, showing by the endorsement what part of the charge was given and what part refused.

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Pen. Code, § 1093(f):

> (f) The judge may then charge the jury, and shall do so on any points of law pertinent to the issue, if requested by either party; and the judge may state the testimony, and he or she may make such comment on the evidence and the testimony and credibility of any witness as in his or her opinion is necessary for the proper determination of the case and he or she may declare the law. At the beginning of the trial or from time to time during the trial, and without any request from either party, the trial judge may give the jury such instructions on the law applicable to the case as the judge may deem necessary for their guidance on hearing the case. Upon the jury retiring for deliberation, the court shall advise the jury of the availability of a written copy of the jury instructions. The court may, at its discretion, provide the jury with a copy of the written instructions given. However, if the jury requests the court to supply a copy of the written instructions, the court shall supply the jury with a copy.

Comments Must Not Direct Verdict and Must be Fair

> The purpose of this provision is to allow the court "to utilize its experience and training in analyzing evidence to assist the jury in reaching a just verdict. [Citations.]" (*People v. Cook* (1983) 33 Cal.3d 400, 407.) In *People v. Rodriguez, supra,* 42 Cal.3d 730, 765-770, we overruled that portion of *People v. Cook, supra,* 33 Cal.3d 400, 413, which held that a trial court may not make *any* comment on the evidence once the jury has announced it has reached an impasse in deliberations, and concluded that although a trial court may not directly express an opinion on the ultimate issue of guilt or innocence of the accused at any stage of the trial, it is not prohibited from appropriate comment *simply because the jury has indicated an initial deadlock in its deliberations.* (*People v. Rodriguez, supra,* 42 Cal.3d at pp. 769-770; see *People v. Melton* (1988) 44 Cal.3d 713, 735.)
>
> In generally summarizing the permissible contours of constitutionally authorized judicial comment, we observed in *People v. Rodriguez, supra,* 42 Cal.3d 730, that "the decisions admonish that judicial comment on the evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power. [Citations.]" (*Id.,* at p. 766; *People v. Gates* (1987) 43 Cal.3d 1168, 1207.)

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> In *People v. Rodriguez, supra,* 42 Cal.3d 730, we also noted that a trial court has "broad latitude in fair commentary, so long as it does not effectively control the verdict. For example, it is settled that the court need not confine itself to neutral, bland, and colorless summaries, but *may focus critically on particular evidence,* expressing views about its persuasiveness. [Citations.]" (*Id.,* at 768, italics added.) Therefore, the circumstance that in the present case, the trial court chose to single out for particular emphasis the evidence concerning the presence of defendant's fingerprints at the crime scene, and defendant's inconsistent testimony, did not render its comments improper. As noted in *Rodriguez,* " '[A] judge may restrict his comments to portions of the evidence or to the *credibility of a single witness* and need not sum up all the testimony, both favorable and unfavorable. [Citations.]' " (*Id.,* at p. 773, italics added.) . . .

(*People v. Proctor* (1992) 4 Cal.4th 499, 542–543 italics in original].)

Required Admonitions

> By requiring the court to inform the jurors that they are the exclusive judges of all questions of fact submitted to them, the constitutional provision makes it abundantly clear that the purpose of the provision was not to create a means by which the jurors could avoid the responsibility of determining the facts and, under proper instructions on the law, the ultimate question of guilt.

(*People v. Brock* (1967) 66 Cal.2d 645, 651.)

> The jury, as required by the constitutional provision, must remain as the exclusive arbiter of questions of fact and the credibility of witnesses, and the judge should make clear that his views are not binding but advisory only.

(*People v. Friend* (1958) 50 Cal.2d 570, 577–578.)

> [B]oth prior to and after its comments, the court admonished the jury that it was free to disregard those comments. We conclude that the trial court's remarks fell within the scope of the constitutional privilege.

(*People v. Proctor* (1992) 4 Cal.4th 499, 543.)

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> Where the trial court instructs the jury that they can wholly disregard any comment by him, n3 that they are the exclusive judges of the credibility of witnesses and of all questions of fact submitted to them, and that his comments were for the purpose of aiding the jury in reaching a verdict but not to compel one, there is no reversible error in connection with the court's comments on the evidence. The jury must remain as the exclusive arbiter of questions of fact and the credibility of witnesses, and the judge should make it clear that his views are not binding but advisory only.

(*People v. Jones* (1970) 7 Cal.App.3d 48, 54–55.)

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181. Charge Removed From Jury Consideration

Count[s] __, charging the defendant with _____ *<insert name[s] of offense[s]>* **no longer need[s] to be decided in this case.**

Do not speculate about or consider in any way why you no longer need to decide (this/these) count[s].

BENCH NOTES

Instructional Duty

The court may give this instruction if one or more of the original counts has been removed from the case, whether through plea or dismissal.

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STAFF NOTES

This instruction is based on CACI 109:

> 109 Removal of Claims or Parties
>
> **[[*Name of plaintiff*]'s claim for [*insert claim*] is no longer an issue in this case.]**
>
> **[[*Name of party*] is no longer a party to this case.]**
>
> **Do not speculate as to why this [claim/person] is no longer involved in this case. You should not consider this during your deliberations.**
>
> Directions for Use
>
> This instruction may be read during trial as appropriate.

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182. One or More Defendants Removed From Case

The charge[s] against defendant[s] _____ *<insert names[s] of defendant[s]>* **no longer need[s] to be decided in this case.**

Do not speculate about or consider in any way why the charge[s] against defendant[s] _____ *<insert names[s] of defendant[s]>* **(do/does) not need to be decided.**

BENCH NOTES

Instructional Duty

The court may give this instruction if one or more of the original defendants has been removed from the case, whether through plea, dismissal, or flight.

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STAFF NOTES

This instruction is modeled on the Ninth Circuit Manual of Model Jury Instructions (2003), Criminal, 2.13:

> **The case against codefendant [*name*] has been disposed of and is no longer before you. Do not guess or speculate as to the reason for the disposition. The disposition should not influence your verdict[s] with reference to the remaining defendant[s], and you must base your verdict[s] solely on the evidence against the remaining defendant[s].**

Comment

No reference should ordinarily be made in this situation to a plea of guilty by the codefendant. *See, e.g., United States v. Barrientos*, 758 F.2d 1152, 1159-60 (7th Cir.1985), *cert. denied*, 474 U.S. 1062 (1986) ("When a co-defendant becomes absent from a trial, whether through a plea, an acquittal, a government motion to dismiss, temporary flight, or for any other reason, a trial court should acknowledge the co-defendant's absence to the jury and instruct them on their duty to consider the evidence of guilt or innocence as to the remaining defendant without any reference to any implications of the co- defendant's absence."). *See also United States v. Carraway*, 108 F.3d 745, 755 (7th Cir.), *cert. denied*, 522 U.S. 891 (1997); *United States v. Rapp*, 871 F.2d 957, 967 (11th Cir.), *cert. denied*, 493 U.S. 890 (1989).

Approved 2000

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183. Substitution of Alternate Juror: During Deliberations

One of your fellow jurors has been excused and an alternate juror has been selected to take (his/her) place, as provided by law.

The alternate juror must participate fully in the deliberations that lead to any verdict[s]. The People and the defendant[s] have the right to a verdict reached only after full participation of the jurors whose votes determine that verdict. This right may be assured only if you begin your deliberations again, from the beginning. Therefore, you must set aside and disregard all past deliberations and begin your deliberations all over again. Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations had not taken place.

Now, please return to the jury room and begin your deliberations again.

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction if an alternate juror has been seated. (*People v. Collins* (1976) 17 Cal.3d 687, 693–694 [overruled on other grounds in *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19].)

If an alternate juror is seated during the penalty phase of a capital trial but prior to submission of the penalty phase to the jury, give Instruction 184, Substitution of Alternate Juror in Capital Case: After Guilt Determination, Before Submission of Penalty Phase to Jury.

AUTHORITY

Statutory Authority to Seat Alternate Juror ▸ Pen. Code, § 1089.
Jury Must Be Instructed to Disregard Previous Deliberations ▸ *People v. Collins* (1976) 17 Cal.3d 687, 693–694 [overruled on other grounds in *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19]; *People v. Renteria* (2001) 93 Cal.App.4th 552, 559.

5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 512.

STAFF NOTES

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Pen. Code, § 1089:

Whenever, in the opinion of a judge of a superior court about to try a defendant against whom has been filed any indictment or information or complaint, the trial is likely to be a protracted one, the court may cause an entry to that effect to be made in the minutes of the court, and thereupon, immediately after the jury is impaneled and sworn, the court may direct the calling of one or more additional jurors, in its discretion, to be known as "alternate jurors."

The alternate jurors must be drawn from the same source, and in the same manner, and have the same qualifications as the jurors already sworn, and be subject to the same examination and challenges , provided that the prosecution and the defendant shall each be entitled to as many peremptory challenges to the alternate jurors as there are alternate jurors called. When two or more defendants are tried jointly each defendant shall be entitled to as many peremptory challenges to the alternate jurors as there are alternate jurors called. The prosecution shall be entitled to additional peremptory challenges equal to the number of all the additional separate challenges allowed the defendant or defendants to the alternate jurors.

The alternate jurors shall be seated so as to have equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already selected, and must attend at all times upon the trial of the cause in company with the other jurors, and for a failure so to do are liable to be punished for contempt.

They shall obey the orders of and be bound by the admonition of the court, upon each adjournment of the court; but if the regular jurors are ordered to be kept in the custody of the sheriff or marshal during the trial of the cause, the alternate jurors shall also be kept in confinement with the other jurors; and upon final submission of the case to the jury the alternate jurors shall be kept in the custody of the sheriff or marshal and shall not be discharged until the original jurors are discharged, except as hereinafter provided.

If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a

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> place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.

Jury Must be Instructed to Disregard Previous Deliberations

> Petitioner contends that the foregoing elements of the right to a trial by jury are part of the broader right which additionally requires each juror to have engaged in all of the jury's deliberations. We agree. The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint. The result is a balance easily upset if a new juror enters the decision-making process after the 11 others have commenced deliberations. The elements of number and unanimity combine to form an essential element of unity in the verdict. By this we mean that a defendant may not be convicted except by 12 jurors who have heard all the evidence and argument and who together have deliberated to unanimity. . . .
>
> [A] proper construction of section 1089 requires that deliberations begin anew when a substitution is made after final submission to the jury. This will insure that each of the 12 jurors reaching the verdict has fully participated in the deliberations, just as each had observed and heard all proceedings in the case. **We accordingly construe section 1089 to provide that the court instruct the jury to set aside and disregard all past deliberations and begin deliberating anew. The jury should be further advised that one of its members has been discharged and replaced with an alternate juror as provided by law; that the law grants to the People and to the defendant the right to a verdict reached only after full participation of the 12 jurors who ultimately return a verdict; that this right may only be assured if the jury begins deliberations again from the beginning; and that each remaining original juror must set aside and disregard the earlier deliberations as if they had not been had.** We are confident that juries made aware of the rights involved will faithfully follow such instructions.

(*People v. Collins* (1976) 17 Cal.3d 687, 693–694 [footnote omitted, overruled on other grounds in *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19].)

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Collins has been consistently applied and remains the law of California.

(*People v. Renteria* (2001) 93 Cal.App.4th 552, 559.)

CACI 5014

5014 Substitution of Alternate Juror

One of your fellow jurors has been excused and an alternate juror has been selected to take [his/her] place. The alternate juror must be given the opportunity to participate fully in your deliberations. Therefore, you must set aside and disregard all past deliberations and begin your deliberations all over again.

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184. Substitution of Alternate Juror in Capital Case: After Guilt Determination, Before Submission of Penalty Phase to Jury

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One of your fellow jurors has been excused and an alternate juror has been selected to take (his/her) place, as provided by law.

For the purposes of this phase of the trial, the alternate juror must accept [all] the verdict[s] and finding[s] returned by the jury in the prior phase[s] of the trial.

In this phase of the trial, you must now determine what penalty is appropriate in light of the prior verdict[s] and finding[s] and all the other evidence that bears on this question. The People and the defendant[s] have the right to a verdict on the issue of penalty that is reached only after full participation of the jurors whose votes determine that verdict. This right may be assured only if the alternate juror participates fully in the deliberations, including any necessary review of the evidence presented in the prior phase[s] of this trial.

BENCH NOTES

Instructional Duty

This instruction may be used if an alternate juror has been seated for the penalty phase of a capital trial. (*People v. Cain* (1995) 10 Cal.4th 1, 66–67; *People v. Collins* (1976) 17 Cal.3d 687, 693–694 [overruled on other grounds in *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19].) It is unclear if the court has a **sua sponte** duty to give this instruction. (Compare *People v. Cain, supra,* 10 Cal.4th at pp. 66–67 [instruction approved]; *People v. Renteria* (2001) 93 Cal.App.4th 552, 559 [court required to give *Collins* instruction when juror substituted during guilt deliberations; noncapital case]; *People v. Cunningham* (2001) 25 Cal.4th 926, 1030 [no error in failing to give instruction on beginning guilt phase deliberations anew where alternate juror seated for penalty phase]). The preferred approach would be to give the instruction when relevant.

In *People v. Cain* (1995) 10 Cal.4th 1, 64–65, the trial court gave a longer explanation of what verdicts and findings the alternate juror was required to accept. The committee believes that the second paragraph of this instruction sufficiently explains this concept. However, if the court would like to provide a more detailed explanation, the court may insert the following after that paragraph:

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> For (that/those) offense[s] for which the jury returned a verdict of guilty and for (that/those) special circumstance[s] that the jury found to be true, the alternate juror must accept that those matters have been proved beyond a reasonable doubt. [Similarly, for ((that/those) offense[s] for which the jury returned a verdict of not guilty/ [and] for (that/those) special circumstance[s] that the jury found (was/were) not proved), the alternate juror must accept that (that/those) matter[s] (has/have) not been proved beyond a reasonable doubt.] [The alternate juror must also accept the jury's finding at the sanity phase of this trial.]

If the defendant requests an instruction on lingering doubt regarding guilt, the court should review the instruction approved of in *People v. Cain, supra,* 10 Cal.4th at pp. 64–65. However, the court has no sua sponte duty to instruct on lingering doubt. (*People v. Cunningham, supra,* 25 Cal.4th at p. 1030.)

AUTHORITY

Statutory Authority to Seat Alternate Juror ▸ Pen. Code, § 1089.

Alternate Juror Seated During Deliberations: Must Be Instructed to Disregard Previous Deliberations ▸ *People v. Collins* (1976) 17 Cal.3d 687, 693–694 [overruled on other grounds in *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19]; *People v. Renteria* (2001) 93 Cal.App.4th 552, 559.

Alternate Juror Seated Prior to Penalty Phase ▸ *People v. Cain* (1995) 10 Cal.4th 1, 66–67; *People v. Cunningham* (2001) 25 Cal.4th 926, 1030.

5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 512.

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STAFF NOTES

Substitution of Juror After Guilt Determination, Prior to Penalty Phase

In *People v. Cain* (1995) 10 Cal.4th 1, 64–65, the court gave the following instruction after substituting a juror:

> After the guilt phase of this trial was concluded and the jury returned its verdicts one of your number was excused for legal cause and replaced with an alternate juror for the penalty phase of the trial. The alternate juror has been present during all evidence and the reading of all instructions on the law in both phases of the trial. However, the alternate juror did not participate in the jury deliberations and voting which resulted in the verdicts returned as to the guilt and innocence of the defendant of the charges set forth in the information, and as to the truthfulness of the special circumstance allegations set out in the information.
>
> For the purposes of this penalty phase of the trial the alternate juror must accept the verdicts and findings rendered by the jury in the guilt phase of the trial. That is, the alternate juror must accept that the defendant has been proved guilty beyond a reasonable doubt of the charges of murder in the first degree, burglary in the first degree, and robbery, as set forth in the information. The alternate juror must accept that the special circumstance allegations have been proved to be true beyond a reasonable doubt; namely that two murders were committed by defendant and that murder was committed while the defendant was engaged in the commission of burglary and robbery and attempted rape, as set forth in the information. The alternate juror must accept the verdict that the defendant is not guilty of rape as charged in the information.
>
> If you have any lingering doubt concerning the guilt of the defendant as to any of those charges of which he was found guilty, or if you have any lingering doubt concerning the truthfulness of any of the special circumstance allegations which were found to be true, you may consider that lingering doubt as a mitigating factor or circumstance.
>
> A lingering doubt is defined as any doubt, however slight, which is not sufficient to create in the minds of the jurors a reasonable doubt.
>
> The People and the defendant have the right to a verdict on the matter of penalty which is reached only after a full participation of the 12 jurors who ultimately return the verdict. This right may be assured in this phase of the trial only if the alternate juror participates fully in the deliberations,

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> including such review as may be necessary of the evidence presented in the guilt phase of the trial.
>
> Therefore, the reasonable doubt of guilt and truthfulness of the charges and special circumstances as to which verdicts have been returned shall not be reexamined by the jury. However, for the purpose of determining if there is a lingering doubt concerning the guilt of the defendant on any charge as to which he has been found guilty, or a lingering doubt as to the truthfulness of any special allegation which has been found to be true, the jury shall begin its deliberations from the beginning with respect to the evidence presented in the guilt phase of this trial. You are instructed to set aside and disregard all past deliberations, if any, concerning whether there is any lingering doubt as to the guilt of the defendant or the truthfulness of any special allegation and begin deliberating anew. This means that each remaining original juror must set aside and disregard any earlier deliberations concerning a possible lingering doubt as if they had not taken place. . . .

The court addressed the defendant's claim that this instruction was constitutionally defective:

> We perceive no constitutional defect in the special instruction. As defendant concedes, excusal of a juror for good cause and substitution of an alternate at the penalty phase does not require a retrial of the guilt phase. (*People v. Fields* (1983) 35 Cal. 3d 329, 351, fn. 9.) If the guilt phase is not retried, the penalty phase jury, including the new juror, must perforce "accept" the guilt phase verdicts and findings, as they were instructed to do in this case. Those findings determined guilt and truth of the special circumstances beyond a reasonable doubt. It follows that reasonable doubt is not at issue in the penalty phase: the new juror must accept the previous findings were made beyond a reasonable doubt, and the jury as a whole has no cause to deliberate further on whether any of them harbor reasonable doubt as to guilt or truth of the special circumstances. . . .
>
> The special instruction did not purport to limit the guilt phase *evidence* that could be considered by the jury, whether in assessing the circumstances of the crime (§ 190.3, factor (a)) or in considering the existence of lingering doubt. Nor did it suggest the substituted juror should play less than an equal role in assessing the evidence from the guilt phase for either of these purposes. To the contrary, the instruction stated the alternate juror was to "participate[] fully in the deliberations, *including*

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such review as may be necessary of the evidence presented in the guilt phase of the trial." . . .

As to lingering doubt, the original jurors were instructed to "set aside and disregard" any earlier deliberations and to begin their deliberations anew, with the substituted juror, "*with respect to the evidence presented in the guilt phase of the trial*." An instruction that allows the jurors to vote against the death penalty if they have residual doubt as to guilt or truth of the special circumstances is sufficient even though it requires the jurors to accept the guilt phase verdicts. [Citations.] Here the instructions made clear not only that lingering doubts as to guilt could be considered in mitigation, but also that the penalty phase jury was to deliberate on this question as an integrated whole, to set aside any previous discussion on the question, and to review in its common deliberations any relevant guilt phase evidence. . . .

Substitution of a juror for the penalty phase presents the potential problem of the new juror "joining a group which has already discussed and evaluated the circumstances of the crime, the capacity of the defendant, and other issues which bear both on guilt and on penalty." (*People v. Fields*, *supra*, 35 Cal. 3d at p. 351.) For that reason we declined in *Fields* to adopt a procedure that would result in routine substitution of jurors at the penalty phase, while recognizing substitution might nonetheless be required when a guilt phase juror, due to "unforeseen circumstances," is unable to complete the trial. (*Id*. at p. 351, fn. 9.) The special instruction given here addressed the potential problem described in *Fields* by commanding the jury in clear and certain terms to set aside any previous discussion of guilt phase evidence relevant to lingering doubt, and in general to deliberate on their penalty verdict as an integrated group, *including any review they conducted of the guilt phase evidence*. We believe this instruction was adequate to safeguard defendant's right to unitary jury deliberations.

(*Id.* at pp. 66–67 [footnotes omitted, italics in original].)

Instruction on Lingering Doubt Not Required Sua Sponte

Defendant also contends that the trial court erred in failing to instruct the jury, upon substitution of the alternate juror, that it must begin deliberations anew with respect to the guilt and special circumstances findings. The excusal of a juror for good cause and the substitution of an alternate at the penalty phase prior to commencement of deliberations do

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> not require a retrial of the guilt phase or a reweighing of the evidence received at the earlier phase of the proceedings. (*People v. Cain*, *supra*, 10 Cal. 4th 1, 66.) As defendant recognizes, the rule announced in *People v. Collins* (1976) 17 Cal. 3d 687, 694, requiring the trial court to instruct the jurors to commence deliberations anew when a substitution is effected in the midst of deliberations, does not apply when, as in the present case, the alternate juror joins the panel of jurors after the conclusion of the guilt phase and prior to the commencement of deliberations at the penalty phase. [Citations.] We also have held that a sua sponte instruction on lingering doubt is not required at the penalty phase and, having reviewed the facts of the present case, we ascertain no reason to reach a different conclusion under these circumstances. [Citation.]

(*People v. Cunningham* (2001) 25 Cal.4th 926, 1030.)

See Notes to Instruction 183.

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185. Instructions to Alternate on Submission of Case to Jury

_____ *<insert name[s] or number[s] of alternate juror[s]>***, the jury is now deliberating, but you are still alternate jurors and are bound by my earlier instructions about your conduct.**

Do not talk about the case or about any of the people or any subject involved in it with anyone, not even your family, friends, or the deliberating jurors. [In addition, you must not talk about these things among yourselves.] Do not decide how you would vote if you were deliberating. Do not form or express an opinion about the issues in this case, unless you are substituted for one of the deliberating jurors.

BENCH NOTES

Instructional Duty
This instruction is provided for the court to use at its discretion.

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190. Final Instruction on Discharge of Jury

You have now completed your jury service in this case. On behalf of all the judges of the court, please accept my thanks for your time and effort.

Now that the case is over, you may choose whether or not to discuss the case and your deliberations with anyone.

[I remind you that under California law, you must wait at least 90 days before negotiating or agreeing to accept any payment for information about the case.]

Let me tell you about some rules the law puts in place for your convenience and protection.

If you consent, the lawyers in this case, the defendant[s], or their representatives may talk to you about the case, including your deliberations or verdict. Those discussions must occur at a reasonable time and place.

Please immediately report to the court any unreasonable contact, made without your consent, by the lawyers in this case, their representatives, or the defendant[s].

Anyone who violates these rules violates a court order and may be fined.

[I order that the court's record of personal juror identifying information, including names, addresses, and telephone numbers, be sealed until further order of this court.]

[If, in the future, the court is asked to decide whether this information will be released, notice will be sent to any juror whose information is involved. You may oppose the release of this information and ask that any hearing on the release be closed to the public. The court will decide whether and under what conditions any information may be disclosed.]

Again, thank you for your service. You are now excused.

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BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction on discharge of the jury. (Code Civ. Proc., § 206.) The court may give the bracketed portions at its discretion. (*Id.*, § 237.)

Code of Civil Procedure section 237(a)(2) requires the court to seal the personal identifying information of jurors in a criminal case following the recording of the jury's verdict. Access to the sealed records may be permitted on a showing of good cause in a petition to the court, as provided by subdivisions (b) through (d).

Section 14 of the California Standards of Judicial Administration states that "it is appropriate for the trial judge to thank jurors for their public service, but the judge's comments should not include praise or criticism of the verdict or the failure to reach a verdict."

AUTHORITY

Statutory Authority ▸ Code Civ. Proc., §§ 206, 237.

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STAFF NOTES

Code of Civ. Proc., § 206:

(a) Prior to discharging the jury from the case, the judge in a criminal action shall inform the jurors that they have an absolute right to discuss or not to discuss the deliberation or verdict with anyone. The judge shall also inform the jurors of the provisions set forth in subdivisions (b), (d), and (e).

(b) Following the discharge of the jury in a criminal case, the defendant, or his or her attorney or representative, or the prosecutor, or his or her representative, may discuss the jury deliberation or verdict with a member of the jury, provided that the juror consents to the discussion and that the discussion takes place at a reasonable time and place.

(c) If a discussion of the jury deliberation or verdict with a member of the jury pursuant to subdivision (b) occurs at any time more than 24 hours after the verdict, prior to discussing the jury deliberation or verdict with a member of a jury pursuant to subdivision (b), the defendant or his or her attorney or representative, or the prosecutor or his or her representative, shall inform the juror of the identity of the case, the party in that case which the person represents, the subject of the interview , the absolute right of the juror to discuss or not discuss the deliberations or verdict in the case with the person, and the juror's right to review and have a copy of any declaration filed with the court.

(d) Any unreasonable contact with a juror by the defendant, or his or her attorney or representative, or by the prosecutor, or his or her representative, without the juror's consent shall be immediately reported to the trial judge.

(e) Any violation of this section shall be considered a violation of a lawful court order and shall be subject to reasonable monetary sanctions in accordance with Section 177.5 of the Code of Civil Procedure.

(f) Nothing in the section shall prohibit a peace officer from investigating an allegation of criminal conduct.

(g) Pursuant to Section 237, a defendant or defendant's counsel may, following the recording of a jury's verdict in a criminal proceeding, petition the court for access to personal juror identifying information

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within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose. This information consists of jurors' names, addresses, and telephone numbers. The court shall consider all requests for personal juror identifying information pursuant to Section 237.

Code of Civ. Proc., § 237, in relevant part:

(a) (1) The names of qualified jurors drawn from the qualified juror list for the superior court shall be made available to the public upon request unless the court determines that a compelling interest, as defined in subdivision (b), requires that this information should be kept confidential or its use limited in whole or in part.

(2) Upon the recording of a jury's verdict in a criminal jury proceeding, the court's record of personal juror identifying information of trial jurors, as defined in Section 194, consisting of names, addresses, and telephone numbers, shall be sealed until further order of the court as provided by this section.

(3) For purposes of this section, "sealed" or "sealing" means extracting or otherwise removing the personal juror identifying information from the court record.

(4) This subdivision applies only to cases in which a jury verdict was returned on or after January 1, 1996.

(b) Any person may petition the court for access to these records. The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure. A compelling interest includes, but is not limited to, protecting jurors from threats or danger of physical harm. If the court does not set the matter for hearing, the court shall by minute order set forth the reasons and make express findings either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure.

(c) If a hearing is set pursuant to subdivision (b), the petitioner shall provide notice of the petition and the time and place of the hearing at least

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20 days prior to the date of the hearing to the parties in the criminal action. The court shall provide notice to each affected former juror by personal service or by first-class mail, addressed to the last known address of the former juror as shown in the records of the court. In a capital case, the petitioner shall also serve notice on the Attorney General. Any affected former juror may appear in person, in writing, by telephone, or by counsel to protest the granting of the petition. A former juror who wishes to appear at the hearing to oppose the unsealing of the personal juror identifying information may request the court to close the hearing in order to protect the former juror's anonymity.

(d) After the hearing, the records shall be made available as requested in the petition, unless a former juror's protest to the granting of the petition is sustained. The court shall sustain the protest of the former juror if, in the discretion of the court, the petitioner fails to show good cause, the record establishes the presence of a compelling interest against disclosure as defined in subdivision (b), or the juror is unwilling to be contacted by the petitioner. The court shall set forth reasons and make express findings to support the granting or denying of the petition to disclose. The court may require the person to whom disclosure is made, or his or her agent or employee, to agree not to divulge jurors' identities or identifying information to others; the court may otherwise limit disclosure in any manner it deems appropriate.

Standards of Judicial Administration, § 14:

At the conclusion of a trial, or upon declaring a mistrial for failure of a jury to reach a verdict, it is appropriate for the trial judge to thank jurors for their public service, but the judge's comments should not include praise or criticism of the verdict or the failure to reach a verdict.

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480. Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice

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Before you may consider the (statements/ [or] testimony) of _____ *<insert name[s] of witness[es]>***, you must decide whether (he/she/they) (was/were) [an] accomplice[s]. A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. A person is *subject to prosecution* if he or she committed the crime or if:**

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

AND

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

The burden is on the defendant to prove that it is more likely than not that _____ *<insert name[s] of witness[es]>* **(was/were) [an] accomplice[s].**

[An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is present at the scene of a crime, even if he or she knows that a crime [will be committed or] is being committed and does nothing to stop it.]

[A person who lacks criminal intent but who pretends to join in a crime only to detect or prosecute (the person/those) who commit[s] that crime is not an accomplice.]

[A person may be an accomplice even if he or she is not actually prosecuted for the crime.]

[You may not conclude that a child under 14 years old was an accomplice unless you also decide that when the child acted, (he/she) understood:

1. **The nature and effect of the criminal conduct;**

2. **That the conduct was wrongful and forbidden;**

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AND

3. **That (he/she) could be punished for participating in the conduct.]**

You may not convict the defendant of _____ *<insert charged crime[s]>* **based on the (statements/ [or] testimony) of an accomplice alone. You may use the (statements/ [or] testimony) of an accomplice to convict the defendant only if:**

1. **The accomplice's (statements/ [or] testimony) (is/are) supported by other evidence that you believe;**

2. **That supporting evidence is independent of the accomplice's (statements/ [or] testimony);**

AND

3. **That supporting evidence tends to connect the defendant to the commission of the crime[s].**

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime[s], and it does not need to support every fact (about which the witness testified/ [or] mentioned by the witness in the statement). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

[The evidence needed to support the (statements/ [or] testimony) of one accomplice cannot be provided by the (statements/ [or] testimony) of another accomplice.]

Any (statements/ [or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statements/ [or] testimony) the weight you think it deserves after examining it with care and caution and in the light of all the other evidence.

If you decide that _____ *<insert name of witness>* **was not an accomplice, then supporting evidence is not required and you should evaluate (his/her) (statements/ [or] testimony) as you would that of any other witness.**

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BENCH NOTES

Instructional Duty

There is a **sua sponte** duty to instruct on the principles governing the law of accomplices, including the need for corroboration, if the evidence at trial suggests that a witness could be an accomplice. (*People v. Tobias* (2001) 25 Cal.4th 327, 331; *People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

"Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed." (*People v. Marlow* (Aug. 20, 2004, S011960) __ Cal.4th __, __ .) When the court concludes that the witness is an accomplice as a matter of law or the parties agree about the witness's status as an accomplice, do not give this instruction. Give Instruction 481, Accomplice Testimony: No Dispute Whether Witness Is Accomplice.

When the witness is a codefendant whose testimony includes incriminating statements, the court **should not** instruct that the witness is an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555.) Instead, the court should give this instruction, informing the jury that it must decide whether the testifying codefendant is an accomplice. In addition, the court should instruct that when the jury considers this testimony as it relates to the testifying codefendant's defense, the jury should evaluate the testimony using the general rules of credibility, but if the jury considers testimony as incriminating evidence against the non-testifying codefendant, the testimony must be corroborated and should be viewed with caution. (See *People v. Marlow* (Aug. 20, 2004, S011960) __ Cal.4th __, __.)

Give the bracketed paragraph that begins with "A person who lacks criminal intent" when the evidence suggests that the witness did not share the defendant's specific criminal intent, e.g., witness was an undercover police officer or an unwitting assistant.

Give the bracketed paragraph that begins with "You may not conclude that a child under 14 years old" on request if the defendant claims that a child witness's testimony must be corroborated because the child acted as an accomplice. (Pen. Code, § 26; *People v. Williams* (1936) 12 Cal.App.2d 207, 209.)

AUTHORITY

Instructional Requirements ▸ Pen. Code, § 1111; *People v. Guiuan* (1998) 18 Cal.4th 558, 569.

Accomplice May Not Provide Sole Basis for Admission of Other Evidence ▸ *People v. Bowley* (1963) 59 Cal.2d 855, 863.

Consideration of Incriminating Testimony ▸ *People v. Guiuan* (1998) 18 Cal.4th 558, 569.

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Defendant's Burden of Proof ▸ *People v. Belton* (1979) 23 Cal.3d 516, 523.
Defense Admissions May Provide Necessary Corroboration ▸ *People v. Williams* (1997) 16 Cal.4th 635, 680.
Accomplice Includes Coperpetrator ▸ *People v. Felton* (Sept. 15, 2004, E033333) __ Cal.App.4th __, __ (DECISION NOT FINAL).
Definition of Accomplice as Aider and Abettor ▸ *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91.
Extent of Corroboration Required ▸ *People v. Szeto* (1981) 29 Cal.3d 20, 27.
One Accomplice May Not Corroborate Another ▸ *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15.
Presence or Knowledge Insufficient ▸ *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911.
Testimony of Feigned Accomplice Need Not Be Corroborated ▸ *People v. Salazar* (1962) 201 Cal.App.2d 284, 287; but see *People v. Brocklehurst* (1971) 14 Cal.App.3d 473, 476; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193.
Uncorroborated Accomplice Testimony May Establish Corpus Delicti ▸ *People v. Williams* (1988) 45 Cal.3d 1268, 1317.
Witness an Accomplice as a Matter of Law ▸ *People v. Williams* (1997) 16 Cal.4th 635, 679.

3 Witkin, Cal. Evidence (4th ed. 2003) Presentation, §§ 98, 99, 105.

RELATED ISSUES

Incest With a Minor

Accomplice instructions are not appropriate in a trial for incest with a minor. A minor is a victim, not an accomplice, to incest. (*People v. Tobias* (2001) 25 Cal.4th 327, 334; see Instruction 1255, Incest With a Minor.)

Liable to Prosecution When Crime Committed

The test for determining if a witness is an accomplice is not whether that person is subject to trial when he or she testifies, but whether he or she was liable to prosecution for the same offense at the time the acts were committed. (*People v. Gordon* (1973) 10 Cal.3d 460, 469.) However, the fact that a witness was charged for the same crime and then granted immunity does not necessarily establish that he or she is an accomplice. (*People v. Stankewitz* (1950) 51 Cal.3d 72, 90.)

Threats and Fear of Bodily Harm

A person who is induced by threats and fear of bodily harm to participate in a crime is not an accomplice. (*People v. Brown* (1970) 6 Cal.App.3d 619, 624; *People v. Perez* (1973) 9 Cal.3d 651, 659–660.)

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STAFF NOTES

Corroboration of Accomplice Testimony

Corroboration of accomplice testimony is required by Penal Code section 1111:

A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

Definition of Accomplice

The Supreme Court relied on authority defining aiders and abettors in defining an accomplice:

> This . . . definition encompasses all principals to the crime (citations omitted), including aiders and abettors and coconspirators. (citations omitted.) . . . The fact that a witness has been charged or held to answer for the same crimes as the defendant and then has been granted immunity does not necessarily establish that he or she is an accomplice. Nor is an individual's presence at the scene of a crime or failure to prevent its commission sufficient to establish aiding and abetting. Indeed, as we explained in *People v. Beeman*, (citation omitted), 'the weight of authority and sound law requires proof that an aider and abettor act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of the offense. (citations omitted).

People v. Stankewitz (1990) 51 Cal.3d 72, 90-91.

Burden of Proof

In order to establish that an individual is an accomplice, a defendant bears the burden of both producing evidence raising that issue and of proving the accomplice status by a preponderance of the evidence.

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People v. Belton (1979) 23 Cal.3d 516, 523.

Sufficiency of Corroboration

It is well-settled that the corroborative evidence need only "tend to connect" the defendant to the charged crime. The Supreme Court discussed this requirement at length in *People v. Szeto* (1981) 29 Cal.3d 20, 27 (all citations omitted):

To corroborate the testimony of an accomplice, the prosecution must produce independent evidence which, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged. 'The evidence need not corroborate the accomplice as to every fact to which he testifies but is sufficient if it does not require interpretation and direction from the testimony of the accomplice yet tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth; it must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient itself to establish every element of the offense charged.' 'Although the corroborating evidence must do more than raise a conjecture or suspicion of guilt, it is sufficient if it tends in some degree to implicate the defendant.' '[T]he corroborative evidence may be slight and entitled to little consideration when standing alone.

Independent evidence the defendants were in possession of property stolen during the crime is sufficient to corroborate an accomplice's testimony, as held in *People v. Narvaez* (2002, D037469) __ Cal.App.4th __:

[Defendants] contend that evidence of possession of stolen property is insufficient to corroborate an accomplice's testimony because such evidence itself needs corroboration to prove a defendant's guilt. . . . [T]he defendant's position is without merit. It is established that "the possession of recently stolen property is sufficient to support corroboration for an

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accomplice's testimony." . . . Moreover, the reason for the rule requiring corroboration before evidence of possession of stolen property can raise an inference that the possessor is guilty of theft, is markedly different from the reason corroboration is required for accomplice testimony. . . . The evidence that the defendants were in possession of the stolen jewelry is direct physical evidence that does not rely on witness credibility. Thus, there is no taint of improper motive.

A Witness Who Is An Accomplice As a Matter of Law

[A] court can decide as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness's criminal culpability are 'clear and undisputed." (citations omitted)

People v. Williams (1997) 16 Cal.4th 635, 679.

It is error to give the jury the option of determining whether a witness is an accomplice when that witness is an accomplice as a matter of law. *People v. Robinson* (1964) 61 Cal.2d 373, 44.

Cautionary Instruction Applies Only To Incriminating Evidence

> We . . . agree that the trial court should not be required to parse the testimony of an accomplice to determine whether it may be construed as "favorable" or "unfavorable" to the defendant. For that reason, we disapprove *People v. Graham* (citation omitted) to the extent it so requires. Instead, to avoid the burden on the trial court of such a requirement, and eliminate the potential for "mischief," we conclude . . . that the instruction concerning accomplice testimony should henceforth refer only to testimony that tends to incriminate the defendant. The present instruction admonishes the jury to view such accomplice testimony "with distrust," explaining that it should view such testimony "with care and caution" in light of all the evidence. We conclude that the phrase "care and caution" better articulates the proper approach to be taken by the jury to such evidence. Accordingly, we conclude that the jury should be instructed to the following effect whenever an accomplice, or a witness who might be determined by the jury to be an accomplice, testifies: "To the extent an accomplice gives testimony that tends to incriminate the defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should

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give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in the case."

People v. Guiuan (1998) 18 Cal.4th 558, 569.

A Witness Who Does Not Share Defendant's Specific Criminal Intent Is Not An Accomplice

The California courts have repeatedly held that one who feigns complicity in the commission of a crime for the purpose of detecting and prosecuting the perpetrator thereof is not an accomplice, and his testimony need not be corroborated.

People v. Salazar (1962) 201 Cal.App.2d 284, 287.

An Accomplice May Not Corroborate Another Accomplice

This rule is so well-settled that courts routinely apply it without expressly stating it. One example is *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15, which tacitly approved the rule by acknowledging that an instruction to that effect was sufficient in the context of that case:

Applied to the facts of this particular case, the instruction given by the court charged the jury in effect that testimony of an accomplice could not be corroborated by that of another accomplice and rendered further instruction on the point unnecessary.

Accomplice Under the Age of 14

Penal Code Section 26 states that children under the age of 14 are not capable of committing a crime "[i]n the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness."

In *People v. Williams* (1936) 12 Cal.App.2d 207, 209, the Court of Appeal articulated the factors to consider in evaluating whether a child understood he had committed a "wrongful" act:

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[T]o justify the legal conclusion that the child was an accomplice of the defendant in the action, the "proof" must have been "clear" not only that the child understood the "nature and effect" of the act that constituted the offense; that the act was "forbidden"; that if he were to commit it, he would be punished; [and] . . . he must have been conscious at the time that "within the meaning obviously intended by the code", he was committing a "wrongful" act. (citations omitted)

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481. Accomplice Testimony: No Dispute Whether Witness Is Accomplice

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If the crime[s] of _____ *<insert charged crime[s]>* **(was/were) committed, then _____** *<insert name[s] of witness[es]>* **(was/were) [an] accomplice[s] to (that/those) crime[s].**

You may not convict the defendant of _____ *<insert crime[s]>* **based on the (statements/ [or] testimony) of an accomplice alone. You may use the (statements/ [or] testimony) of an accomplice to convict the defendant only if:**

1. **The accomplice's (statements/ [or] testimony) (is/are) supported by other evidence that you believe;**

2. **That supporting evidence is independent of the accomplice's (statements/ [or] testimony);**

AND

3. **That supporting evidence tends to connect the defendant to the commission of the crime[s].**

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact about which the witness testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

[The evidence needed to support the (statements/ [or] testimony) of one accomplice cannot be provided by the (statements/ [or] testimony) of another accomplice.]

Any (statements/ [or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statements/ [or] testimony) the weight you think it deserves after examining it with care and caution and in the light of all the other evidence.

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BENCH NOTES

Instructional Duty

There is a **sua sponte** duty to instruct on the principles governing the law of accomplices, including the need for corroboration, if the evidence at trial suggests that a witness could be an accomplice. (*People v. Tobias* (2001) 25 Cal.4th 327, 331.)

"Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed." (*People v. Marlow* (Aug. 20, 2004, S011960) __ Cal.4th __, __ .) Give this instruction only if the court concludes that the witness is an accomplice as a matter of law or the parties agree about the witness's status as an accomplice. (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1161 [only give instruction " 'if undisputed evidence established the complicity' "].) If there is a dispute about whether the witness is an accomplice, give Instruction 480, Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice.

When the witness is a codefendant whose testimony includes incriminating statements, the court **should not** instruct that the witness is an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555.) Instead, the court should give this instruction, informing the jury that it must decide whether the testifying codefendant is an accomplice. In addition, the court should instruct that when the jury considers this testimony as it relates to the testifying codefendant's defense, the jury should evaluate the testimony using the general rules of credibility, but if the jury considers testimony as incriminating evidence against the non-testifying codefendant, the testimony must be corroborated and should be viewed with caution. (See *People v. Marlow* (Aug. 20, 2004, S011960) __ Cal.4th __, __.)

AUTHORITY

Instructional Requirements ▸ Pen. Code, § 1111; *People v. Guiuan* (1998) 18 Cal.4th 558, 569.

Accomplice May Not Provide Sole Basis for Admission of Other Evidence ▸ *People v. Bowley* (1963) 59 Cal.2d 855, 863.

Consideration of Incriminating Testimony ▸ *People v. Guiuan* (1998) 18 Cal.4th 558, 569.

Defense Admissions May Provide Necessary Corroboration ▸ *People v. Williams* (1997) 16 Cal.4th 635, 680.

Definition of Accomplice as Aider and Abettor ▸ *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91.

Extent of Corroboration Required ▸ *People v. Szeto* (1981) 29 Cal.3d 20, 27.

One Accomplice May Not Corroborate Another ▸ *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15.

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Presence or Knowledge Insufficient ▸ *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911.

Testimony of Feigned Accomplice Need Not Be Corroborated ▸ *People v. Salazar* (1962) 201 Cal.App.2d 284, 287; but see *People v. Brocklehurst* (1971) 14 Cal.App.3d 473, 476; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193.

Uncorroborated Accomplice Testimony May Establish Corpus Delicti ▸ *People v. Williams* (1988) 45 Cal.3d 1268, 1317.

Witness an Accomplice as a Matter of Law ▸ *People v. Williams* (1997) 16 Cal.4th 635, 679.

3 Witkin, Cal. Evidence (4th ed. 2003) Presentation, §§ 98, 99, 105.

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STAFF NOTES

Corroboration of Accomplice Testimony

Corroboration of accomplice testimony is required by Penal Code section 1111:

A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

Sufficiency of Corroboration

It is well-settled that the corroborative evidence need only "tend to connect" the defendant to the charged crime. The Supreme Court discussed this requirement at length in *People v. Szeto* (1981) 29 Cal.3d 20, 27 (all citations omitted):

To corroborate the testimony of an accomplice, the prosecution must produce independent evidence which, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged. 'The evidence need not corroborate the accomplice as to every fact to which he testifies but is sufficient if it does not require interpretation and direction from the testimony of the accomplice yet tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth; it must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient itself to establish every element of the offense charged.' 'Although the corroborating evidence must do more than raise a conjecture or suspicion of guilt, it is sufficient if it tends in some degree to implicate the

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defendant.' '[T]he corroborative evidence may be slight and entitled to little consideration when standing alone.

Independent evidence the defendants were in possession of property stolen during the crime is sufficient to corroborate an accomplice's testimony, as held in *People v. Narvaez* (2002, D037469) __ Cal.App.4th __:

[Defendants] contend that evidence of possession of stolen property is insufficient to corroborate an accomplice's testimony because such evidence itself needs corroboration to prove a defendant's guilt. . . . [T]he defendant's position is without merit. It is established that "the possession of recently stolen property is sufficient to support corroboration for an accomplice's testimony." . . . Moreover, the reason for the rule requiring corroboration before evidence of possession of stolen property can raise an inference that the possessor is guilty of theft, is markedly different from the reason corroboration is required for accomplice testimony. . . . The evidence that the defendants were in possession of the stolen jewelry is direct physical evidence that does not rely on witness credibility. Thus, there is no taint of improper motive.

A Witness Who Is An Accomplice As a Matter of Law

[A] court can decide as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness's criminal culpability are 'clear and undisputed." (citations omitted)

People v. Williams (1997) 16 Cal.4th 635, 679.

It is error to give the jury the option of determining whether a witness is an accomplice when that witness is an accomplice as a matter of law. *People v. Robinson* (1964) 61 Cal.2d 373, 44.

Cautionary Instruction Applies Only To Incriminating Evidence

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> We . . . agree that the trial court should not be required to parse the testimony of an accomplice to determine whether it may be construed as "favorable" or "unfavorable" to the defendant. For that reason, we disapprove *People v. Graham* (citation omitted) to the extent it so requires. Instead, to avoid the burden on the trial court of such a requirement, and eliminate the potential for "mischief," we conclude . . . that the instruction concerning accomplice testimony should henceforth refer only to testimony that tends to incriminate the defendant. The present instruction admonishes the jury to view such accomplice testimony "with distrust," explaining that it should view such testimony "with care and caution" in light of all the evidence. We conclude that the phrase "care and caution" better articulates the proper approach to be taken by the jury to such evidence. Accordingly, we conclude that the jury should be instructed to the following effect whenever an accomplice, or a witness who might be determined by the jury to be an accomplice, testifies: "To the extent an accomplice gives testimony that tends to incriminate the defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in the case."

People v. Guiuan (1998) 18 Cal.4th 558, 569.

An Accomplice May Not Corroborate Another Accomplice

This rule is so well-settled that courts routinely apply it without expressly stating it. One example is *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15, which tacitly approved the rule by acknowledging that an instruction to that effect was sufficient in the context of that case:

> **Applied to the facts of this particular case, the instruction given by the court charged the jury in effect that testimony of an accomplice could not be corroborated by that of another accomplice and rendered further instruction on the point unnecessary.**

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510. Aiding and Abetting: Intoxication

If you conclude that the defendant was intoxicated, you may consider this evidence in deciding whether the defendant:

A. Knew that _____ *<insert name of perpetrator>* **intended to commit _____** *<insert target offense>***;**

AND

B. Intended to aid and abet _____ *<insert name of perpetrator>* **in committing _____** *<insert target offense>***.**

Someone is *intoxicated* if he or she (took[,]/ [or] used[,]/[or] was given) any drug, drink, or other substance that caused an intoxicating effect.

[Do not consider evidence of intoxication in deciding whether _____ *<insert charged nontarget offense>* **is a natural and probable consequence of _____** *<insert target offense>***.]**

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to instruct on voluntary intoxication; however, the trial court must give this instruction on request. (See *People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432; *People v. Castillo* (1997) 16 Cal.4th 1009, 1014; *People v. Saille* (1991) 54 Cal.3d 1103, 1119 [in context not involving aiding and abetting].) Although voluntary intoxication is not an affirmative defense to a crime, the jury may consider evidence of voluntary or involuntary intoxication and its effect on a defendant's ability to form specific mental states. (Pen. Code, §§ 22, 26; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131–1134; *People v. Scott* (1983) 146 Cal.App.3d 823, 832.)

Give the last bracketed paragraph on request if the defendant was charged with both target and nontarget crimes. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1134.)

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Related Instructions
See Instructions 650, Voluntary Intoxication, and 651, Involuntary Intoxication.

AUTHORTIY

Instructional Requirements ▸ Pen. Code, § 22; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131–1134; see *People v. Castillo* (1997) 16 Cal.4th 1009, 1014; *People v. Saille* (1991) 54 Cal.3d 1103, 1119 [in context other than aiding and abetting].
Burden of Proof ▸ See *People v. Saille* (1991) 54 Cal.3d 1103, 1106 [in context other than aiding and abetting].

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, §§ 26–30.

RELATED ISSUES

Intoxication Based on Mistake of Fact Is Involuntary
Intoxication resulting from trickery is not "voluntary." (*People v. Scott* (1983) 146 Cal.App.3d 823, 831–833 [defendant drank punch not knowing it contained hallucinogens; court held his intoxication was result of trickery and mistake and involuntary].)

Unconsciousness Based on Voluntary Intoxication Is Not a Complete Defense
Unconsciousness is typically a complete defense to a crime except when it is caused by voluntary intoxication. (*People v. Heffington* (1973) 32 Cal.App.3d 1, 8.) Unconsciousness caused by voluntary intoxication is governed by Penal Code section 22, rather than by section 26, and is only a partial defense to a crime. (*People v. Walker* (1993) 14 Cal.App.4th 1615, 1621 [no error in refusing to instruct on unconsciousness when defendant was voluntarily under the influence of drugs at the time of the crime].)

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STAFF NOTES

Availability of Defense

The court in *People v. Mendoza* (1998) 18 Cal.4th 1114, 1126, 1129, 1131, decided "whether [Penal Code] section 22 permits defendants tried as aiders and abettors to present, and the jury to consider, evidence of intoxication on the question whether they had the requisite mental states of knowledge and intent" [original italics]:

> The intent requirement for an aider and abettor fits within the *Hood* definition of specific intent. To be culpable, an aider and abettor must intend not only the act of encouraging and facilitating but also the *additional* criminal act the perpetrator commits. . . . Unlike the act of the direct perpetrator, the act of the aider and abettor is not inherently criminal. Indeed, the aider and abettor's act may be, and often is, innocuous when divorced from the culpable mental state. . . . *Awareness* of the direct perpetrator's purpose is critical for the alleged aider and abettor to be culpable for that perpetrator's act. . . . For these reasons, we conclude that the intent requirement for aiding and abetting liability is a "required specific intent" for which evidence of voluntary intoxication is admissible under section 22.

Penal Code section 22 provides:

(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act.

> (b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought .
>
> (c) Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor, drug, or other substance.

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Mendoza held that "the jury may consider intoxication on both the defendant's knowledge and intent" (*id.* at p. 1131):

> [A]lthough knowledge "may not fall literally within the *Hood* formulation of specific intent, the element [of aiding and abetting liability] that requires that the defendant act with knowledge of [the perpetrator's criminal intent] is closely akin to *Hood's* definition of specific intent . . .."

Mendoza also held that "the jury could consider intoxication in deciding the defendant's guilt as an aider and abettor on *all* the charged crimes," not just on "charged crimes that require the *perpetrator* to have a specific intent" (*id.* at pp. 1131–1132, original italics):

The mental state required for an aider and abettor is the same for all crimes and is independent of the perpetrator's mental state. The aider and abettor must specifically intend to aid the perpetrator, whether the intended crime itself requires a general or specific intent on the part of the perpetrator.

The instruction above and its accompanying notes are based in part on instruction 650, Voluntary Intoxication.

Use of Intoxication Evidence

The court in *Mendoza* emphasized the narrowness of its holding (*id.* at p. 1133, original italics):

> Defendants may present evidence of intoxication solely on the question whether they are liable for criminal acts as aiders and abettors. Once a jury finds a defendant did knowingly and intentionally aid and abet a criminal act, intoxication evidence is irrelevant to the *extent* of the criminal liability. A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime but also of any other crime the perpetrator actually commits that is a natural and probable consequence of the intended. . . . Intoxication is irrelevant in deciding what is reasonably foreseeable.

Suggested Instructional Language

Mendoza suggested how the trial court might instruct on intoxication (*id.* at p. 1134):

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If the court gives any instruction at all on the relevance of intoxication (*People v. Castillo, supra,* 16 Cal.4th at p. 1014 [no sua sponte duty to instruct on intoxication]), it might simply instruct that the jury may consider intoxication in determining whether a defendant tried as an aider and abettor had the required mental state. It might also instruct that the intoxication evidence is irrelevant on the question whether a charged crime was a natural and probable consequence of the target crime. The court would not additionally be required to parse out those elements of each crime charged for which the evidence could be considered or distinguish between the knowledge and the intent requirements.

***Castillo,* 16 Cal.4th at p. 1014, provided:**

In *Saille,* we explained that, with the abolition of diminished capacity as a defense, "Intoxication is now relevant only to the extent that it bears on the question of whether the defendant actually had the requisite specific mental state." [Citation omitted.] An instruction relating intoxication to any mental state is therefore "now more like the 'pinpoint' instructions" that "are not required to be given sua sponte." (*Ibid*.) Under *Saille,* therefore, the court did not have a sua sponte duty to give *any* instruction on the relevance of intoxication, any more than it had to instruct on the relevance of other evidence. In the absence of instructions, defense counsel could simply argue that defendant did not actually have the necessary mental state due to his intoxication, just as counsel could argue any other inferences from the evidence.

The instruction above, however, separately lists the knowledge and intent requirements to conform to the mental state elements in instruction 501, Aiding and Abetting: Intended Crimes. Instruction 650, Voluntary

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Intoxication, also provides blanks for listing specific mental states. Setting out the elements of the mental state guides the jury on how to weigh evidence of involuntary intoxication in the context of aiding and abetting. *<Alternatively, the second sentence of the first paragraph of the instruction could track the first sentence of the Mendoza quote immediately above, saying "If you conclude that the defendant was voluntarily intoxicated, you may consider this evidence in determining whether the defendant had the required mental state for aiding and abetting.">*

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1275. Evidence of Uncharged Sex Offense

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

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

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

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

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

BENCH NOTES

Instructional Duty

The court must give this instruction on request when evidence of other sexual offenses has been introduced. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924 [error to refuse limiting instruction on request]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1317–1318 [in context of prior acts of domestic violence]; but

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see *CJER Mandatory Criminal Jury Instructions Handbook* (CJER 10th ed. 2001) Sua Sponte Instructions, § 2.109, pp. 87–88 [included without comment within sua sponte instructions]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1067 [general limiting instructions should be given when evidence of past offenses would be highly prejudicial without them].)

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

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

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

Related Instructions

Instruction 360, Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.
Instruction 932, Evidence of Uncharged Domestic Violence.
Instruction 933, Evidence of Uncharged Elder or Dependent Adult Abuse.

AUTHORITY

Instructional Requirement ▸ Evid. Code, § 1108(a); see *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1016; *People v. Frazier* (2001) 89 Cal.App.4th 30, 37; *People v. Falsetta* (1999) 21 Cal.4th 903, 923–924 [dictum].
Sexual Offense Defined ▸ Evid. Code, § 1108(d)(1).
Other Crimes Proved by Preponderance of Evidence ▸ *People v. Carpenter* (1997) 15 Cal.4th 312, 382; *People v. James* (2000) 81 Cal.App.4th 1343, 1359; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 146.
Propensity Evidence Alone Is Not Sufficient to Support Conviction Beyond a Reasonable Doubt ▸ *People v. Hill* (2001) 86 Cal.App.4th 273, 277–278; see *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [in context of prior acts of domestic violence]; *People v. James* (2000) 81 Cal.App.4th 1343, 1357–1358, fn. 8 [same].

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1 Witkin, Cal. Evidence (4th ed. 2003) Circumstantial Evidence, §§ 96–97.

COMMENTARY

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

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

RELATED ISSUES

Constitutional Challenges

Evidence Code section 1108 does not violate a defendant's rights to due process (*People v. Falsetta* (1999) 21 Cal.4th 903, 915–922; *People v. Branch* (2001) 91 Cal.App.4th 274, 281; *People v. Fitch* (1997) 55 Cal.App.4th 172,

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184) or equal protection (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310–1313; *People v. Fitch, supra,* 55 Cal.App.4th at pp. 184–185).

Expert Testimony

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

Rebuttal Evidence

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

Subsequent Offenses Admissible

"[E]vidence of subsequently committed sexual offenses may be admitted pursuant to Evidence Code section 1108." (*People v. Medina* (2004) 114 Cal.App.4th 897, 903.)

Evidence of Acquittal

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

See also the Related Issues section of Instruction 360, Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.

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STAFF NOTES

Evidence of Disposition to Commit Sexual Offenses

Evidence Code section 1101 establishes the general rule that character evidence, including evidence of specific instances of conduct, is not admissible to prove conduct, except as provided in section 1108 and related sections:

> (a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

Evidence Code section 1108(a) establishes an exception to section 1101 for evidence of a defendant's other sexual offenses:

> (a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.

Evidence of prior sexual offenses is now admissible to prove identity or any other relevant purpose, as discussed in *People v. Britt* (2002) 104 Cal.App.4th 500, 505, 506, petition for review filed Jan. 17, 2003:

> By removing the restriction on character evidence in [Evidence Code] section 1101, section 1108 now "permit[s] the jury in sex offense … cases to consider evidence of prior offenses *for any relevant purpose*" [citation omitted], subject only to the prejudicial effect versus probative value weighing process required by section 352. . . . Thus, in a sex crime prosecution, the [*Ewoldt*] "signature test" is no longer the yardstick for admission of uncharged sexual misconduct to prove identity.

The instruction includes "inclined" and "likely" as synonyms for "disposed." Evidence of sexual offenses other than the offense charged has also been called "propensity" or "predilection" evidence. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 911, 915.)

Validity of CALJIC Instructions

The Supreme Court in *People v. Reliford* 29 Cal.4th 1007, 1012–1016, held that CALJIC No. 2.50.01 (1999 rev.) correctly states the law when evidence of prior sexual offenses is admitted under Evidence Code section 1108:

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> [W]e conclude that the *Falsetta* dictum was correct and that the 1999 version of CALJIC No. 2.50.01 correctly states the law. . . . The first part of the instruction permits jurors to infer the defendant has a disposition to commit sex crimes from evidence the defendant has committed other sex offenses. The inference is a reasonable one. . . . The instruction next informs the jurors they may--but are not required to--infer from this predisposition that the defendant was likely to commit and did commit the charged offense. This, again, is a legitimate inference.

Reliford recognized improvements to No. 2.50.01 after 1999:

> Although we find no constitutional error in the 1999 version of the instruction, we nonetheless recognize it could be improved. The 2002 revision to CALJIC No. 2.50.01 deletes the sentence, "The weight and significance of the evidence, if any, are for you to decide" and inserts an additional cautionary statement: "If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime." Without passing on issues not before us . . . we think the new sentence is an improvement.

Alternative Language from *James*

In *People v. James, supra,* 81 Cal.App.4th at p. 1357, fn. 8 [dictum], Justice Parrilli suggests improvements to the parallel instruction regarding evidence of prior domestic violence:

> We believe an instruction in general terms would be more appropriate, leaving particular inferences for the argument of counsel and the jury's common sense. At a minimum, deleting the words "and did commit" from the standard instruction would remedy many of the concerns addressed above. Using the facts of our case to determine selection of gender and singular/plural references, and assuming no complications arising from the different burdens of proof currently prescribed by CALJIC Nos. 2.01 and 2.50.1 . . ., we suggest the following instruction:
>
> > “You've heard testimony about other offenses involving domestic violence that are not charged in this case. I will refer to those as 'uncharged offenses' because they are not charged in this case. Before you can consider evidence of any uncharged offense, you must be satisfied by a preponderance of the

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evidence that the defendant committed that offense. If you are not satisfied by a preponderance of the evidence, you may not use that evidence for any purpose, and must disregard it entirely.

"If you conclude the defendant committed an uncharged offense, you may consider that evidence and weigh it together with any other evidence received during the trial to help you determine whether the defendant is guilty of the charged crime. The weight and significance of any evidence are for you to decide. However, if you find the defendant committed any or all of the uncharged offenses, that is not sufficient, by itself, to prove he committed the charged crime. You may not find the defendant guilty unless you are satisfied that each element of the charged crime has been proven beyond a reasonable doubt."

Sexual Offenses Defined

Evidence Code section 1108(d)(1) <as amended by Stats. 2002, chs. 194 & 828> defines "sexual offense":

(d) As used in this section, the following definitions shall apply:

(1) "Sexual offense" means a crime under the law of a state or of the United States that involved any of the following:

(A) Any conduct proscribed by Section 243.4, 261, 261.5, 262, 264.1, 266c, 269, 286, 288, 288a, 288.2, 288.5, or 289, or subdivision (b), (c), or (d) of Section 311.2 or Section 311.3, 311.4, 311.10, 311.11, 314, or 647.6, of the Penal Code.

(B) Any conduct proscribed by Section 220 of the Penal Code, except assault with intent to commit mayhem.

(C) Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person.

(D) Contact, without consent, between the genitals or anus of the defendant and any part of another person's body.

(E) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person.

(F) An attempt or conspiracy to engage in conduct described in this paragraph.

Consent Defined

Evidence Code section 1108(d)(2) defines "consent":

(d) As used in this section, the following definitions shall apply:

(2) "Consent" shall have the same meaning as provided in Section 261.6

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> of the Penal Code, except that it does not include consent which is legally ineffective because of the age, mental disorder, or developmental or physical disability of the victim.

Admission Under Other Code Sections

Evidence Code section 1108(a) does not limit admission of evidence pursuant to any other provision of the Evidence Code, as stated in section 1108(c):

> (c) This section shall not be construed to limit the admission or consideration of evidence under any other section of this code.

Thus, evidence of other crimes may be admitted to prove a fact such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented, other than a disposition to commit the act. (Evid. Code, § 1101(b).)

The court must weigh admission of prior offenses against the possibility of undue prejudice or confusion under Evidence Code section 352, as discussed in *People v. Pierce* (2002) 104 Cal.App.4th 893, 900:

> Before admitting propensity evidence of a prior sex offense, the court "must engage in a careful weighing process under section 352." (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 917.) It must consider factors including relevance, similarity to the charged offense, the certainty of commission, remoteness, and the likelihood of distracting or inflaming the jury. (*Ibid*.)

Pretrial Disclosure

The prosecution must disclose propensity evidence before trial, as set forth in Evidence Code section 1108(b) [as amended by Stats. 2002, ch. 828, § 1]:

> (b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered in compliance with the provisions of Section 1054.7 of the Penal Code.

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Legislative History of Section 1108

The Assembly Journal for the 1995-96 Regular Session, p. 3277, contains the following letter from Assembly Member Rogan, dated Aug. 24, 1995, regarding A.B. 882 (Stats.1995, ch. 439), which enacted Evidence Code section 1108 [pertinent language highlighted]:

> This letter clarifies the intent of AB 882, which I authored. The bill concerns the admissibility in sexual offense cases of evidence that the defendant has committed another sexual offense or offenses.
>
> AB 882 is modeled on Rules 413-15 of the Federal Rules of Evidence, and adapts the principle of these rules to the framework of California law. A number of statements were generated in the legislative history of the federal rules that can be consulted and relied on for explanation concerning the background, rationale, and effect of this reform. [Citations omitted].
>
> . . .
>
> During the hearing before the Assembly Committee on Public Safety, the language of the new S[ection] 1108 of the Evidence Code was amended to provide explicitly that evidence of other offenses within the scope of the section is not subject to S[ection] 1101's prohibition of evidence of character or disposition. This makes it clear that S[ection] 1108 permits courts to admit such evidence on a common sense basis--without a precondition of finding a 'non-character' purpose for which it is relevant--and permits rational assessment by juries of evidence so admitted. This includes consideration of the other sexual offenses as evidence of the defendant's disposition to commit such crimes, and for its bearing on the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense.
>
> . . .
>
> During the hearing before the Senate Committee on Judiciary, an amendment was adopted to provide explicitly that Evidence Code S[ection] 352 remains applicable to evidence offered under the new S[ection] 1108. While S[ection] 1108 explicitly supersedes S[ection] 1101's prohibition of evidence of character or disposition within its scope of application, it does not supersede other provisions of the Evidence Code, such as normal restrictions in hearsay and the court's authority to exclude evidence presenting an overriding likelihood of prejudice under S[ection] 352. [Citations omitted.]
>
> The amendment adopted at the Judiciary Committee hearing simply makes this point explicit in relation to S[ection] 352. The reform does, however,

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affect the practical operation of S[ection] 352 balancing, because admission and consideration of evidence of other sexual offenses to show character or disposition would be no longer treated as intrinsically prejudicial or impermissible. Hence, evidence offered under S[ection] 1108 could not be excluded on the basis of S[ection] 352 unless 'the probability that its admission will ... create substantial danger of undue prejudice' (or other adverse effects identified in S[ection] 352) substantially outweighed its probative value concerning the defendant's disposition to commit the sexual offense or offenses with which he is charged and other matters relevant to the determination of the charge. As with other forms of relevant evidence that are not subject to any exclusionary principle, the presumption will be in favor of admission.

At the hearing before the Judiciary Committee, there was discussion whether more exacting requirements of similarity between the charged offense and the defendant's other offenses should be imposed. The decision was against making such a change, because doing so would tend to reintroduce the excessive requirements of specific similarity under prior law which AB 882 is designed to overcome, see Lungren, supra, at 14, and could often prevent the admission and consideration of evidence of other sexual offenses in circumstances where it is rationally probative. Many sex offenders are not 'specialists', and commit a variety of offenses which differ in specific character."

Instruction Number

Instruction 1275 is grouped with the sex offense instructions. If it stays in this category, consider moving instruction 339, Consent: Prior Sexual Intercourse, to the 1270 series.

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

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

<Introductory Sentence Alternative B—evidence of other act admitted>
[The People presented evidence that the defendant _____ *<insert description of alleged conduct admitted under Evid. Code, § 1101(b)>***.]**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

BENCH NOTES

Instructional Duty
The court must give this instruction on request when evidence of other offenses has been introduced. (Evid. Code, § 1101(b); *People v. Carpenter* (1997) 15 Cal.4th 312, 382; *People v. Collie* (1981) 30 Cal.3d 43, 63–64.) The court is only

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required to give this instruction **sua sponte** in the "occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose." (*People v. Collie, supra,* 30 Cal.3d at pp. 63–64.)

Do not give this instruction in the penalty phase of a capital case. (See Instruction 703DP, Death Penalty: Evidence of Other Violent Crimes.)

*If evidence of uncharged conduct is admitted **only** under Evidence Code section 1108 or 1109, **do not** give this instruction. (See Instructions 1275, Evidence of Uncharged Sex Offense; 932, Evidence of Uncharged Domestic Violence; and 933, Evidence of Uncharged Elder or Dependent Adult Abuse.)*

If the court admits evidence of uncharged conduct amounting to a criminal offense, give introductory sentence alternative A and select the words "uncharged offense[s]" where indicated. If the court admits evidence under Evidence Code section 1101(b) that does not constitute a criminal offense, give introductory sentence alternative B and select the word "act[s]" where indicated. (*People v. Enos* (1973) 34 Cal.App.3d 25, 42 [evidence tending to show defendant was "casing" a home admitted to prove intent where burglary of another home charged and defendant asserted he was in the second home by accident].)

If the court has admitted evidence that the defendant was convicted of a felony or committed a misdemeanor for the purpose of impeachment in addition to evidence admitted under Evidence Code section 1101(b), then the court must specify for the jury what evidence it may consider under section 1101(b). (*People v. Rollo* (1977) 20 Cal.3d 109, 123, fn. 6 [superseded in part on other grounds as recognized in *People v. Olmedo* (1985) 167 Cal.App.3d 1085, 1096].) In alternative A, insert a description of the uncharged offense allegedly shown by the 1101(b) evidence. If the court has not admitted any felony convictions or misdemeanor conduct for impeachment, then the court may give the alternative "another offense" or "other offenses" without specifying the uncharged offenses.

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

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

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

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

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

AUTHORITY

Evidence Admissible for Limited Purposes ▸ Evid. Code, § 1101(b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393–394; *People v. Balcom* (1994) 7 Cal.4th 414, 422.

Degree of Similarity Required ▸ *People v. Ewoldt* (1994) 7 Cal.4th 380, 402–404; *People v. Balcom* (1994) 7 Cal.4th 414, 424.

Analysis Under Evidence Code Section 352 Required ▸ *People v. Ewoldt* (1994) 7 Cal.4th 380, 404; *People v. Balcom* (1994) 7 Cal.4th 414, 426–427.

Instructional Requirements ▸ *People v. Collie* (1981) 30 Cal.3d 43, 63–64; *People v. Morrison* (1979) 92 Cal.App.3d 787, 790.

Other Crimes Proved by Preponderance of Evidence ▸ *People v. Carpenter* (1997) 15 Cal.4th 312, 382.

Potential Conflict With Circumstantial Evidence Instruction ▸ *People v. James* (2000) 81 Cal.App.4th 1343, 1358–1359.

1 Witkin, Cal. Evidence (4th ed. 2003) Circumstantial Evidence, §§ 74–95.

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RELATED ISSUES

Circumstantial Evidence—Burden of Proof

Evidence of other offenses is circumstantial evidence that the defendant committed the offense charged. (See *People v. James* (2000) 81 Cal.App.4th 1343, 1358, fn. 9.) Courts have recognized a potential conflict between the preponderance standard required to prove uncharged offenses and the reasonable doubt standard required to prove each underlying fact when the case is based primarily on circumstantial evidence. (See *People v. Medina* (1995) 11 Cal.4th 694, 763–764; *People v. James, supra,* 81 Cal.App.4th at p. 1358, fn. 9.) The court must give the general circumstantial evidence instruction (Instruction 300, Circumstantial Evidence) "only when the prosecution relies on circumstantial evidence to prove the defendant's guilt from a pattern of incriminating circumstances, not when circumstantial evidence serves solely to corroborate direct evidence." (*People v. James, supra,* 81 Cal.App.4th at p. 1359.) Thus, if evidence of other offenses is offered to corroborate direct evidence that the defendant committed the crime, no conflict exists. However, when the prosecution's case rests substantially or entirely on circumstantial evidence, there will be a conflict between this instruction and Instruction 300. (*People v. James, supra,* 81 Cal.App.4th at p. 1358, fn. 9; *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382, fn. 4; *People v. Jeffries* (2000) 83 Cal.App.4th 15, 23–24, fn. 7.) No case has determined how this conflict should be resolved. If this issue arises in a particular case, the court should consider the authorities cited and determine whether it is necessary to modify this instruction. (*People v. Younger, supra,* 84 Cal.App.4th at p. 1382, fn. 4; *People v. Jeffries, supra,* 83 Cal.App.4th at p. 24, fn. 7.)

Issue in Dispute

The "defendant's plea of not guilty does put the elements of the crime in issue for the purpose of deciding the admissibility of evidence of uncharged misconduct, unless the defendant has taken some action to narrow the prosecution's burden of proof." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4; *People v. Rowland* (1992) 4 Cal.4th 238, 260.) The defense may seek to "narrow the prosecution's burden of proof" by stipulating to an issue. (*People v. Bruce* (1989) 208 Cal.App.3d 1099, 1103–1106.) "[T]he prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness." (*People v. Scheid* (1997) 16 Cal.4th 1, 16–17.) However, an offer to stipulate makes the evidence less probative and more cumulative, weighing in favor of exclusion under Evidence Code section 352. (*People v. Thornton* (2000) 85 Cal.App.4th 44, 49 [observing that offer "not to argue" the issue is insufficient].) The court must also consider whether there could

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be a “reasonable dispute” about the issue. (See *People v. Balcom* (1994) 7 Cal.4th 414, 422–423 [evidence of other offense not admissible to show intent to rape because if jury believed witness’s account, intent could not reasonably be disputed]; *People v. Bruce, supra,* 208 Cal.App.3d at pp. 1103–1106 [same].)

Subsequent Offenses Admissible

Evidence of a subsequent as well as a prior offense is admissible. (*People v. Balcom* (1994) 7 Cal.4th 414, 422–423, 425.)

Offenses Not Connected to Defendant

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

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STAFF NOTES

Evid. Code, § 1101:

(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

Ewoldt—Issues On Which Other Offenses May Be Admitted

In the present case, evidence of defendant's prior misconduct is relevant to prove a material fact other than defendant's criminal disposition, because the similarity between the circumstances of the prior acts and the charged offenses supports the inference that defendant committed the charged offenses pursuant to the same design or plan defendant used to commit the uncharged misconduct.

"The presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done." (1A Wigmore, Evidence (Tillers rev. ed. 1983) § 102, p. 1666.) . . . Evidence of a common design or plan, therefore, is not used to prove the defendant's intent or identity but rather to prove that the defendant engaged in the conduct alleged to constitute the charged offense. n2

n2 This distinction, between the use of evidence of uncharged acts to establish the existence of a common design or plan as opposed to the

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> use of such evidence to prove intent or identity, is subtle but significant. Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. "In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it." (2 Wigmore, *supra*, (Chadbourn rev. ed. 1979) § 300, p. 238.) For example, in a prosecution for shoplifting in which it was conceded or assumed that the defendant left the store without paying for certain merchandise, the defendant's uncharged similar acts of theft might be admitted to demonstrate that he or she did not inadvertently neglect to pay for the merchandise, but rather harbored the intent to steal it.
>
> Evidence of a common design or plan is admissible to establish that the defendant committed the *act* alleged. Unlike evidence used to prove intent, where the act is conceded or assumed, "[i]n proving design, the act is still undetermined . . .." (2 Wigmore, *supra*, (Chadbourn rev. ed. 1979) § 300, p. 238.) For example, in a prosecution for shoplifting in which it was conceded or assumed that the defendant was present at the scene of the alleged theft, evidence that the defendant had committed uncharged acts of shoplifting in a markedly similar manner to the charged offense might be admitted to demonstrate that he or she took the merchandise in the manner alleged by the prosecution.
>
> Evidence of *identity* is admissible where it is conceded or assumed that the charged offense was committed by someone, in order to prove that the defendant was the perpetrator. For example, in a prosecution for shoplifting in which it was conceded or assumed that a theft was committed by an unidentified person, evidence that the defendant had committed uncharged acts of shoplifting in the same unusual and distinctive manner as the charged offense might be admitted to establish that the defendant was the perpetrator of the charged offense. (2 Wigmore, *supra*, (Chadbourn rev. ed. 1979) § 410, p. 477.)

(*People v. Ewoldt* (1994) 7 Cal.4th 380, 393–394 [emphasis in original]; see also *People v. Balcom* (1994) 7 Cal.4th 414, 422.)

Ewoldt—Required Similarity for Admissibility

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In determining whether evidence of uncharged misconduct is relevant to demonstrate a common design or plan, it is useful to distinguish the nature and degree of similarity (between uncharged misconduct and the charged offense) required in order to establish a common design or plan, from the degree of similarity necessary to prove intent or identity. n6

n6 In addition to demonstrating the existence of a common design or plan, uncharged conduct may be relevant to establish the following, among other matters: motive [citation], knowledge [citation], intent [citation], and identity [citation]. [End footnote.]

The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] "[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . .." (2 Wigmore, *supra*, (Chadbourn rev. ed. 1979) § 302, p. 241.) In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant " 'probably harbor[ed] the same intent in each instance.' [Citations.]" [Citation.]

A greater degree of similarity is required in order to prove the existence of a common design or plan. As noted above, in establishing a common design or plan, evidence of uncharged misconduct must demonstrate "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (2 Wigmore, *supra*, (Chadbourn rev. ed. 1979) § 304, p. 249, italics omitted.) "[T]he difference between requiring similarity, for acts negativing innocent intent, and requiring common features indicating common design, for acts showing design, is a difference of degree rather than of kind; for to be similar involves having common features, and to have common features is merely to have a high degree of similarity." (at pp. 250-251, italics omitted; see also 1 McCormick, *supra*, § 190, p. 805.)

To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of

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> similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. For example, evidence that a search of the residence of a person suspected of rape produced a written plan to invite the victim to his residence and, once alone, to force her to engage in sexual intercourse would be highly relevant even if the plan lacked originality. In the same manner, evidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense. [Citation.]
>
> The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] "The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature." (1 McCormick, *supra*, § 190, pp. 801-803.)

(*People v. Ewoldt* (1994) 7 Cal.4th 380, 402–403; see also *People v. Balcom* (1994) 7 Cal.4th 414, 424.)

352 Analysis Required

> Evidence of uncharged offenses "is so prejudicial that its admission requires extremely careful analysis. [Citations.]" [Citations.] "Since 'substantial prejudicial effect [is] inherent in [such] evidence,' uncharged offenses are admissible only if they have *substantial* probative value." [Citation.]
>
> Although the evidence of defendant's uncharged criminal conduct in this case is relevant to establish a common design or plan, to be admissible such evidence "must not contravene other policies limiting admission, such as those contained in Evidence Code section 352. [Citations.]" [Citations.]. . .

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> Our holding does not mean that evidence of a defendant's similar uncharged acts that demonstrate the existence of a common design or plan will be admissible in all (or even most) criminal prosecutions. In many cases the prejudicial effect of such evidence would outweigh its probative value, because the evidence would be merely cumulative regarding an issue that was not reasonably subject to dispute. [Citation.] This is so because evidence of a common design or plan is admissible only to establish that the defendant engaged in the conduct alleged to constitute the charged offense, not to prove other matters, such as the defendant's intent or identity as to the charged offense. [Citation.]
>
> For example, in most prosecutions for crimes such as burglary and robbery, it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is whether the defendant was the perpetrator of that crime. Thus, in such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible. Although such evidence is relevant to demonstrate that, assuming the defendant was present at the scene of the crime, the defendant engaged in the conduct alleged to constitute the charged offense, if it is beyond dispute that the alleged crime occurred, such evidence would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value. In ruling upon the admissibility of evidence of uncharged acts, therefore, it is imperative that the trial court determine specifically what the proffered evidence is offered to prove, so that the probative value of the evidence can be evaluated for that purpose.

(*People v. Ewoldt* (1994) 7 Cal.4th 380, 404–406 [emphasis in original]; see also *People v. Balcom* (1994) 7 Cal.4th 414, 422–423, 426–427.)

Preponderance Standard

"[W]e adhere to the preponderance standard and disapprove any language suggesting the clear and convincing evidence standard." (*People v. Carpenter* (1997) 15 Cal.4th 312, 382.)

Potential Conflict with Circumstantial Evidence Instruction

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> In *People v. Medina*, *supra*, 11 Cal. 4th at pages 763-764, our Supreme Court noted the appellant's contention that CALJIC Nos. 2.01 and 2.50.1 are in conflict. However, the *Medina* court did not resolve the tension between the different standards of proof prescribed by the two instructions, observing merely that "special rules" govern the consideration of other crimes evidence. (11 Cal. 4th at p. 764.)
>
> We respectfully suggest the standard of proof rule stated in CALJIC No. 2.01 is an issue worthy of the high court's renewed attention, in view of the increased significance of other crimes evidence under sections 1108 and 1109. As noted in *Medina*, the rule that other crimes may be established by a preponderance is consistent with the general rule that only the ultimate facts are subject to proof beyond a reasonable doubt. [Citations.] Though prior offenses are usually established by direct evidence, a prior offense is itself circumstantial evidence relevant to the charged offense. [Citation.] Thus, CALJIC No. 2.01 would apply to prior offense evidence in some cases. (See the Use Note to CALJIC No. 2.50.1 (1999 rev.) (6th ed. 1996), noting the potential for conflict with CALJIC No. 2.01, and suggesting CALJIC No. 2.01 would control "when the prosecution's evidence is primarily or entirely circumstantial.")

(*People v. James* (2000) 81 Cal.App.4th 1343, 1358, fn. 9.)

> The jury did receive related instructions that created ambiguity. CALJIC No. 2.50.1 instructed the jury to determine whether the prior offenses were proven by a preponderance of the evidence. CALJIC No. 2.01, however, which was required in this case because the prosecution's case was entirely based on circumstantial evidence, told the jury that each fact supporting an inference essential to establish guilt must be proven beyond a reasonable doubt. As explained in *James*, we believe the combination of these instructions is likely to confuse a jury. However, the more fundamental error is allowing the improper inference of guilt from propensity. If a jury is properly instructed that propensity evidence is not a sufficient basis for conviction, the only burden of proof problem is one that favors the defendant--a higher than normal standard of proof for prior crimes evidence in cases resting chiefly on circumstantial evidence. (*James*, *supra*, 81 Cal. App. 4th at pp. 1358-1360, and fn. 9.)

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(*People v. Younger* (2000) 84 Cal.App.4th 1360, 1382, fn. 4.)

> CALJIC Nos. 2.50.1 and 2.50.01 are not contrary to CALJIC No. 2.01. The former instructions provide only that an inference of guilt *may be drawn* from prior offenses that have been proved by a preponderance of evidence. They do *not* suggest that an inference so drawn is *sufficient* for a *finding* of guilt. Contrary to defendant's argument, neither CALJIC No. 2.50.01 nor any other instruction told the jury "that they could *find* that the defendant 'did commit' the charged offenses based on a preponderance of the evidence." (Italics added.) The jury could so *infer*, but it could not rely on that inference to *find* defendant guilty unless it found that the underlying facts had been proved beyond a reasonable doubt. n7
>
> n7 CALJIC No. 2.01 evidently was not given in *People v. Orellano* (2000) 79 Cal. App. 4th 179, which also considered the pre-1999 version of CALJIC No. 2.50.01. In *Orellano*, "the jurors were specifically told they could infer appellant's disposition, and his guilt of the current charges, from his commission of the prior crimes, shown by a mere preponderance of evidence." (79 Cal. App. 4th at p. 186.) In this case, the addition of CALJIC No. 2.01 meant that the jurors could not rely on any such inference to find defendant guilty unless the underlying facts were proved beyond a reasonable doubt.

(*People v. Jeffries* (2000) 83 Cal.App.4th 15, 23–24, fn. 7.)

Do Not Consider as Evidence of Bad Character

> When the evidence of the Marin County crimes was presented, the court instructed the jury to consider it "solely on the matter of the state of mind involved in the commission of the offenses" and not as "evidence of the defendant's character or as any evidence that he is inclined to commit crimes." The court repeated the substance of the instruction at the end of the guilt phase. Defendant contends the court erroneously "did not require the jury to find the necessary foundational facts" that he "acted with an intent to rape and a premeditated and deliberate intent to kill, and that the Santa Cruz crimes were so similar in nature to the Marin crimes that if [defendant] had a specific intent and mental state in the latter, he also had that intent and mental state in the former." No additional instructions, however, were needed.

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(*People v. Carpenter* (1997) 15 Cal.4th 312, 382.)

Instructional Requirements

> Defendant complains that the trial court should have instructed the jury *sua sponte* on the limited admissibility of evidence of previous assaults he allegedly committed on his wife. n18 Although the trial court may in an appropriate case instruct *sua sponte* on the limited admissibility of evidence of past criminal conduct, we have consistently held that it is under no duty to do so. . . .We have more recently decided that in many cases *sua sponte* instructions regarding relevant defenses . . . and lesser included offenses . . .are required because those matters are "closely and openly connected" with the evidence and the fate of the defendant in cases to which they apply. . . . Defendant fails to show that the limited admissibility of particular bits of evidence of past criminal conduct normally deserves similar unsolicited recognition and instruction by the trial court.
>
> Evidence of past offenses may not improperly affect the jury's deliberations if the facts are equivocal, the charged offense is dissimilar, or the evidence is obviously used to effect one or more of the many legitimate purposes for which it can be introduced. . . . Neither precedent nor policy favors a rule that would saddle the trial court with the duty either to interrupt the testimony *sua sponte* to admonish the jury whenever a witness implicates the defendant in another offense, or to review the entire record at trial's end in search of such testimony. There may be an occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose. In such a setting, the evidence might be so obviously important to the case that *sua sponte* instruction would be needed to protect the defendant from his counsel's inadvertence. But we hold that in this case, and in general, the trial court is under no duty to instruct *sua sponte* on the limited admissibility of evidence of past criminal conduct.

(*People v. Collie* (1981) 30 Cal.3d 43, 63–64 [citations and footnotes omitted].)

> In the future, however, in any case in which the court has properly admitted both a prior felony conviction of the defendant for the purpose of impeachment and "other crimes" evidence on a substantive issue, the cautionary instruction on the latter point

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> should identify the evidence to which it relates. CALJIC instructions are properly neutral and objective, but in certain circumstances clarity requires that they be made to refer specifically to the facts of the case before the court.

(*People v. Rollo* (1977) 20 Cal.3d 109, 123, fn. 6 [superseded in part on other grounds as recognized in *People v. Olmedo* (1985) 167 Cal.App.3d 1085, 1096].)

> [I]t is error for a trial judge to give CALJIC instruction No. 2.50 and list *four separate issues* upon which the evidence is being received and which the jury may consider unless the evidence is relevant and admissible with respect to *each* of such four issues. . . .
>
> In the giving of CALJIC instruction No. 2.50, the trial court should be careful to limit the issues upon which such evidence is relevant and admissible by striking from the instruction those issues upon which the evidence is not admissible.

(*People v. Swearington* (1977) 71 Cal.App.3d 935, 947–949 [emphasis in original].)

Issue in Dispute

> We since have held, in *People v. Daniels* (1991) 52 Cal.3d 815, 857-858, "that defendant's plea [of not guilty] does put the elements of the crime in issue for the purpose of deciding the admissibility of evidence [of uncharged misconduct], unless the defendant has taken some action to narrow the prosecution's burden of proof." (Fns. omitted.) In *Estelle v. McGuire* (1991) _____ U.S. _____, _____ [116 L.Ed.2d 385, 397, 112 S.Ct. 475, 481], the high court stated, "[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense."

(*People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4; *People v. Rowland* (1992) 4 Cal.4th 238, 260.)

The defense may seek to “narrow the prosecution’s burden of proof” by stipulating to an issue. (*People v. Bruce* (1989) 208 Cal.App.3d 1099, 1103–1106.) “[T]he prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state’s case of its persuasiveness and forcefulness.” (*Peopl v. Scheid* (1997) 16 Cal.4th 1, 16–17.) However, an offer to stipulate makes

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the evidence less probative and more cumulative, weighing in favor of exclusion under Evidence Code section 352. (*People v. Thornton* (2000) 85 Cal.App.4th 44, 49 [observing that offer "not to argue" the issue is insufficient].) The court must also consider whether there could be a "reasonable dispute" about the issue. (See *People v. Balcom* (1994) 7 Cal.4th 414, 422–423; *People v. Bruce*, *supra*, 208 Cal.App.3d at pp. 1103–1106.)

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451. Opinion Testimony of Lay Witness

A witness[, who was not testifying as an expert,] gave (his/her) opinion during the trial. You may but are not required to accept that opinion as true or correct. You may give the opinion whatever weight you think appropriate. Evaluate the witness's opinion according to the instructions I have given regarding the believability of witnesses generally. Consider also the extent of the witness's opportunity to perceive the matters on which his or her opinion is based, the reasons the witness gave for any opinion, and the facts or information on which the witness relied in forming that opinion. You must decide whether information on which the witness relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

BENCH NOTES

Instructional Duty
Give this instruction on request when a lay witness gives opinion testimony.

Give the bracketed phrase "who was not testifying as an expert" if an expert witness also testified in the case.

Related Instructions
Instruction 450, Expert Witness.
Instruction 1320, Owner's Opinion of Value.

AUTHORITY

Opinion Testimony ▸ Evid. Code, §§ 800, 802.
Opinion Testimony to Prove Character ▸ Evid. Code, § 1100.
Jury Must Decide What Weight to Give Lay Opinion ▸ See *People v. Pena* (1977) 68 Cal.App.3d 100, 102–103.

1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, §§ 3–25.

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STAFF NOTES

Evid. Code, § 800:

> If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:
>
> (a) Rationally based on the perception of the witness; and
>
> (b) Helpful to a clear understanding of his testimony.

Evid. Code, § 802:

> A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.

Evid. Code, § 1100:

> Except as otherwise provided by statute, any otherwise admissible evidence (including evidence in the form of an opinion, evidence of reputation, and evidence of specific instances of such person's conduct) is admissible to prove a person's character or a trait of his character.

Opportunity to Perceive

In *People v. Fudge* (1994) 7 Cal.4th 1075, 1111, the court held that the failure of the trial court to give a specific instruction on eye witness identification was harmless in light of the jury instructions given, which included the CALJIC instruction on opinion testimony of a lay witness. The court specifically quoted this portion of the instruction:

> [T]he jury should consider "the extent of [the witness's] opportunity to perceive the matters upon which his opinion is based . . .."

(*Ibid*. [quoting CALJIC No. 2.81.])

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Jury Not Required to Accept Opinion

> The court instructed the jury in accordance with CALJIC Nos. 14.26 and 14.27. n1 CALJIC No. 14.26 is based on Penal Code section 484 which states in pertinent part: "In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, . . ."
>
> n1 The trial court instructed the jury as follows: "When the value of property alleged to have been taken by theft must be determined, the reasonable and fair market value at the time and in the locality of the theft shall be the test. Fair market value is the highest price, estimated in terms of money, for which the property would have sold in the open market at that time and in that locality, if the owner was desirous of buying but under no urgent necessity of doing so, if the seller had a reasonable time within which to find a purchaser, and if the buyer had knowledge of the character of the property and of the uses to which it might be put. [para.] Any expression of opinion on value that the court has received in evidence may be considered by you in determining value. You are not bound to accept any such opinion as conclusive, but you should give to it the weight to which you shall find it to be entitled. You may disregard any such opinion if you find it to be unreasonable." The foregoing instructions are taken from CALJIC Nos. 14.26 and 14.27, respectively.
>
> Defendant contends that this instruction misstates the law and should not have been utilized as a guideline for any witness or in the jury's determination. [. . .]
>
> CALJIC No. 14.26 does not require that the jury accept whatever value is placed on the article either by its owner or by an expert. It is left to the jury the determination of which valuation, that of the People's expert or that of the defendant's expert, was correct or which expert was credible.

(*People v. Pena* (1977) 68 Cal.App.3d 100, 102-103.)

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485. In-Custody Informant

The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case.

[An *in-custody informant* is someone[, other than (a/an) (codefendant[,]/ [or] percipient witness[,]/ [or] accomplice[,]/ [or] coconspirator,)] whose testimony is based on statements the defendant made while both the defendant and the informant were held within a correctional institution.]

[_____ *<insert name of witness>* **is an *in-custody informant.*]**

[_____ *<insert name of institution>* **is a correctional institution.]**

BENCH NOTES

Instructional Duty
The court must give this instruction on request. (Pen. Code, § 1127a.)

The court should also be aware of the following statutory provisions relating to in-custody informants: Penal Code sections 1127a(c) [prosecution must disclose consideration given to witness]; 1191.25 [prosecution must notify victim of in-custody informant]; and 4001.1 [limitation on payments to in-custody informants and action that may be taken by in-custody informant].

If there is no issue over whether the witness is an in-custody informant and the parties agree, the court may instruct the jury that the witness "is an in-custody informant." If there is an issue over whether the witness is an in-custody informant, give the bracketed definition of the term.

Related Instruction
Instruction 490, Witness in Custody or Physically Restrained.

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AUTHORITY

Instructional Duty ▸ Pen. Code, § 1127a.

5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trials, § 653.

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STAFF NOTES

Pen. Code, § 1127a:

(a) As used in this section, an "in-custody informant" means a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution.

(b) In any criminal trial or proceeding in which an in-custody informant testifies as a witness, upon the request of a party, the court shall instruct the jury as follows:

"The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case."

(c) When the prosecution calls an in-custody informant as a witness in any criminal trial, contemporaneous with the calling of that witness, the prosecution shall file with the court a written statement setting out any and all consideration promised to, or received by, the in-custody informant.

The statement filed with the court shall not expand or limit the defendant's right to discover information that is otherwise provided by law. The statement shall be provided to the defendant or the defendant's attorney prior to trial and the information contained in the statement shall be subject to rules of evidence.

(d) For purposes of subdivision (c), "consideration" means any plea bargain, bail consideration, reduction or modification of sentence, or any other leniency, benefit, immunity, financial assistance, reward, or amelioration of current or future conditions of incarceration in return for, or in connection with, the informant's testimony in the criminal proceeding in which the prosecutor intends to call him or her as a witness.

Penal Code, § 1191.25:

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The prosecution shall make a good faith attempt to notify any victim of a crime which was committed by, or is alleged to have been committed by, an in-custody informant, as defined in subdivision (a) of Section 1127a, within a reasonable time before the in-custody informant is called to testify. The notice shall include information concerning the prosecution's intention to offer the in-custody informant a modification or reduction in sentence or dismissal of the case or early parole in exchange for the in-custody informant's testimony in another case. The notification or attempt to notify the victim shall be made prior to the commencement of the trial in which the in-custody informant is to testify where the intention to call him or her is known at that time, but in no case shall the notice be made later than the time the in-custody informant is called to the stand.

Nothing contained in this section is intended to affect the right of the people and the defendant to an expeditious disposition of a criminal proceeding, as provided in Section 1050. The victim of any case alleged to have been committed by the in-custody informant may exercise his or her right to appear at the sentencing of the in-custody informant pursuant to Section 1191.1, but the victim shall not have a right to intervene in the trial in which the in-custody informant is called to testify.

Penal Code, § 4001.1:

(a) No law enforcement or correctional official shall give, offer, or promise to give any monetary payment in excess of fifty dollars ($ 50) in return for an in-custody informant's testimony in any criminal proceeding. Nothing contained herein shall prohibit payments incidental to the informant's testimony such as expenses incurred for witness or immediate family relocation, lodging, housing, meals, phone calls, travel, or witness fees authorized by law, provided those payments are supported by appropriate documentation demonstrating that the money was used for the purposes for which it was given.

(b) No law enforcement agency and no in-custody informant acting as an agent for the agency, may take some action, beyond merely listening to statements of a defendant, that is deliberately designed to elicit incriminating remarks.

(c) As used in this section, an "in-custody informant" means a person

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described in subdivision (a) of Section 1127a.

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490. Witness in Custody or Physically Restrained

<Alternative A—physically restrained>
[When _____ *<insert name[s] of witness[es]>* **testified, (he/she/they) (was/were) physically restrained. Do not speculate about the reason. You must completely disregard this circumstance in deciding the issues in this case. Do not consider it for any purpose or discuss it during your deliberations. Evaluate the witness's testimony according to the instructions I have given you.]**

<Alternative B—in custody>
[When _____ *<insert name[s] of witness[es]>* **testified, (he/she/they) (was/were) in custody. [Do not speculate about the reason.] The fact that a witness is in custody does not by itself make a witness more or less believable. Evaluate the witness's testimony according to the instructions I have given you.]**

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction if the witness has been physically restrained in a manner that is visible to the jury. (See *People v. Duran* (1976) 16 Cal.3d 282, 291–292; *Wilson v. McCarthy* (1985) 770 F.2d 1482, 1485; *People v. Metzger* (1904) 143 Cal. 447, 448.) If the restraints are not visible, do not give this instruction unless requested. For an in-custody witness, give this instruction on request.

Do not give this instruction for an in-custody informant unless the witness is also physically restrained. When an in-custody informant testifies, the court must give Instruction 485, In-Custody Informant. For an in-custody informant, the court may only give this instruction if it is limited to the issue of physical restraints.

In alternative B, always give the bracketed sentence that begins with "Do not speculate" unless the jury has been informed of the reason the witness is in custody.

The rules articulated in *People v. Duran* (1976) 16 Cal.3d 282, 290–292, regarding physical restraints of a defendant at trial also apply to physical restraint of a defense witness. (*Id.* at p. 288, fn. 4.)

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AUTHORITY

Instructional Duty ▸ *People v. Duran* (1976) 16 Cal.3d 282, 291–292; *Wilson v. McCarthy* (1985) 770 F.2d 1482, 1485; *People v. Metzger* (1904) 143 Cal. 447, 448.

Requirements Before Restraints Used ▸ *People v. Duran* (1976) 16 Cal.3d 282, 290–292; *People v. Mar* (2002) 28 Cal.4th 1201, 1218.

Use of Stun Belts ▸ *People v. Mar* (2002) 28 Cal.4th 1201, 1205–1206.

5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trials, §§ 11–16.

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STAFF NOTES

Duran Rules on Shackling Apply to Defense Witnesses

> n4 The rules articulated hereinafter are applicable to the shackling of defendants and defense witnesses, since the considerations supporting use of physical restraints are similar in each instance. (See *Kennedy* v. *Cardwell, supra*, 487 F.2d 101, 105, fn. 5, and authority cited therein.) As *Kennedy* notes, however, the prejudicial effect of shackling defense witnesses is less consequential since "the shackled witness . . . [does] not directly affect the presumption of innocence." (*Id*.)

(*People v. Duran* (1976) 16 Cal.3d 282, 288, fn. 4.)

See also Notes to Instruction 150, Defendant Physically Restrained

Instructional Requirements

In *People v. Duran* (1976) 16 Cal.3d 282, 291–292, the court held that there is a sua sponte duty to instruct on physical restraints if visible to the jury. If the restraints are not visible to the jury, the court must instruct on request. (See also *Wilson v. McCarthy* (1985) 770 F.2d 1482, 1485; *People v. Metzger* (1904) 143 Cal. 447, 448.)

Staff was unable to locate any cases on whether there is a duty to give a cautionary instruction about the fact that a witness is in custody.

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932. Evidence of Uncharged Domestic Violence

The People presented evidence that the defendant committed domestic violence that was not charged in this case[, specifically: _____ *<insert other domestic violence alleged>*.**]** ***Domestic violence*** **means abuse committed against (an adult/a fully emancipated minor) who is a (spouse[,]/ [or] former spouse[,]/ [or] cohabitant[,]/ [or] former cohabitant[,]/ [or] person with whom the defendant has had a child[,]/ [or] person who dated or is dating the defendant[,]/ [or] person who was or is engaged to the defendant).**

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

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

[The term ***cohabitants*** **means two unrelated adults 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.]**

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

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

If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based

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

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

BENCH NOTES

Instructional Duty

The court must give this instruction on request when evidence of other domestic violence has been introduced. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924 [error to refuse limiting instruction on request]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1317–1318; but see *CJER Mandatory Criminal Jury Instructions Handbook* (CJER 10th ed. 2001) Sua Sponte Instructions, § 2.109, pp. 87–88 [included without comment within sua sponte instructions]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1067 [general limiting instructions should be given when evidence of past offenses would be highly prejudicial without them].)

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

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

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

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

Related Instructions

Instruction 360, Evidence of Uncharged Offenses to Prove Identity, Intent, or Common Plan, etc.
Instruction 1275, Evidence of Uncharged Sex Offense.
Instruction 933, Evidence of Uncharged Elder or Dependent Adult Abuse.

AUTHORITY

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

5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Trial, § 640.
1 Witkin, Cal. Evidence (4th ed. 2003) Circumstantial Evidence, § 98.

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COMMENTARY

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

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

RELATED ISSUES

Constitutional Challenges

Evidence Code section 1109 does not violate a defendant's rights to due process (*People v. Falsetta* (1999) 21 Cal.4th 903, 915–922; *People v. Branch* (2001) 91 Cal.App.4th 274, 281; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095–1096; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1028–1029; *People v. Johnson* (2000) 77 Cal.App.4th 410, 420; *People v. Fitch* (1997) 55

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Cal.App.4th 172, 184) or equal protection (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310–1313; *People v. Fitch, supra,* 55 Cal.App.4th at pp. 184–185).

Exceptions

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

See the Related Issues sections of Instruction 360, Evidence of Uncharged Offenses to Prove Identity, Intent, Common Plan, etc., and Instruction 1275, Evidence of Uncharged Sex Offense.

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STAFF NOTES

Evidence of Disposition to Commit Domestic Violence
Evidence Code section 1101 establishes the general rule that character evidence, including evidence of specific instances of conduct, is not admissible to prove conduct, except as provided in section 1109 and related sections:

> (a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

Evidence Code section 1109(a)(1) establishes an exception to section 1101 for evidence of a defendant's other acts of domestic violence:

> (a)(1) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.

This instruction includes "inclined" and "likely" as synonyms for "disposed." Evidence of domestic violence other than the offense charged has also been called "propensity" or "predilection" evidence. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 911, 915.)

Validity of CALJIC Instructions
See the Staff Notes to instruction 1275, Evidence of Uncharged Sex Offense.

Burden of Proof
Misplacing the preponderance burden in relation to the beyond reasonable doubt burden may create a negative pregnant, thereby permitting the jury to find guilt by proof less than beyond a reasonable doubt, as discussed in *People v. Sizemore* (2002) 99 Cal.App.4th 546, 559–560:

> Telling a jury prior domestic violence proved by a preponderance of the evidence is not sufficient to prove the present offense beyond a reasonable doubt implies by was of a negative pregnant that prior domestic violence proved beyond a reasonable doubt is indeed sufficient to prove the present offense beyond a reasonable doubt. . . .

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> Fn. 4: . . . [T]he phrase "by a preponderance of the evidence" is misplaced in CALJIC No. 2.50.02. The phrase does not belong in the paragraph in which it appears, but more properly in a previous paragraph or in a separate instruction.

Domestic Violence, Cohabitant, and Abuse Defined
Evidence Code section 1109(d) defines "domestic violence":

> (d) As used in this section, "domestic violence" has the meaning set forth in Section 13700 of the Penal Code.

Penal Code section 13700(b) defines "domestic violence" and "cohabitant" as follows:

> (b) "Domestic violence" means abuse committed against an adult or a fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. For purposes of this subdivision, "cohabitant" means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) whether the parties hold themselves out as husband and wife, (5) the continuity of the relationship, and (6) the length of the relationship.

The instruction states "two unrelated adult persons living together <u>as a couple</u> for a <u>long</u> time" instead of the statutory language "two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship." The instruction also phrases factor (4) as "whether the parties present themselves as (husband and wife/domestic partners)" instead of the statutory language "whether the parties hold themselves out as husband and wife."

Penal Code section 13700(a) defines "abuse" as follows:

> (a) "Abuse" means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.

Emancipated Minor Defined
An act of domestic violence may be committed against a "fully emancipated minor." (See Pen. Code, § 13700(b).) The Emancipation of Minors Law (Fam.

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Code, § 7000 et seq.) governs the emancipation of minors. Section 7002 sets forth the conditions under which a minor becomes emancipated, as follows:

> A person under the age of 18 years is an emancipated minor if any of the following conditions is satisfied:
> (a) The person has entered into a valid marriage, whether or not the marriage has been dissolved.
> (b) The person is on active duty with the armed forces of the United States.
> (c) The person has received a declaration of emancipation pursuant to Section 7122.

Admission Under Other Code Sections
Section 1109(a)(1) does not limit or preclude admission of evidence pursuant to any other provision of the Evidence Code, as stated in section 1109(c):

> (c) This section shall not be construed to limit or preclude the admission or consideration of evidence under any other statute or case law.

Thus, evidence of other domestic violence may be admitted to prove a fact such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, other than a disposition to commit the act. (Evid. Code, § 1101(b).)

Pretrial Disclosure
The prosecution must disclose propensity evidence before trial, as set forth in Evidence Code section 1109(b):

> (b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, in compliance with the provisions of Section 1054 .7 of the Penal Code.

Exceptions
Section 1109(e) and (f) establish exceptions to the admission of prior domestic violence, as follows:

> (e) Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice.
> (f) Evidence of the findings and determinations of administrative agencies regulating the conduct of health facilities licensed under Section 1250 of the Health and Safety Code is inadmissible under this section.

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933. Evidence of Uncharged Elder or Dependent Adult Abuse

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

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

[A *dependent adult* is a person residing California, between the ages of 18 and 64, who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights.]

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

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

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

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

BENCH NOTES

Instructional Duty

The court must give this instruction on request when evidence of other elder or dependent adult abuse has been introduced. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924 [error to refuse limiting instruction on request]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1317–1318; but see *CJER Mandatory Criminal Jury Instructions Handbook* (CJER 10th ed. 2001) Sua Sponte Instructions, § 2.109, pp. 87–88 [included without comment within sua sponte instructions]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1067 [general limiting instructions should be given when evidence of past offenses would be highly prejudicial without them].)

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

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

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

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

Related Instructions

Instruction 360, Evidence of Uncharged Offense to Prove Identity, Intent, or Common Plan, etc.
Instruction 932, Evidence of Uncharged Domestic Violence.
Instruction 1275, Evidence of Uncharged Sex Offense.

AUTHORITY

Instructional Requirement ▸ Evid. Code, § 1109(a)(2).
Abandonment Defined ▸ Welf. & Inst. Code, § 15610.05.
Abduction Defined ▸ Welf. & Inst. Code, § 15610.06.
Abuse of Elder or Dependent Adult Defined ▸ Evid. Code, § 1109(d); Welf. & Inst. Code, § 15610.07.
Care Custodian Defined ▸ Welf. & Inst. Code, § 15610.17.
Dependent Adult Defined ▸ Welf. & Inst. Code, § 15610.23.
Elder Defined ▸ Welf. & Inst. Code, § 15610.27.
Financial Abuse Defined ▸ Welf. & Inst. Code, § 15610.30.
Goods and Services Defined ▸ Welf. & Inst. Code, § 15610.35.
Isolation Defined ▸ Welf. & Inst. Code, § 15610.43.
Mental Suffering Defined ▸ Welf. & Inst. Code, § 15610.53.
Neglect Defined ▸ Welf. & Inst. Code, § 15610.57.
Physical Abuse Defined ▸ Welf. & Inst. Code, § 15610.63.
Other Crimes Proved by Preponderance of Evidence ▸ *People v. Carpenter* (1997) 15 Cal.4th 312, 382; *People v. James* (2000) 81 Cal.App.4th 1343, 1359.
Propensity Evidence Alone Is Not Sufficient to Support Conviction Beyond a Reasonable Doubt ▸ *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382; *People v. James* (2000) 81 Cal.App.4th 1343, 1357–1358, fn. 8 [in context of prior domestic violence offenses]; see *People v. Hill* (2001) 86 Cal.App.4th 273, 277–278 [in context of prior sexual offenses].

1 Witkin, Cal. Evidence (4th ed. 2003) Circumstantial Evidence, § 98.

COMMENTARY

The paragraph that begins with "If you decide that the defendant committed" tells the jury that they may draw an inference of disposition. (See *People v. Hill* (2001) 86 Cal.App.4th 273, 275–279; *People v. Brown* (2000) 77

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Cal.App.4th 1324, 1334–1335.) One appellate court, however, suggests using more general terms to instruct the jury how they may use evidence of other domestic violence offenses, "leaving particular inferences for the argument of counsel and the jury's common sense." (*People v. James* (2000) 81 Cal.App.4th 1343, 1357, fn. 8 [includes suggested instruction].) If the trial court adopts this approach, the paragraph that begins with "If you decide that the defendant committed the uncharged (elder/dependent adult) abuse" may be replaced with the following:

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

RELATED ISSUES

Exceptions

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

See the Related Issues sections of Instruction 360, Evidence of Uncharged Offenses to Prove Identity, Intent, Common Plan, etc.; Instruction 932, Evidence

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of Uncharged Domestic Violence; and Instruction 1275, Evidence of Uncharged Sex Offense.

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STAFF NOTES

Evidence of Disposition to Commit Elder or Dependent Adult Abuse
Evidence Code section 1101 establishes the general rule that character evidence, including evidence of specific instances of conduct, is not admissible to prove conduct, except as provided in section 1109 and related sections:

> (a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

Evidence Code section 1109(a)(2) establishes an exception to section 1101 for evidence of a defendant's other acts of elder or dependent adult abuse:

> (a)(2) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving abuse of an elder or dependent adult, evidence of the defendant's commission of other abuse of an elder or dependent adult is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.

This instruction includes "inclined" and "likely" as synonyms for "predisposed" or "disposed." Evidence of elder or dependent adult abuse other than the offense charged has also been called "propensity" or "predilection" evidence. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 911, 915 [in context of domestic violence].)

Validity of CALJIC Instructions
See the Staff Notes to instruction 1275, Evidence of Uncharged Sex Offense.

Elder or Dependent Adult Abuse Defined
"Abuse of an elder or a dependent adult" is defined in Welfare and Institutions Code section 15610.07. (Evid. Code, § 1109(d).) Section 15610.07 provides:

> "Abuse of an elder or a dependent adult" means either of the following:
> (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
> (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

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Other Related Definitions

The Elder Abuse and Dependent Adult Civil Protection Act (see Welf. & Inst. Code, § 15610 et seq.) provides additional definitions, which are incorporated by the reference in Evidence Code section 1109(d) to Welfare and Institutions Code section 15610.07. Selected definitions follow.

Welfare and Institutions Code section 15610.05:

> "Abandonment" means the desertion or willful forsaking of an elder or a dependent adult by anyone having care or custody of that person under circumstances in which a reasonable person would continue to provide care and custody.

Welfare and Institutions Code section 15610.06:

> "Abduction" means the removal from this state and the restraint from returning to this state, or the restraint from returning to this state, of any elder or dependent adult who does not have the capacity to consent to the removal from this state and the restraint from returning to this state, or the restraint from returning to this state, as well as the removal from this state or the restraint from returning to this state, of any conservatee without the consent of the conservator or the court.

Welfare and Institutions Code section 15610.17:

> "Care custodian" means an administrator or an employee of any of the following public or private facilities or agencies, or persons providing care or services for elders or dependent adults, including members of the support staff and maintenance staff:
> (a) Twenty-four-hour health facilities, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.
> (b) Clinics.
> (c) Home health agencies.
> (d) Agencies providing publicly funded in-home supportive services, nutrition services, or other home and community-based support services.
> (e) Adult day health care centers and adult day care.
> (f) Secondary schools that serve 18- to 22-year-old dependent adults and postsecondary educational institutions that serve dependent adults or elders.
> (g) Independent living centers.
> (h) Camps.
> (i) Alzheimer's Disease day care resource centers.
> (j) Community care facilities, as defined in Section 1502 of the Health and Safety Code, and residential care facilities for the elderly, as defined in Section 1569.2 of the Health and Safety Code.
> (k) Respite care facilities.
> (l) Foster homes.

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(m) Vocational rehabilitation facilities and work activity centers.
(n) Designated area agencies on aging.
(o) Regional centers for persons with developmental disabilities.
(p) State Department of Social Services and State Department of Health Services licensing divisions.
(q) County welfare departments.
(r) Offices of patients' rights advocates and clients' rights advocates, including attorneys.
(s) The office of the long-term care ombudsman.
(t) Offices of public conservators, public guardians, and court investigators.
(u) Any protection or advocacy agency or entity that is designated by the Governor to fulfill the requirements and assurances of the following:
(1) The federal Developmental Disability Assistance and Bill of Rights Act, as amended, contained in Chapter 75 (commencing with Section 6000) of Title 42 of the United States Code, for protection and advocacy of the rights of persons with developmental disabilities.
(2) The Protection and Advocacy for the Mentally Ill Individuals Act of 1986, as amended, contained in Chapter 114 (commencing with Section 10801) of Title 42 of the United States Code, for the protection and advocacy of the rights of persons with mental illnesses.
(v) Any other protective, public, sectarian, mental health, or private assistance or advocacy agency or person providing health services or social services to elders or dependent adults.

Welfare and Institutions Code section 15610.23:

(a) "Dependent adult" means any person residing in this state, between the ages of 18 and 64 years, who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age.
(b) "Dependent adult" includes any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

Welfare and Institutions Code section 15610.25:

"Developmentally disabled person" means a person with a developmental disability specified by or as described in subdivision (a) of Section 4512.

Welfare and Institutions Code section 15610.27:

"Elder" means any person residing in this state, 65 years of age or older.

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Welfare and Institutions Code section 15610.30:

(a) "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following :

(1) Takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.

(2) Assists in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.

(b) A person or entity shall be deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains possession of property in bad faith.

(1) A person or entity shall be deemed to have acted in bad faith if the person or entity knew or should have known that the elder or dependent adult had the right to have the property transferred or made readily available to the elder or dependent adult or to his or her representative.

(2) For purposes of this section, a person or entity should have known of a right specified in paragraph (1) if, on the basis of the information received by the person or entity or the person or entity's authorized third party, or both, it is obvious to a reasonable person that the elder or dependent adult has a right specified in paragraph (1).

(c) For purposes of this section, " representative" means a person or entity that is either of the following:

(1) A conservator, trustee, or other representative of the estate of an elder or dependent adult.

(2) An attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney.

Welfare and Institutions Code section 15610.35:

"Goods and services necessary to avoid physical harm or mental suffering" include, but are not limited to, all of the following:

(a) The provision of medical care for physical and mental health needs.

(b) Assistance in personal hygiene.

(c) Adequate clothing.

(d) Adequately heated and ventilated shelter.

(e) Protection from health and safety hazards.

(f) Protection from malnutrition, under those circumstances where the results include, but are not limited to, malnutrition and deprivation of necessities or physical punishment.

(g) Transportation and assistance necessary to secure any of the needs set forth in subdivisions (a) to (f), inclusive.

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Welfare and Institutions Code section 15610.43:

(a) "Isolation" means any of the following:

(1) Acts intentionally committed for the purpose of preventing, and that do serve to prevent, an elder or dependent adult from receiving his or her mail or telephone calls.

(2) Telling a caller or prospective visitor that an elder or dependent adult is not present, or does not wish to talk with the caller, or does not wish to meet with the visitor where the statement is false, is contrary to the express wishes of the elder or the dependent adult, whether he or she is competent or not, and is made for the purpose of preventing the elder or dependent adult from having contact with family, friends, or concerned persons.

(3) False imprisonment, as defined in Section 236 of the Penal Code.

(4) Physical restraint of an elder or dependent adult, for the purpose of preventing the elder or dependent adult from meeting with visitors.

(b) The acts set forth in subdivision (a) shall be subject to a rebuttable presumption that they do not constitute isolation if they are performed pursuant to the instructions of a physician and surgeon licensed to practice medicine in the state, who is caring for the elder or dependent adult at the time the instructions are given, and who gives the instructions as part of his or her medical care.

(c) The acts set forth in subdivision (a) shall not constitute isolation if they are performed in response to a reasonably perceived threat of danger to property or physical safety.

Welfare and Institutions Code section 15610.53:

"Mental suffering" means fear, agitation, confusion, severe depression, or other forms of serious emotional distress that is brought about by forms of intimidating behavior, threats, harassment, or by deceptive acts performed or false or misleading statements made with malicious intent to agitate, confuse, frighten, or cause severe depression or serious emotional distress of the elder or dependent adult.

Welfare and Institutions Code section 15610.57:

(a) "Neglect" means either of the following:

(1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.

(2) The negligent failure of the person themselves to exercise that degree of care that a reasonable person in a like position would exercise.

(b) Neglect includes, but is not limited to, all of the following:

(1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.

(2) Failure to provide medical care for physical and mental health needs.

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No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.
(3) Failure to protect from health and safety hazards.
(4) Failure to prevent malnutrition or dehydration.
(5) Failure of a person to provide the needs specified in paragraphs (1) to (4), inclusive, for themselves due to ignorance, illiteracy, incompetence, mental limitation, substance abuse, or poor health.

Welfare and Institutions Code 15610.63:

"Physical abuse" means any of the following:
(a) Assault, as defined in Section 240 of the Penal Code.
(b) Battery, as defined in Section 242 of the Penal Code.
(c) Assault with a deadly weapon or force likely to produce great bodily injury, as defined in Section 245 of the Penal Code.
(d) Unreasonable physical constraint, or prolonged or continual deprivation of food or water.
(e) Sexual assault, that means any of the following:
(1) Sexual battery, as defined in Section 243.4 of the Penal Code.
(2) Rape, as defined in Section 261 of the Penal Code.
(3) Rape in concert, as described in Section 264.1 of the Penal Code.
(4) Spousal rape, as defined in Section 262 of the Penal Code.
(5) Incest, as defined in Section 285 of the Penal Code.
(6) Sodomy, as defined in Section 286 of the Penal Code.
(7) Oral copulation, as defined in Section 288a of the Penal Code.
(8) Sexual penetration, as defined in Section 289 of the Penal Code.
(f) Use of a physical or chemical restraint or psychotropic medication under any of the following conditions:
(1) For punishment.
(2) For a period beyond that for which the medication was ordered pursuant to the instructions of a physician and surgeon licensed in the State of California, who is providing medical care to the elder or dependent adult at the time the instructions are given.
(3) For any purpose not authorized by the physician and surgeon.

Admission Under Other Code Sections

Section 1109(a)(1) does not limit or preclude admission of evidence pursuant to any other provision of the Evidence Code, as stated in section 1109(c):

(c) This section shall not be construed to limit or preclude the admission or consideration of evidence under any other statute or case law.

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Thus, evidence of other elder or dependent adult abuse may be admitted to prove a fact such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, other than a disposition to commit the act. (Evid. Code, § 1101(b).)

Pretrial Disclosure

The prosecution must disclose propensity evidence before trial, as set forth in Evidence Code section 1109(b):

> (b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, in compliance with the provisions of Section 1054 .7 of the Penal Code.

Exceptions

Section 1109(e) and (f) establish exceptions to the admission of prior elder or dependent adult, as follows:

> (e) Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice.
> (f) Evidence of the findings and determinations of administrative agencies regulating the conduct of health facilities licensed under Section 1250 of the Health and Safety Code is inadmissible under this section.

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651. Involuntary Intoxication

You may consider any evidence that the defendant was involuntarily intoxicated in deciding whether the defendant had the required (intent/ [or] mental state) when (he/she) acted.

A person is *involuntarily intoxicated* if he or she unknowingly ingested some intoxicating liquor, drug, or other substance, or if his or her intoxication is caused by the force, duress, fraud, or trickery of someone else, for whatever purpose, without any fault on the part of the intoxicated person.

BENCH NOTES

Instructional Duty
It appears that the court has no sua sponte duty to instruct on involuntary intoxication, unless the intoxication results in unconsciousness. (See *People v. Saille* (1991) 54 Cal.3d 1103, 1119 [no sua sponte duty when evidence of voluntary intoxication presented to negate element of offense].) If the defendant is relying on the defense of unconsciousness caused by involuntary intoxication, see Instruction 640, Unconsciousness.

Related Instructions
See Instruction 650, Voluntary Intoxication.

AUTHORITY

Instructional Requirements ▸ See Pen. Code, § 26, subd. 3.
Burden of Proof ▸ See *People v. Saille* (1991) 54 Cal.3d 1103, 1106 [in context of voluntary intoxication].
Involuntary Intoxication Defined ▸ *People v. Velez* (1985) 175 Cal.App.3d 785, 796.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, §§ 34, 15.

COMMENTARY

One court has held that a mistake of fact defense (see Pen. Code, § 26, subd. 3) can be based on involuntary intoxication. (*People v. Scott* (1983) 146 Cal.App.3d 823, 831–832.) For further discussion, see Instruction 660, Mistake of Fact.

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RELATED ISSUES

Unconsciousness Based on Voluntary Intoxication Is Not a Complete Defense
Unconsciousness is typically a complete defense to a crime except when it is caused by voluntary intoxication. (*People v. Heffington* (1973) 32 Cal.App.3d 1, 8.) Unconsciousness caused by voluntary intoxication is governed by Penal Code section 22, rather than by section 26, and is only a partial defense to a crime. (*People v. Walker* (1993) 14 Cal.App.4th 1615, 1621 [no error in refusing to instruct on unconsciousness when defendant was voluntarily under the influence of drugs at the time of the crime].)

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STAFF NOTES

Involuntary Intoxication
Involuntary intoxication is generally defined in *People v. Velez* (1985) 175 Cal.App.3d 785, 796 [dictum; original italics]:

> [I]nvoluntary intoxication is sometimes referred to as "innocent" intoxication. [Citation omitted.] The defense is allowed where the defendant has been without fault. "Involuntary intoxication, it appears, was first recognized as that caused by the unskillfulness of a physician or by the contrivance of one's enemies. Today, where the intoxication is induced through the fault of another *and without any fault on the part of the accused*, it is generally treated as involuntary. Intoxication caused by the force, duress, fraud, or contrivance of another, for whatever purpose, without any fault on the part of the accused, is uniformly recognized as involuntary intoxication. . . . [C]ourts have allowed the defense of involuntary intoxication based on the ingestion of an unlawful drug where the defendant reasonably believed he was consuming a lawful substance or where the unlawful drug was placed without defendant's knowledge *in a lawful substance*.

Mistake of Fact
Involuntary intoxication may result in a mistake of fact, which can then disprove any criminal intent, as held in *People v. Scott* (1983) 146 Cal.App.3d 823, 831–832:

The evidence establishes that defendant unknowingly and therefore involuntarily ingested some kind of hallucinogen which caused him to act in a bizarre and irrational manner []. . . . Subdivision Three . . . of Penal Code section 26 includes among persons incapable of committing a crime, "Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent." It is clear that in attempting to commandeer the vehicles defendant acted under a mistake of fact: he thought he was a secret government agent acting to protect his own life or possibly that of the President.

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655. Mental Impairment: Defense to Specific Intent or Mental State

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You have heard evidence that the defendant suffered from a mental (disease[,]/ [or] defect[,]/ [or] disorder). You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted [or failed to act] with the state of mind required for that crime.

The People have the burden of proving beyond a reasonable doubt that the defendant acted [or failed to act] with the required state of mind, specifically: _____ *<insert specific intent or mental state required, e.g., "malice aforethought," "the intent to permanently deprive the owner of his or her property," or "knowledge that . . ."*>**. If the People have not met this burden, you must find the defendant not guilty of** _____ *<insert name of alleged offense>***.**

[You must not consider evidence of mental (disease[,]/ [or] defect[,]/ [or] disorder) when deciding if _____ ***<insert name of nontarget offense>*** was a natural and probable consequence of _____ ***<insert name of target offense>***.]

<Repeat for each offense requiring specific intent or a specific mental state.>

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to instruct on mental impairment as a defense to specific intent or mental state; however, the trial court must give this instruction on request. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.) The jury may consider evidence of mental impairment and its effect on the defendant's ability to form any mental state required for the offense charged. (Pen. Code, § 28; *People v. Reyes* (1997) 52 Cal.App.4th 975, 983–985 [relevant to knowledge element in receiving stolen property]; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131–1134 [voluntary intoxication relevant to mental state in aiding and abetting].)

Evidence of mental impairment may not be considered for general-intent crimes, unless there is an element, such as knowledge, that requires a specific mental state. (*People v. Reyes, supra,* 52 Cal.App.4th at pp. 983–985; *People v. Mendoza, supra,* 18 Cal.4th at pp. 1131–1134.)

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In all cases, the court must insert the specific intent or mental state required and the offense for which the mental state is an element. (See *People v. Hill* (1967) 67 Cal.2d 105, 118.)

Give the bracketed paragraph that begins with "You must not consider evidence of mental" when instructing on aiding and abetting liability for a nontarget offense. (*People v. Mendoza, supra,* 18 Cal.4th at p. 1134.)

AUTHORITY

Statutory Authority ▸ Pen. Code, § 28; see also Pen. Code, §§ 25, 29.
Instructional Requirements ▸ *People v. Saille* (1991) 54 Cal.3d 1103, 1119.
Mental States—Knowledge ▸ *People v. Reyes* (1997) 52 Cal.App.4th 975, 983–985.
Mental States—Aiding and Abetting ▸ *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131–1134.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 10.

RELATED ISSUES

Scope of Expert Testimony

Penal Code section 29 provides that an expert testifying about a defendant's mental illness "shall not testify as to whether the defendant had or did not have the required mental states." (Pen. Code, § 29.) In *People v. Coddington* (2000) 23 Cal.4th 529, 582–583, the Supreme Court held that the trial court improperly restricted the scope of the expert testimony when the court refused to permit "hypothetical questions regarding the effect of mental defect or illness on a person's ability to deliberate or premeditate." (*Id.* at p. 582.) "An expert's opinion that a form of mental illness can lead to impulsive behavior is relevant to the existence *vel non* of the mental states of premeditation and deliberation regardless of whether the expert believed appellant actually harbored those mental states at the time of the killing." (*Id.* at pp. 582–583 [italics original]; see also *People v. Nunn* (1996) 50 Cal.App.4th 1357, 1364–1365 [discussing appropriate scope of expert testimony].)

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STAFF NOTES

Pen. Code, § 28, Evidence of Mental Disease:

(a) Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.

(b) As a matter of public policy there shall be no defense of diminished capacity, diminished responsibility, or irresistible impulse in a criminal action or juvenile adjudication hearing.

(c) This section shall not be applicable to an insanity hearing pursuant to Section 1026 .

(d) Nothing in this section shall limit a court's discretion, pursuant to the Evidence Code, to exclude psychiatric or psychological evidence on whether the accused had a mental disease, mental defect, or mental disorder at the time of the alleged offense.

Pen. Code, § 25, Diminished Capacity:

(a) The defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissable to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged.

(b) In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the

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> time of the commission of the offense.
>
> (c) Notwithstanding the foregoing, evidence of diminished capacity or of a mental disorder may be considered by the court only at the time of sentencing or other disposition or commitment.
>
> (d) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

Pen. Code, § 29, Expert testimony:

> In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.

Instructional Duty

> The withdrawal of diminished capacity as a defense removes intoxication from the realm of defenses to crimes. Intoxication is now relevant only to the extent that it bears on the question of whether the defendant actually had the requisite specific mental state. Thus it is now more like the "pinpoint" instructions discussed in [citations] to which a defendant is entitled upon request. Such instructions relate particular facts to a legal issue in the case or "pinpoint" the crux of a defendant's case, such as mistaken identification or alibi. [Citation.] They are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte.

(*People v. Saille* (1991) 54 Cal.3d 1103, 1119.)

Mental State--Knowledge

> A general intent crime may also involve a specific mental state, such as knowledge.. . .

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> Under *Hood* and *Whitfield*, ". . . the criteria of specific intent for [the purpose of section 22] are not necessarily the same as the criteria of specific intent as a measure of the scienter required for an offense.". . .
> Thus, here, as in *People v. Whitfield*, *supra*, 7 Cal. 4th 437, 450, the classification of the crime as one of general intent has nothing to do with the required element of knowledge, a specific mental state.. . . Accordingly, we hold that with regard to the element of knowledge, receiving stolen property is a "specific intent crime," as that term is used in section 22, subdivision (b), and section 28, subdivision (a).

(*People v. Reyes* (1997) 52 Cal.App.4th 975, 983–985.)

Mental State—Aider and Abettor

> For these reasons, we conclude that the intent requirement for aiding and abetting liability is a "required specific intent" for which evidence of voluntary intoxication is admissible under section 22. This conclusion raises two additional questions. . . .
>
> Our holding is very narrow. Defendants may present evidence of intoxication solely on the question whether they are liable for criminal acts as aiders and abettors. Once a jury finds a defendant did knowingly and intentionally aid and abet a criminal act, intoxication evidence is irrelevant to the *extent* of the criminal liability. A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime but also of any other crime the perpetrator actually commits that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable. [Citation.] Intoxication is irrelevant in deciding what is reasonably foreseeable. . . .
>
> Our conclusion also makes the law understandable to the jury. If the court gives any instruction at all on the relevance of intoxication (see *People v. Castillo*, *supra*, 16 Cal. 4th at p. 1014 [no sua sponte duty to instruct on intoxication]), it might simply instruct that the jury may consider intoxication in determining whether a defendant tried as an aider and abettor had the required mental state. It might also instruct that the intoxication evidence is irrelevant on the question

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> whether a charged crime was a natural and probable consequence of the target crime. The court would not additionally be required to parse out those elements of each crime charged for which the evidence could be considered or distinguish between the knowledge and the intent requirements.

(*People v. Mendoza* (1998) 18 Cal.4th 1114, 1131–1134.)

Scope of Expert Testimony

> The court extended that ruling to preclude any hypothetical questions regarding the effect of mental defect or illness on a person's ability to deliberate or premeditate. Appellant then offered no evidence of mental illness at the guilt phase. He now claims that the court erred.
>
> The ruling was an overly restrictive reading of the statutory limitations on admission of evidence of mental illness. . . .
>
> An expert's opinion that a form of mental illness can lead to impulsive behavior is relevant to the existence *vel non* of the mental states of premeditation and deliberation regardless of whether the expert believed appellant actually harbored those mental states at the time of the killing. . . .
>
> Although we agree that the court erred in ruling that the experts could not testify unless they believed defendant did not premeditate and deliberate the murders, that error is not a basis for reversal of the judgment.

(*People v. Coddington* (2000) 23 Cal.4th 529, 582–583.)

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656. Reasonable Person Standard for Physically Disabled Person

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A person with a physical disability is required to (know what/use the amount of care that) a reasonably careful person with the same physical disability would (know/use) in the same situation.

BENCH NOTES

Instructional Duty

The court should give this instruction on request if the defendant has a physical disability and the crimes charged or lesser offenses include a reasonable person standard. (*People v. Mathews* (1994) 25 Cal.App.4th 89, 99–100.) This includes cases where the prosecution must prove that the defendant "reasonably should have known" a fact, and cases involving negligence.

For example, in *People v. Mathews, supra,* 25 CalApp.4th at pp. 93–94, the defendant, who was blind, hearing impaired, and confined to a wheelchair, was charged with brandishing a firearm at police officers when the officers entered the defendant's home. The issue at trial was whether the defendant "reasonably should have known" that these were officers entering his home. (*Id.* at p. 98.) The court held that the trial court erred by failing to give the defense's requested instruction that the defendant must be held to the standard of a reasonable person with the same physical disabilities, not to the standard of a reasonable person without disabilities. (*Id.* at pp. 99–100.)

If the case requires the prosecution to prove that the defendant "reasonably should have known" a fact, then, in the first parenthesis, select the words "know what" and, in the second, select "know."

If the case requires the prosecution to prove negligence by the defendant, then, in the first parenthesis, select the phrase "use the amount of care that" and, in the second, select "use."

By "same" disability, this instruction is referring to the effect of the disability, not the cause.

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AUTHORITY

Instructional Requirements ▸ *People v. Mathews* (1994) 25 Cal.App.4th 89, 99–100.

Authority ▸ Restatement Second of Torts, § 283C; see also Restatement Second of Torts, § 283B; CACI No. 403.

RELATED ISSUES

Reasonable Person Standard Not Modified by Evidence of Mental Impairment

In *People v. Jefferson* (June 17, 2004, C041274) __Cal.App.4th __, 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.)

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STAFF NOTES

This instruction is based on CACI 403, Standard of Care for Physically Disabled Person, which states:

> **A person with a physical disability is required to use the amount of care that a reasonably careful person who has the same physical disability would use in the same situation.**

Directions for Use

By "same" disability, this instruction is referring to the effect of the disability, not the cause.

Sources and Authority

- Restatement Second of Torts, section 283C, provides: "If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability." (See also *Conjorsky v. Murray* (1955) 135 Cal.App.2d 478, 482 [287 P.2d 505]; *Jones v. Bayley* (1942) 49 Cal.App.2d 647, 654 [122 P.2d 293] .)

- Persons with mental illnesses are not covered by the same standard as persons with physical illnesses. (See *Bashi v. Wodarz* (1996) 45 Cal.App.4th 1314, 1323 [53 Cal.Rptr.2d 635].)

- Civil Code section 41 provides: "A person of unsound mind, of whatever degree, is civilly liable for a wrong done by the person, but is not liable in exemplary damages unless at the time of the act the person was capable of knowing that the act was wrongful." This section applies to negligence. (*Bashi, supra,* 45 Cal.App.4th at p. 1321.)

- Restatement Second of Torts, section 283B, provides: "Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances."

- As to contributory negligence, the courts agree with the Restatement's position that mental deficiency that falls short of insanity does not excuse conduct that is otherwise contributory

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negligence. (*Fox v. City and County of San Francisco* (1975) 47 Cal.App.3d 164, 169 [120 Cal.Rptr. 779] ; Rest.2d Torts, § 464, com. g.)

Instructional Requirements

It makes no sense, either in law or logic, to hold appellant to the standard of a reasonable person *with* normal eyesight and hearing. The People concede ". . . it is obvious that the entire case was about . . . [appellant's disabilities]." This is undoubtedly true and precisely why instruction thereon should have been given.

BAJI No. 3.36 (1993 rev.) provides: "The amount of caution required of a person whose physical faculties are impaired is the care which a person of ordinary prudence with similarly impaired faculties would use under circumstances similar to those shown by the evidence." . . .

We borrow this rule from tort law, i.e., BAJI No. 3.36 (1993 rev.), and hold that it may be utilized as a theory of defense to exhibiting a firearm in the presence of a peace officer. We give the handicapped defendant the benefit of the doubt as to the proper interpretation of the "reasonably should know" requirement of Penal Code section 417, subdivision (c). . . .

What is "apparent" to a reasonable person who can see and hear is not "apparent" to a person who is blind and hearing impaired.

(*People v. Mathews* (1994) 25 Cal.App.4th 89, 99–100 [emphasis in original].)

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671. When Conduct of Officer May Not Be Attributed to Defendant

If, while acting for a law enforcement purpose, an officer [or (his/her) agent] pretends to be an accomplice of a defendant, then no act done by the officer [or agent] may be attributed to the defendant or held against the defendant, unless the defendant, using (his/her) independent will, directed the officer [or agent] to do the act.

[As used in this instruction, an *agent* is a person who does something at the request, suggestion, or direction of an officer. It is not necessary that the agent know the officer's true identity, or that the agent realize that he or she is acting as an agent.]

BENCH NOTES

Instructional Duty

Give this instruction on request if supported by the evidence. (*People v. Goldberg* (1957) 152 Cal.App.2d 562; *People v. Lanzit* (1925) 70 Cal.App. 498, 509.)

AUTHORITY

Case Law ▸ *People v. Goldberg* (1957) 152 Cal.App.2d 562; *People v. Lanzit* (1925) 70 Cal.App. 498, 509.

Agent Defined ▸ *People v. McIntire* (1979) 23 Cal.3d 742, 748.

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STAFF NOTES

Case Authority

> Of course, no act done by a feigned accomplice may be imputed to the criminal actor at the trial.

(*People v. Goldberg* (1957) 152 Cal.App.2d 562.)

> When officers of the law are informed that a person intends to commit a crime against the property or person of another, the law permits them to afford opportunities for its commission and to lay traps which may result in the detection of the offender. To this end a person may be engaged to act with the one who is suspected and to be present with him at the time the crime is to be committed; and if the accused, having himself originally conceived the criminal intent, commits such of the overt acts as are necessary to complete the offense, he will not be protected from punishment by reason of the fact that when the acts were done by him the person who was present with the knowledge and approval of the authorities aided in and encouraged their perpetration. It is of course necessary that the defendant should have directly participated in so much of the entire transaction that the acts which he himself personally committed shall alone be sufficient to make out a complete offense against the law; for no act done by his feigned accomplice may be imputed to him, and if, in order to constitute the offense, it is necessary that something done by the supposed confederate shall be imputed to the accused, then the prosecution will fail.

(*People v. Lanzit* (1925) 70 Cal.App. 498, 509.)

Definition of Agent

The definition of agent is taken from Instruction 670, Entrapment. The Notes to that instruction state that the definition is derived from *People v. McIntire* (1979) 23 Cal.3d 742, 748, which provides:

> The purposes of the entrapment defense can be fulfilled only if it is understood that one can act as the agent of a law enforcement official without realizing the identity of his principal; the unwitting agent, though he may not appreciate the true nature of his role, is nonetheless being manipulated as the officer's tool in a plan to foster a crime and entrap its perpetrator. . . . Case law from other

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jurisdictions supports our conclusion that manipulation of a third party by law enforcement officers to procure the commission of a criminal offense by another renders the third party a government agent for purposes of the entrapment defense, even though the third party remains unaware of the law enforcement object. As one commentator has observed, “Despite his lack of intent to secure the defendant’s arrest, his agency in such a situation seems apparent.” (Note, Entrapment (1960) 73 Harv.L.Rev. 1333, 1342).

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681. Present Mental Competence of Defendant

You must decide whether the defendant is mentally competent to stand trial. That is the only purpose of this proceeding. Do not consider whether the defendant is guilty or not guilty of any crime or whether (he/she) was sane or insane at the time that any alleged crime was committed.

The defendant is mentally competent to stand trial if (he/she) can do all of the following:

1. Understand the nature and purpose of the criminal proceedings against (him/her);

2. Assist, in a rational manner, (his/her) attorney in presenting (his/her) defense;

AND

3. Understand (his/her) own status and condition in the criminal proceedings.

The law presumes that a defendant is mentally competent. In order to overcome this presumption, ((the defendant/the People) must prove/it must be proved) that it is more likely than not that the defendant is now mentally incompetent because of a (mental disorder/developmental disability).

[A developmental disability *is a disability that begins before a person is 18 years old and continues, or is expected to continue, for an indefinite period of time. It must be a substantial handicap and does not include other handicapping conditions that are solely physical in nature. Examples of developmental disabilities include mental retardation, cerebral palsy, epilepsy, autism, and closely related conditions requiring similar treatment.]*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury on the standard for competence.

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The party that seeks a finding of incompetence bears the burden of proof. If the court raises the issue, neither party bears that burden. Choose the appropriate language regarding which party bears the burden of proof in the paragraph that begins with "The law presumes that . . . ." (*People v. Skeirik* (1991) 229 Cal.App.3d 444, 459–460.)

Give Instruction 140, Predeliberation Instructions and any other relevant posttrial instructions, such as Instruction 120, Evidence, or Instruction 130, Witnesses.

Do **not** give Instruction 300, Circumstantial Evidence, or Instruction 301, Circumstantial Evidence: Intent or Mental State. These instructions have "no application when the standard of proof is preponderance of the evidence." (*People v. Johnwell* (Sept. 1, 2004, F041899) __ Cal.App.4th __, __.)

AUTHORITY

Instructional Requirements ▸ Pen. Code, §§ 1367–1370.
Developmental Disability Defined ▸ Pen. Code, § 1370.1(a)(1)(H).
Presumption of Competence ▸ Pen. Code, § 1369(f).
Unanimous Verdict ▸ Pen. Code, § 1369(f).

5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 698.

RELATED ISSUES

Threshold for Section 1368 Hearing

A trial court must conduct a section 1368 hearing when there is substantial evidence of incompetence. (*People v. Cox* (1978) 82 Cal.App.3d 221, 225–226.) Substantial evidence raises a reasonable doubt about the defendant's competence to stand trial. (*People v. Frye* (1998) 18 Cal.4th 894, 951–952.)

Defense Counsel May Seek Finding Contrary to Client's Wishes

A section 1368 hearing is civil in nature. Since neither guilt nor innocence is at issue, defense counsel must "advocate the position counsel perceives to be in the client's best interests even when that interest conflicts with the client's stated position." (*People v. Stanley* (1995) 10 Cal.4th 764, 804.)

Presumption of Competence

A defendant may be found competent on the basis of the presumption of competence alone, even when the defense has presented evidence to the contrary. (*People v. Chamberlain* (1936) 7 Cal.2d 257, 260.)

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STAFF NOTES

Statutory Authority

Penal Code section 1367:

> (a) A person cannot be tried or adjudged to punishment while that person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.
>
> (b) Section 1370 shall apply to a person who is charged with a felony and is incompetent as a result of a mental disorder. Sections 1367.1 and 1370.01 shall apply to a person who is charged with a misdemeanor or misdemeanors only, and the judge finds reason to believe that the defendant is mentally disordered, and may, as a result of the mental disorder, be incompetent to stand trial. Section 1370.1 shall apply to a person who is incompetent as a result of a developmental disability and shall apply to a person who is incompetent as a result of a mental disorder, but is also developmentally disabled.

Penal Code section 1368:

> (a) If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent. If the defendant is not represented by counsel, the court shall appoint counsel. At the request of the defendant or his or her counsel or upon its own motion, the court shall recess the proceedings for as long as may be reasonably necessary to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time.

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(b) If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369. If counsel informs the court that he or she believes the defendant is mentally competent, the court may nevertheless order a hearing. Any hearing shall be held in the superior court.

(c) Except as provided in Section 1368.1, when an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of the defendant has been determined.

If a jury has been impaneled and sworn to try the defendant, the jury shall be discharged only if it appears to the court that undue hardship to the jurors would result if the jury is retained on call.

If the defendant is declared mentally incompetent, the jury shall be discharged.

Penal Code section 1368.1:

(a) If the action is on a complaint charging a felony, proceedings to determine mental competence shall be held prior to the filing of an information unless the counsel for the defendant requests a preliminary examination under the provisions of Section 859b. At such preliminary examination, counsel for the defendant may (1) demur, (2) move to dismiss the complaint on the ground that there is not reasonable cause to believe that a felony has been committed and that the defendant is guilty thereof, or (3) make a motion under Section 1538.5.

(b) If the action is on a complaint charging a misdemeanor, counsel for the defendant may (1) demur, (2) move to dismiss the complaint on the ground that there is not reasonable cause to believe that a public offense has been committed and that the defendant is guilty thereof, or (3) make a motion under Section 1538.5.

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(c) In ruling upon any demurrer or motion described in subdivision (a) or (b), the court may hear any matter which is capable of fair determination without the personal participation of the defendant.

(d) A demurrer or motion described in subdivision (a) or (b) shall be made in the court having jurisdiction over the complaint. The defendant shall not be certified until the demurrer or motion has been decided.

Penal Code section 1369:

A trial by court or jury of the question of mental competence shall proceed in the following order:

(a) The court shall appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant. In any case where the defendant or the defendant's counsel informs the court that the defendant is not seeking a finding of mental incompetence, the court shall appoint two psychiatrists, licensed psychologists, or a combination thereof. One of the psychiatrists or licensed psychologists may be named by the defense and one may be named by the prosecution. If it is suspected the defendant is developmentally disabled, the court shall appoint the director of the regional center for the developmentally disabled established under Division 4.5 (commencing with Section 4500) of the Welfare and Institutions Code, or the designee of the director, to examine the defendant. The court may order the developmentally disabled defendant to be confined for examination in a residential facility or state hospital.

The regional center director shall recommend to the court a suitable residential facility or state hospital. Prior to issuing an order pursuant to this section, the court shall consider the recommendation of the regional center director. While the person is confined pursuant to order of the court under this section, he or she shall be provided with necessary care and treatment.

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(b)(1) The counsel for the defendant shall offer evidence in support of the allegation of mental incompetence.

(2) If the defense declines to offer any evidence in support of the allegation of mental incompetence, the prosecution may do so.

(c) The prosecution shall present its case regarding the issue of defendant's present mental competence.

(d) Each party may offer rebutting testimony, unless the court, for good reason in furtherance of justice, also permits other evidence in support of the original contention.

(e) When the evidence is concluded, unless the case is submitted without final argument, the prosecution shall make its final argument and the defense shall conclude with its final argument to the court or jury.

(f) In a jury trial, the court shall charge the jury, instructing them on all matters of law necessary for the rendering of a verdict. It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. The verdict of the jury shall be unanimous.

(a)(1)(A) If the defendant is found mentally competent, the criminal process shall resume, the trial on the offense charged shall proceed, and judgment may be pronounced.

(B) If the defendant is found mentally incompetent, the trial or judgment shall be suspended until the person becomes mentally competent.

(i) In the meantime, the court shall order that the mentally incompetent defendant be delivered by the sheriff to a state hospital for the care and treatment of the mentally disordered, or to any other available public or private treatment facility approved by the community program director that will promote the defendant's speedy restoration to mental competence, or placed on outpatient status as specified in Section 1600.

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(ii) However, if the action against the defendant who has been found mentally incompetent is on a complaint charging a felony offense specified in Section 290, the prosecutor shall determine whether the defendant previously has been found mentally incompetent to stand trial pursuant to this chapter on a charge of a Section 290 offense, or whether the defendant is currently the subject of a pending Section 1368 proceeding arising out of a charge of a Section 290 offense. If either determination is made, the prosecutor shall so notify the court and defendant in writing. After this notification, and opportunity for hearing, the court shall order that the defendant be delivered by the sheriff to a state hospital or other secure treatment facility for the care and treatment of the mentally disordered unless the court makes specific findings on the record that an alternative placement would provide more appropriate treatment for the defendant and would not pose a danger to the health and safety of others.

(iii) If the action against the defendant who has been found mentally incompetent is on a complaint charging a felony offense specified in Section 290 and the defendant has been denied bail pursuant to subdivision (b) of Section 12 of Article I of the California Constitution because the court has found, based upon clear and convincing evidence, a substantial likelihood that the person's release would result in great bodily harm to others, the court shall order that the defendant be delivered by the sheriff to a state hospital for the care and treatment of the mentally disordered unless the court makes specific findings on the record that an alternative placement would provide more appropriate treatment for the defendant and would not pose a danger to the health and safety of others.

(iv) The clerk of the court shall notify the Department of Justice in writing of any finding of mental incompetence with respect to a defendant who is subject to clause (ii) or (iii) for inclusion in his or her state summary criminal history information.

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(C) Upon the filing of a certificate of restoration to competence, the court shall order that the defendant be returned to court in accordance with Section 1372. The court shall transmit a copy of its order to the community program director or a designee.

(D) A defendant charged with a violent felony may not be delivered to a state hospital or treatment facility pursuant to this subdivision unless the state hospital or treatment facility has a secured perimeter or a locked and controlled treatment facility, and the judge determines that the public safety will be protected.

(E) For purposes of this paragraph, "violent felony" means an offense specified in subdivision (c) of Section 667.5.

(F) A defendant charged with a violent felony may be placed on outpatient status, as specified in Section 1600, only if the court finds that the placement will not pose a danger to the health or safety of others.

(2) Prior to making the order directing that the defendant be confined in a state hospital or other treatment facility or placed on outpatient status, the court shall order the community program director or a designee to evaluate the defendant and to submit to the court within 15 judicial days of the order a written recommendation as to whether the defendant should be required to undergo outpatient treatment, or committed to a state hospital or to any other treatment facility. No person shall be admitted to a state hospital or other treatment facility or placed on outpatient status under this section without having been evaluated by the community program director or a designee.

(3) When the court orders that the defendant be confined in a state hospital or other public or private treatment facility, the court shall provide copies of the following documents which shall be taken with the defendant to the state hospital or other treatment facility where the defendant is to be confined:

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(A) The commitment order, including a specification of the charges.

(B) A computation or statement setting forth the maximum term of commitment in accordance with subdivision (c).

(C) A computation or statement setting forth the amount of credit for time served, if any, to be deducted from the maximum term of commitment.

(D) State summary criminal history information.

(E) Any arrest reports prepared by the police department or other law enforcement agency.

(F) Any court-ordered psychiatric examination or evaluation reports.

(G) The community program director's placement recommendation report.

(H) Records of any finding of mental incompetence pursuant to this chapter arising out of a complaint charging a felony offense specified in Section 290 or any pending Section 1368 proceeding arising out of a charge of a Section 290 offense.

(4) When the defendant is committed to a treatment facility pursuant to clause (i) of subparagraph (B) of paragraph (1) or the court makes the findings specified in clause (ii) or (iii) of subparagraph (B) of paragraph (1) to assign the defendant to a treatment facility other than a state hospital or other secure treatment facility, the court shall order that notice be given to the appropriate law enforcement agency or agencies having local jurisdiction at the site of the placement facility of any finding of mental incompetence pursuant to this chapter arising out of a charge of a Section 290 offense.

(5) When directing that the defendant be confined in a state hospital pursuant to this subdivision, the court shall

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select the hospital in accordance with the policies established by the State Department of Mental Health.

(6)(A) If the defendant is committed or transferred to a state hospital pursuant to this section, the court may, upon receiving the written recommendation of the medical director of the state hospital and the community program director that the defendant be transferred to a public or private treatment facility approved by the community program director, order the defendant transferred to that facility. If the defendant is committed or transferred to a public or private treatment facility approved by the community program director, the court may, upon receiving the written recommendation of the community program director, transfer the defendant to a state hospital or to another public or private treatment facility approved by the community program director. In the event of dismissal of the criminal charges before the defendant recovers competence, the person shall be subject to the applicable provisions of the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code). Where either the defendant or the prosecutor chooses to contest either kind of order of transfer, a petition may be filed in the court for a hearing, which shall be held if the court determines that sufficient grounds exist. At the hearing, the prosecuting attorney or the defendant may present evidence bearing on the order of transfer. The court shall use the same standards as are used in conducting probation revocation hearings pursuant to Section 1203.2.

Prior to making an order for transfer under this section, the court shall notify the defendant, the attorney of record for the defendant, the prosecuting attorney, and the community program director or a designee.

(B) If the defendant is initially committed to a state hospital or secure treatment facility pursuant to clause (ii) or (iii) of subparagraph (B) of paragraph (1) and is subsequently transferred to any other facility, copies of the documents specified in paragraph (3) shall be taken with the defendant to each subsequent facility to which the defendant is

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transferred. The transferring facility shall also notify the appropriate law enforcement agency or agencies having local jurisdiction at the site of the new facility that the defendant is a person subject to clause (ii) or (iii) of subparagraph (B) of paragraph (1).

(b)(1) Within 90 days of a commitment made pursuant to subdivision (a), the medical director of the state hospital or other treatment facility to which the defendant is confined shall make a written report to the court and the community program director for the county or region of commitment, or a designee, concerning the defendant's progress toward recovery of mental competence. Where the defendant is on outpatient status, the outpatient treatment staff shall make a written report to the community program director concerning the defendant's progress toward recovery of mental competence. Within 90 days of placement on outpatient status, the community program director shall report to the court on this matter. If the defendant has not recovered mental competence, but the report discloses a substantial likelihood that the defendant will regain mental competence in the foreseeable future, the defendant shall remain in the state hospital or other treatment facility or on outpatient status. Thereafter, at six-month intervals or until the defendant becomes mentally competent, where the defendant is confined in a treatment facility, the medical director of the hospital or person in charge of the facility shall report in writing to the court and the community program director or a designee regarding the defendant's progress toward recovery of mental competence. Where the defendant is on outpatient status, after the initial 90-day report, the outpatient treatment staff shall report to the community program director on the defendant's progress toward recovery, and the community program director shall report to the court on this matter at six- month intervals. A copy of these reports shall be provided to the prosecutor and defense counsel by the court. If the report indicates that there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future, the committing court shall order the defendant to be returned to the court for proceedings pursuant to paragraph (2) of subdivision (c). The court shall transmit a copy of its order to the community program director or a designee.

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(2) Any defendant who has been committed or has been on outpatient status for 18 months and is still hospitalized or on outpatient status shall be returned to the committing court where a hearing shall be held pursuant to the procedures set forth in Section 1369. The court shall transmit a copy of its order to the community program director or a designee.

(3) If it is determined by the court that no treatment for the defendant's mental impairment is being conducted, the defendant shall be returned to the committing court. The court shall transmit a copy of its order to the community program director or a designee.

(4) At each review by the court specified in this subdivision, the court shall determine if the security level of housing and treatment is appropriate and may make an order in accordance with its determination.

(c)(1) At the end of three years from the date of commitment or a period of commitment equal to the maximum term of imprisonment provided by law for the most serious offense charged in the information, indictment, or misdemeanor complaint, whichever is shorter, a defendant who has not recovered mental competence shall be returned to the committing court. The court shall notify the community program director or a designee of the return and of any resulting court orders.

(2) Whenever any defendant is returned to the court pursuant to paragraph (1) or (2) of subdivision (b) or paragraph (1) of this subdivision and it appears to the court that the defendant is gravely disabled, as defined in subparagraph (B) of paragraph (1) of subdivision (h) of Section 5008 of the Welfare and Institutions Code, the court shall order the conservatorship investigator of the county of commitment of the defendant to initiate conservatorship proceedings for the defendant pursuant to Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code. Any hearings required in the conservatorship proceedings shall be held in the superior

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court in the county that ordered the commitment. The court shall transmit a copy of the order directing initiation of conservatorship proceedings to the community program director or a designee and shall notify the community program director or a designee of the outcome of the proceedings.

(3) Where the defendant is confined in a treatment facility, a copy of any report to the committing court regarding the defendant's progress toward recovery of mental competence shall be provided by the committing court to the prosecutor and to the defense counsel.

(d) The criminal action remains subject to dismissal pursuant to Section 1385. If the criminal action is dismissed, the court shall transmit a copy of the order of dismissal to the community program director or a designee.

(e) If the criminal charge against the defendant is dismissed, the defendant shall be released from any commitment ordered under this section, but without prejudice to the initiation of any proceedings that may be appropriate under the Lanterman-Petris-Short Act, Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code.

(f) As used in this chapter, "community program director" means the person, agency, or entity designated by the State Department of Mental Health pursuant to Section 1605 of this code and Section 4360 of the Welfare and Institutions Code.

(g) For the purpose of this section, "secure treatment facility" shall not include, except for state mental hospitals, state developmental centers, and correctional treatment facilities, any facility licensed pursuant to Chapter 2 (commencing with Section 1250) of, Chapter 3 (commencing with Section 1500) of, or Chapter 3.2 (commencing with Section 1569) of, Division 2 of the Health and Safety Code, or any community board and care facility.

Statutory Definition of Developmental Disability:

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Penal Code section 1370.1(a)(1)(H) defines developmental disability as follows:

> ***As used in this section, "developmental disability" means a disability that originates before an individual attains age 18, continues, or can be expected to continue, indefinitely and constitutes a substantial handicap for the individual, and shall not include other handicapping conditions that are solely physical in nature. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include handicapping conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.***

Defendant's 'Status and Condition'

This instruction includes an additional element regarding the defendant's understanding of his or her "status and condition" out of an abundance of caution because* People v. Stanley*, while finding this concept "implicit" in the statutory language, tacitly accepts it as a correct rendering of the language of* Dusky v. United States *(1960) 362 U.S. 402, 402 (The "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him.").* People v. Stanley *(1995) 10 Cal.4th 764, 816. Other cases have included the defendant's "status and condition" as factors for consideration without further discussion,* see e.g., People v. Campbell *(1976) 63 Cal.App.3d 599, 608.

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682. Determining Restoration to Sanity

The defendant was previously found not guilty of a crime by reason of insanity. You must decide whether the defendant is sane at the present time. That is the only purpose of this proceeding. You are not being asked to decide whether the defendant is guilty or not guilty of any crime or whether (he/she) was sane or insane at any other time.

The defendant is sane if (he/she) no longer poses a danger to the health and safety of others as a result of a mental disorder, disease, or defect.

<Alternative A–defendant's ability to continue unsupervised self-medication not an issue>
[The law presumes that the defendant is still insane. In order to overcome this presumption, the defendant has the burden of proving that it is more likely than not that (he/she) no longer poses a danger to the health and safety of others.]

<Alternative B—defendant's ability to continue unsupervised self-medication an issue>
[The law presumes that the defendant is still insane. In order to overcome this presumption, the defendant has the burden of proving that it is more likely than not that:

1. (He/She) is no longer a danger to the health and safety of others because (he/she) is now taking prescribed medicine that controls (his/her) mental condition;

AND

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the standard for determining if a defendant has been restored to sanity.

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Revise and give Instruction 140, Predeliberation Instructions as follows: Replace the paragraph that begins with "Your verdict [on each count and any special finding(s)] must be unanimous" with "Nine or more of you must agree on your verdict." (*People v. Franklin* (1972) 7 Cal. 3d 126, 149.) In addition, give any other relevant posttrial instructions, such as Instruction 120, Evidence, or Instruction 130, Witnesses.

Do **not** give Instruction 300, Circumstantial Evidence, or Instruction 301, Circumstantial Evidence: Intent or Mental State. These instructions have "no application when the standard of proof is preponderance of the evidence." (*People v. Johnwell* (Sept. 1, 2004, F041899) __ Cal.App.4th __, __.)

Do not give this instruction in conjunction with proceedings under Penal Code sections 2970 and 2972. (*People v. Noble* (2002) 100 Cal.App.4th 184, 190.)

AUTHORITY

Instructional Requirements ▸ Pen. Code, § 1026.2.
Unsupervised Self-Medication ▸ *People v. Williams* (1988) 198 Cal.App.3d 1476, 1481–1482.
Presumption of Continuing Insanity ▸ *In re Franklin* (1972) 7 Cal.3d 126, 141 [interpreting precursor statute].
Three-Fourths Verdict and Defendant's Burden of Proof ▸ *In re Franklin* (1972) 7 Cal.3d 126, 149; *People v. Mapp* (1983) 150 Cal.App.3d 346, 351.

5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, §§ 679–690.

RELATED ISSUES

Court May Order a Directed Verdict

The court may order a directed verdict when insufficiency of the evidence warrants it. (*People v. Mapp* (1983) 150 Cal.App.3d 346, 351.)

Both Parties Have Right to Jury Trial on Issue of Restoration of Sanity

Even if the defendant waives the right to a jury on the issue of restoration of sanity, the prosecution may still assert their right to a jury. (*People v. Superior Court of Contra Costa County* (1990) 219 Cal.App.3d 607, 612.)

No Right to Jury Trial on First-Stage Hearing on Outpatient Treatment

Even though success at the first-stage hearing is a necessary step on the way to eventual release, equal protection does not require that a criminal defendant who has been committed have a right to a jury at such a hearing. (*People v. Tilbury* (1991) 54 Cal.3d 56, 67.)

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STAFF NOTES

Statutory Authority

Penal Code section 1026.2:

a) An application for the release of a person who has been committed to a state hospital or other treatment facility, as provided in Section 1026, upon the ground that sanity has been restored, may be made to the superior court of the county from which the commitment was made, either by the person, or by the medical director of the state hospital or other treatment facility to which the person is committed or by the community program director where the person is on outpatient status under Title 15 (commencing with Section 1600). The court shall give notice of the hearing date to the prosecuting attorney, the community program director or a designee, and the medical director or person in charge of the facility providing treatment to the committed person at least 15 judicial days in advance of the hearing date.

(b) Pending the hearing, the medical director or person in charge of the facility in which the person is confined shall prepare a summary of the person's programs of treatment and shall forward the summary to the community program director or a designee and to the court. The community program director or a designee shall review the summary and shall designate a facility within a reasonable distance from the court in which the person may be detained pending the hearing on the application for release. The facility so designated shall continue the program of treatment, shall provide adequate security, and shall, to the greatest extent possible, minimize interference with the person's program of treatment.

(c) A designated facility need not be approved for 72-hour treatment and evaluation pursuant to the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code). However, a county jail may not be designated unless the services specified in subdivision (b) are provided and accommodations are provided which ensure both the safety of the person and the safety of the general population of the jail. If there is evidence that the treatment program is not being complied with or accommodations have not

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been provided which ensure both the safety of the committed person and the safety of the general population of the jail, the court shall order the person transferred to an appropriate facility or make any other appropriate order, including continuance of the proceedings.

(d) No hearing upon the application shall be allowed until the person committed has been confined or placed on outpatient status for a period of not less than 180 days from the date of the order of commitment.

(e) The court shall hold a hearing to determine whether the person applying for restoration of sanity would be a danger to the health and safety of others, due to mental defect, disease, or disorder, if under supervision and treatment in the community. If the court at the hearing determines the applicant will not be a danger to the health and safety of others, due to mental defect, disease, or disorder, while under supervision and treatment in the community, the court shall order the applicant placed with an appropriate forensic conditional release program for one year. All or a substantial portion of the program shall include outpatient supervision and treatment. The court shall retain jurisdiction. The court at the end of the one year, shall have a trial to determine if sanity has been restored, which means the applicant is no longer a danger to the health and safety of others, due to mental defect, disease, or disorder. The court shall not determine whether the applicant has been restored to sanity until the applicant has completed the one year in the appropriate forensic conditional release program, unless the community program director sooner makes a recommendation for restoration of sanity and unconditional release as described in subdivision (h). The court shall notify the persons required to be notified in subdivision (a) of the hearing date.

(f) If the applicant is on parole or outpatient status and has been on it for one year or longer, then it is deemed that the applicant has completed the required one year in an appropriate forensic conditional release program and the court shall, if all other applicable provisions of law have been met, hold the trial on restoration of sanity as provided for in this section.

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(g) Before placing an applicant in an appropriate forensic conditional release program, the community program director shall submit to the court a written recommendation as to what forensic conditional release program is the most appropriate for supervising and treating the applicant. If the court does not accept the community program director's recommendation, the court shall specify the reason or reasons for its order on the court record. Sections 1605 to 1610, inclusive, shall be applicable to the person placed in the forensic conditional release program unless otherwise ordered by the court.

(h) If the court determines that the person should be transferred to an appropriate forensic conditional release program, the community program director or a designee shall make the necessary placement arrangements, and, within 21 days after receiving notice of the court finding, the person shall be placed in the community in accordance with the treatment and supervision plan, unless good cause for not doing so is made known to the court.

During the one year of supervision and treatment, if the community program director is of the opinion that the person is no longer a danger to the health and safety of others due to a mental defect, disease, or disorder, the community program director shall submit a report of his or her opinion and recommendations to the committing court, the prosecuting attorney, and the attorney for the person. The court shall then set and hold a trial to determine whether restoration of sanity and unconditional release should be granted. The trial shall be conducted in the same manner as is required at the end of one full year of supervision and treatment.

(i) If at the trial for restoration of sanity the court rules adversely to the applicant, the court may place the applicant on outpatient status, pursuant to Title 15 (commencing with Section 1600) of Part 2, unless the applicant does not meet all of the requirements of Section 1603.

(j) If the court denies the application to place the person in an appropriate forensic conditional release program or if restoration of sanity is denied, no new application may be filed by the person until one year has elapsed from the date of the denial.

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(k) In any hearing authorized by this section, the applicant shall have the burden of proof by a preponderance of the evidence.

(l) If the application for the release is not made by the medical director of the state hospital or other treatment facility to which the person is committed or by the community program director where the person is on outpatient status under Title 15 (commencing with Section 1600), no action on the application shall be taken by the court without first obtaining the written recommendation of the medical director of the state hospital or other treatment facility or of the community program director where the person is on outpatient status under Title 15 (commencing with Section 1600).

(m) This subdivision shall apply only to persons who, at the time of the petition or recommendation for restoration of sanity, are subject to a term of imprisonment with prison time remaining to serve or are subject to the imposition of a previously stayed sentence to a term of imprisonment. Any person to whom this subdivision applies who petitions or is recommended for restoration of sanity may not be placed in a forensic conditional release program for one year, and a finding of restoration of sanity may be made without the person being in a forensic conditional release program for one year. If a finding of restoration of sanity is made, the person shall be transferred to the custody of the California Department of Corrections to serve the term of imprisonment remaining or shall be transferred to the appropriate court for imposition of the sentence that is pending, whichever is applicable.

Unsupervised Self-Medication

In *People v. Williams* (1988) 198 Cal.App.3d 1476, 1481-82, the court approvingly summarized the following jury instruction given in the case of a petitioner who sought release because his mental disorder was controlled by medication:

> The instruction was framed to reflect his previous conduct while on medication allowing the jury to decide the threshold question whether [defendant] would continue to take his prescribed medication in an unsupervised environment and if so, whether in his

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> medicated condition he represented a danger to himself or others.

Presumption of Continuing Insanity

In re Franklin (1972) 7 Cal.3d 126, 141, a case based on the precursor statute to section 1026.2, explained the reason that the defendant bears the burden of proving his sanity:

> We agree with *Slyback* and other authorities which have considered the matter, that it is reasonable to presume under such circumstances that defendant's insanity, established by a preponderance of the evidence, has continued to the date of trial. (*citations omitted) . . .* [T]he fact that defendant must prove his insanity by a preponderance of the evidence constitutes "a very solid basis upon which the presumption of continuing mental illness may rest."

Defendant Posing Danger To Self As Well As Others

The text of Pen. Code section 1026.2 in effect from January 1, 1986 until January 1, 1989 provided in pertinent part of subsection (e) as follows:

> The court shall hold a hearing to determine if the person applying for restoration of sanity would no longer be a danger to the health and safety of others, **including himself or herself**, if under supervision and treatment in the community.

(*Emphasis added*). The language currently in effect, as cited *supra*, does not contain the bolded language and as a result it is omitted from this instruction.

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683. Extension of Commitment

_____ <insert name of respondent> *has been committed to a mental health facility. You must decide whether (he/she) is insane at the present time. That is the only purpose of this proceeding. You are not being asked to decide whether* **_____ <insert name of respondent>** *is guilty or not guilty of any crime or whether (he/she) was sane or insane at any other time.*

To prove that **_____ <*insert name of respondent*>** is now insane, the People must prove beyond a reasonable doubt that:

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

AND

2. As a result of (his/her) mental condition, (he/she) now poses a substantial danger of physical harm to others.

Proof *beyond a reasonable doubt* is proof that leaves you with an abiding conviction that something is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. In deciding whether the People have proved something beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial.

[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:**

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

AND

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

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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.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the standard for extending commitment.

Give Instruction 140, Predeliberation Instructions and any other relevant posttrial instructions, such as Instruction 120, Evidence, or Instruction 130, Witnesses.

AUTHORITY

Instructional Requirements ▸ Pen. Code, § 1026.5(b)(1).
Unanimous Verdict, Burden of Proof ▸ *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
Affirmative Defense of Medication ▸ *People v. Borden* (1990) 217 Cal.App.3d 1591, 1600–1602.

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

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.) 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.) 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.)

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STAFF NOTES

Statutory Authority

Penal Code section 1026.5:

(a)(1) In the case of any person committed to a state hospital or other treatment facility pursuant to Section 1026 or placed on outpatient status pursuant to Section 1604, who committed a felony on or after July 1, 1977, the court shall state in the commitment order the maximum term of commitment, and the person may not be kept in actual custody longer than the maximum term of commitment, except as provided in this section. For the purposes of this section, "maximum term of commitment" shall mean the longest term of imprisonment which could have been imposed for the offense or offenses of which the person was convicted, including the upper term of the base offense and any additional terms for enhancements and consecutive sentences which could have been imposed less any applicable credits as defined by Section 2900.5, and disregarding any credits which could have been earned pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3.

(2) In the case of a person confined in a state hospital or other treatment facility pursuant to Section 1026 or placed on outpatient status pursuant to Section 1604, who committed a felony prior to July 1, 1977, and who could have been sentenced under Section 1168 or 1170 if the offense was committed after July 1, 1977, the Board of Prison Terms shall determine the maximum term of commitment which could have been imposed under paragraph (1), and the person may not be kept in actual custody longer than the maximum term of commitment, except as provided in subdivision (b). The time limits of this section are not jurisdictional.

In fixing a term under this section, the board shall utilize the upper term of imprisonment which could have been imposed for the offense or offenses of which the person was convicted, increased by any additional terms which could have been imposed based on matters which were found to be true in the committing court. However, if at least two of the members of the board after reviewing the person's file determine that a longer term should be imposed for the reasons specified in Section 1170.2,

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a longer term may be imposed following the procedures and guidelines set forth in Section 1170.2, except that any hearings deemed necessary by the board shall be held within 90 days of September 28, 1979. Within 90 days of the date the person is received by the state hospital or other treatment facility, or of September 28, 1979, whichever is later, the Board of Prison Terms shall provide each person with the determination of the person's maximum term of commitment or shall notify the person that a hearing will be scheduled to determine the term.

Within 20 days following the determination of the maximum term of commitment the board shall provide the person, the prosecuting attorney, the committing court, and the state hospital or other treatment facility with a written statement setting forth the maximum term of commitment, the calculations, and any materials considered in determining the maximum term.

(3) In the case of a person committed to a state hospital or other treatment facility pursuant to Section 1026 or placed on outpatient status pursuant to Section 1604 who committed a misdemeanor, the maximum term of commitment shall be the longest term of county jail confinement which could have been imposed for the offense or offenses which the person was found to have committed, and the person may not be kept in actual custody longer than this maximum term.

(4) Nothing in this subdivision limits the power of any state hospital or other treatment facility or of the committing court to release the person, conditionally or otherwise, for any period of time allowed by any other provision of law.

(b)(1) A person may be committed beyond the term prescribed by subdivision (a) only under the procedure set forth in this subdivision and only if the person has been committed under Section 1026 for a felony and by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others.

(2) Not later than 180 days prior to the termination of the maximum term of commitment prescribed in subdivision (a), the medical director of a state hospital in which the person is being

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treated, or the medical director of the person's treatment facility or the local program director, if the person is being treated outside a state hospital setting, shall submit to the prosecuting attorney his or her opinion as to whether or not the patient is a person described in paragraph (1). If requested by the prosecuting attorney, the opinion shall be accompanied by supporting evaluations and relevant hospital records. The prosecuting attorney may then file a petition for extended commitment in the superior court which issued the original commitment. The petition shall be filed no later than 90 days before the expiration of the original commitment unless good cause is shown. The petition shall state the reasons for the extended commitment, with accompanying affidavits specifying the factual basis for believing that the person meets each of the requirements set forth in paragraph (1).

(3) When the petition is filed, the court shall advise the person named in the petition of the right to be represented by an attorney and of the right to a jury trial. The rules of discovery in criminal cases shall apply. If the person is being treated in a state hospital when the petition is filed, the court shall notify the community program director of the petition and the hearing date.

(4) The court shall conduct a hearing on the petition for extended commitment. The trial shall be by jury unless waived by both the person and the prosecuting attorney. The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless that time is waived by the person or unless good cause is shown.

(5) Pending the hearing, the medical director or person in charge of the facility in which the person is confined shall prepare a summary of the person's programs of treatment and shall forward the summary to the community program director or a designee, and to the court. The community program director or a designee shall review the summary and shall designate a facility within a reasonable distance from the court in which the person may be detained pending the hearing on the petition for extended commitment. The facility so designated shall continue the program of treatment, shall provide adequate security, and

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shall, to the greatest extent possible, minimize interference with the person's program of treatment.

(6) A designated facility need not be approved for 72-hour treatment and evaluation pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code). However, a county jail may not be designated unless the services specified in paragraph (5) are provided and accommodations are provided which ensure both the safety of the person and the safety of the general population of the jail. If there is evidence that the treatment program is not being complied with or accommodations have not been provided which ensure both the safety of the committed person and the safety of the general population of the jail, the court shall order the person transferred to an appropriate facility or make any other appropriate order, including continuance of the proceedings.

(7) The person shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings. All proceedings shall be in accordance with applicable constitutional guarantees. The state shall be represented by the district attorney who shall notify the Attorney General in writing that a case has been referred under this section. If the person is indigent, the county public defender or State Public Defender shall be appointed. The State Public Defender may provide for representation of the person in any manner authorized by Section 15402 of the Government Code. Appointment of necessary psychologists or psychiatrists shall be made in accordance with this article and Penal Code and Evidence Code provisions applicable to criminal defendants who have entered pleas of not guilty by reason of insanity.

(8) If the court or jury finds that the patient is a person described in paragraph (1), the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed. This commitment shall be for an additional period of two years from the date of termination of the previous commitment, and the person may not be kept in actual custody longer than two years unless another extension of commitment is obtained in accordance with the provisions of this subdivision. Time spent on outpatient status, except when placed

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in a locked facility at the direction of the outpatient supervisor, shall not count as actual custody and shall not be credited toward the person's maximum term of commitment or toward the person's term of extended commitment.

(9) A person committed under this subdivision shall be eligible for release to outpatient status pursuant to the provisions of Title 15 (commencing with Section 1600) of Part 2.

(10) Prior to termination of a commitment under this subdivision, a petition for recommitment may be filed to determine whether the patient remains a person described in paragraph (1). The recommitment proceeding shall be conducted in accordance with the provisions of this subdivision.

(11) Any commitment under this subdivision places an affirmative obligation on the treatment facility to provide treatment for the underlying causes of the person's mental disorder.

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684. Commitment as Sexually Violent Predator

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

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

3. (He/She) has been convicted of committing sexually violent offenses against two or more victims;

4. It is likely that (he/she) will engage in sexually violent predatory criminal behavior as a result of a diagnosed mental disorder;

AND

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

A person is *likely* to engage in such behavior if he or she presents a substantial danger of committing sexually violent predatory crimes if released into the community. A *substantial danger* is a serious and well-founded risk. The likelihood that the person will commit such acts does not have to be greater than 50 percent.

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

_____ <*insert name[s] of crime[s] enumerated in Welf. & Inst. Code, § 6600(b)*> (is/are) [a] *sexually violent offense[s]* when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the victim or another person.

[**_____ <*insert name[s] of crime[s] enumerated in Welf. & Inst. Code, § 6600(b)*>** (is/are) also [a] *sexually violent offense[s]* when the offense[s] (is/are) committed on a child under 14 years old and the offense[s] involve[s] substantial sexual conduct. *Substantial sexual conduct* means oral copulation, or masturbation of either the victim or the offender, or penetration of the vagina or rectum of either the victim or the offender with the penis of the other or with any foreign object.]

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As used here, a *conviction* for committing a sexually violent offense is one of the following:

<Give the appropriate bracketed description[s] below.>

> ***<A. Conviction With Fixed Sentence>***
> [A prior [or current] conviction for one of the offenses I have just described to you that resulted in a prison sentence for a fixed period of time.]
>
> ***<B. Conviction With Indeterminate Sentence>***
> [A conviction for an offense that I have just described to you that was committed before July 1, 1977, and resulted in an indeterminate sentence.]
>
> ***<C. Conviction in Another Jurisdiction>***
> [A prior conviction in another jurisdiction for an offense that includes all of the same elements of one of the offenses that I have just described to you.]
>
> ***<D. Conviction Under Previous Statute>***
> [A conviction for an offense under a previous statute that includes all of the elements of one of the offenses that I have just described to you.]
>
> ***<E. Conviction With Probation>***
> [A prior conviction for one of the offenses that I have just described to you for which the respondent received probation.]
>
> ***<F. Acquittal Based on Insanity Defense>***
> [A prior finding of not guilty by reason of insanity for one of the offenses that I have just described to you.]
>
> ***<G. Conviction as Mentally Disordered Sex Offender>***
> [A conviction resulting in a finding that the respondent was a mentally disordered sex offender.]

[The term d*iagnosed mental disorder* includes congenital or acquired conditions affecting a person's emotional or volitional capacity and predisposing that person to commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others.]

You may not conclude that **_____** ***<insert name of respondent>*** is a sexually violent predator unless the People have proved beyond a reasonable doubt that (he/she) has been convicted of committing a sexually violent offense against two or more victims *and* that (he/she) has a diagnosed mental disorder that

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makes (him/her) a danger to the health and safety of others as I have defined that danger for you.

In order to prove that _____ <***insert name of respondent***> is a danger to the health and safety of others, the People do not need to prove a recent overt act committed while (he/she) was in custody. A *recent overt act* is a criminal act that shows a likelihood that the actor may engage in sexually violent predatory criminal behavior.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a respondent is a sexually violent predator.

The court also **must give** Instructions 110, Reasonable Doubt; 120, Evidence; 130, Witnesses; 140, Predeliberation Instructions; and any other relevant posttrial instructions. These instructions may need to be modified.

AUTHORITY

Elements and Definitions ▸ Welf. & Inst. Code, §§ 6600, 6600.1.
Unanimous Verdict, Burden of Proof ▸ *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
Likely Defined ▸ *People v. Roberge* (2003) 29 Cal.4th 979, 988.
Predatory Acts Defined ▸ *People v. Hurtado* (2002) 28 Cal.4th 1179, 1190.
Must Instruct on Necessity for Confinement in Secure Facility ▸ *People v. Grassini* (2003) 113 Cal.App.4th 765, 777.
Determinate Sentence Defined ▸ Pen. Code, § 1170.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 193.

RELATED ISSUES

Different Proof Requirements at Different Stages of the Proceedings

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Even though two concurring experts must testify to commence the petition process under Welfare and Institutions Code section 6001, the same requirement does not apply to the trial. (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1064.)

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STAFF NOTES

Statutory Authority

Welfare and Institutions Code section 6600 provides as follows:

As used in this article, the following terms have the following meanings:

(a)(1) "Sexually violent predator" means a person who has been convicted of a sexually violent offense against two or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.

(2) For purposes of this subdivision any of the following shall be considered a conviction for a sexually violent offense:

(A) A prior or current conviction that resulted in a determinate prison sentence for an offense described in subdivision (b).

(B) A conviction for an offense described in subdivision (b) that was committed prior to July 1, 1977, and that resulted in an indeterminate prison sentence.

(C) A prior conviction in another jurisdiction for an offense that includes all of the elements of an offense described in subdivision (b).

(D) A conviction for an offense under a predecessor statute that includes all of the elements of an offense described in subdivision (b) .

(E) A prior conviction for which the inmate received a grant of probation for an offense described in subdivision (b).

(F) A prior finding of not guilty by reason of insanity for an offense described in subdivision (b).

(G) A conviction resulting in a finding that the person was a mentally disordered sex offender.

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(3) Conviction of one or more of the crimes enumerated in this section shall constitute evidence that may support a court or jury determination that a person is a sexually violent predator, but shall not be the sole basis for the determination. The existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of Mental Health. Jurors shall be admonished that they may not find a person a sexually violent predator based on prior offenses absent relevant evidence of a currently diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.

(4) The provisions of this section shall apply to any person against whom proceedings were initiated for commitment as a sexually violent predator on or after January 1, 1996.

(b) "Sexually violent offense" means the following acts when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, and that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity, as provided in subdivision (a): a felony violation of paragraph (2) of subdivision (a) of Section 261, paragraph (1) of subdivision (a) of Section 262, Section 264.1, subdivision (a) or (b) of Section 288, or subdivision (a) of Section 289 of the Penal Code, or sodomy or oral copulation in violation of Section 286 or 288a of the Penal Code.

(c) "Diagnosed mental disorder" includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.

(d) "Danger to the health and safety of others" does not require proof of a recent overt act while the offender is in custody.

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(e) "Predatory" means an act is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization.

(f) "Recent overt act" means any criminal act that manifests a likelihood that the actor may engage in sexually violent predatory criminal behavior.

(g) Notwithstanding any other provision of law and for purposes of this section, no more than one prior juvenile adjudication of a sexually violent offense may constitute a prior conviction for which the person received a determinate term if all of the following applies:

(1) The juvenile was 16 years of age or older at the time he or she committed the prior offense.

(2) The prior offense is a sexually violent offense as specified in subdivision (b). Notwithstanding Section 6600.1, only an offense described in subdivision (b) shall constitute a sexually violent offense for purposes of this subdivision.

(3) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 because of the person's commission of the offense giving rise to the juvenile court adjudication.

(4) The juvenile was committed to the Department of the Youth Authority for the sexually violent offense.

(h) A minor adjudged a ward of the court for commission of an offense that is defined as a sexually violent offense shall be entitled to specific treatment as a sexual offender. The failure of a minor to receive that treatment shall not constitute a defense or bar to a determination that any person is a sexually violent predator within the meaning of this article.

Penal Code Section 6600.1

(a) If the victim of an underlying offense that is specified in subdivision (b) of Section 6600 is a child under the age of 14 and the offending act or acts involved

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substantial sexual conduct, the offense shall constitute a "sexually violent offense" for purposes of Section 6600.

(b) "Substantial sexual conduct" means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender.

Penal Code Section 1170, Determinate Sentencing

> (a)(1) The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.

Definition of "Likely"

The California Supreme Court has discussed the meaning of "likely" in the context of Welf. & Inst. Code section 6601:

> We therefore conclude that the phrase "*likely* to engage in acts of sexual violence" (italics added), as used in section 6601, subdivision (d), connotes much more than the mere *possibility* that the person will reoffend as a result of a predisposing mental disorder that seriously impairs volitional control. On the other hand, the statute does not require a precise determination that the chance of reoffense if *better than even*. Instead, an evaluator applying this standard must conclude that the person is "likely" to reoffend if, because of a current mental disorder which makes it difficult or impossible to restrain violent sexual behavior, the person presents a *substantial danger*, that is, a *serious and well-founded risk*, that he or she will commit such crimes if free in the community.

(*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 922.) (*Italics in original*).

The Supreme Court then explained this meaning in the context of Welf. & Inst. Code section 6600(a):

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> [U]nder section 6600, subdivision (a), which is at issue here, a person is "likely [to] engage in sexually violent criminal behavior" if at trial the person is found to present a *substantial danger*, that is, a *serious and well-founded risk*, of committing such crimes if released from custody.

(*People v. Roberge* (2003) 29 Cal.4th 979, 988.) (*Italics in original*).

Quantifying the Likelihood of Reoffending

The Supreme Court emphasized that the likelihood of reoffending did not have to be "more likely than not:"

> We further note that when the Legislature wishes to employ a "more likely than not" standard, it has demonstrated its ability to do so in express terms . . . Thus, mere use of the word "likely" is not proof that the Legislature intended to require the evaluators to predict a greater than 50 percent chance the person would reoffend . . . "[D]anger to the health and safety of others" (citations omitted) produced by a mental disorder that "predisposes" one to the commission of sexual violence (citations omitted) does not, by common understanding, evaporate with an expert's prediction that the sufferer's risk of reoffense is *no greater than 50 percent*. "Danger" is merely "the state of being exposed to harm" (citation omitted) or "the condition of being exposed to the *chance* of evil; *risk*; peril" (citation omitted) and that one is "predisposed" to do something simply connotes that he or she is "inclined" or "susceptible" to doing it. (citation omitted).

(*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 919-920.) (*Italics in original*).

Confinement Necessary

> Appellant contends that the trial court reversibly erred in its instruction to the jury on one of the elements which had to be proved for it to find the SVP petition true. He asserts that the trial court should have advised the jury that it had to determine whether custody in a secure facility was necessary to ensure that he was not a danger to the health and safety of others. Although we conclude that the trial court had a duty to so instruct, appellant's contention of reversible error must fail. . . .
>
> Respondent argues that the " 'amenability to voluntary treatment' theory" constitutes a theory of defense and the requested language constitutes a

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> pinpoint instruction. A pinpoint instruction relates specific evidence to the elements of the offense, highlighting a defense theory, and must be given on request, but need not be given sua sponte. [Citations.] We disagree with respondent's assertion. We conclude that, at the very least, the presence of such evidence creates a sua sponte duty in the trial court to instruct the jury that it is to determine whether custody in a secure facility is necessary to ensure that the individual is not a danger to the health and safety of others.

(*People v. Grassini* (2003) 113 Cal.App.4th 765, 775–777.)

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685. Idiocy as a Defense

You may not find the defendant guilty of **_____ <insert description of crime>** *if (he/she) was legally incapable of committing a crime because of idiocy.*

The defendant was legally incapable of committing a crime because of idiocy if at the time the crime was committed:

1. **(He/She) had a mental disease or defect;**

AND

2. **Because of that disease or defect, (he/she) did not know or understand the nature and quality of (his/her) act or did not know or understand that (his/her) act was morally or legally wrong.**

The defendant has the burden of proving this defense by a preponderance of the evidence. [This is a different burden of proof from proof beyond a reasonable doubt.] To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that (he/she) was legally incapable of committing a crime because of idiocy. If the defendant has not met this burden, (he/she) has not proved this defense.

BENCH NOTES

Instructional Duty

The court has a** sua sponte **duty to instruct on idiocy when the defendant has raised this defense. (Pen. Code, § 25.)

If the court grants a bifurcated trial on the defense of idiocy, the court must also give the appropriate posttrial instructions such as Instruction 140, Predeliberation Instructions; Instruction 120, Evidence; and Instruction 130, Witnesses. (See *In Re Ramon M.* (1978) 22 Cal.3d 419, 427, fn. 10.)

If the court does not grant a bifurcated trial, give the bracketed sentence “This is a different burden of proof from proof beyond a reasonable doubt.”

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AUTHORITY

Instructional Requirements ▸ Pen. Code, §§ 25, 25.5, 26.
Burden of Proof ▸ *In Re Ramon M.* (1978) 22 Cal.3d 419, 427, fn. 10.
Same Test for Both Idiocy and Insanity ▸ *In Re Ramon M.* (1978) 22 Cal.3d 419, 427.
Requirement of Mental Disease or Defect ▸ *People v. McCaslin* (1986) 178 Cal.App.3d 1, 8.
Incapacity Based on Mental Disease or Defect ▸ *People v. Stress* (1988) 205 Cal.App.3d 1259, 1271.
Penal Code Section 25(b) Supersedes Model Penal Code Test ▸ *People v. Phillips* (2000) 83 Cal.App.4th 170, 173.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 2.

COMMENTARY

In *In Re Ramon M.* (1978) 22 Cal.3d 419, 427, the Supreme Court held that the same test should apply for determining both idiocy and insanity. However, the court was applying the Model Penal Code test, which was subsequently superseded by Proposition 8 as codified in Penal Code section 25(b). The Court of Appeal in *People v. Phillips* (2000) 83 Cal.App.4th 170, 173, expressly found that "the test for insanity as stated in section 25, subdivision (b) applies also to determine whether a person is an idiot pursuant to section 26." Accordingly, the committee followed *Phillips* in drafting this instruction.

RELATED ISSUES

Legal and Moral Wrong
The wrong contemplated by the two-part insanity test refers to both the legal wrong and the moral wrong. If the defendant appreciates that his or her act is criminal but does not think it is morally wrong, he or she may still be criminally insane. (See *People v. Skinner* (1985) 39 Cal.3d 765, 777–784; see also *People v. Stress* (1988) 205 Cal.App.3d 1259, 1271–1274.)

Penal Code Sections 1016, 1017, 1026, 1027
The Supreme Court found in *In Re Ramon M.* (1978) 22 Cal.3d 419, 427 that the same test for legal incapacity should apply to both insanity and mental retardation. Moreover, the court concluded that the Legislature "probably intended [Pen. Code, §§ 1016, 1017, 1026, 1027] to apply to all persons who assertedly lack mental capacity to commit crime. In light of this legislative intent, and of the identity of the legal test for idiocy and insanity . . . we conclude that the term 'insanity' in

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Penal Code sections 1016 through 1027 refers to mental incapacity, whether arising from mental illness or mental retardation. Accordingly a defendant asserting a defense of idiocy should raise that defense by separate plea (see Pen. Code, §§ 1016, 1017), may obtain a bifurcated trial (see Pen. Code, § 1026), [and] must prove his incapacity by a preponderance of the evidence [citation] . . . ." (*Id.* at p. 427, fn. 10.)

Extension of Commitment

The test for extending a person's commitment is not the same as the test for insanity. (*People v. Superior Court (Williams)* (1991) 233 Cal.App.3d 477, 490.) The test for insanity and idiocy 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.) In contrast, the standard for recommitment under Penal Code section 1026.5 (b) is whether a defendant, "by reason of a mental disease, defect, or disorder [,] represents a substantial danger of physical harm to others." (*People v. Superior Court, supra,* 233 Cal.App.3d at pp. 489–490; *People v. Wilder* (1995) 33 Cal.App.4th 90, 99.)

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STAFF NOTES

Statutory Authority

Penal Code section 26:

> All persons are capable of committing crimes except those belonging to the following classes:
>
> One – Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness.
>
> Two – Idiots.
>
> Three – Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent.
>
> Four – Persons who committed the act charged without being conscious thereof.
>
> Five – Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.
>
> Six – Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.

Penal Code Section 25(b)

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In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense.

Same Test for Both Idiocy and Insanity

The Supreme Court has found that both idiocy and insanity are forms of mental incapacity and the same test should apply to both:

> Every jurisdiction to consider the matter employs the same test for insanity and for defenses based on mental retardation . . .we conclude that the term 'insanity' in Penal Code sections 1016 through 1027 refers to mental incapacity, whether arising from mental illness or mental retardation.

In Re Ramon M. (1978) 22 Cal.3d 419, 427, fn. 9-10 (applying the pre-proposition 8 Model Penal Code test).

Test for Idiocy

> The test for the defense of idiocy, however, is not defined by statute. The question is whether the Model Penal Code test adopted in *Ramon M.* still applies. We conclude it does not. As the court pointed out in *Ramon M.*, there is no basis for distinguishing between insanity and idiocy for the purposes of imposing criminal responsibility. It would make no sense to conclude that lack of capacity to commit a crime is governed under one test in the case of mental illness and another test in the case of mental retardation.
>
> We hold that the test for insanity as stated in section 25, subdivision (b) applies also to determine whether a person is an idiot pursuant to section 26.

(*People v. Phillips* (2000) 83 Cal.App.4th 170, 173.

Inadvertent Use of "And" in Penal Code Section 25

In 1985 the Supreme Court considered whether the use of the conjunctive "and" in Pen. Code section 25(b) was a drafting error:

> If the use of the conjunctive "and" in section 25(b) is not a draftsman's error, a defendant must now establish both that he "was incapable of knowing or understanding the nature and quality of his or her act *and* of distinguishing right from wrong." We recognize the basic principle of

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> statutory and constitutional construction which mandates that courts, in construing a measure, not undertake to rewrite its unambiguous language. (citations omitted) That rule is not applied, however, when it appears clear that a word has been erroneously used, and a judicial correction will best carry out the intent of the adopting body. (citation omitted) The inadvertent use of "and" where the purpose or intent of a statute seems clearly to require "or" is a familiar example of a drafting error which may properly be rectified by judicial construction (citations omitted) . . . Since 1850 the disjunctive M'Naghten test of insanity has been accepted as the rule by which the minimum cognitive function which constitutes wrongful intent will be measured in this state. As such it is itself among the fundamental principles of our criminal law. Had it been the intent of the drafters of Proposition 8 or of the electorate which adopted it both to abrogate the more expansive ALI-*Drew* test and to abandon that prior fundamental principle of culpability for crime, we would anticipate that this intent would be expressed in some more obvious manner than the substitution of a single conjunctive in a lengthy initiative provision. (citations omitted) Applying section 25(b) as a conjunctive test of insanity would erase that fundamental principle. It would return the law to that which preceded M'Naghten . . . We find nothing in the language of Proposition 8, or in any other source from which the intent of the electorate may be divined which indicates that such a fundamental, far-reaching change in the law of insanity as that was intended.

(*People v. Skinner* (1985) 39 Cal.3d 765, 776-777.)

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1900. Giving or Offering a Bribe to an Executive Officer

The defendant is charged [in Count __] with (giving/ [or] offering) a bribe to an executive officer.

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

4. The defendant (gave/ [or] offered) a bribe to an executive officer in this state [or someone acting on the officer's behalf];

AND

5. The defendant acted with the corrupt intent to unlawfully influence that officer's official (act[,]/ decision[,]/ vote[,]/ opinion[,]/ [or] other proceeding).

As used here, *bribe* means something of present or future value or advantage, or a promise to give such a thing, that is given or offered with the corrupt intent to unlawfully influence the public or official action, vote, decision, or opinion of the person to whom the bribe is given.

A person acts with *corrupt intent* when he or she acts wrongfully, in order to gain a financial or other advantage for himself, herself, or someone else.

The official (act[,]/ proceeding[,]/ decision[,]/ vote[,]/ [or] opinion) the defendant sought to influence must have related to an existing subject that could have been brought before the public officer in his or her official capacity. It does not have to relate to a duty specifically given by statute to that officer.

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

[The executive officer does not need to have (accepted the bribe[,]/ [or] performed the requested act[,]/ [or] deliberately failed to perform a duty).]

[*Offering a bribe* does not require specific words or behavior, as long as the language used and the circumstances clearly show an intent to bribe.] [The thing offered does not need to actually be given, exist at the time it is offered, or have a specific value.]

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BENCH NOTES

Instructional Duty

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

Give the bracketed sentence that begins with "The executive officer does not" if the evidence shows that the executive officer did not accept the bribe or follow through on the action sought.

Give the bracketed definition of "offering a bribe" if the prosecution is pursuing this theory. Give the bracketed sentence that begins, "The thing offered does not need to actually," on request.

AUTHORITY

Elements ▸ Pen. Code, § 67.
Bribe Defined ▸ Pen. Code, § 7, subd. 6.
Corruptly Defined ▸ Pen. Code, § 7, subd. 3.
Executive Officer Defined ▸ *People v. Strohl* (1976) 57 Cal.App.3d 347, 361.
Corrupt Intent Is an Element of Bribery ▸ *People v. Gliksman* (1978) 78 Cal.App.3d 343, 351; *People v. Zerillo* (1950) 36 Cal.2d 222, 232.
Subject Matter of Bribe ▸ *People v. Megladdery* (1940) 40 Cal.App.2d 748, 782; *People v. Diedrich* (1982) 31 Cal.3d 263, 276.
Offering a Bribe ▸ *People v. Britton* (1962) 205 Cal.App.2d 561, 564.
Bribery and Extortion Distinguished ▸ *People v. Powell* (1920) 50 Cal.App. 436, 441.
No Bilateral Agreement Necessary ▸ *People v. Gliksman* (1978) 78 Cal.App.3d 343, 350–351.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

RELATED ISSUES

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Entrapment

The crime is complete once an offer is made. Accordingly, subsequent efforts to procure corroborative evidence do not constitute entrapment. (*People v. Finkelstin* (1950) 98 Cal.App.2d 545, 553; *People v. Bunkers* (1905) 2 Cal.App. 197, 209.)

Accomplice Liability and Conspiracy

The giver and the recipient of a bribe are not accomplices of one another, nor are they coconspirators, because they are guilty of distinct crimes that require different mental states. (*People v. Wolden* (1967) 255 Cal.App.2d 798, 804.)

Extortion Distinguished

Extortion is bribery with the additional element of coercion. Accordingly, the defendant cannot be guilty of receiving a bribe and extortion in the same transaction. (*People v. Powell* (1920) 50 Cal.App. 436, 441.)

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STAFF NOTES

Penal Code, § 67:

> ***Every person who gives or offers any bribe to any executive officer in this state, with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer, is punishable by imprisonment in the state prison for two, three or four years, and is disqualified from holding any office in this state.***

Statutory Definition of Bribe
Penal Code section 7(6) defines bribe:

> **The word "bribe" signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his or her action, vote, or opinion, in any public or official capacity.**

Corrupt Intent is an Element
In *People v.Gliksman* (1978) 78 Cal.App.3d 343, 351, the court found:

> The various bribery statutes are to be read in conjunction with this requirement [in Pen. Code section 7(6)] of corrupt intent to influence official action.

In *People v. Zerillo* (1950) 36 Cal.2d 222, 232, the court stated:

> **In the present case the jurors were not given any direct explanation or qualification in the instruction [about specific intent], but we cannot say that they were misled in view of the fact that they were repeatedly instructed elsewhere that the making or offering of a gratuity or present to a public official is not criminal 'unless there was a prior corrupt understanding or the act of giving or offering to give is at the very time coupled with a corrupt intent to influence the recipient in the discharge of his duty in a public or official capacity,' and that the defendant could not be found guilty unless the jury was satisfied that he offered a bribe to Duffy 'with the intent to then and there corruptly influence him in respect to' any official act.**

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Statutory Definition of Corruptly:
Penal Code section 7(3) defines corruptly:

> ***The word "corruptly" imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person.***

Delivery of Bribe
Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §47, p. 1138, explains:

> **The normal bribe-giving calls for delivery to the person being bribed or that person's agent. (See CALJIC (6th ed.), No. 7.06 [what constitutes giving a bribe].) But the prohibition on bribery of a legislator also prohibits giving the bribe "to another person for him," and thus the briber may be guilty without delivery to the legislator, or even without the legislator's knowledge of the bribe. (See P.C. 85 . . . .)**

Bribe-Offering
In *People v. Finkelstin* (1950) 98 Cal.App.2d 545, 554, the court observed that:

> **Under section 67 of the Penal Code every person who merely offers a bribe to an executive officer with intent to influence his decision is guilty. [citations omitted] The law punishes an offer which is calculated to debase [citation omitted] as well as the actual delivery of the thing of value to the official.**

In *People v. Britton* (1962) 205 Cal.App.2d 561, 564, the court approved the following language to instruct a jury on offering a bribe:

> **To constitute the offense of offering a bribe, it is not necessary that any particular language or words be used, provided that the language used, viewed in the light of the attending circumstances, is such as to clearly show that a bribe is being offered.**
>
> **The offer need not go to the extent of an actual tender or presentation or showing of the bribe. Nor is it necessary that the thing offered as a bribe has a present existence or a definite or ascertained value.**

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Subject Matter of Bribe

> **It is sufficient to charge and prove that the subject matter upon which the bribe was to operate existed and could be brought before the public officer in his official capacity. The fact the duty is not specifically conferred upon the officer by statute is immaterial.**

(*People v. Megladdery* (1940) 40 Cal.App.2d 748, 782.)

> **"The law does not require any specific action to be pending on the date the bribe is received. Penal Code section 165 prohibits asking or receiving a bribe to effect the consideration '. . . of any question or matter, upon which [a person named by the statue] *may* be required to act in his official capacity, . . .' (Italics added.) The use of the word 'may' suggests that payments designed to alter the outcome of any matter that could conceivably come before the official are within the prohibition of the statute." ([*People v. Diedrich* (1982) 31 Cal. 3d 263, 276].) . . .**
>
> ***Diedrich* thus both declares and demonstrates that bribery does not require that a specific official action be pending when the bribe is given, or that there be proof that the bribe was intended to influence any particular such act. Rather, it is sufficient that the evidence reflect that there existed subjects of potential action by the recipient, and that the bribe was given or received with the intent that some such action be influenced.**

(*People v. Gaio* (2000) 81 Cal.App.4th 919, 929.)

Definition of Executive Officer

People v. Strohl *(1976) 57 Cal.App. 3d 347, 361, defines and contrasts executive officers and ministerial officers:*

> ***Generally, whether the duties entrusted to a public officer are "executive" or "ministerial" in character turns on whether the duties to be performed are discretionary or imperative. In the former, the public servant is an "executive officer"; in the latter, a "ministerial officer."***

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1901. Giving or Offering a Bribe to a Ministerial Officer

The defendant is charged [in Count __] with (giving/ [or] offering) a bribe to a (ministerial officer/government employee/government appointee).

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

6. The defendant (gave/ [or] offered) a bribe to a (ministerial officer/employee/appointee) of the (State of California/City of **_____** ***<insert name of city>***/County of **_____** ***<insert name of county>***/**_____** ***<insert name of political subdivision from Pen. Code, § 67.5>***) [or to someone acting on the (officer's/employee's/appointee's) behalf];

AND

7. The defendant acted with the corrupt intent to unlawfully influence that (officer's/employee's/appointee's) official (act[,]/ decision[,]/ vote[,]/ opinion[,]/ [or] other proceeding).

As used here, *bribe* means something of present or future value or advantage, or a promise to give such a thing, that is given or offered with the corrupt intent to unlawfully influence the public or official action, vote, decision, or opinion of the person to whom the bribe is given.

A person acts with *corrupt intent* when he or she acts wrongfully, in order to gain a financial or other advantage for himself, herself, or someone else.

The official (act[,]/ proceeding[,]/ decision[,]/ vote[,]/ [or] opinion) the defendant sought to influence must have related to an existing subject that could have been brought before the (officer/employee/appointee) in his or her official capacity. It does not have to relate to a duty specifically given by statute to that (officer/employee/appointee).

[A ministerial officer *is an officer who has a clear and mandatory duty involving the performance of specific tasks without the exercise of discretion.]*

[The (officer/employee/appointee) does not need to have (accepted the bribe[,]/ [or] performed the requested act[,]/ [or] deliberately failed to perform a duty).]

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[*Offering a bribe* does not require specific words or behavior, as long as the language used and the circumstances clearly show an intent to bribe.] [The thing offered does not need to actually be given, exist at the time it is offered, or have a specific value.]

BENCH NOTES

Instructional Duty

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

If the defendant is charged with a felony based on the value of the item offered or given (Pen. Code, § 67.5(b)), give Instruction 1902, Giving or Offering a Bribe to a Ministerial Officer: Value of Thing Offered.

Give the bracketed sentence that begins with "The (officer/employee/appointee) does not" if the evidence shows that the officer did not accept the bribe or follow through on the action sought.

Give the bracketed definition of "offering a bribe" if the prosecution is pursuing this theory. Give the bracketed sentence that begins, "The thing offered does not need to actually," on request.

AUTHORITY

Elements ▸ Pen. Code, § 67.5.
Bribe Defined ▸ Pen. Code, § 7, subd. 6.
Corruptly Defined ▸ Pen. Code, § 7, subd. 3.
Grand Theft Defined ▸ Pen. Code, § 487.
Ministerial Officer Defined ▸ Gov. Code, § 820.25(b); *People v. Strohl* (1976) 57 Cal.App.3d 347, 361.
Corrupt Intent Is an Element of Bribery ▸ *People v. Gliksman* (1978) 78 Cal.App.3d 343, 351; *People v. Zerillo* (1950) 36 Cal.2d 222, 232.
Subject Matter of Bribe ▸ *People v. Megladdery* (1940) 40 Cal.App.2d 748, 782; *People v. Diedrich* (1982) 31 Cal.3d 263, 276.
Offering a Bribe ▸ *People v. Britton* (1962) 205 Cal.App.2d 561, 564.
Bribery and Extortion Distinguished ▸ *People v. Powell* (1920) 50 Cal.App. 436, 441.
No Bilateral Agreement Necessary ▸ *People v. Gliksman* (1978) 78 Cal.App.3d 343, 350–351.

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2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

LESSER INCLUDED OFFENSES

If the defendant is charged with a felony based on the value of the item offered or given (Pen. Code, § 67.5(b)), then the misdemeanor is a lesser included offense (Pen. Code, § 67.5(a)). The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has proved that the thing offered was worth more than $400 or was something that if stolen would qualify as grand theft. If the jury finds that this allegation has not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

See the Related Issues section of Instruction 1900, Giving or Offering a Bribe to an Executive Officer.

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STAFF NOTES

Penal Code, § 67.5:

> ***(a) Every person who gives or offers as a bribe to any ministerial officer, employee, or appointee of the State of California, county or city therein, or political subdivision thereof, any thing the theft of which would be petty theft is guilty of a misdemeanor.***
>
> ***(b) If the theft of the thing given or offered would be grand theft the offense is a felony.***

Statutory Definition of Bribe
Penal Code section 7(6) defines bribe:

> **The word "bribe" signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his or her action, vote, or opinion, in any public or official capacity.**

Statutory Definition of Corruptly:
Penal Code section 7(3) defines corruptly:

> **The word "corruptly" imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person.**

Corrupt Intent is an Element
See Notes to 1900.

Definition of Ministerial Officer
California Government Code section 820.25(b) defines ministerial officer as follows:

> ***["M]inisterial duty" is defined as a plain and mandatory duty involving the execution of a set task and to be performed without the exercise of discretion.***

People v. Strohl ***(1976) 57 Cal.App. 3d 347, 361, defines and contrasts executive officers and ministerial officers:***

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> ***Generally, whether the duties entrusted to a public officer are "executive" or "ministerial" in character turns on whether the duties to be performed are discretionary or imperative. In the former, the public servant is an "executive officer"; in the latter, a "ministerial officer."***

Delivery of Bribe
See Notes to Instruction 1900.

Bribe-Offering
See Notes to Instruction 1900.

Subject Matter of Bribe
See Notes to Instruction 1900.

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1902. Giving or Offering a Bribe to a Ministerial Officer: Value of Thing Offered

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If you find the defendant guilty of (giving/ [or] offering) a bribe to a (ministerial officer/government employee/government appointee), you must then decide whether the People have proved the additional allegation that the defendant (offered/ [or] gave) the (officer/employee/appointee) (something worth more than $400/ _____ <*insert other item from Pen. Code, § 487*>).

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

BENCH NOTES

Instructional Duty

If the defendant is charged with a felony based on the value of the item offered or given (Pen. Code, § 67.5(b)), the court has a **sua sponte** duty to instruct on this sentencing factor.

This instruction must **be given with Instruction 1901, Giving or Offering a Bribe to a Ministerial Officer.**

The court must provide the jury with a verdict form on which the jury will indicate if the alleged sentencing factor has or has not been proved.

AUTHORITY

Elements ▸ Pen. Code, § 67.5(b).

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

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STAFF NOTES

Penal Code, § 67.5:

> ***(c)*** ***Every person who gives or offers as a bribe to any ministerial officer, employee, or appointee of the State of California, county or city therein, or political subdivision thereof, any thing the theft of which would be petty theft is guilty of a misdemeanor.***
>
> ***(d)*** ***If the theft of the thing given or offered would be grand theft the offense is a felony.***

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1903. Requesting or Taking a Bribe

The defendant is charged [in Count __] with (requesting[,]/ taking[,]/ [or] agreeing to take) a bribe.

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

8. The defendant was (a/an) (executive officer/ministerial officer/employee/appointee/legislative officer/judicial officer) of the (State of California/City of _____ <***insert name of city***>/County of _____ <***insert name of county***>/_____ <***insert name of political subdivision from Pen. Code, § 68***>);

9. The defendant (requested[,]/ took[,]/ [or] agreed to take) a bribe;

10. When the defendant (requested[,]/ took[,]/ [or] agreed to take) the bribe, (he/she) represented that the bribe would unlawfully influence (his/her) official (act[,]/ decision[,]/ vote[,]/ [or] opinion). The representation may have been express or implied;

AND

11. The defendant acted with the corrupt intent that (his/her) public or official duty would be unlawfully influenced.

As used here, *bribe* means something of present or future value or advantage, or a promise to give such a thing, that is requested or taken with the corrupt intent that the public or official action, vote, decision, or opinion of the person to who is requesting, taking, or agreeing to take the bribe, will be unlawfully influenced.

A person acts with *corrupt intent* when he or she acts wrongfully, in order to gain a financial or other advantage for himself, herself, or someone else.

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

[A ministerial officer *is an officer who has a clear and mandatory duty involving the performance of specific tasks without the exercise of discretion.]*

[A legislative officer *is a member of the (Assembly/ [or] Senate) of this state.]*

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[A *judicial officer* includes a (juror[,]/ [or] judge [,]/ [or] referee[,]/ [or] commissioner[,]/ [or] arbitrator [,]/ [or] umpire[,]/ [or] [other] person authorized by law to hear or determine any question or controversy).]

[*Requesting or agreeing to take a bribe* does not require specific words or behavior, as long as the language used and the circumstances clearly show that the person is seeking a bribe from someone else.] [The People do not need to prove that the other person actually consented to give a bribe.]

[The People do not need to prove that the defendant made any effort to follow through on the purpose for which the bribe was sought.]

BENCH NOTES

Instructional Duty

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

Give the bracketed definition of "requesting or agreeing to take a bribe" if the prosecution is pursuing this theory.

Give the bracketed sentence that begins with "The People do not need to prove that the defendant made any effort to follow through" if there is no evidence that the defendant took any action based on the alleged bribe.

AUTHORITY

Elements ▸ Pen. Code, §§ 68, 86, 93.
Bribe Defined ▸ Pen. Code, § 7, subd. 6.
Corruptly Defined ▸ Pen. Code, § 7, subd. 3.
Executive Officer Defined ▸ *People v. Strohl* (1976) 57 Cal.App.3d 347, 361.
Ministerial Officer Defined ▸ Gov. Code, § 820.25(b); *People v. Strohl* (1976) 57 Cal.App.3d 347, 361.
Legislative Member ▸ Pen. Code, § 86.
Judicial Officer ▸ Pen. Code, § 93.
Corrupt Intent Is an Element of Bribery ▸ *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350; *People v. Zerillo* (1950) 36 Cal.2d 222, 232.
Meaning of Understanding or Agreement ▸ *People v. Pic'l* (1982) 31 Cal.3d 731, 738–740; *People v. Diedrich* (1982) 31 Cal.3d 263, 273–274; *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350.

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Bribery and Extortion Distinguished ▸ *People v. Powell* (1920) 50 Cal.App. 436, 441.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

RELATED ISSUES

See the Related Issues section of Instruction 1900, Giving or Offering a Bribe to an Executive Officer.

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Penal Code, §68:

(a) Every executive or ministerial officer, employee, or appointee of the State of California, a county or city therein, or a political subdivision thereof, who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his or her vote, opinion, or action upon any matter then pending, or that may be brought before him or her in his or her official capacity, shall be influenced thereby, is punishable by imprisonment in the state prison for two, three, or four years and, in cases in which no bribe has been actually received, by a restitution fine of not less than two thousand dollars ($2,000) or not more than ten thousand dollars ($10,000) or, incases in which a bribe was actually received, by a restitution fine of at least the actual amount of the bribe received or two thousand dollars ($2,000), whichever is greater, or any larger amount of not more than double the amount of any bribe received or ten thousand dollars ($10,000), whichever is greater, and, in addition thereto, forfeits his or her office, employment, or appointment, and is forever disqualified from holding any office, employment, or appointment, in this state.

Pen. Code, § 86, "Receiving bribes by members of the Legislature":

Every member of either of the houses composing the Legislature of this state who asks, receives, or agrees to receive, any bribe, upon any understanding that his or her official vote, opinion, judgment, or action shall be influenced thereby, or shall give, in any particular manner, or upon any particular side of any question or matter upon which he or she may be required to act in his or her official capacity, or gives, or offers or promises to give, any official vote in consideration that another Member of the Legislature shall give this vote either upon the same or another question, is punishable by imprisonment in the state prison for two, three, or four years and, in cases in which no bribe has been actually received, by a restitution fine of not less than two thousand dollars ($ 2,000) or not more than ten thousand dollars ($ 10,000) or, in cases in which a bribe was actually received, by a restitution fine of at least the actual amount of the bribe received or two thousand dollars ($ 2,000), whichever is greater, or any larger amount of not more than double the amount of any bribe received or ten thousand dollars ($ 10,000), whichever is greater.

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Pen. Code, § 93 "Receiving bribes by judicial officers and jurors":

> ***(a) Every judicial officer, juror, referee, arbitrator, or umpire, and every person authorized by law to hear or determine any question or controversy, who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his or her vote, opinion, or decision upon any matters or question which is or may be brought before him or her for decision, shall be influenced thereby, is punishable by imprisonment in the state prison for two, three, or four years and, in cases where no bribe has been actually received, by a restitution fine of not less than two thousand dollars ($ 2,000) or not more than ten thousand dollars ($ 10,000) or, in cases where a bribe was actually received, by a restitution fine of at least the actual amount of the bribe received or two thousand dollars ($ 2,000), whichever is greater, or any larger amount of not more than double the amount of any bribe received or ten thousand dollars ($ 10,000), whichever is greater.***

Statutory Definition of Bribe
See Notes to Instruction 1900.

Statutory Definition of Corruptly:
See Notes to Instruction 1900.

"On Agreement or Understanding"-- No Bilateral Agreement Required—Specific Intent of Defendant Must Be Shown

> ***The Court of Appeal in* People *v.* Gliksman *(1978) 78 Cal. App. 3d 343, made a thorough survey of cases in this state and other jurisdictions interpreting the statutes that forbid bribery "upon any understanding or agreement" resulting in the corruption of governmental processes. As here,* Gliksman *involved an act of bribery of a witness in which one party secretly cooperated with the police. The court was called upon to construe Penal Code section 138, which makes it a felony for a witness to seek a bribe "upon any understanding" that he will alter his testimony.***
>
> **Gliksman *initially observed that the courts in California have almost uniformly rejected the contention that a statutory requirement of a bribe "upon any agreement or understanding" refers to formation of a bilateral agreement. [Citations.] Rather, the language means that*** *bribery must be proposed by the person*

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offering to give or to receive the bribe, as the case may be, with the criminal intent that a corrupt act will be committed by the one accepting the bribe; if the offender has that intent, the fact that the other party does not subjectively intend to perform is irrelevant.

Agreeing with the rule of these cases,* Gliksman *reasoned that the intent of the Legislature in specifying a bribe sought "upon any understanding" (Pen. Code, § 138) was to punish bribery in which one party proposes a corrupt act by the other. "If the Legislature had intended that a mutual understanding is essential, it could have reasonably provided that the essence of the crime be 'entering into an agreement' or 'agreeing' with another to be bribed." (*Gliksman, supra*, 78 Cal. App. 3d at p. 350.) . . .

n3 . . . Thus, a conviction may be sustained if it is proved beyond a reasonable doubt that the bribe was offered for the* purpose *of obtaining the quid pro quo of altered testimony.

We approve of the reasoning of* Gliksman *and the authority cited therein, and believe it is equally applicable to the language of section 136 1/2, the statute at issue here. . . .

We therefore hold that a bilateral agreement is not a necessary element of the crime of offering a bribe to a witness to prevent his attendance at trial. *It is sufficient if the defendant offers the bribe with the intent of persuading the witness to "agree" not to testify.* ***To the extent that* Jang *conflicts with this holding, it is hereby disapproved.***

(*People v. Pic'l *(1982) 31 Cal.3d 731, 738–740.)

The terms "agreement," and "understanding" as used in the bribery statutes are terms of art. In* People *v.* Fitzpatrick *(1926) 78 Cal. App. 37, 45, the court noted: "The agreement referred to . . . in section 165 of the Penal Code . . . is not the kind of agreement contemplated by the civil law of contracts, under which there must be an actual meeting of the minds of contracting parties in order to form an agreement. . . . The terms of the statute are met if it is proven to the satisfaction of a jury that the defendants [i.e., the bribe-takers] have 'agreed' or intended in their own minds to receive a bribe." Similarly, the court in* People *v.* Gliksman *(1978) 78 Cal. App. 3d 343, 350-351 concluded: "It is the state of mind of

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the actual or potential bribe-receiver that is determinative; a bilateral agreement is not necessary."

(*People v. Diedrich *(1982) 31 Cal.3d 263, 273–274.)

Defendant urges that the jury instruction given by the court to define an agreement to receive a bribe was improper. The instruction (CALJIC No. 7.09 somewhat modified), as given, reads:

"To constitute agreeing to receive a bribe, it is not necessary to establish that there was a mutual understanding, in the sense of an agreement, with the person from whom the bribe was solicited.

"It is, however, necessary to establish that the bribe seeker himself agreed or consented to receive a bribe upon a representation on his part that his testimony as a witness would be influenced.

"It is immaterial that the person from whom a bribe is solicited does not intend to bribe such witness or agree to do so." . . .

The language of Penal Code section 138 does not compel us to hold that the determination whether the crime has been committed by one who has completed the unilateral acts described therein is to be governed by the acts and intentions of another. [Citations.]

We conclude that the language "upon any understanding that his testimony shall be influenced thereby" means that such is the condition upon which the bribe is received or the offer to receive is made. When the bribe is received or the offer is made on that condition, express or implied, the crime is committed.

(*People v. Gliksman *(1978) 78 Cal.App.3d 343, 346–350.)

Defendant Must Intend Corrupt Influence

[W]e think the import of section 7, subdivision 6, is to require that the receipt or offer to receive be coupled with a corrupt intent to be influenced in one's official action, i.e., testifying. . . .

The trial judge instructed the jury on this point as follows: "[The] necessary mental state is that his testimony shall be corruptly influenced by the bribe." While perhaps a more artful instruction

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> ***could be devised, we think this, in conjunction with the other instructions given, adequately conveys the thought that the defendant must act with the corrupt intent to be influenced in his official action.***

(*People v. Gliksman *(1978) 78 Cal.App.3d 343, 351–352.)

Subject Matter of Bribe
See Notes to Instruction 1900.

Definition of Executive Officer
See Notes to Instruction 1900.

Definition of Ministerial Officer
See Notes to Instruction 1901.

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1904. Giving or Offering a Bribe to a Witness

The defendant is charged [in Count __] with (giving[,]/ [or] offering[,]/ [or] promising) a bribe to a witness.

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

12. The defendant (gave[,]/ [or] offered[,]/ [or] promised) a bribe to (a witness[,]/ [or] a person about to be called as a witness[,]/ [or] a person about to give material information to a law enforcement official about a crime)[,] [or to someone acting on the (witness's/person's) behalf];

AND

13. The defendant acted with the corrupt intent to persuade the (witness/person) to agree that the bribe would unlawfully influence the (testimony/information) that the (witness/person) would give.

As used here, *bribe* means something of present or future value or advantage, or a promise to give such a thing, that is given or offered with the corrupt intent to unlawfully influence the testimony or information of the person to whom the bribe is given.

A person acts with *corrupt intent* when he or she acts wrongfully, in order to gain a financial or other advantage for himself, herself, or someone else.

[As used here, witness *means someone [or a person the defendant reasonably believed to be someone]:*

<Give the appropriate bracketed paragraph[s].>

- *[Who knows about the existence or nonexistence of facts relating to a crime(;/.)]*

  [OR]

- *[Whose declaration under oath has been or may be received as evidence(;/.)]*

  [OR]

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- *[Who has reported a crime to a (peace officer[,]/ [or] prosecutor[,]/ [or] probation or parole officer[,]/ [or] correctional officer[,]/ [or] judicial officer)(;/.)]*

  [OR

- *Who has been served with a subpoena issued under the authority of any state or federal court.]]*

[A person is about to be called as a witness *(if he or she knows or has been told that he or she will be called as a witness [,]/ [or] if he or she knows material information relating to the issues in a case that has been or may be filed).]*

[Information is material *if it is significant or important.]*

[A (district attorney[,]/ [or] deputy district attorney[,]/ [or] city attorney[,]/ [or] deputy city attorney[,]/ [or] the Attorney General[,]/ [or] a deputy attorney general[,]/ [or] _____ *<insert title of peace officer included in Pen. Code, § 830 et seq.>***) is a *law enforcement official*.]**

[The (witness/person giving information) does not need to (have accepted the bribe[,]/ have been influenced by the bribe[,]/ [or] have intended to give the (testimony/information) the defendant sought).]

*[*Offering a bribe *does not require specific words or behavior, as long as the language used and the circumstances clearly show an intent to bribe.] [The thing offered does not need to actually be given, exist at the time it is offered, or have a specific value.]*

BENCH NOTES

Instructional Duty

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

Give the bracketed sentence that begins with "The (witness/person giving information) does not need" if the evidence shows the witness did not accept the bribe or follow through on the bribe.

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Give the bracketed definition of "offering a bribe" if the prosecution is pursuing this theory. Give the bracketed sentence that begins, "The thing offered does not need to actually," on request.

AUTHORITY

Elements ▸ Pen. Code, § 137(a).
Witness Defined ▸ Pen. Code, § 136(2).
Bribe Defined ▸ Pen. Code, § 7, subd. 6.
Corruptly Defined ▸ Pen. Code, § 7, subd. 3.
Law Enforcement Official Defined ▸ Pen. Code, § 137(e).
About to Be Called as a Witness ▸ *People v. Broce* (1977) 76 Cal.App.3d 71, 75–76.
Meaning of Understanding or Agreement ▸ *People v. Pic'l* (1982) 31 Cal.3d 731, 738–740; *People v. Diedrich* (1982) 31 Cal.3d 263, 273–274; *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350.
Intent Requirement ▸ *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350.
Offering a Bribe ▸ *People v. Britton* (1962) 205 Cal.App.2d 561, 564.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

RELATED ISSUES

Extortion Distinguished

Extortion is bribery with the additional element of coercion. Accordingly, one cannot be guilty of receiving a bribe and extortion in the same transaction. (*People v. Powell* (1920) 50 Cal.App. 436, 441.)

Witness

A witness need not have information that is actually true or that relates to charges that result in conviction. (*People v. Cribas* (1991) 231 Cal.App.3d 596, 610–611.)

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Penal Code, § 137:

> ***(a) Every person who gives or offers, or promises to give, to any witness, person about to be called as a witness, or person about to give material information pertaining to a crime to a law enforcement official, any bribe, upon any understanding or agreement that the testimony of such witness or information given by such person shall be thereby influenced is guilty of a felony.***
>
> ***(e) As used in this section "law enforcement official" includes any district attorney, deputy district attorney, city attorney, deputy city attorney, the Attorney General or any deputy attorney general, or any peace officer included in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2.***

Statutory Definition of Bribe
Penal Code section 7(6) defines bribe:

> **The word "bribe" signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his or her action, vote, or opinion, in any public or official capacity.**

Statutory Definition of Corruptly:
Penal Code section 7(3) defines corruptly:

> ***The word "corruptly" imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person.***

Definition of Witness
California Penal Code section 136(2) defines a witness as follows:

> ***"Witness" means any natural person, (i) having knowledge of the existence or nonexistence of facts relating to any crime, or (ii) whose declaration under oath is received or has been received as evidence for any purpose, or (iii) who has reported any crime to any peace officer, prosecutor, probation or parole officer, correctional officer or judicial officer, or (iv) who has been served***

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with a subpoena issued under the authority of any court in the state, or of any other state or of the United States, or (v) who would be believed by any reasonable person to be an individual described in subparagraphs (i) to (iv), inclusive.

About to Be Called as a Witness

Defendant contends that he did not violate Penal Code section 137. He points out that Weinald was neither a witness nor a possible witness with respect to the weapons possession charge pending against defendant. This is true, but irrelevant. Weinald's observations were material to the legality of defendant's arrest -- whether he planned to raise its illegality as a defense to the criminal charges or, affirmatively, in an action for false arrest. Nor does it matter that no such action was pending at the time of the threat. Section 137 contains no such requirement.

"[This] is a law primarily to prevent the corrupt interference with the administration of justice. Its purpose is to go back as far as necessary and say in effect that any attempt to so influence prospective witnesses that the truth will not be presented in anticipated litigation is felonious . . . . It is the intent of the person interested and his purpose and design that is decisive of that question. True, a person cannot be a witness unless there is an action pending, but a person may be about to be called as a witness even though no action is pending." (*People *v.* McAllister *(1929) 99 Cal.App. 37, 40-41.)

"No reason is suggested nor is one apparent why it should be unlawful to attempt to bribe or otherwise persuade someone to later defraud the court as a witness if the attempt be made while an action is pending, but if the same effort to obstruct justice were used just before the action were begun it should be exempt from condemnation . . . . The term 'or person about to be called as a witness' in the first part of the section, . . . was used with the legislative intent of including within its denouncement all offers of bribes to any person in contemplation of his becoming a witness. Such anticipation is not affected . . . by the fact, . . . that the proceeding in which influenced testimony is to be given or withheld has not yet been filed." (*Id.*, p. 41.) [Citations.]

(*People v. Broce *(1977) 76 Cal.App.3d 71, 75–76.)

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Intent and Meaning of "Understanding or Agreement"
See Notes to Instruction 1903.

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1905. Giving or Offering a Bribe to a Witness Not to Testify

The defendant is charged [in Count __] with (giving[,]/ [or] offering[,]/ [or] promising) a bribe to a witness not to testify.

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

14. The defendant (gave[,]/ [or] offered[,]/ [or] promised) a bribe to (a witness/ [or] a person about to be called as a witness) [or to someone else acting on the (witness's/person's) behalf];

AND

15. The defendant acted with the corrupt intent that the bribe would unlawfully persuade the (witness/person) not to attend (a trial/ [or] _____ <***insert type of other judicial proceeding***>).

As used here, *bribe* means something of present or future value or advantage, or a promise to give such a thing, that is given or offered with the corrupt intent to unlawfully influence the witness not to attend (a trial/ [or] _____ <***insert type of other judicial proceeding***>).

A person acts with *corrupt intent* when he or she acts wrongfully, in order to gain a financial or other advantage for himself, herself, or someone else.

[As used here, witness *means someone [or a person the defendant reasonably believed to be someone]:*

<Give the appropriate bracketed paragraph[s].>

- *[Who knows about the existence or nonexistence of facts relating to a crime(;/.)]*

  [OR]

- *[Whose declaration under oath has been or may be received as evidence(;/.)]*

  [OR]

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- *[Who has reported a crime to a (peace officer[,]/ [or] prosecutor[,]/ [or] probation or parole officer[,]/ [or] correctional officer[,]/ [or] judicial officer)(;/.)]*

  [OR

- *Who has been served with a subpoena issued under the authority of any state or federal court.]]*

[A person is about to be called as a witness *(if he or she knows or has been told that he or she will be called as a witness[,]/ [or] if he or she knows material information relating to the issues in a case that has been or may be filed). [Information is* material *if it is significant or important.]]*

[The (witness/person giving information) does not need to (have accepted the bribe[,]/ have been influenced by the bribe[,]/ [or] have failed attend (the trial[,]/ [or] **_____ <insert type of other judicial proceeding>***)).]*

*[*Offering a bribe *does not require specific words or behavior, as long as the language used and the circumstances clearly show an intent to ensure that the witness will not attend (a trial/ [or]* **_____ <insert type of other judicial proceeding>***).] [The thing offered does not need to actually be given, exist at the time it is offered, or have a specific value.]*

BENCH NOTES

Instructional Duty

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

Give the bracketed sentence that begins with "The (witness/person giving information) does not need" if the evidence shows the witness did not accept the bribe or follow through on the bribe.

Give the bracketed definition of "offering a bribe" if the prosecution is pursuing this theory. Give the bracketed sentence that begins, "The thing offered does not need to actually," on request.

AUTHORITY

Elements ▸ Pen. Code, § 138(a).
Witness Defined ▸ Pen. Code, § 136(2).

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Bribe Defined ▸ Pen. Code, § 7, subd. 6.
Corruptly Defined ▸ Pen. Code, § 7, subd. 3.
About to Be Called as a Witness ▸ *People v. Broce* (1977) 76 Cal.App.3d 71, 75–76.
Meaning of Understanding or Agreement ▸ *People v. Pic'l* (1982) 31 Cal.3d 731, 738–740; *People v. Diedrich* (1982) 31 Cal.3d 263, 273–274; *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350.
Intent Requirement ▸ *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350.
Offering a Bribe ▸ *People v. Britton* (1962) 205 Cal.App.2d 561, 564.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

RELATED ISSUES

See the Related Issues section of Instruction 1904, Giving or Offering a Bribe to a Witness.

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STAFF NOTES

Penal Code, § 138(a):

> ***(e) Every person who gives or offers or promises to give, to any witness or person about to be called as a witness, any bribe, upon any understanding or agreement that the person shall not attend upon any trial or other judicial proceeding, or every person who attempts by means of any offer of a bribe to dissuade any person from attending upon any trial or other judicial proceeding, is guilty of a felony.***

Statutory Definition of Bribe
See Notes to Instruction 1904.

Statutory Definition of Corruptly:
See Notes to Instruction 1904.

Definition of Witness
See Notes to Instruction 1904.

About to Be Called as a Witness
See Notes to Instruction 1904.

Intent and Meaning of "Understanding or Agreement"
See Notes to Instruction 1903.

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1906. Witness Receiving a Bribe

The defendant is charged [in Count __] with receiving a bribe as a witness.

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

16. The defendant was (a witness/about to be called as a witness);

17. The defendant (took/ [or] offered to take) a bribe;

18. When the defendant (took/ [or] offered to take) the bribe, (he/she) represented that the bribe would unlawfully (influence (his/her) testimony/cause (him/her) not to attend the (trial/_____ <***insert type of other judicial proceeding***>)). The representation may have been express or implied;

AND

19. The defendant acted with the corrupt intent that the bribe would unlawfully (influence (his/her) testimony/cause (him/her) not to attend the (trial/_____ <***insert type of other judicial proceeding***>)).

As used here, *bribe* means something of present or future value or advantage, or a promise to give such a thing, that is requested or taken with corrupt intent.

A person acts with *corrupt intent* when he or she acts wrongfully, in order to gain a financial or other advantage for himself, herself, or someone else.

[As used here, witness *means someone [or a person reasonably believed to be someone]:*

<Give the appropriate bracketed paragraph[s].>

- *[Who knows about the existence or nonexistence of facts relating to a crime(;/.)]*

  [OR]

- *[Whose declaration under oath has been or may be received as evidence(;/.)]*

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[OR]

- *[Who has reported a crime to a (peace officer[,]/ [or] prosecutor[,]/ [or] probation or parole officer[,]/ [or] correctional officer[,]/ [or] judicial officer)(;/.)]*

[OR

- *Who has been served with a subpoena issued under the authority of any state or federal court.]]*

[A person is about to be called as a witness *(if he or she knows or has been told that he or she will be called as a witness[,]/ [or] if he or she knows material information relating to the issues in a case that has been or may be filed). [Information is* material *if it is significant or important.]]*

[*Offering to take a bribe* does not require specific words or behavior, as long as the language used and the circumstances clearly show that the person is seeking a bribe from someone else.] [The People do not need to prove that the other person actually consented to give a bribe.]

[The People do not need to prove that the defendant made any effort to follow through on the purpose for which the bribe was sought.]

BENCH NOTES

Instructional Duty

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

Give the definition of "offering to take a bribe" if that is the prosecution's theory of the case.

Give the bracketed sentence that begins with "The People do not need to prove" if there is no evidence that the defendant took any action based on the alleged bribe.

AUTHORITY

Elements ▸ Pen. Code, § 138(b).
Witness Defined ▸ Pen. Code, § 136(2).

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Bribe Defined ▸ Pen. Code, § 7, subd. 6.
Corruptly Defined ▸ Pen. Code, § 7, subd. 3.
About to Be Called as a Witness ▸ *People v. Broce* (1977) 76 Cal.App.3d 71, 75–76.
Meaning of Understanding or Agreement ▸ *People v. Pic'l* (1982) 31 Cal.3d 731, 738–740; *People v. Diedrich* (1982) 31 Cal.3d 263, 273–274; *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350.
Offering a Bribe ▸ *People v. Britton* (1962) 205 Cal.App.2d 561, 564.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

RELATED ISSUES

See the Related Issues section of Instruction 1904, Giving or Offering a Bribe to a Witness.

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STAFF NOTES

Penal Code, § 138(b):

> ***(b) Every person who is a witness, or is about to be called as such, who receives, or offers to receive, any bribe, upon any understanding that his or her testimony shall be influenced thereby, or that he or she will absent himself or herself from the trial or proceeding upon which his or her testimony is required, is guilty of a felony.***

Statutory Definition of Bribe
See Notes to Instruction 1904.

Statutory Definition of Corruptly:
See Notes to Instruction 1904.

Definition of Witness
See Notes to Instruction 1904.

About to Be Called as a Witness
See Notes to Instruction 1904.

Intent and Meaning of "Understanding or Agreement"
See Notes to Instruction 1903.

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1907. Using Force or Threatening a Witness Before Testimony or Information Given

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The defendant is charged [in Count __] with (using force/ [or] threatening to use force) against a person to cause that person [or someone else] to (give false (testimony/ [or] information)/ [or] withhold true (testimony/ [or] information)).

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

1. The defendant [unlawfully] (used force/ [or] threatened to use force) against _____ ***<insert name/description of person allegedly targeted>***;

AND

<Alternative 2A—to give or withhold testimony>

[2. When the defendant (used force/ [or] made the threat), (he/she) intended to cause _____ ***<insert name/description of person defendant allegedly sought to influence>*** to (give false testimony/ [or] withhold true testimony).]

<Alternative 2B—to give or withhold information>

[2. When the defendant (used force/ [or] made the threat), (he/she) intended to cause _____ ***<insert name/description of person defendant allegedly sought to influence>*** to (give false material information about a crime to/ [or] withhold true material information about a crime from) a law enforcement official.]

[A person *makes a threat of force* when he or she communicates to someone else a believable threat of unlawful injury to a person or property.]

[Information is *material* if it is significant or important.]

[(A/The) (district attorney[,]/ [or] deputy district attorney[,]/ [or] city attorney[,]/ [or] deputy city attorney[,]/ [or] Attorney General[,]/ [or] deputy attorney general[,]/ [or] _____ **<insert title of peace officer included in Pen. Code, § 830 et seq.>***) is a* law enforcement official.*]*

[The People do not need to prove that _____ *<insert name/description of person defendant allegedly sought to influence>* **actually (gave false (testimony/information)/ [or] withheld true (testimony/information)).]**

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BENCH NOTES

Instructional Duty

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

Give the bracketed sentence that beings with "A person *makes a threat of force*" whenever the prosecution alleges that the defendant made a threat. (Pen. Code, § 137(b).)

Give the bracketed sentence that begins with "The People do not need to prove that" if the evidence shows that the testimony or information of the alleged target was not affected.

AUTHORITY

Elements ▸ Pen. Code, § 137(b).
Threat Defined ▸ Pen. Code, § 137(b).
Law Enforcement Official Defined ▸ Pen. Code, § 137(e).
Specific Intent Required ▸ *People v. Womack* (1995) 40 Cal.App.4th 926, 929–930.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

LESSER INCLUDED OFFENSES

The misdemeanor offense of knowingly inducing a false statement to a law enforcement official in violation of Penal Code section 137(c) is not a lesser included offense of section 137(b) because the latter offense lacks the element that the defendant must actually cause a false statement to be made. (*People v. Miles* (1996) 43 Cal.App.4th 575, 580.)

RELATED ISSUES

Penal Code Sections 137(b), 136.1, and 138

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Because one cannot “influence” the testimony of a witness if the witness does not testify, a conviction under Penal Code section 137(b) is inconsistent with a conviction under Penal Code section 136.1 or 138, which require that a defendant prevent, rather than influence, testimony. (*People v. Womack* (1995) 40 Cal.App.4th 926, 931.)

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Penal Code, § 137:

> ***(b) Every person who attempts by force or threat of force or by the use of fraud to induce any person to give false testimony or withhold true testimony or to give false material information pertaining to a crime to, or withhold true material information pertaining to a crime from, a law enforcement official is guilty of a felony, punishable by imprisonment in the state prison for two, three, or four years.***
>
> ***As used in this subdivision, "threat of force" means a credible threat of unlawful injury to any person or damage to the property of another which is communicated to a person for the purpose of inducing him to give false testimony or withhold true testimony or to give false material information pertaining to a crime to, or to withhold true material information pertaining to a crime from, a law enforcement official.***

Definition of Law Enforcement Official
Penal Code section 137(e) defines this term as follows:

> ***As used in this section "law enforcement official" includes any district attorney, deputy district attorney, city attorney, deputy city attorney, the Attorney General or any deputy attorney general, or any peace officer included in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2.***

Specific Intent Required

> ***The felony of attempting "by force or threat of force . . . to induce any person to give false testimony or withhold true testimony" requires that the force or threat of force be used with the specific intent of inducing a witness to give false or withhold true testimony.***

(*People v. Womack *(1995) 40 Cal.App.4th 926, 929–930.)

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1908. Influencing a Witness by Fraud

The defendant is charged [in Count __] with using fraud to influence a person to (give false (testimony/ [or] information)/ [or] withhold true (testimony/ [or] information)).

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

2. The defendant used fraud against _____ ***<insert name/description of person defendant allegedly sought to influence>***;

AND

<Alternative 2A—to give or withhold testimony>
[2. When the defendant used fraud, (he/she) intended to cause _____ ***<insert name/description of person defendant allegedly sought to influence>*** to (give false testimony/ [or] withhold true testimony).]

<Alternative 2B—to give or withhold information>
[2. When the defendant used fraud, (he/she) intended to cause _____ ***<insert name/description of person defendant allegedly sought to influence>*** to (give false material information about a crime to/ [or] withhold true material information about a crime from) a law enforcement official.]

A person uses fraud *when he or she makes a false statement, misrepresents information, hides the truth, or otherwise does something with the intent to deceive.*

[Information is material *if it is significant or important.]*

[(A/The) (district attorney[,]/ [or] deputy district attorney[,]/ [or] city attorney[,]/ [or] deputy city attorney[,]/ [or] Attorney General[,]/ [or] deputy attorney general[,]/ [or] _____ **<insert title of peace officer included in Pen. Code, § 830 et seq.>***) is a* law enforcement official.*]*

[The People do not need to prove that _____ *<insert name/description of person defendant allegedly sought to influence>* **actually (gave false (testimony/information)/ [or] withheld true (testimony/information)).]**

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BENCH NOTES

Instructional Duty

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

Give the bracketed sentence that begins with "The People do not need to prove that" if the evidence shows that the testimony or information of the alleged target was not affected.

AUTHORITY

Elements ▸ Pen. Code, § 137(b).
Fraud Defined ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72.
Law Enforcement Official Defined ▸ Pen. Code, § 137(e).
Specific Intent Required ▸ *People v. Womack* (1995) 40 Cal.App.4th 926, 929–930.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

LESSER INCLUDED OFFENSES

The misdemeanor offense of knowingly inducing a false statement to a law enforcement official in violation of Penal Code section 137(c) is not a lesser included offense of section 137(b) because the latter offense lacks the element that the defendant must actually cause a false statement to be made. (*People v. Miles* (1996) 43 Cal.App.4th 575, 580.)

RELATED ISSUES

Deceiving a Witness

Deceiving a witness is a separate crime under Penal Code section 133:

> Every person who practices any fraud or deceit, or knowingly makes or exhibits any false statement, representation, token, or writing, to any witness or person about to be called as a witness upon any trial, proceeding, inquiry, or investigation whatever, authorized by law, with intent to affect the testimony of such witness, is guilty of a misdemeanor.

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STAFF NOTES

Penal Code, § 137:

> ***(c) Every person who attempts by force or threat of force or by the use of fraud to induce any person to give false testimony or withhold true testimony or to give false material information pertaining to a crime to, or withhold true material information pertaining to a crime from, a law enforcement official is guilty of a felony, punishable by imprisonment in the state prison for two, three, or four years.***

Definition of Law Enforcement Official
See Notes to Instruction 1907.

Definition of Fraud

> An intent to defraud is an intent to deceive another person for the purpose of gaining a material advantage over that person or to induce that person to part with property or alter that person's position by some false statement or false representation of fact, wrongful concealment or suppression of the truth or by any artifice or act designed to deceive.

(*People v. Pugh* (2002) 104 Cal.App.4th 66, 72.)

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1909. Intimidating a Witness

The defendant is charged [in Count __] with intimidating a witness.

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

<Alternative 1A—attending or giving testimony>

[1. The defendant maliciously (tried to (prevent/ [or] discourage)/(prevented/ [or] discouraged)) _____ ***<insert name/description of person defendant allegedly sought to influence>*** from (attending the/ [or] giving testimony at) _____ ***<insert type of judicial proceeding or inquiry authorized by law***>;]

<Alternative 1B—report of victimization>

[1. The defendant [maliciously] (tried to (prevent/ [or] discourage)/ (prevented/ [or] discouraged)) _____ ***<insert name/description of person defendant allegedly sought to influence>*** from making a report that (he/she/someone else) was a victim of a crime to _____ ***<insert type of official specified in Pen. Code, § 136.1(b)(1)***>;]

<Alternative 1C—causing prosecution>

[1. The defendant [maliciously] (tried to (prevent/ [or] discourage)/ (prevented/ [or] discouraged)) _____ ***<insert name/description of person defendant allegedly sought to influence>*** from cooperating or providing information so that a (complaint/indictment/information/probation violation/parole violation) could be sought and prosecuted, and from helping to prosecute that action;]

<Alternative 1D—causing arrest>

[1. The defendant [maliciously] (tried to (prevent/ [or] discourage)/ (prevented/ [or] discouraged)) _____ ***<insert name/description of person defendant allegedly sought to influence>*** from (arresting[,]/ [or] (causing/ [or] seeking) the arrest of [,]) anyone in connection with a crime;]

2. _____ ***<insert name/description of person defendant allegedly sought to influence>*** was a (witness/ [or] crime victim);

AND

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3. The defendant knew (he/she) was (trying to (prevent/ [or] discourage)/(preventing/ [or] discouraging)) _____ ***<insert name/description of person defendant allegedly sought to influence>*** from _____ ***<insert appropriate description from element 1>*** and intended to do so.

[A person acts *maliciously* when he or she unlawfully intends to annoy, harm, or injure someone else in any way, or intends to interfere in any way with the orderly administration of justice.]

[As used here, witness *means someone [or a person the defendant reasonably believed to be someone]:*

<Give the appropriate bracketed paragraph[s].>

- *[Who knows about the existence or nonexistence of facts relating to a crime(;/.)]*

  [OR]

- *[Whose declaration under oath has been or may be received as evidence(;/.)]*

  [OR]

- *[Who has reported a crime to a (peace officer[,]/ [or] prosecutor[,]/ [or] probation or parole officer[,]/ [or] correctional officer[,]/ [or] judicial officer)(;/.)]*

  [OR

- *Who has been served with a subpoena issued under the authority of any state or federal court.]]*

[A person is a *victim* if there is reason to believe that a federal or state crime is being or has been committed or attempted against him or her.]

[It is not a defense that the defendant was not successful in preventing or discouraging the (victim/ [or] witness).]

[It is not a defense that no one was actually physically injured or otherwise intimidated.]

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BENCH NOTES

Instructional Duty

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

In element 1, alternative 1A applies to charges under Penal Code section 136.1(a), which prohibits "knowingly and maliciously" preventing or attempting to prevent a witness or victim from giving testimony. Alternatives 1B through 1D apply to charges under Penal Code section 136.1(b). Subdivision (b) does not use the words "knowingly and maliciously." However, subdivision (c) provides a higher punishment if a violation of either subdivision (a) or (b) is done "knowingly and maliciously," and one of the other listed sentencing factors is proved. An argument can be made that the knowledge and malice requirements apply to all violations of Penal Code section 136.1(b), not just those charged with the additional sentencing factors under subdivision (c). Because the offense always requires specific intent, the committee has included the knowledge requirement with the specific intent requirement in element 3. (*People v. Ford* (1983) 145 Cal.App.3d 985, 990; see also *People v. Womack* (1995) 40 Cal.App.4th 926, 929–930.) If the court concludes that the malice requirement also applies to all violations of subdivision (b), the court should give the bracketed word "maliciously" in element 1, in alternatives 1B through 1D, and the definition of this word.

If the defendant is charged with one of the sentencing factors in Penal Code section 136.1(c), give Instruction 1910, Intimidating a Witness or Victim: Sentencing Factors. If the defendant is charged with the sentencing factor based on a prior conviction, the court must give both Instruction 1910 and Instruction 200 Prior Conviction: Non-Bifurcated Trial, unless the court has granted a bifurcated trial on the prior conviction or the defendant has stipulated to the conviction.

Note that Penal Code section 136.1(a)(3) states, "For purposes of this section, evidence that the defendant was a family member who interceded in an effort to protect the witness or victim shall create a presumption that the act was without malice." It is unclear if the court must instruct on this presumption.

AUTHORITY

Elements ▸ Pen. Code, § 136.1(a) & (b).
Malice Defined ▸ Pen. Code, § 136(1).

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Witness Defined ▸ Pen. Code, § 136(2).
Victim Defined ▸ Pen. Code, § 136(3).
Specific Intent Required ▸ *People v. Ford* (1983) 145 Cal.App.3d 985, 990; see also *People v. Womack* (1995) 40 Cal.App.4th 926, 929–930.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

LESSER INCLUDED OFFENSES

A violation of Penal Code section 136.1(a) or (b) is a felony-misdemeanor, punishable by a maximum of three years in state prison. If the defendant is also charged with one of the sentencing factors in Penal Code section 136.1(c), then the offense is a felony punishable by two, three, or four years. In the defendant is charged under Penal Code section 131.6(c), then the offenses under subdivisions (a) and (b) are lesser included offenses. The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has proved the sentencing factor alleged. If the jury finds that this allegation has not been proved, then the offense should be set at the level of the lesser offense.

The misdemeanor offense of knowingly inducing a false statement to a law enforcement official in violation of Penal Code section 137(c) is not a lesser included offense of Penal Code section 137(b) because the latter offense lacks the element that the defendant must actually cause a false statement to be made. (*People v. Miles* (1996) 43 Cal.App.4th 575, 580.)

RELATED ISSUES

Penal Code Sections 137(b), 136.1, and 138

Because one cannot "influence" the testimony of a witness if the witness does not testify, a conviction under Penal Code section 137(b) is inconsistent with a conviction under Penal Code section 136.1 or 138, which requires that a defendant prevent, rather than influence, testimony. (*People v. Womack* (1995) 40 Cal.App.4th 926, 931.)

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Penal Code, § 136.1:

(a) Except as provided in subdivision (c), any person who does any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison;

(1) Knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

(2) Knowingly and maliciously attempts to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

(3) For purposes of this section, evidence that the defendant was a family member who interceded in an effort to protect the witness or victim shall create a presumption that the act was without malice.

(b) Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:

(1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge.

(2) Causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof.

(3) Arresting or causing or seeking the arrest of any person in connection with that victimization.

(c) Every person doing any of the acts described in subdivision (a) or (b) knowingly and maliciously under any one or more of the

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following circumstances, is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years under any of the following circumstances:

(1) Where the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person of the property of any victim, witness, or any third person.

(2) Where the act is in furtherance of a conspiracy.

(3) Where the act is committed by any person who has been convicted of any violation of this section, any predecessor law hereto or any federal statute or statute of any other state which, if the act prosecuted was committed in this state, would be a violation of this section.

(4) Where the act is committed by any person for pecuniary gain or for any other consideration acting upon the request of any other person. All parties to such a transaction are guilty of a felony.

(d) Every person attempting the commission of any act described in subdivisions (a), (b), and (c) is guilty of the offense attempted without regard to success or failure of the attempt. The fact that no person was injured physically, or in fact intimidated, shall be no defense against any prosecution under this section.

(e) Nothing in this section precludes the imposition of an enhancement for great bodily injury where the injury inflicted is significant or substantial.

Definition of Witness
See Instruction 1904.

Definition of Malice
California Penal Code section 136(1) defines malice as follows:

"Malice" means an intent to vex, annoy, harm, or injure in any way another person, or to thwart or interfere in any manner with the orderly administration of justice.

Definition of Victim

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California Penal Code section 136(3) defines a victim as follows:

> ***"Victim" means any natural person with respect to whom there is reason to believe that any crime as defined under the laws of this state or any other state or of the United States is being or has been perpetrated or attempted to be perpetrated.***

Specific Intent Required

> ***The jury was instructed on general intent. There was no request for an instruction on specific intent, but defendant argues that the court had a* sua sponte *duty to so instruct. We agree. . . .***
>
> ***Penal Code section 136.1, subdivision (c)(1), proscribes one from (among other things) using a threat of violence in an attempt to dissuade a witness from testifying. Unless the actions or statements are meant to achieve the consequence of affecting a potential witness' testimony, no crime has been committed. The statement, "You punk mother fucker, we'll get you, you've got kids," can be interpreted as a simple angry statement of impending revenge: "You did this to me and you will pay for it." If this is the proper interpretation, the crime was not committed.***
>
> ***On the other hand, the proper interpretation could be: "You did this to me and if you do it again you will pay. You better not testify in the future or we'll get your kids." If the jury found this interpretation, defendant has violated the section. Thus, in the words of* Daniels, supra, *14 Cal.3d 857, "the definition refers to a defendant's intent to . . . achieve some additional consequence," and is therefore a specific intent crime.***
>
> ***Once the crime has been committed, it makes no difference whether the witness does or does not testify. In this respect it is like a charge of bribery. The various forms of bribery require specific intent. (See 2 CALJIC (4th ed. 1979) appen. D, pp. 352-354.) The crime of bribery is complete when the defendant makes the offer with a corrupt intent. [Citation.]***
>
> ***Likewise, it is analogous to solicitation to commit murder. Such crime requires specific intent and is complete when the solicitation is made.***

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(*People v. Ford *(1983) 145 Cal.App.3d 985, 990; see also* People v. Womack *(1995) 40 Cal.App.4th 926, 929–930.)

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1910. Intimidating a Witness: Sentencing Factors

If you find the defendant guilty of intimidating a witness, you must then decide whether the People have proved the additional allegation[s] that the defendant [acted maliciously] [and] [(acted in furtherance of a conspiracy/used or threatened to use force/acted to obtain money or something of value)].

To prove (this/these) allegation[s], the People must prove that:

[1. The defendant acted maliciously.]

[AND]

<Alternative A—furtherance of a conspiracy>
[(1/2). The defendant acted with the intent to assist in a conspiracy to intimidate a witness.]

<Alternative B—used or threatened force>
[(1/2). The defendant used force or threatened, either directly or indirectly, to use force or violence on the person or property of [a] (witness[,]/ [or] victim[,]/ [or] any other person).]

<Alternative C—financial gain>
[(1/2). The defendant acted (in order to obtain (money/ [or] something of value)/ [or] at the request of someone else in exchange for something of value).]

[Instruction[s] __ ***<insert instruction number[s]>*** explain[s] when someone is acting in a conspiracy to intimidate a witness. You must apply those instructions when you decide whether the People have proved this additional allegation. ***<The court must modify and give Instruction 550, et seq., explaining the law of conspiracy as it applies to the facts of the particular case.***>]

[A person acts *maliciously* when he or she unlawfully intends to annoy, harm, or injure someone else in any way, or intends to interfere in any way with the orderly administration of justice.]

The People have the burden of proving (this/each) allegation beyond a reasonable doubt. If the People have not met this burden [for any allegation], you must find that (this/the) allegation has not been proved.

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BENCH NOTES

Instructional Duty

If the defendant is charged with a felony based on Penal Code section 136.1(c), the court has a **sua sponte** duty to instruct on the alleged sentencing factor. This instruction **must** be given with Instruction 1909, Intimidating a Witness.

As noted in the Bench Notes to Instruction 1909, the court will instruct the jury that knowledge and malice are elements of a violation of Penal Code section 136.1(a) and may, in some circumstances, also instruct that malice is an element of a violation of Penal Code section 136.1(b). If the court has given the malice element in Instruction 1909, the court may delete it here. If the court has not already given this element and the defendant is charged under subdivision (c), the court must give the bracketed element requiring malice here.

If the defendant is charged with the sentencing factor based on a prior conviction, the court must give Instruction 200 Prior Conviction: Non-Bifurcated Trial, unless the court has granted a bifurcated trial on the prior conviction or the defendant has stipulated to the conviction. In such cases, the court should also give this instruction, Instruction 1910, only if the court has not already instructed the jury on malice or the defendant is also charged with another sentencing factor.

The court must provide the jury with a verdict form on which the jury will indicate if each alleged sentencing factor has or has not been proved.

If the court instructs on furtherance of a conspiracy, give the appropriate corresponding instructions on conspiracy. (See Instruction 550, Conspiracy.)

AUTHORITY

Elements ▸ Pen. Code, § 136.1(c).
Malice Defined ▸ Pen. Code, § 136(1).

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

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Penal Code, § 136.1:

(d) Every person doing any of the acts described in subdivision (a) or (b) knowingly and maliciously under any one or more of the following circumstances, is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years under any of the following circumstances:

(5) Where the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person of the property of any victim, witness, or any third person.

(6) Where the act is in furtherance of a conspiracy.

(7) Where the act is committed by any person who has been convicted of any violation of this section, any predecessor law hereto or any federal statute or statute of any other state which, if the act prosecuted was committed in this state, would be a violation of this section.

(8) Where the act is committed by any person for pecuniary gain or for any other consideration acting upon the request of any other person. All parties to such a transaction are guilty of a felony.

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1912. Threatening a Witness After Testimony or Information Given

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The defendant is charged [in Count __] with (using force/ [or] threatening to use force) against a witness.

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

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

AND

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

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

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

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

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

BENCH NOTES

Instructional Duty

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

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AUTHORITY

Elements ▸ Pen. Code, § 140(a).
Witness Defined ▸ Pen. Code, § 136(2).
Victim Defined ▸ Pen. Code, § 136(3).
Public Prosecutor Defined ▸ Gov. Code, §§ 26500, 12550, 41803.
Law Enforcement Officer Defined ▸ Pen. Code, § 13519(b).
General Intent Offense ▸ *People v. McDaniel* (1994) 22 Cal.App.4th 278, 283.
Threat Need Not Be Communicated to Target ▸ *People v. McLaughlin* (1996) 46 Cal.App.4th 836, 842.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

COMMENTARY

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

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Penal Code, § 140(a):

> ***Except as provided in Section 139, every person who willfully uses force or threatens to use force or violence upon the person of a witness to, or a victim of, a crime or any other person, or to take, damage, or destroy any property of any witness, victim, or any other person, because the witness, victim, or other person has provided any assistance or information to a law enforcement officer, or to a public prosecutor in a criminal proceeding or juvenile court proceeding, shall be punished by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison for two, three, or four years.***

Threat Need Not Be Communicated to Witness

> ***The obvious intent of the statute is to preserve and protect witnesses. Protection of witnesses does not require that the witness be personally aware of the threat involving force or violence. We conclude that section 140 prohibits the threats it describes, whether or not the threats are communicated to the potential victim.***

(*People v. McLaughlin *(1996) 46 Cal.App.4th 836, 842.)

General Intent Offense

> ***The underlying purpose of the threat in section 139, threats of force or violence against a witness or crime victim, is "to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family." (§ 139, subd. (c).) The communication of the threat is the act and the intent to create a future or additional consequence is the intent to cause the victim to feel fear or intimidation. [Citation.] Thus section 139 has been held, under the* Hood *analysis, to have the specific intent to cause the victim fear or intimidation. [Citation.]***
>
> ***Section 136.1 proscribes preventing or dissuading a witness or victim from testifying or doing other enumerated acts. Unless the defendant's acts or statements are intended to affect or influence a potential witness's or victim's testimony or acts, no crime has been committed under this section. [Citation.] Since the definition refers to a defendant's intent to achieve some further or additional***

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> ***consequence, section 136.1 is a specific intent crime. [Citation.]***
>
> ***The acts proscribed in section 140, to the contrary, take place* because *the witness, victim, or informant has provided information or assistance to a law enforcement officer. The statute is retrospective rather than prospective and proscribes acts which are retaliatory rather than acts to intimidate. It defines only a description of the particular act of threatening to use force or violence, or taking, damaging, or destroying property, without reference to an intent to do a further act or achieve a future consequence. Consequently, section 140 is a general intent crime and the trial court did not err in so instructing.***

(*People v. McDaniel *(1994) 22 Cal.App.4th 278, 283.)

First Amendment—Threat Must be Genuine, Not Hyperbole

In reviewing other statutes criminalizing threats, the courts have held that, while intent to carry out the threat is not required, the evidence must show a "genuine" threat:

> ***[In* Watts v. United States *(1969) 394 U.S. 705, 707,] the Court construed the word "threat" to exclude statements which are, when taken in context, not "true threats" because they are conditional and made in jest. 397 U.S. at 708. In effect, the Court was stating that threats punishable consistently with the First Amendment were only those which according to their language and context conveyed a gravity of purpose and likelihood of execution so as to constitute speech beyond the pale of protected "vehement, caustic . . unpleasantly sharp attacks on government and public officials."***

(*United States v. Kelner *(2d Cir. 1976) 534 F.2d 1020, 1027.)

> ***Although there is no requirement in section 76 of specific intent to execute the threat, the statute requires the defendant to have the specific intent that the statement be taken as a threat and also to have the apparent ability to carry it out, requirements which convey a sense of immediacy and the reality of potential danger and sufficiently proscribe only true threats, meaning threats which 'convincingly express an intention of being carried out.' . . . . Thus, section 76 . . . adequately expresses the notion that the threats proscribed are only those 'so unequivocal, unconditional,***

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immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution.'

(*People v. Gudger *(1994) 29 Cal.App.4th 310, 320–321.)

Definition of Witness
See Instruction 1904.

Definition of Victim
See Instruction 1909.

Definition of Law Enforcement Officer

As used in this section, "law enforcement officer" means any officer or employee of a local police department or sheriff's office, any peace officer of the Department of Parks and Recreation, as defined in subdivision (f) of Section 830.2, any peace officer of the University of California Police Departments, as defined in subdivision (b) of Section 830.2, any peaceofficer of the California State University Police Departments, as defined in subdivision (c) of Section 830.2, a peace officer, as defined in subdivision (d) of Section 830.31, or a peace officer as defined in subdivisions (a) and (b) of Section 830.32.

(Pen. Code, § 13519(b).)

Definition of Public Prosecutor
The definition in this statute is derived from three different provisions of the Government Code:

Govt. Code, § 12250:

The Attorney General has direct supervision over the district attorneys of the several counties of the State and may require of them written reports as to the condition of public business entrusted to their charge.

When he deems is advisable or necessary in the public interest, or when directed to do so by the Governor, he shall assist any district attorney in the discharge of his duties, and may, where he deems it necessary, take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction. In this respect he has all the powers of a district attorney, including

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the power to issue or cause to be issued subpoenas or other process.

Govt. Code, § 26500:

> ***The district attorney is the public prosecutor, except as otherwise provided by law.***
>
> ***The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses.***

Govt. Code, § 41803:

> ***[The City Attorney] shall perform other legal services required from time to time by the legislative body.***

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1913. Evidence Tampering by Peace Officer or Other Person

The defendant is charged [in Count __] with tampering with evidence.

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

3. The defendant willfully and intentionally (changed[,]/ [or] planted[,]/ [or] placed[,]/ [or] made[,]/ [or] hid[,]/ [or] moved) _____ ***<insert name/description of physical matter at issue>***;

4. The defendant knew (he/she) was (changing[,]/ [or] planting[,]/ [or] placing[,]/ [or] making[,]/ [or] hiding[,]/ [or] moving) the _____ ***<insert name/ description of physical matter at issue>***;

[AND]

5. When the defendant (changed[,]/ [or] planted[,]/ [or] placed[,]/ [or] made[,]/ [or] hid[,]/ [or] moved) the _____ ***<insert name/description of physical matter at issue>***, (he/she) intended that ((his/her) action would result in (someone being charged with a crime/ [or] the _____ ***<insert name/description of physical matter at issue>*** being wrongfully produced as genuine or true in a _____ ***<insert type of court proceeding specified in Pen. Code, § 141>***)(;/.)

<Give element 4 if the defendant is charged under Pen. Code, § 141(b).>
[AND

4. When the defendant acted, (he/she) was a peace officer.]

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

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

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BENCH NOTES

Instructional Duty

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

Give element 4 if the defendant is a peace officer charged with a felony violation of Penal Code section 141(b).

The jury must determine whether the defendant was a peace officer. (See *People v. Flood* (1998) 18 Cal.4th 470, 482.) The court must instruct the jury on the appropriate definition of "peace officer" from the statute. *(Ibid.)* It is error for the court to instruct that a person is a peace officer as a matter of law. (*Ibid.* [instruction that "Officer Bridgeman and Officer Gurney are peace officers" was error].)

AUTHORITY

Elements ▸ Pen. Code, § 141.
Peace Officer Defined ▸ Pen. Code, § 830 et seq.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 4.

LESSER INCLUDED OFFENSES

If the defendant is charged with a felony based on being a peace officer (Pen. Code, § 141(b)), then the misdemeanor of evidence tampering by a non–peace officer is a lesser included offense. (Pen. Code, § 141(a).)

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STAFF NOTES

Penal Code, § 141:

> ***(a) Except as provided in subdivision (b), any person who knowingly, willfully, and intentionally alters, modifies, plants, places, manufactures, conceals, or moves any physical matter, with specific intent that the action will result in a person being charged with a crime or with the specific intent that the physical matter will be wrongfully produced as genuine or true upon any trial, proceeding, or inquiry whatever, is guilty of a misdemeanor.***
>
> ***(b) Any peace officer who knowingly, willfully, and intentionally alters, modifies, plants, places, manufactures, conceals, or moves any physical matter, with specific intent that the action will result in a person being charged with a crime or with the specific intent that the physical matter will be wrongfully produced as genuine or true upon any trial, proceeding, or inquiry whatever, is guilty of a felony punishable by two, three, or five years in the state prison.***
>
> ***(c) Nothing in this section shall preclude prosecution under both this section and any other provision of law.***

No Case Law

This statute was added in 2000. Staff was unable to locate any cases on the statute.

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1915. Perjury

The defendant is charged [in Count __] with perjury.

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

<Alternative 1A—defendant took an oath>

[1. The defendant took an oath to (testify[,]/ [or] declare[,]/ [or] depose[,]/ [or] certify) truthfully before a competent (tribunal[,]/ [or] officer[,]/ [or] person) under circumstances in which the oath of the State of California lawfully may be given;]

<Alternative 1B—defendant gave statement under penalty of perjury>

[1. The defendant (testified[,]/ [or] declared[,]/ [or] deposed[,]/ [or] certified) under penalty of perjury under circumstances in which such (testimony[,]/ [or] declaration[,]/ [or] deposition[,]/ [or] certificate) was permitted by law;]

2. When the defendant (testified[,]/ [or] declared[,]/ [or] deposed[,]/ [or] certified), (he/she) willfully stated that the information was true even though (he/she) knew it was false;

3. The information was material;

4. The defendant knew (he/she) was making the statement under (oath/penalty of perjury);

[AND]

5. When the defendant made the false statement, (he/she) intended to (testify[,]/ [or] declare[,]/ [or] depose[,]/ [or] certify) falsely while under (oath/penalty of perjury)(;/.)

<Give element 6 only if statement made in declaration, deposition, or certificate.>

[AND

6. The defendant signed and delivered (his/her) (declaration[,]/ [or] deposition[,]/ [or] certificate) to someone else intending that it be circulated or published as true.]

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

[An oath *is an affirmation or any other method authorized by law to affirm the truth of a statement.]*

[Information is material *if it is probable that the information would influence the outcome of the proceedings, but it does not need to actually have an influence on the proceedings.]*

[Information is material *if* **_____ <insert appropriate definition; see Bench Notes>**.*]*

The People do not need to prove that the defendant knew that the information in (his/her) statement was material.

You may not find the defendant's statement was false based on the testimony of **_____ <insert name of witness>** *alone. In addition to the testimony of* **_____ <insert name of witness>**, *there must be some other evidence that the defendant's statement was false. This other evidence may be direct or indirect. [However, if you conclude, based on the defendant's own testimony, that the allegedly false statement was in fact false, then additional evidence is not required.]*

If the defendant actually believed that the statement was true, the defendant is not guilty of this crime even if the defendant's belief was mistaken.

The People allege that the defendant made the following false statement[s]: **_____ <insert alleged statement[s]>**.

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant made at least one false statement and you all agree on which particular false statement the defendant made. The People do not need to prove that all the allegedly false statements were in fact false.]

[It is not a defense (that the oath was given or taken in an irregular manner/ [or] that the defendant did not go before or take the oath in the presence of the officer claiming to administer the oath) as long as the defendant caused the officer administering the oath to certify that the oath had been taken.]

[When a person makes a statement, without qualification, that information is true, but he or she does not know whether the information is true, the making of that statement is the same as saying something that the person knows is false.]

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[If the defendant attempted to correct the statement after it was made, that attempt may show that the defendant did not intend to (testify[,]/ [or] declare[,]/ [or] depose[,]/ [or] certify) falsely. It is up to you to decide the meaning and importance of that conduct.]

BENCH NOTES

Instructional Duty

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

The court has a **sua sponte** duty to define "material." (*People v. Kobrin* (1995) 11 Cal.4th 416, 430 [materiality is a fact question to be decided by the jury].) The first bracketed definition of material is appropriate for court proceedings or legislative hearings. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 405 [not appropriate for charge of perjury on required disclosure forms].) For other types of proceedings, the court should use the second bracketed sentence, inserting an appropriate definition in the blank provided. (*Id.* at pp. 405–407.)

The court has a **sua sponte** duty to instruct the jury about the need for corroboration of the evidence of perjury. (*People v. DiGiacomo* (1961) 193 Cal.App.2d 688, 698; Pen. Code, § 118(b).) If the evidence that the statement is false is based in whole or in part on the defendant's testimony, give the bracketed sentence that begins with "However, if you conclude, based on the defendant's own testimony."

If the prosecution alleges under a single count that the defendant made multiple statements that were perjury, the court has a **sua sponte** duty to instruct on unanimity. (*People v. McRae* (1967) 256 Cal.App.2d 95, 120–121.) Give the bracketed paragraph that begins with "You may not find the defendant guilty unless."

Give element 6 if the case involves a declaration, deposition, or certificate. (Pen. Code, § 124; *People v. Griffini* (1998) 65 Cal.App.4th 581, 596 [delivery requirement applies to "declaration"; discussing at length meaning of "deposition," "declaration," "certificate," and "affidavit"]; *Collins v. Superior Court* (2001) 89 Cal.App.4th 1244, 1247; *People v. Post* (2001) 94 Cal.App.4th 467, 480–481.)

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Give the bracketed sentence that begins with "It is not a defense (that the oath was given or taken in an irregular manner" on request if supported by the evidence and when instructing with element 1A. (Pen. Code, § 121.)

Give the bracketed sentence that begins with "When a person makes a statement, without qualification," on request if supported by the evidence. (Pen. Code, § 125.)

If there is sufficient evidence, give the bracketed paragraph that begins with "If the defendant attempted to correct." (*People v. Baranov* (1962) 201 Cal.App.2d 52, 60–61.)

AUTHORITY

Elements ▸ Pen. Code, § 118.
Oath Defined ▸ Pen. Code, § 119.
Irregular Oath Not a Defense ▸ Pen. Code, § 121.
Knowledge of Materiality Not Necessary ▸ Pen. Code, § 123.
Completion of Deposition, Affidavit, or Certificate ▸ Pen. Code, § 124; *Collins v. Superior Court* (2001) 89 Cal.App.4th 1244, 1247.
Unqualified Statement Equivalent to False Statement ▸ Pen. Code, § 125.
Material Defined ▸ *People v. Pierce* (1967) 66 Cal.2d 53, 61; *People v. Hedgecock* (1990) 51 Cal.3d 395, 405; *People v. Rubio* (August 19, 2004, F043941) __ Cal.App.4th __, __.
Materiality Is Element to Be Decided by Jury ▸ *People v. Kobrin* (1995) 11 Cal.4th 416, 430; *People v. Feinberg* (1997) 51 Cal.App.4th 1566, 1576.
Specific Intent to Testify Falsely Required ▸ *People v. Viniegra* (1982) 130 Cal.App.3d 577, 584; see also *People v. Hagen* (1998) 19 Cal.4th 652, 663–664 [discussing intent requirement for perjury].
Good Faith Belief Statement True Negates Intent ▸ *People v. Von Tiedeman* (1898) 120 Cal. 128, 134 [cited with approval in *People v. Hagen* (1998) 19 Cal.4th 652, 663–664]; *People v. Louie* (1984) 158 Cal.App.3d Supp. 28, 43.
Declaration Must Be Delivered ▸ *People v. Griffini* (1998) 65 Cal.App.4th 581, 596.
Unanimity ▸ *People v. McRae* (1967) 256 Cal.App.2d 95, 120–121.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 56–81.

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Attempted Perjury ▸ *People v. Post* (2001) 94 Cal.App.4th 467, 480–481.

RELATED ISSUES

Unsigned Deposition
In *People v. Post* (2001) 94 Cal.App.4th 467, 480–481, the court held that an unexecuted deposition transcript was like an undelivered statement that could not form the basis for a perjury conviction. Nevertheless, it was sufficient evidence to support a conviction on the lesser included offense of attempted perjury. *(Ibid.)*

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STAFF NOTES

Penal Code, §118:

(a) Every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may by law of the State of California be administered, willfully and contrary to the oath, states as true any material matter which he or she knows to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which the testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury.

This subdivision is applicable whether the statement, or the testimony, declaration, deposition, or certification is made or subscribed within or without the State of California.

(b) No person shall be convicted of perjury where proof of falsity rests solely upon contradiction by testimony of a single person other than the defendant. Proof of falsity may be established by direct or indirect evidence.

Statutory Definition of Oath

Penal Code section 119 defines oath as follows:

The term "oath," as used in the last two sections, includes an affirmation and every other mode authorized by law of attesting the truth of that which is stated.

Irregular Oath No Defense

Penal Code section 121 states:

It is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner, or that the person accused of perjury did not go before, or was not in the presence of, the officer purporting to administer the oath, If such accused caused or procured such officer to certify that the oath had been taken or administered.

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Ignorance of Materiality No Defense

Penal Code section 123 states:

> It is no defense to a prosecution for perjury that the accused did not know the materiality of the false statement made by him; or that it did not, in fact, affect the proceeding in or for which it was made. It is sufficient that it was material, and might have been used to affect such proceeding.

Deposition, Affidavit, Certificate or Declaration Must Be Delivered

Penal Code section 124 states:

> ***The making of a deposition, affidavit or certificate is deemed to be complete, within the provisions of this chapter, from the time when it is delivered by the accused to any other person with the intent that it be uttered or published as true.***

In* People v. Griffini *(1998) 65 Cal.App.4th 581, 596, the court held that this provision also applied to "declarations," though not specifically listed in the statute.* Griffini, supra*, provides an extensive discussion of the meaning of these various terms.

Specific Intent to Testify Falsely Required

> ***Defendant's remaining contention is that: "Failure to instruct that perjury requires intent to falsely* swear *was error which unfairly undermined the defense and forced conviction."***
>
> ***Here we find merit.***
>
> ***Initially, it should be observed that we are not here concerned with whether the defendant intentionally made false statements in order to obtain public welfare aid and assistance; the evidence abundantly tends to show that she did. We are instead concerned with whether those false statements were* intentionally made under penalty of perjury*. If they were not, although other crimes may have been committed thereby, the crimes of perjury were not established. . . .***
>
> ***[Evidence showed defendant was illiterate, signed forms without reading them and was never told what "perjury" means.]***

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Under this evidence, if believed by the jury, defendant lacked the **specific intent** *to declare falsely under oath or penalty of perjury. Such a specific intent is an essential element of the crime of perjury. (***People** *v.* **Rodley** *(1900) 131 Cal. 240, 260;* **People** *v.* **Walker** *(1967) 247 Cal.App.2d 554, 563 [cert. den., 389 U.S. 824];* **People** *v.* **Guasti** *(1952) 110 Cal.App.2d 456, 464.)*

We look to the trial court's instruction on the elements of perjury. Among other things, and as here relevant, they were told:

"In order to prove the commission of the crime of perjury, each of the following elements must be proved: 1. That a person declared under penalty of perjury that the statements were true and correct, . . . 4. That such person had the specific intent to declare falsely."

The jury might readily have concluded that the demand of element 1 had been met, for the statements at issue **recited under penalty of perjury** *that they were true and correct.*

But it will be observed that element 4 fell short of instructing that a specific intent to declare falsely **under oath or penalty of perjury** *was required. The jury could readily, perhaps more readily, have construed its language as requiring only a specific intent to make false statements to the welfare agency without, as testified and contended by defendant, the intent that the statements be under oath or penalty of perjury.*

To clarify the matter defendant proffered the following instruction: "An essential element of Perjury under Penalty of Perjury is that the person making the declaration **must be aware that the declaration was being made under penalty of perjury.** *If you find that the defendant was aware that she was signing a particular document under penalty of perjury, then this essential element will be proven. If, on the other hand, you find that the defendant was unaware that a particular document was signed under penalty of perjury, then that particular document cannot be the basis for a finding that perjury under penalty of perjury was in fact committed." (Italics added.) . . .*

By virtue of the foregoing we conclude that the trial court, under the evidence of the case and the issues and defense raised by defendant, should have given a jury instruction such as was proffered by her -- thus making it clear that in addition to an

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> ***intentional false statement, a conviction for perjury requires that the accused have the*** **specific intent** ***that it be made under oath, or penalty of perjury.***

(**People v. Viniegra** ***(1982) 130 Cal.App.3d 577, 583–586.)***

Recently, the Supreme Court, in a tax case, made the following observations in dicta about the intent requirement in perjury:

> ***Contrary to the Attorney General's argument, one of the statutory contexts in which willfulness has been held to mean more than simply volitional action is the crime of perjury, to which former section 19405(a)(1) was, we agree, closely related. In a perjury prosecution based on the defendant's having allegedly made an unqualified statement of a matter he did not know to be true (Pen. Code, § 125), this court held the "willfully" element of Penal Code section 118 applies and requires proof the defendant made such statement "with the consciousness that he did not know that it was true, and with the intent that it should be received as a statement of what was true in fact.")*** **People** ***v.*** **Von Tiedeman** ***(1898) 120 Cal. 128, 135; see also*** **People v. Tolmachoff** ***(1943) 58 Cal. App. 2d 815, 821 ["The use of the word 'wilfully' in a prosecution for perjury simply means that the witness made the allegedly perjurious statement with the consciousness that it was false; with the consciousness that he did not know that it was true and with the intent that it should be received as a statement of what was true in fact."].) n5 As with the general crime of perjury, here too the meaning of willfully should be discovered, if possible, from statutory context, which, as already discussed, suggests the definition used in the parallel federal law.***
>
> ***n5 Johnny contends that, in addition to its error in instructing with CALJIC No. 1.20, the trial court erred in failing to instruct, pursuant to the standard perjury instruction (CALJIC No. 7.21), that former section 19405(a)(1) requires proof of "specific intent to declare falsely under penalty of perjury." (Cf.*** **People v. Viniegra** ***(1982) 130 Cal. App. 3d 577, 584 [Perjury under Penal Code section 118 requires "the specific intent to declare falsely under oath or penalty of perjury." (Italics omitted.)].) Johnny cites no authority that such a requirement is part of the*** **willfulness** ***element of perjury, or that it is applicable to former section 19405(a)(1). To the extent the specific intent referred to is not part of the willfulness element of perjury, his contention goes beyond the***

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> ***scope of our review, which we decline to expand. To the extent the specific intent referred to* is *an aspect of willfulness, for purposes of former section 19405(a)(1) the concept it embodies appears to be adequately communicated by the federal description of willfulness as an intentional violation of a known legal duty.***

(*People v. Hagen *(1998) 19 Cal.4th 652, 663–664.)

Materiality

> ***The test is whether the statement could probably have influenced the outcome of the proceedings, and the actual belief or opinion of the judge in the original proceeding is not controlling.***

(*People v. Pierce *(1967) 66 Cal.2d 53, 61.)

Materiality is Element to be Decided by Jury

> ***In* People v. Kobrin *(1995) 11 Cal. 4th 416, our Supreme Court altered previously existing law by holding that materiality is an element of the crime of perjury that must be determined by the jury. [Citation.] n5***
>
> ***n5 Prior to* Kobrin*, the long-standing rule had been that the issue of materiality was a question of law for the court. [Citations.] CALJIC No. 7.21 (1996 rev.) now provides a definition of materiality and includes materiality in the list of enumerated elements of the offense. [end footnote] . . .***
>
> ***Given the absence of a definition of the term "material" and failure of the court's instruction to reiterate the materiality requirement in the specifically enumerated list of elements of the charge, we are convinced the perjury instruction was inadequate.***

(*People v. Feinberg *(1997) 51 Cal.App.4th 1566, 1576.)

Unanimity

A unanimity instruction is recommended when one count contains multiple alleged perjurious statements:

> ***Caution would dictate that where numerous statements are set forth in one count such a modification [“And the twelve of you***

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must individually agree as to the particular statement"] or a separate instruction (see CALJIC 111(rev.)) be given.

(*People v. McRae *(1967) 256 Cal.App.2d 95, 120-121.)

Proof of One False Statement is Sufficient

The indictment, as we have already observed, contains a large number of assignments of perjury. It may be that the evidence is not sufficient to sustain all of such assignments, but the rule is well settled that while the indictment may embrace two, or more, or many assignments of perjury, if the evidence sustains on or more of the assignments it is not necessary for the prosecution to prove all of the charges.

(*People v. Gray *(1942) 52 Cal.App.2d 620, 655 [quoting* People *v.* Follette *(1925) 74 Cal. App. 178, 199].)

Unqualified Statement

Pen. Code section 125 states:

An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false.

Attempt to Correct

Baranov next contends that the trial court committed prejudicial error in refusing to permit him to testify that in the civil trial, immediately after the noon recess, he requested the permission of his attorney to take the witness stand and change his testimony respecting his signing of the note. He further contends that the refusal of the trial court to give an instruction requested by him on this subject enhanced the prejudicial nature of the error in refusing to admit the testimony above noted. With this we agree. . . .

Baranov requested of the court that it instruct the jury as follows:

"You are instructed that a correction of his testimony or an attempt to correct his testimony on the part of one charged with perjury before the tribunal where he originally appeared, may be of value in showing that he was mistaken in giving his original testimony or that he gave his testimony inadvertently, and thus

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tend to support the conclusion that he did not wilfully intend to testify falsely.

"The fact, if it be a fact, that he was not permitted to take the witness stand to correct previously given erroneous testimony because his counsel settled the litigation in question to the satisfaction of the other party to the litigation and the Court which resulted in the accused not being allowed to take the witness stand to correct his previous testimony, may be considered by you as supporting the conclusion that the defendant did not wilfully intend to testify falsely at the time he gave the alleged false testimony."

Baranov was entitled to have them consider this question under proper instruction.

(*People v. Baranov *(1962) 201 Cal.App.2d 52, 59–61.)

Good Faith Belief

Section 2101 of the Unemployment Insurance Code declares that wilfully making a false statement or representation, or knowingly failing to disclose a material fact, to obtain any benefit or payment constitutes a misdemeanor. (See fn. 1.) Under section 2101 the prosecution must prove two elements beyond a reasonable doubt: (1) An intent to defraud and (2) the wilful making of a false statement or representation. [Citations.] It is, of course, a defense to an allegation of intent to defraud that the accused acted without such intent but in the good faith belief that his conduct was justified. . . .

We agree with appellant's contention that the trial court failed to discharge its duty to instruct on appellant's theory of defense. . . .

***Compounding the trial court's error, the court below also gave, over defendant's objection, CALJIC No. 7.22, which derives from Penal Code section 125 and provides that an unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false. Such an instruction has been held to be improper in a prosecution for perjury because it absolutely eliminates the whole question of criminal intent, which is "the vital element in every crime of perjury." (*People *v.* Von Tiedeman *(1898) 120 Cal. 128, 134.) As the* Von Tiedeman**

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*court aptly observed with regard to the perjury prosecution involved in that case, "Under the charge as given, a person with the most honest intentions could be convicted. A man honestly mistaken could be guilty of the crime [of perjury]." (***Id.***, at p. 134.)*

The foregoing analysis applies with equal force to the case at bench. Although, as noted, the trial court properly instructed on the requirement of specific intent, the court's further instruction based upon CALJIC No. 7.22 effectively permitted the jury to find such specific intent to defraud based only upon appellant's disability certifications of Mr. Argosino, when appellant himself admitted in his testimony that he did not definitely know what was wrong with the patient. Thus, if appellant's diagnosis were mistaken, as it was shown to be through the prosecution evidence, the jury could find, based upon CALJIC No. 7.22, the specific intent to defraud solely on account of appellant's mistake, no matter how honestly made. The instruction under CALJIC No. 7.22, without a good faith instruction accompanying it, in this case deprived appellant of his right to a jury determination of the issue of appellant's specific intent to defraud. (See CALJIC No. 7.24.) n9

n9 CALJIC No. 7.24 reads as follows: "An essential element of perjury is that the statement be made willfully by a person who knows that the statement is being made under [oath] [penalty of perjury] and [who knows or believes that the statement is false] [or] [is aware that he is ignorant of the truth or falsity of his statement]. A statement made under an honest mistake and in a belief that it is true is not perjury even though the statement is false.

"The word 'willfully' simply means a purpose or willingness to commit the act or make the omission referred to."

*(***People v. Louie** *(1984) 158 Cal.App.3d Supp. 28, 43–44.)*

In **People** *v.* **Follette** *(1925) 74 Cal. App. 178, 220–221, the court held that is was permissible to instruct in the language of Penal Code section 125 so long as the court also instructed that a good faith belief in the truth of the statement was a defense.*

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1917. Perjury by False Affidavit

The defendant is charged [in Count __] with perjury by false affidavit.

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

6. The defendant gave an affidavit in which (he/she) (swore[,]/ [or] affirmed[,]/ [or] declared[,]/ [or] deposed[,]/ [or] certified) that (he/she) would (testify[,]/ [or] declare[,]/ [or] depose[,]/ [or] certify) before a competent (tribunal[,]/ [or] officer[,]/ [or] person) in connection with a case that had been or would be filed;

7. The defendant signed and delivered (his/her) affidavit to someone else intending that it be used, circulated, or published as true;

8. In the affidavit, the defendant willfully stated that information was true even though (he/she) knew it was false;

9. The information was material;

10. The defendant knew (he/she) was making the statement under (oath/affirmation);

AND

11. When the defendant made the false statement, (he/she) intended to (testify[,]/ [or] declare[,]/ [or] depose[,]/ [or] certify) falsely while under (oath/affirmation).

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

An affidavit *is a written statement made under an (oath/affirmation) given by a person authorized to administer oaths. [An* oath *is an affirmation or any other method authorized by law to affirm the truth of a statement.]*

[Information is material *if it is probable that the information would influence the outcome of the proceedings, but it does not need to actually have an influence on the proceedings.]*

[Information is material *if* _____ **<insert appropriate definition; see Bench Notes>**.*]*

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The People do not need to prove that the defendant knew that the information in (his/her) statement was material.

You may not find the defendant's statement was false based on the testimony of **_____ <insert name of witness>** *alone. In addition to the testimony of* **_____ <insert name of witness>**, *there must be some other evidence that the defendant's statement was false. This other evidence may be direct or indirect. [However, if you conclude, based on the defendant's own testimony, that the allegedly false statement was in fact false, then additional evidence is not required.]*

If the defendant actually believed that the statement was true, the defendant is not guilty of this crime even if the defendant's belief was mistaken.

The People allege that the defendant made the following false statement[s]: **_____ <insert alleged statement[s]>**.

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant made at least one false statement and you all agree on which particular false statement the defendant made. The People do not need to prove that all the allegedly false statements were in fact false.]

[It is not a defense (that the oath was given or taken in an irregular manner/ [or] that the defendant did not go before or take the oath in the presence of the officer claiming to administer the oath) as long as the defendant caused the officer administering the oath to certify that the oath had been taken.]

[If you find beyond a reasonable doubt that after the defendant made the statement[s] in the affidavit, (he/she) testified under oath in another case involving the same facts, but made [a] statement[s] that (was/were) different from (that/those) in the affidavit, you may, but are not required to, rely on that testimony to conclude that the statement[s] in the affidavit are false.]

[When a person makes a statement, without qualification, that information is true, but he or she does not know whether the information is true, the making of that statement is the same as saying something that the person knows is false.]

[If the defendant attempted to correct the statement after it was made, that attempt may show that the defendant did not intend to (testify[,]/ [or] declare[,]/ [or] depose[,]/ [or] certify) falsely. It is up to you to decide the meaning and importance of that conduct.]

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BENCH NOTES

Instructional Duty

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

The court has a **sua sponte** duty to define "material." (*People v. Kobrin* (1995) 11 Cal.4th 416, 430 [materiality is a fact question to be decided by the jury].) The first bracketed definition of material is appropriate for court proceedings or legislative hearings. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 405 [not appropriate for charge of perjury on required disclosure forms].) For other types of proceedings, the court should use the second bracketed sentence, inserting an appropriate definition in the blank provided. *(Ibid.)*

The court has a **sua sponte** duty to instruct the jury about the need for corroboration of the evidence of perjury. (*People v. DiGiacomo* (1961) 193 Cal.App.2d 688, 698; Pen. Code, § 118(b).) If the evidence that the statement is false is based in whole or in part on the defendant's testimony, give the bracketed sentence that begins with "However, if you conclude, based on the defendant's own testimony."

If the prosecution alleges under a single count that the defendant made multiple statements that were perjury, the court has a **sua sponte** duty to instruct on unanimity. (*People v. McRae* (1967) 256 Cal.App.2d 95, 120–121.) Give the bracketed paragraph that begins with "You may not find the defendant guilty unless."

Give the bracketed sentence that begins with "It is not a defense (that the oath was given or taken in an irregular manner" on request if supported by the evidence. (Pen. Code, § 121.)

Do not give the bracketed paragraph stating that defendant "testified under oath in another case involving the same facts" if there is evidence that the defendant's statements alleged to be false in the current case were in fact true. (Pen. Code, § 118a; Evid. Code, §§ 600–607; *People v. Roder* (1983) 33 Cal.3d 491, 497–505.) Although the statute creates a rebuttable presumption that the first statements made were false, the instruction has been written as a permissive inference. An instruction phrased as a rebuttable presumption would create an unconstitutional mandatory presumption. (See *People v. Roder, supra,* 33 Cal.3d at pp. 497–505.)

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Give the bracketed sentence that begins with "When a person makes a statement, without qualification," on request if supported by the evidence. (Pen. Code, § 125.)

If there is sufficient evidence, give the bracketed paragraph that begins with "If the defendant attempted to correct." (*People v. Baranov* (1962) 201 Cal.App.2d 52, 60–61.)

AUTHORITY

Elements ▸ Pen. Code, § 118a.
Oath Defined ▸ Pen. Code, § 119.
Irregular Oath Not a Defense ▸ Pen. Code, § 121.
Knowledge of Materiality Not Necessary ▸ Pen. Code, § 123.
Completion of Deposition, Affidavit, or Certificate ▸ Pen. Code, § 124; *Collins v. Superior Court* (2001) 89 Cal.App.4th 1244, 1247.
Unqualified Statement Equivalent to False Statement ▸ Pen. Code, § 125.
Material Defined ▸ *People v. Pierce* (1967) 66 Cal.2d 53, 61; *People v. Hedgecock* (1990) 51 Cal.3d 395, 405; *People v. Rubio* (August 19, 2004, F043941) __ Cal.App.4th __, __.
Materiality Is Element to Be Decided by Jury ▸ *People v. Kobrin* (1995) 11 Cal.4th 416, 430; *People v. Feinberg* (1997) 51 Cal.App.4th 1566, 1576.
Specific Intent to Testify Falsely Required ▸ *People v. Viniegra* (1982) 130 Cal.App.3d 577, 584; see also *People v. Hagen* (1998) 19 Cal.4th 652, 663–664 [discussing intent requirement for perjury].
Good Faith Belief Statement True Negates Intent ▸ *People v. Von Tiedeman* (1898) 120 Cal. 128, 134 [cited with approval in *People v. Hagen* (1998) 19 Cal.4th 652, 663–664]; *People v. Louie* (1984) 158 Cal.App.3d Supp. 28, 43.
Unanimity ▸ *People v. McRae* (1967) 256 Cal.App.2d 95, 120–121.
Mandatory Presumption Unconstitutional Unless Instructed as Permissive Inference ▸ *People v. Roder* (1983) 33 Cal.3d 491, 497–505.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 56–81.

LESSER INCLUDED OFFENSES

Attempted Perjury ▸ *People v. Post* (2001) 94 Cal.App.4th 467, 480–481.

RELATED ISSUES

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See the Related Issues section of Instruction 1915, Perjury.

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Penal Code, § 118a:

> ***Any person who, in any affidavit taken before any person authorized to administer oaths, swears, affirms, declares, deposes, or certifies that he will testify, declare, depose, or certify before any competent tribunal, officer, or person, in any case then pending or thereafter to be instituted, in any particular manner, or to any particular fact, and in such affidavit willfully and contrary to such oath states as true any material matter which he knows to be false, is guilty of perjury. In any prosecution under this section, the subsequent testimony of such person, in any action involving the matters in such affidavit contained, which is contrary to any of the matters in such affidavit contained, shall be prima facie evidence that the matters in such affidavit were false.***

Definition of Affidavit

> ***A sworn statement in writing made esp. under oath or on affirmation before an authorized magistrate or officer. [From medieval Latin, "he has made an oath."]***

(Merriam-Webster's Collegiate Dictionary, 10th Ed.)

> ***[T]he execution of an affidavit involves a more formal and exacting process than signing a declaration or certificate. An affiant must take an oath before a duly authorized officer.***

(*People v. Griffini *(1998) 65 Cal.App.4th 581, 588.)

Rebuttable Presumption

> ***A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption.***

(Evid. Code, § 602.)

Definition of Presumption

> ***A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence.***

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(Evid. Code, § 600(a).)

Presumptions Affecting the Burden of Producing Evidence

> ***The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate.***

(Evid. Code, § 604.)

Presumptions in Criminal Cases

> ***When a presumption affecting the burden of proof operates in a criminal action to establish presumptively any fact that is essential to the defendant's guilt, the presumption operates only if the facts that give rise to the presumption have been found or otherwise established beyond a reasonable doubt and, in such case, the defendant need only raise a reasonable doubt as to the existence of the presumed fact.***

(Evid. Code, § 607.)

Instruction Must Be Permissive Inference

It would be reversible error for the court to instruct on this issue as a rebuttable presumption, as explained in *People v. Roder* (1983) 33 Cal.3d 491, 497–498:

> [The United States Supreme Court in *Ulster County Court v. Allen* (1979) 442 U.S. 140] emphasized that a sharp distinction must be drawn between two different types of devices: (1) "[an] entirely permissive inference or presumption, which allows -- but does not require -- the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant" (*id*., at p. 157 [60 L.Ed.2d at p. 792]), and (2) "[a] mandatory presumption . . . [which] tells the trier that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." (Original italics.) (*Ibid*.) . . .

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> [T]he court recognized that "[a] mandatory presumption is a far more troublesome evidentiary device" insofar as the reasonable doubt standard is concerned. (*Ibid*.) Because such a presumption tells the trier of fact that it *must* assume the existence of the ultimate, elemental fact from proof of specific, designated basic facts, it limits the jury's freedom independently to assess all of the prosecution's evidence in order to determine whether the facts of the particular case establish guilt beyond a reasonable doubt.n7
>
> N7. . . . Because a mandatory presumption *requires* the trier of fact to find that the elemental fact has been established when the presumption's terms have been met, such a device appears reconcilable with the prosecution's burden of proof under *Winship* only if the basic fact proved *compels* the inference of guilt beyond a reasonable doubt. . . .

Nor it the problem cured by the fact that the presumption is rebuttable:

> Although subdivision 2 also provides that this presumption "may . . . be rebutted by proof," the rebuttable nature of the presumption does not alter the fact that if the defendant decides to put the People to their proof, the statute *compels* the jury to presume that he had the requisite guilty knowledge simply from the prosecution's proof that he was a secondhand dealer who received stolen property under circumstances which called for a reasonable inquiry -- facts which might permit, but certainly would not require, the jury to find beyond a reasonable doubt that defendant knew the property was stolen. Thus, on its face, section 496 is a classic example of a "mandatory presumption" described in *Ulster County*, for it "tells the trier [of fact] that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts."

(*Id.* at p. 501.)

The crucial inquiry is whether the jury was instructed in the language of a mandatory presumption or of a permissive inference:

> [A] determination of the nature of the presumption at issue in any case "requires careful attention to the words actually spoken to the jury [citation], for whether a defendant has been accorded his constitutional rights depends upon the way a reasonable juror could have interpreted the instruction" [Citation.] . . . .

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> The instruction did not inform the jury that if it found the basic facts it could, but was not required to, infer guilty knowledge, but instead told the jury that upon finding the basic facts, it "shall presume" such knowledge unless it had a reasonable doubt. . . .
>
> [T]he presumption would not have operated merely as a permissive inference.

(*Id.* at pp. 502–505.)

Based on *Roder*, Staff has drafted the instruction as a permissive inference rather than a rebuttable presumption.

Statutory Definition of Oath

See Notes to Instruction 1915.

Irregular Oath No Defense

See Notes to Instruction 1915.

Ignorance of Materiality No Defense

See Notes to Instruction 1915.

Deposition, Affidavit, Certificate or Declaration Must Be Delivered

See Notes to Instruction 1915.

Specific Intent to Testify Falsely Required

See Notes to Instruction 1915.

Materiality

See Notes to Instruction 1915.

Unanimity

See Notes to Instruction 1915.

Proof of One False Statement is Sufficient

See Notes to Instruction 1915.

Unqualified Statement

See Notes to Instruction 1915.

Attempt to Correct

See Notes to Instruction 1915.

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Good Faith Belief
See Notes to Instruction 1915.

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1920. Threatening a Public Official

The defendant is charged [in Count __] with threatening a public official.

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

12. The defendant willingly (threatened to kill/ [or] threatened to cause serious bodily harm to) a _____ ***<insert title of person specified in Pen. Code, § 76(a)>*** [or a member of the immediate family of a _____ ***<insert title of person specified in Pen. Code, § 76(a)***>];

13. When the defendant acted, (he/she) intended that (his/her) statement be taken as a threat;

14. When the defendant acted, (he/she) knew that the person (he/she) threatened was a _____ ***<insert title of person specified in Pen. Code, § 76(a)>*** [or a member of the immediate family of a _____ ***<insert title of person specified in Pen. Code, § 76(a)***>];

15. When the defendant acted, (he/she) had the apparent ability to carry out the threat;

[AND]

16. The person threatened reasonably feared for (his/her) safety [or for the safety of (his/her) immediate family](;/.)

<Give element 6 if directed at a person specified in Pen. Code, § 76(d) or (e).>
[AND

17. The threat was directly related to the _____'s ***<insert title of person specified in Pen. Code, § 76(d) or (e)>*** performance of (his/her) job duties.]

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

[When the person making the threat is an incarcerated prisoner with a stated release date, the ability to carry out the threat *includes the ability to do so in the future.]*

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*[*Serious bodily harm *includes serious physical injury or serious traumatic condition.]*

*[*Immediate family *includes a spouse, parent, or child[, or anyone who has regularly resided in the household for the past six months].]*

*[*Staff of a judge *includes court officers and employees[, as well as commissioners, referees, and retired judges sitting on assignment].]*

[The defendant does not have to communicate the threat directly to the intended victim, but may do so through someone else.]

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

BENCH NOTES

Instructional Duty

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

AUTHORITY

Elements and Definitions ▸ Pen. Code, § 76.
Reasonable Fear by Victim Is Element ▸ *People v. Andrews* (1999) 75 Cal.App.4th 1173, 1178.
Statute Constitutional ▸ *People v. Gudger* (1994) 29 Cal.App.4th 310, 321.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 16.

LESSER INCLUDED OFFENSES

An offense under Penal Code section 71, threatening a public officer to prevent him or her from performing his or her duties, may be a lesser included offense. However, there is no case law on this issue.

RELATED ISSUES

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Threat Must Convey Intent to Carry Out

"Although there is no requirement in section 76 of specific intent to execute the threat, the statute requires the defendant to have the specific intent that the statement be taken as a threat and also to have the apparent ability to carry it out, requirements which convey a sense of immediacy and the reality of potential danger and sufficiently proscribe only true threats, meaning threats which 'convincingly express an intention of being carried out.' . . . Thus, section 76 . . . adequately expresses the notion that the threats proscribed are only those 'so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution.' " (*People v. Gudger* (1994) 29 Cal.App.4th 310, 320–321.)

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STAFF NOTES

Penal Code, § 76:

(a) Every person who knowingly and willingly threatens the life of, or threatens serious bodily harm to, any elected public official, county public defender, county clerk, exempt appointee of the Governor, judge, or Deputy Commissioner of the Board of Prison Terms, or the staff or immediate family of any elected public official, county public defender, county clerk, exempt appointee of the Governor, judge, or Deputy Commissioner of the Board of Prison Terms, with the specific intent that the statement is to be taken as a threat, and the apparent ability to carry out that threat by any means, is guilty of a public offense, punishable as follows: . . .

(1) Upon a first conviction, the offense is punishable by a fine not exceeding five thousand dollars ($ 5,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both that fine and imprisonment.

(2) If the person has been convicted previously of violating this section, the previous conviction shall be charged in the accusatory pleading, and if the previous conviction is found to be true by the jury upon a jury trial, or by the court upon a court trial, or is admitted by the defendant, the offense is punishable by imprisonment in the state prison. . . .

(c) For purposes of this section, the following definitions shall apply:

(1) "Apparent ability to carry out that threat" includes the ability to fulfill the threat at some future date when the person making the threat is an incarcerated prisoner with a stated release date.

(2) "Serious bodily harm" includes serious physical injury or serious traumatic condition.

(3) "Immediate family" means a spouse, parent, or child, or anyone who has regularly resided in the household for the past six months.

(4) "Staff of a judge" means court officers and employees, including commissioners, referees, and retired judges sitting on assignment.

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(5) "Threat" means a verbal or written threat or a threat implied by a pattern of conduct or a combination of verbal or written statements and conduct made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.

(d) As for threats against staff, the threat must relate directly to the official duties of the staff of the elected public official, county public defender, county clerk, exempt appointee of the Governor, judge, or Deputy Commissioner of the Board of Prison Terms in order to constitute a public offense under this section.

(e) A threat must relate directly to the official duties of a Deputy Commissioner of the Board of Prison Terms in order to constitute a public offense under this section.

Threat Need Not Be Communicated Directly To Victim

The threat does not need to be communicated directly to the victim,* see *the following jury instruction that was approved in* People v. Craig *(1998) 65 Cal.App.4th 1082, 1092-1093:

> ***In order to constitute a [']threat' it is not necessary that the threat be made directly to the intended victim. It is sufficient that the threat be made through a third party.***

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1921. Trying to Prevent an Executive Officer From Performing Duty

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

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

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

AND

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

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

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

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

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

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

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

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

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

<When lawful performance is an issue, give the following paragraph and Instruction 1935, Lawful Performance.>

[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 _____***<insert number>*** explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

BENCH NOTES

Instructional Duty

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

In order to be "performing a lawful duty," an executive officer, including a peace officer, must be acting lawfully. (*In re Manuel G.* (1997) 16 Cal.4th 805, 816–817; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217.) The court has a **sua sponte** duty to instruct on lawful performance and the defendant's reliance on self-defense as it relates to the use of excessive force when this is an issue in the case. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47; *People v. White* (1980) 101 Cal.App.3d 161, 167–168.)

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

If there is an issue in the case as to the lawful performance of a duty by a peace officer, give the last bracketed paragraph and Instruction 1935, Lawful Performance.

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

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AUTHORITY

Elements ▸ Pen. Code, § 69.
Specific Intent Required ▸ *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1154.
Immediate Ability to Carry Out Threat Not Required ▸ *People v. Hines* (1997) 15 Cal.4th 997, 1061.
Lawful Performance Element to Attempting to Deter ▸ *In re Manuel G.* (1997) 16 Cal.4th 805, 816–817.
Statute Constitutional ▸ *People v. Hines* (1997) 15 Cal.4th 997, 1061.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 119.

LESSER INCLUDED OFFENSES

Resisting an officer, Penal Code section 148(a), is not a lesser included offense of attempting to deter an officer. (*People v. Belmares* (2003) 106 Cal.App.4th 19, 26.)

RELATED ISSUES

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

State of Mind of Victim Irrelevant
Unlike other threat crimes, the state of mind of the intended victim is irrelevant. (*People v. Gutierrez *(2002) 28 Cal.4th 1083, 1153;* People v. Hines *(1997) 15 Cal.4th 997, 1061, fn. 15.)

Immediate Ability to Carry Out Threat Not Required
"As long as the threat reasonably appears to be a serious expression of intention to inflict bodily harm and its circumstances are such that there is a reasonable tendency to produce in the victim a fear that the threat will be carried out, a statute proscribing such threats is not unconstitutional for lacking a requirement of immediacy or imminence. Thus, threats may be constitutionally prohibited even when there is no* immediate *danger that they will be carried out." (*People v. Hines *(1997) 15 Cal.4th 997, 1061 [quoting* In re M.S. *(1995) 10 Cal. 4th 698, 714, citation and internal quotation marks removed, emphasis in original]; see also* People v. Gudger *(1994) 29 Cal.App.4th 310, 320–321;

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Watts v. United States ***(1969) 394 U.S. 705, 707;*** **United States v. Kelner** ***(2d Cir. 1976) 534 F.2d 1020, 1027.)***

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STAFF NOTES

Penal Code, §69:

> ***Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment.***

Elements

> ***A threat, unaccompanied by any physical force, may support a conviction for the first type of offense under section 69. [Citation.] To avoid the risk of punishing protected First Amendment speech, however, the term "threat" has been limited to mean a threat of unlawful violence used in an attempt to deter the officer. [Citations.] The central requirement of the first type of offense under section 69 is an attempt to deter an executive officer from performing his or her duties imposed by law; unlawful violence, or a threat of unlawful violence, is merely the means by which the attempt is made.***

(*In re Manuel G.** *(1997) 16 Cal.4th 805, 817.)

Attempting vs. Trying
It is clear from the language of the statute that an attempt to prevent performance of an officer's duties constitutes the completed crime, not a separate crime of "attempted prevention of performance of job duties." Accordingly, the task force chose to use the word "try" instead of "attempt" to avoid potential confusion with conceptually different attempt crimes.

Threat Need Not Be Communicated Directly To Victim
In the context of a Penal Code section 76, **People v. Craig** ***(1998) 65 Cal.App.4th 1082, 1092-1093, held:***

> ***In order to constitute a [']threat' it is not necessary that the threat be made directly to the intended victim. It is sufficient that the threat be made through a third party.***

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In* People v. Hines *(1997) 15 Cal.4th 997, 1060–1061, the court held that the defendant had not violated Penal Code section 69 where his statement that the guard's "days were short" was not communicated directly to the guard but was told to other inmates who told the guard. Thus, it is unclear if the above holding applies to a charge of violating Penal Code section 69.

Officer Need Not Be Engaged In Duties At The Time

> ***Although the statute applies only when the conduct that the threat is intended to deter is a "duty imposed upon such officer* by law*" - e., only when the conduct that the defendant attempts to deter is* lawful *conduct to be performed by the officer in connection with his or her duties as an officer – the statutory language does not require that the officer be engaged in the performance of his or her duties at the time the threat is made. Instead, the plain language of the statute encompasses attempts to deter* either *an officer's* immediate *performance of a duty imposed by law* or *the officer's performance of such a duty at some time* in the future. *Thus, for example, a person who telephones an off-duty officer at his or her home and threatens to kill the officer if he or she continues to pursue a lawful investigation the following day or week may be convicted of the first type of offense under section 69, even though the officer was not engaged in the performance of his or her duties at the time the threat was made.***

(*In re Manuel G. *(1997) 16 Cal.4th 805, 817 [emphasis in original].)

Lawful Performance

> ***Of course, when a defendant threatens an on-duty officer in an attempt to deter or prevent the officer from continuing to perform the specific conduct in which the officer is then currently engaged, and the officer's conduct is unlawful, the defendant would not violate the statute, because he or she would not have attempted to deter the officer's performance of lawful conduct. When a defendant threatens an officer in an attempt to deter the officer from performing a duty at some later time, however, only the future performance of such duty must be lawful, and the circumstance that the officer may not have been acting in the lawful performance of his or her duties--or may not have been engaged in his or her official duties at all--at the time the threat is made, would not preclude a finding that the defendant violated section 69. In sum, under the first type of offense prohibited by***

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> ***section 69, the relevant factor is simply the lawfulness of the official conduct that the defendant (through threat or violence) has attempted to deter, and not the lawfulness (or official nature) of the conduct in which the officer is engaged at the time the threat is made.***

(*In re Manuel G.** *(1997) 16 Cal.4th 805, 816–817.)

Defendant Need Not Have Present Ability to Carry Out Threat
A present ability to carry out the threat is not required if the target of the threat could reasonably fear retaliatory action in the future. (*People v. Hines** *(1997) 15 Cal.4th 997, 1060.)

Statute As Written is Overbroad
The statute as written would prohibit lawful threatening conduct. To avoid overbreadth, this instruction requires that the defendant act both "willfully" and "unlawfully." (*People v. Anderson** *(1984) 151 Cal.App.3d 893, 895-896.)

Statute Prohibits Either Threat or Violence to Deter Officer

> ***Section 69 prohibits two distinct types of activity--threats and violent conduct--when* either *activity constitutes an attempt "to deter or prevent an executive officer from performing any duty imposed upon such officer by law." Plainly, the statute does not require that a defendant engage in* both *threats* and *violent conduct.***

(*People v. Hines** *(1997) 15 Cal.4th 997, 1061–1062 [emphasis in original, footnote omitted].)

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1922. Resisting an Executive Officer in Performance of Duty

The defendant is charged [in Count __] with resisting an executive officer in the performance of that officer's duty.

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

1. The defendant [unlawfully] used force [or violence] to resist an executive officer;

2. When the defendant acted, the officer was performing (his/her) lawful duty;

AND

3. When the defendant acted, (he/she) knew the executive officer was performing (his/her) duty.

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

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

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

<When lawful performance is an issue, give the following paragraph and Instruction 1935, Lawful Performance.>
[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 **_____<*insert number*>** explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

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BENCH NOTES

Instructional Duty

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

In order to be "performing a lawful duty," an executive officer, including a peace officer, must be acting lawfully. (*In re Manuel G.* (1997) 16 Cal.4th 805, 816; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217.) The court has a **sua sponte** duty to instruct on lawful performance and the defendant's reliance on self-defense as it relates to the use of excessive force when this is an issue in the case. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47; *People v. White* (1980) 101 Cal.App.3d 161, 167–168.))

If there is an issue in the case as to the lawful performance of a duty by a peace officer, give the last bracketed paragraph and Instruction 1935, Lawful Performance.

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

AUTHORITY

Elements ▸ Pen. Code, § 69.
General Intent Offense ▸ *People v. Roberts* (1982) 131 Cal.App.3d Supp. 1, 9.
Lawful Performance Element to Resisting Officer ▸ *In re Manuel G.* (1997) 16 Cal.4th 805, 816.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 119.

LESSER INCLUDED OFFENSES

Penal Code section 148 (a) may be a lesser included offense.

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STAFF NOTES

Penal Code, § 69:

> ***Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment.***

Lawful Performance

> ***By defining the offense in terms of using force to* resist *an officer "in the performance of" his or her duty, the second part of section 69 necessarily assumes that the officer is engaged in such duty when resistance is offered. Therefore,* Wilkins *properly stated that, for purposes of the offense set forth in the second part of section 69, the officers must have been acting lawfully when the defendant resisted arrest. (*People v. Gonzalez*,* supra*, 51 Cal. 3d at p. 1217.)***

(*In re Manuel G.** *(1997) 16 Cal.4th 805, 816–817 [discussing* **People v. Wilkins** *(1993) 14 Cal. App. 4th 761, 776–777].)

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1940. Assault by Prisoner Serving Life Sentence

The defendant is charged [in Count __] with assault with (force likely to produce great bodily injury/a deadly weapon) with malice aforethought, while serving a life sentence.

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

<Alternative 1A—force with weapon>

[1. The defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;]

<Alternative 1B—force without weapon>

[1. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and the force used was likely to produce great bodily injury;]

2. The defendant did that act willfully;

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

4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;

5. The defendant acted with malice aforethought;

[AND]

<Alternative 6A—defendant sentenced to life term>

[6. When (he/she) acted, the defendant had been sentenced to a maximum term of life in state prison [in California](;/.)]

<Alternative 6B—defendant sentenced to life and to determinate term>

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[6. When (he/she) acted, the defendant had been sentenced to both a specific term of years and a maximum term of life in state prison [in California](;/.)]

<Give element 7 when self-defense or defense of another is an issue raised by the evidence.>

[AND

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

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

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

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

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

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

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

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

[The term[s] (*great bodily injury/* [and] *deadly weapon)* (is/are) defined in another instruction.]

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

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

The defendant acted with *implied malice* if:

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

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

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

AND

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

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

BENCH NOTES

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 7 and any appropriate defense instructions. (See Instructions 690-697.)

In element 1, give alternative 1A if it is alleged the assault was committed with a deadly weapon. Give alternative 1B if it is alleged that the assault was committed with force likely to produce great bodily injury.

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In element 6, give alternative 6A if the defendant was sentenced to only a life term. Give element 6B if the defendant was sentenced to both a life term and a determinate term. (*People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341.)

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

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

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

Penal Code section 4500 provides that the punishment for this offense is death or life in prison without parole, unless "the person subjected to such assault does not die within a year and a day after" the assault. If this is an issue in the case, the court should consider whether the time of death should be submitted to the jury for a specific factual determination pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.

Defense—Instructional Duty

As with murder, the malice required for this crime may be negated by evidence of heat of passion or imperfect self-defense. (*People v. St. Martin* (1970) 1 Cal.3d 524, 530–531; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781.) If the evidences raises an issue about one or both of these potential defenses, the court has a **sua sponte** duty to give the appropriate instructions, Instruction 750, Voluntary Manslaughter: Heat of Passion, or Instruction 751, Voluntary Manslaughter: Imperfect Self-Defense. The court must modify these instructions for the charge of assault by a life prisoner.

Related Instructions

Instruction 875, Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury.

Instruction 720, Murder With Malice Aforethought.

AUTHORITY

Elements of Assault by Life Prisoner ▸ Pen. Code, § 4500.

Elements of Assault With Deadly Weapon or Force Likely ▸ Pen. Code, §§ 240, 245(a)(1)–(3) & (b).

Willful Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

Deadly Weapon Defined ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029.

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Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12].
Malice Equivalent to Malice in Murder ▸ *People v. St. Martin* (1970) 1 Cal.3d 524, 536–537; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781.
Malice Defined ▸ Pen. Code, § 188; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1217–1222; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103–105.
Ill Will Not Required for Malice ▸ *People v. Sedeno* (1974) 10 Cal.3d 703, 722 [overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12].
Undergoing Sentence of Life ▸ *People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 58–60.

LESSER INCLUDED OFFENSES

Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury—Not a Prisoner ▸ Pen. Code, § 245; see *People v. St. Martin* (1970) 1 Cal.3d 524, 536; *People v. Noah* (1971) 5 Cal.3d 469, 478–479.
Assault ▸ Pen. Code, § 240; *People v. Noah* (1971) 5 Cal.3d 469, 478–479.

Note: Assault by a prisoner not serving a life sentence, Penal Code section 4501, is not a lesser included offense of assault by a prisoner serving a life sentence, Penal Code section 4500. (*People v. Noah* (1971) 5 Cal.3d 469, 476–477.)

RELATED ISSUES

Status as Life Prisoner Determined on Day of Alleged Assault
Whether the defendant is sentenced to a life term is determined by his or her status on the day of the assault. (*People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341; *Graham v. Superior Court* (1979) 98 Cal.App.3d 880, 890.) It does not matter if the conviction is later overturned or the sentence is later reduced to something less than life. (*People v. Superior Court of Monterey (Bell), supra,* 99 Cal.App.4th at p. 1341; *Graham v. Superior Court, supra,* 98 Cal.App.3d at p. 890.)

Undergoing Sentence of Life
This statute applies to "[e]very person undergoing a life sentence . . . ." (Pen. Code, § 4500.) In *People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341, the defendant had been sentenced both to life in prison and to a determinate term and, at the time of the assault, was still technically

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serving the determinate term. The court held that he was still subject to prosecution under this statute, stating "a prisoner who commits an assault is subject to prosecution under section 4500 for the crime of assault by a life prisoner if, on the day of the assault, the prisoner was serving a sentence which potentially subjected him to actual life imprisonment, and therefore the prisoner might believe he had 'nothing left to lose' by committing the assault." *(Ibid.)*

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STAFF NOTES

Penal Code, § 4500:

> Every person while undergoing a life sentence, who is sentenced to state prison within this state, and who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.
>
> For the purpose of computing the days elapsed between the commission of the assault and the death of the person assaulted, the whole of the day on which the assault was committed shall be counted as the first day.
>
> Nothing in this section shall be construed to prohibit the application of this section when the assault was committed outside the walls of any prison if the person committing the assault was undergoing a life sentence and was serving a sentence to a state prison at the time of the commission of the assault and was not on parole, on probation, or released on bail pending an appeal.

Elements

> The elements of the offense set forth in section 4500 are (1) an aggravated assault, (2) by a state prisoner, (3) *serving a life term*, (4) with malice aforethought.

(*People v. Superior Court of Marin (Gaulden)* (1977) 66 Cal.App.3d 773, 778 [overruled on other grounds in *People v. Sumstine* (1984) 36 Cal.3d 909, 917, fn. 4.].)

Assault With a Deadly Weapon or Force Likely

The elements and definitions used in this instruction come from Instruction 875, Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury.

Malice Aforethought—Same As In Murder

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> Included in the instructions given the jury regarding the meaning of malice aforethought was the definition of malice contained in Penal Code section 7, subdivision 4, n2 and defendant asserts that this definition of malice should not be given the jury in a prosecution under Penal Code section 4500. This assertion is meritorious. *People* v. *Chacon, supra*, 69 Cal.2d 765, 781, in holding that the instructions there given on malice aforethought were inadequate stated, "The words malice aforethought in section 4500 have the same meaning as in sections 187 [murder] and 188 [malice definition]. (*People* v. *McNabb* (1935) 3 Cal.2d 441, 456 . . . ; *People* v. *Wells* (1949) 33 Cal.2d 330, 338 . . . ; see *People* v. *Berry* (1955) 44 Cal.2d 426, 430 . . . .) Thus the rules that have evolved regarding malice aforethought as an element in a charge of murder apply to section 4500." (See also *People* v. *Sanchez*, 65 Cal.2d 814, 820 [vacated on another ground in 70 Cal.2d 562].) And it has been held that malice as used in the statute defining murder imports something more than the definition given in section 7 (*People* v. *Conley, supra*, 64 Cal.2d 310, 320-321; *People* v. *Gorshen*, 51 Cal.2d 716, 731; *People* v. *Waysman*, 1 Cal.App. 246, 247) and that section 7's definition of malice should not be read to a jury in a murder case (*People* v. *Chavez*, 37 Cal.2d 656, 666; see *People* v. *Conley, supra; People* v. *Gorshen, supra*). Accordingly, section 7's definition of malice likewise should not be read to the jury in a section 4500 case.

(*People v. St. Martin* (1970) 1 Cal.3d 524, 536–537; see also *People* v. *Chacon,* (1968) 69 Cal.2d 765, 780–781.)

The definition of malice aforethought comes Instruction 720, Murder with Malice Aforethought.

Heat of Passion and Imperfect Self-Defense Apply

> We recently held in a prosecution under section 4500 that it was error to refuse an instruction on provocation. (*People* v. *Chacon*, 69 Cal.2d 765, 781.) We stated: "In a prosecution for murder the presence of sufficient provocation or heat of passion negates the existence of the requisite malice aforethought. [Citation.] In the usual case, this instruction supplements the self-defense instruction. Thus, in a prosecution for murder, even though the defense of self-defense fails, as it might for excessive retaliation by the defendant, the jury might still find the original attack sufficient to constitute provocation, which would preclude a finding of malice aforethought and reduce the crime to manslaughter. Since the refusal to

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> instruct on provocation would be erroneous in a prosecution for murder, it was erroneous here." . . .
>
> [W]here substantial evidence is presented sufficient to inform the court that the defendant is relying upon provocation to show that he did not act with malice aforethought in a prosecution under section 4500, the court must instruct on its own motion on the issue of provocation.

(*People v. St. Martin* (1970) 1 Cal.3d 524, 530–531.)

Undergoing Sentence of Life

> [I]t is well established that a prisoner who commits an assault is subject to prosecution under section 4500 for the crime of assault by a life prisoner if, on the day of the assault, the prisoner was serving a sentence which potentially subjected him to actual life imprisonment, and therefore the prisoner might believe he had "nothing left to lose" by committing the assault.

(*People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341.) In *Bell, supra,* the defendant had been sentenced to a determinate term with two life sentences to run consecutively to the determinate term. At the time of the assault, he was still serving the determinate term. (*Id.* at p. 1342.) The court held:

> Based on our review of the pertinent Penal Code sections and their legislative purpose, we find that the Legislature intended section 4500 to apply to a prisoner who at the time of committing an assault was serving a fixed term sentence to be followed by a consecutive life sentence. The defendant is serving one aggregate term of confinement in which he is potentially restrained of his liberty for life and might think he is immune from further punishment. Such a defendant falls into the class of prisoners who are undergoing a life sentence within the meaning of section 4500.

(*Id.* at pp. 1343–1344.)

Status as Life Prisoner Determined on Day of Alleged Assault

> Graham contends that the enactment of the determinate sentence law (§ 1170 et seq.) in 1976 requires that the life sentence he was admittedly serving on November 27, 1973, now be considered as a term of years. From this premise he concludes the indictment against him must be set aside because there is no evidence that he was a "person undergoing a life

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> sentence" when the crime was committed. This contention cannot be sustained.
>
> Every inmate sentenced to prison for an offense carrying a maximum term of life is "a life prisoner" within the meaning of section 4500 even though the Adult Authority may subsequently fix his term at less than life or grant parole. [Citations.] A life prisoner may be convicted of violating section 4500 even if the conviction under which he was a life prisoner is invalid. "'If the purpose of the statute is to be achieved, and obviously the purpose is a sound one, it makes no difference why the prisoner has been confined, or that he may be legally entitled to release.'" [Citations.]
>
> The legislative purpose in enacting section 4500 was to deter those who were serving life sentences who might otherwise believe they had nothing to lose. [Citation.] It is the prisoner's status on the day of the offense which brings him within this classification.

(*Graham v. Superior Court* (1979) 98 Cal.App.3d 880, 890; see also *In re Carmichael* (1982) 132 Cal.App.3d 542, 546 [defendant's conviction under Pen. Code, § 4500 remained valid because he was subject to life sentence at time of assault, even though change from indeterminate to determinate sentencing resulted in his underlying sentence for robbery becoming a determinate term].)

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1941. Assault by Prisoner Not Serving Life Sentence

The defendant is charged [in Count __] with assault with (force likely to produce great bodily injury/a deadly weapon) while serving a state prison sentence.

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

<Alternative 1A—force with weapon>

[1. The defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;]

<Alternative 1B—force without weapon>

[1. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and the force used was likely to produce great bodily injury;]

6. The defendant did that act willfully;

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

8. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;

[AND]

9. When (he/she) acted, the defendant was serving a sentence in a [California] state prison for a term other than life(;/.)

<Give element 6 when self-defense or defense of another is an issue raised by the evidence.>

[AND

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

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

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

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

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

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

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

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

[The term[s] (*great bodily injury/* [and] *deadly weapon)* (is/are) defined in another instruction.]

A person is *serving a sentence in a state prison* if he or she is (confined in _____ *<insert name of institution from Pen. Code, § 5003>*/**committed to the Department of (the Youth Authority/Corrections)) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *serving a sentence in a state prison* even if, at the time of the offense, he or she is confined in a local**

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correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is not *serving a sentence in a state prison*.]

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 6 and any appropriate defense instructions. (See Instructions 690-697.)

In element 1, give alternative 1A if it is alleged the assault was committed with a deadly weapon. Give alternative 1B if it is alleged that the assault was committed with force likely to produce great bodily injury.

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

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

In the definition of "serving a sentence in a state prison," give the bracketed portion that begins with "regardless of the purpose," or the bracketed second or third sentence, if requested and relevant based on the evidence.

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

Related Instructions

Instruction 875, Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury.

AUTHORITY

Elements of Assault by Prisoner Not Serving Life Sentence ▸ Pen. Code, § 4501.
Elements of Assault With Deadly Weapon or Force Likely ▸ Pen. Code, §§ 240, 245(a)(1)–(3) & (b).

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Defendant Not Serving Life Sentence Is Element ▸ *People v. Noah* (1971) 5 Cal.3d 469, 477.
Willful Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.
Deadly Weapon Defined ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029.
Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12].
Confined in State Prison Defined ▸ Pen. Code, § 4504.
Underlying Conviction Need Not Be Valid ▸ *Wells v. California* (1965) 352 F.2d 439, 442.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 61.

LESSER INCLUDED OFFENSES

Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury—Not a Prisoner ▸ Pen. Code, § 245; see *People v. Noah* (1971) 5 Cal.3d 469, 478–479.
Assault ▸ Pen. Code, § 240; *People v. Noah* (1971) 5 Cal.3d 469, 478–479.

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STAFF NOTES

Penal Code, § 4501:

Every person confined in a state prison of this state except one undergoing a life sentence who commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury, shall be guilty of a felony and shall be imprisoned in the state prison for two, four, or six years to be served consecutively.

Penal Code, § 4504, "Confined in Prison":

(a) A person is deemed confined in a "state prison" if he is confined in any of the prisons and institutions specified in Section 5003 by order made pursuant to law, including, but not limited to, commitments to the Department of Corrections or the Department of the Youth Authority, regardless of the purpose of such confinement and regardless of the validity of the order directing such confinement, until a judgment of a competent court setting aside such order becomes final.

(b) A person is deemed "confined in" a prison although, at the time of the offense, he is temporarily outside its walls or bounds for the purpose of serving on a work detail or for the purpose of confinement in a local correctional institution pending trial or for any other purpose for which a prisoner may be allowed temporarily outside the walls or bounds of the prison, but a prisoner who has been released on parole is not deemed "confined in" a prison for purposes of this chapter.

Penal Code, § 5003:

The department [of Corrections] has jurisdiction over the following prisons and institutions:

(a) The California State Prison at San Quentin.

(b) The California State Prison at Folsom.

(c) The California Institution for Men.

(d) The California Institution for Women.

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(e) The Deuel Vocational Institution.

(f) The California Medical Facility.

(g) The Correctional Training Facility.

(h) The California Men's Colony.

(i) The California Correctional Institution at Tehachapi.

(j) The California Rehabilitation Center.

(k) The California Correctional Center at Susanville.

(l) The Sierra Correctional Center.

(m) The Richard J. Donovan Correctional Facility at Rock Mountain.

(n) Mule Creek State Prison.

(o) Northern California Women's Facility.

(p) Pelican Bay State Prison.

(q) Avenal State Prison.

(r) California State Prison--King's County at Corcoran.

(s) Chuckawalla Valley State Prison.

(t) Those other institutions and prison facilities as the Department of Corrections or the Director of Corrections may be authorized by law to establish, including, but not limited to, prisons in Madera, Kern, Imperial, and Los Angeles Counties.

Elements—Includes that Defendant Was Not Undergoing Life Sentence

The elements of the offense set forth in section 4501 are: (1) an aggravated assault; (2) by a state prisoner; (3) who is *not* undergoing a life sentence.

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(*People v. Noah* (1971) 5 Cal.3d 469, 477.)

> Inasmuch as section 4501 is applicable only to prisoners serving a sentence of less than life, the status of a defendant as one who is serving a life sentence is a defense which he may assert if charged with violation of section4501. (Cf. *People* v. *Montalvo* (1971) 4 Cal.3d 328, 334.)
>
> It follows that when an information or indictment alleges a violation of section 4500, and by so doing alleges that the defendant *is* serving a life term, section 4501 cannot be a necessarily included offense in fact, since an offender who violates section 4500 cannot violate section 4501. (See *People* v. *Marshall* (1957) 48 Cal.2d 394, 398.)
>
> Furthermore, since a conviction for violation of section 4501 requires an affirmative finding by the trier of fact that the defendant is *not* serving a life sentence, the section cannot be considered a lesser degree of the offense set forth in section 4500. n5 (Cf. *People* v. *Montalvo, supra*, 4 Cal.3d 328, 335, fn. 5.)

(*Id.* at p. 476.)

Assault With a Deadly Weapon or Force Likely
The elements and definitions used in this instruction come from Instruction 875, Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury.

Underlying Conviction Need Not be Valid

> All that is required by Section 4500 et seq. is that the prisoner be serving a sentence. The statutes do not require that the conviction and sentence be a valid one. If the purpose of the statute is to be achieved, and obviously the purpose is a sound one, it makes no difference why the prisoner has been confined, or that he may be legally entitled to release.

(*Wells v. California* (1965) 352 F.2d 439, 442 [quotation marks and citation omitted].)

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1942. Battery by Gassing

The defendant is charged [in Count __] with battery by gassing.

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

1. The defendant was (serving a sentence in a [California] state prison/confined in a local detention facility);

2. While so confined, the defendant intentionally committed an act of gassing, that is, (he/she) (placed[,]/ [or] threw[,]/ [or] caused to be placed or thrown) (human excrement/human urine/human bodily fluids or substances/a mixture containing human bodily substances) on the body of (a peace officer/an employee of a (local detention facility/state prison));

AND

3. The (excrement/urine/bodily fluids or substances/mixture) actually made contact with the skin [or membranes] of (a peace officer/an employee of a (local detention facility/state prison)).

[A person is *serving a sentence in a state prison* if he or she is (confined in _____ <***insert name of institution from Pen. Code, § 5003***>/committed to the Department of (the Youth Authority/Corrections)) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *serving a sentence in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is not *serving a sentence in a state prison*.]]

[A (county jail/city jail/_____ <***insert description***>) is a *local detention facility*.]

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

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BENCH NOTES

Instructional Duty

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

If the battery is charged under Penal Code section 4501.1, in element 1, use the phrase "serving a sentence in state prison" and the bracketed definition of this phrase. If the battery is charged under Penal Code section 243.9, in element 1, give the language referencing a "local detention facility" and the bracketed definition of local detention facility.

When giving the definition of "serving a sentence in a state prison," give the bracketed portion that begins "regardless of the purpose," or the bracketed second or third sentence, if requested and relevant based on the evidence.

The jury must determine whether the alleged victim was a peace officer. (*People v. Flood* (1998) 18 Cal.4th 470, 482.) The court must instruct the jury in the appropriate definition of "peace officer" from the statute. (*Ibid.*) It is error for the court to instruct that the witness is a peace officer as a matter of law. (*Ibid.* [instruction that "Officer Bridgeman and Officer Gurney are peace officers" was error].)

AUTHORITY

Elements ▸ Pen. Code, §§ 242, 243.9, 4501.1.
Confined in State Prison Defined ▸ Pen. Code, § 4504.
Local Detention Facility Defined ▸ Pen. Code, § 6031.4.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 12–14, 62.

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STAFF NOTES

Penal Code, § 243.9, in relevant part:

> ***(a) Every person confined in any local detention facility who commits a battery by gassing upon the person of any peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, or employee of the local detention facility is guilty of aggravated battery and shall be punished by imprisonment in a county jail or by imprisonment in the state prison for two, three, or four years.***
>
> ***(b) For purposes of this section, "gassing" means intentionally placing or throwing, or causing to be placed or thrown, upon the person of another, any human excrement or other bodily fluids or bodily substances or any mixture containing human excrement or other bodily fluids, or bodily substances that results in actual contact with the person's skin or membranes.***

Penal Code, § 4501.1, in relevant part:

> ***(a) Every person confined in the state prison who commits a battery by gassing upon the person of any peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, or employee of the state prison is guilty of aggravated battery and shall be punished by imprisonment in the state prison for two, three, or four years. Every state prison inmate convicted of a felony under this section shall serve his or her term of imprisonment as prescribed in Section 4501.5.***
>
> ***(b) For purposes of this section, "gassing" means intentionally placing or throwing, or causing to be placed or thrown, upon the person of another, any human excrement or other bodily fluids or bodily substances or any mixture containing human excrement or other bodily fluids, or bodily substances that results in actual contact with the person's skin or membranes.***

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Confined in State Prison—Defined

See Notes to Instruction 1941.

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1943. Battery by Prisoner on Nonprisoner

The defendant is charged [in Count __] with battery on someone who was not a prisoner.

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

1. **The defendant willfully touched _____** *<insert name of person allegedly battered, excluding title of law enforcement agent>* **in a harmful or offensive manner;**

2. **When (he/she) acted, the defendant was serving a sentence in a [California] state prison;**

[AND]

3. **_____** *<insert name of person allegedly battered, excluding title of law enforcement agent>* **was not serving a sentence in state prison(;/.)**

<Give element 4 when self-defense or defense of another is an issue raised by the evidence.>
[AND

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

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

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

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

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A person is *serving a sentence in a state prison* if he or she is (confined in _____ <*insert name of institution from Pen. Code, § 5003*>/committed to the Department of (the Youth Authority/Corrections)) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *serving a sentence in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is not *serving a sentence in a state prison*.]

<When lawful performance is an issue, give the following paragraph and Instruction 1935, Lawful Performance.>

[A custodial officer is not lawfully performing his or her duties if he or she is using unreasonable or excessive force in his or her duties. Instruction _____ <*insert number*> explains when force is unreasonable or excessive.]

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 4 and any appropriate defense instructions. (See Instructions 690-697.)

The court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (See *People v. Coleman* (1978) 84 Cal.App.3d 1016, 1022–1023; *People v. White* (1980) 101 Cal.App.3d 161, 167–168; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47.) If there is evidence of excessive force, give bracketed element 4, the last bracketed paragraph, and the appropriate portions of Instruction 1935, Lawful Performance.

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

In the definition of "serving a sentence in a state prison," give the bracketed portion that begins with "regardless of the purpose," or the bracketed second or third sentence, if requested and relevant based on the evidence.

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Related Instructions
Instruction 850, Simple Battery.

AUTHORITY

Elements of Battery by Prisoner on Nonprisoner ▸ Pen. Code, § 4501.5.
Elements of Battery ▸ Pen. Code, § 242; see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [harmful or offensive touching].
Willful Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.
Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335[citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12].
Confined in State Prison Defined ▸ Pen. Code, § 4504.
Underlying Conviction Need Not Be Valid ▸ *Wells v. California* (1965) 352 F.2d 439, 442.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 12–15, 57.
1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 67.

LESSER INCLUDED OFFENSES

Simple Battery ▸ Pen. Code, § 242.
Assault ▸ Pen. Code, § 240.

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STAFF NOTES

Penal Code, § 4501.5:

> Every person confined in a state prison of this state who commits a battery upon the person of any individual who is not himself a person confined therein shall be guilty of a felony and shall be imprisoned in the state prison for two, three, or four years, to be served consecutively.

Confined in State Prison—Defined

See Notes to Instruction 1941.

Battery

The elements and definitions used in this instruction come from Instruction 850, Simple Battery.

Self-Defense Against Excessive Force

> Appellant next contends that the court erred in instructing the jury on the right of a correctional officer to use force when escorting a prisoner. The instruction in question is as follows:
>
> "A correctional officer who is making a lawful escort of a prison inmate may use reasonable force to make such escort, or to prevent escape, or to overcome resistance.
>
> "The officer need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the inmate being escorted.
>
> "Where such an officer is making a lawful escort, if the inmate being escorted has knowledge, or by the exercise of reasonable care should have knowledge, that he is being escorted by a correctional officer, it is the duty of such inmate to refrain from using force or any weapon to resist such escort unless unreasonable or excessive force is being used to make the escort.
>
> "A correctional officer is not permitted to use unreasonable or excessive force on an inmate in making an otherwise lawful escort.
>
> "If an officer does use unreasonable or excessive force in making an escort, the person being escorted may lawfully use reasonable force to

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> protect himself.
>
> "Thus, if you find that the officer used unreasonable or excessive force in making or attempting to make the escort in question, and that the defendant used only reasonable force to protect himself, the defendant is not guilty of the offense charged in the indictment."
>
> This instruction is a modification of CALJIC No. 16.103, "Resisting Arrest -- Use of Reasonable Force -- Duty to Submit," and CALJIC No. 16.106, "Resisting Arrest or Detention for Questioning -- Use of Excessive Force by Officer." . . .
>
> Contrary to appellant's contention, the instruction did not mislead the jury. Although the instruction is based upon Penal Code section 834a, n2 it did not pertain to a lesser included offense. Rather, it accurately described the respective rights and duties of a correctional officer and a prisoner with regard to force.

(*People v. Coleman* (1978) 84 Cal.App.3d 1016, 1022–1023 [footnote omitted].)

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1944. Holding a Hostage

The defendant is charged [in Count __] with holding a hostage.

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

1. **The defendant (held a person hostage/ [or] held a person against his or her will, by force or threat of force, in defiance of official orders) inside a (prison/facility under the jurisdiction of the Department of Corrections).;**

AND

2. **When the defendant acted, (he/she) was serving a sentence in a [California] state prison.**

A person is *serving a sentence in a state prison* if he or she is (confined in _____ *<insert name of institution from Pen. Code, § 5003>*/**committed to the Department of (the Youth Authority/Corrections)) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *serving a sentence in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is not *serving a sentence in a state prison*.]**

BENCH NOTES

Instructional Duty

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

In the definition of "serving a sentence in a state prison," give the bracketed portion that begins with "regardless of the purpose," or the bracketed second or third sentence, if requested and relevant based on the evidence.

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AUTHORITY

Elements ▸ Pen. Code, § 4503.
Confined in State Prison Defined ▸ Pen. Code, § 4504.
Underlying Conviction Need Not Be Valid ▸ *Wells v. California* (1965) 352 F.2d 439, 442.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 255.

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STAFF NOTES

Penal Code, § 4503:

Any person confined therein who holds as hostage any person within any prison or facility under the jurisdiction of the Director of Corrections, or who by force or threat of force holds any person or persons against their will in defiance of official orders within any such prison or facility, shall be guilty of a felony and shall be imprisoned in the state prison for three, five, or seven years to be served consecutively.

Penal Code, § 4504, "Confined in Prison":

(a) A person is deemed confined in a "state prison" if he is confined in any of the prisons and institutions specified in Section 5003 by order made pursuant to law, including, but not limited to, commitments to the Department of Corrections or the Department of the Youth Authority, regardless of the purpose of such confinement and regardless of the validity of the order directing such confinement, until a judgment of a competent court setting aside such order becomes final.

(b) A person is deemed "confined in" a prison although, at the time of the offense, he is temporarily outside its walls or bounds for the purpose of serving on a work detail or for the purpose of confinement in a local correctional institution pending trial or for any other purpose for which a prisoner may be allowed temporarily outside the walls or bounds of the prison, but a prisoner who has been released on parole is not deemed "confined in" a prison for purposes of this chapter.

Penal Code, § 5003:

The department [of Corrections] has jurisdiction over the following prisons and institutions:

(a) The California State Prison at San Quentin.

(b) The California State Prison at Folsom.

(c) The California Institution for Men.

(d) The California Institution for Women.

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(e) The Deuel Vocational Institution.

(f) The California Medical Facility.

(g) The Correctional Training Facility.

(h) The California Men's Colony.

(i) The California Correctional Institution at Tehachapi.

(j) The California Rehabilitation Center.

(k) The California Correctional Center at Susanville.

(l) The Sierra Correctional Center.

(m) The Richard J. Donovan Correctional Facility at Rock Mountain.

(n) Mule Creek State Prison.

(o) Northern California Women's Facility.

(p) Pelican Bay State Prison.

(q) Avenal State Prison.

(r) California State Prison--King's County at Corcoran.

(s) Chuckawalla Valley State Prison.

(t) Those other institutions and prison facilities as the Department of Corrections or the Director of Corrections may be authorized by law to establish, including, but not limited to, prisons in Madera, Kern, Imperial, and Los Angeles Counties.

No Cases on Statute
Staff was unable to locate any published cases on this statute.

Underlying Conviction Need Not be Valid

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> All that is required by Section 4500 et seq. is that the prisoner be serving a sentence. The statutes do not require that the conviction and sentence be a valid one. If the purpose of the statute is to be achieved, and obviously the purpose is a sound one, it makes no difference why the prisoner has been confined, or that he may be legally entitled to release.

(*Wells v. California* (1965) 352 F.2d 439, 442 [quotation marks and citation omitted].)

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1945. Inciting a Riot in a Prison or Jail

The defendant is charged [in Count __] with inciting a riot [in a (state prison/county jail)].

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

1. **The defendant (did an act [or engaged in conduct] that encouraged a riot[,]/ [or] urged others to commit acts of force or violence[,]/ [or] urged others to (burn/ [or] destroy) property);**

2. **The defendant acted at a time and place and under circumstances that produced a clear, present, and immediate danger that (acts of force or violence would happen/ [or] property would be (burned/ [or] destroyed));**

3. **When the defendant acted, (he/she) intended to cause a riot;**

4. **As a result of the defendant's action [or conduct], a riot occurred [in a (state prison/county jail)];**

AND

5. **The riot resulted in serious bodily injury to someone.**

A *riot* occurs when two or more people, acting together and without legal authority, disturb the public peace by using force or violence or by threatening to use force or violence with the immediate ability to carry out those threats. [A disturbance of the public peace may happen in any place of confinement, including a (state prison/ [or] county jail).]

A *serious bodily injury* means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (loss of consciousness/ concussion/ bone fracture/ protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).

[To *commit acts of force or violence* means to wrongfully [and unlawfully] apply physical force to the property or person of another.]

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BENCH NOTES

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

The defendant may admit to the fact that the incident occurred in a state prison or county jail. (Pen. Code, § 404.6(d).) If the defendant makes such an admission, the court should delete all bracketed references to state prison or county jail. If the defendant does not make such an admission, the court should give the bracketed portions referring to state prison or county jail.

AUTHORITY

Elements ▸ Pen. Code, § 404.6(c).
Riot Defined ▸ Pen. Code, § 404.
Serious Bodily Injury Defined ▸ Pen. Code, § 243(f)(4); *People v. Talyor* (2004) 118 Cal.App.4th 11, 25, fn. 4.
Force or Violence Defined ▸ See *People v. Lozano* (1987) 192 Cal.App.3d 618, 627; *People v. Bravot* (1986) 183 Cal.App.3d 93, 97.
Statute Constitutional ▸ *People v. Davis* (1968) 68 Cal.2d 481, 484–487.
Terms of Statute Understandable ▸ *People v. Jones* (1971) 19 Cal.App.3d 437, 447.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 14.

RELATED ISSUES

Defendant Must Urge Others
To be guilty of inciting a riot, the defendant must urge others to commit acts of force or property destruction. (*People v. Boyd* (1985) 38 Cal.3d 762, 778; *In re Wagner* (1981) 119 Cal.App.3d 90, 106.) Thus, in *In re Wagner, supra*, 119 Cal.App.3d at p. 106, the court held that the evidence was insufficient to establish incitement to riot where the defendant was observed throwing rocks at the police. *(Ibid.)*

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STAFF NOTES

Penal Code, § 404.6:

(a) Every person who with the intent to cause a riot does an act or engages in conduct that urges a riot, or urges others to commit acts of force or violence, or the burning or destroying of property, and at a time and place and under circumstances that produce a clear and present and immediate danger of acts of force or violence or the burning or destroying of property, is guilty of incitement to riot.

(b) Incitement to riot is punishable by a fine not exceeding one thousand dollars ($ 1,000), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.

(c) Every person who incites any riot in the state prison or a county jail that results in serious bodily injury, shall be punished by either imprisonment in a county jail for not more than one year, or imprisonment in the state prison.

(d) The existence of any fact that would bring a person under subdivision (c) shall be alleged in the complaint, information, or indictment and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt, by the court where guilt is established by a plea of guilty or nolo contendere, or by trial by the court sitting without a jury.

Penal Code, § 404, Riot Defined:

(a) Any use of force or violence, disturbing the public peace, or any threat to use force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot.

(b) As used in this section, disturbing the public peace may occur in any place of confinement. Place of confinement means any state prison, county jail, industrial farm, or road camp, or any city jail, industrial farm, or road camp, or any juvenile hall, juvenile camp, juvenile ranch, or juvenile forestry camp.

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Definition of Serious Bodily Injury
As stated in the Staff Notes for Instruction 851, Battery Causing Serious Bodily Injury, the definition of "serious bodily injury" comes from Penal Code section 243(f)(4):

> "Serious bodily injury" means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness, concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement.

Force or Violence—As Defined in Escape Cases (Pen. Code § 4532)

> [W]here an escapee's force or violence is directed against a person, it is synonymous with the crime of battery as defined in section 242: "*any* willful and unlawful use of force or violence upon the person of another." (Italics added.) In other words, the line between simple and forcible escape is crossed upon the commission of a battery. To conclude otherwise would be to equate those who escape without any force or violence with those who commit "minor" batteries. Such an equation, however, would cloud the distinction between simple and forcible escape and weaken the statute's deterrent/protective purpose.

(*People v. Lozano* (1987) 192 Cal.App.3d 618, 627 [footnote omitted, italics in original].)

> "[The] words 'force' and 'violence' are synonymous and mean any wrongful application of physical force *against property* or the person of another." (CALJIC No. 7.31 (4th ed. 1979) italics added.) Section 4532, subdivision (b), speaks in general terms of "force or violence" and does not in any way indicate that it must be directed to a person. ". . . The words "force" and "violence" are not ambiguous or uncertain, and there is no doubt about the meaning of section 4532, subdivision (b). The "fair import" of these words and common sense compel the conclusion that "force" and "violence" may be utilized against property and most assuredly are used when one seeks freedom by running through a glass door.

(*People v. Bravot* (1986) 183 Cal.App.3d 93, 97; see also *People v. White* (1988) 202 Cal.App.3d 862, 866 [holding that "force" includes force to property; sustaining conviction of defendant who made a hole in the ceiling of his cell.])

The definition of "use of force" comes from Instruction 850, Simple Battery. That instruction used the single term "force" in place of the phrase "force or violence." As explained in the Staff Notes to that instruction, "violence" has no real meaning in the

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context of simple battery and is just a synonym for “force.” (*People v. Mansfield* (1988) 200 Cal.App.3d 82, 87-88; *People v. Myers* (1998) 61 Cal.App.4th 328, 335.)

It is unclear if “force” has the same meaning in the context of inciting a riot or if “violence” has any distinct meaning from the term “force” in this context.

Statute Constitutional

> It is equally clear that nothing in the statute as drawn renders it vague or overly broad or constitutes an impermissible limitation on freedom of speech, in violation of the First and Fourteenth Amendments to the United States Constitution or of section 9 of article I of the California Constitution.
>
> Contrary to defendant's suggestion, the section does not fail to give adequate warning of what constitutes a penal offense when it provides for punishment of every person who "urges others" to commit acts of force or violence or to burn or destroy property. "Urge" is a word of common and ordinary usage, and the point at which the proscribed urging occurs will depend in each instance on the point at which the speaker utters the words or indulges in other conduct urging that the violent or forcible acts or the burning or destruction be done. . . .
>
> In short, section 404.6 is a "statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power . . . ." It is not too vague or too broad to meet the requirements of due process, nor does it substantially or unreasonably impinge upon the guaranty of free speech. [Citation.]

(*People v. Davis* (1968) 68 Cal.2d 481, 484–487.)

Urge and Clear and Present Danger Do Not Require Further Definition

> Consequently, defendant's argument that further instructions were required to define "acting together" and "urging" is unmeritorious.
>
> Defendant also maintains that the instructions established no standards for determining a "clear and present danger," and hypothesizes a conviction on the basis of mere words, particularly unpopular words, such as "pigs." However, the incitement to riot instruction contained language indicating that not just words, but words, acts and conduct which tended to incite were necessary to justify a conviction. To persons of ordinary

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> understanding, the urging of others to acts of force or violence is neither similar nor comparable to speech which merely stirs to anger, invites public dispute, or brings about a condition of unrest. (*People* v. *Davis*, 68 Cal.2d 481, 485.) In addition, the phrase "clear and present danger" is taken from the statute and, as such, is sufficient. (*People* v. *Failla, supra*, 64 Cal.2d 560, 565.) Similarly, extracts from appellate opinions are deemed to be correct statements of the law. (See *People* v. *Odom*, 19 Cal.App.2d 641, 649.)

(*People v. Jones* (1971) 19 Cal.App.3d 437, 447.)

Agreement Not Necessary to "Act Together"

> It has been established that "It [is] not necessary that a previous agreement between the aggressors should have been alleged, or have existed, to bring such offenses within the inhibitions of section 404." (*People* v. *Bundte*, 87 Cal.App.2d 735, 743.) Thus, it is the *concurrence* of unlawful action by individuals in the use, or threat to unlawfully use force or violence that constitutes the offense of riot. (*People* v. *Bundte, supra*, at p. 744.) All persons who encourage, incite, promote, give support to or countenance a riot are principals in a riot. (*People* v. *Bundte, supra*, at p. 746.)

(*People v. Cipriani* (1971) 18 Cal.App.3d 299, 304.)

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1946. Possession or Manufacture of Weapon in Penal Institution

The defendant is charged [in Count __] with (possessing[,]/ [or] manufacturing[,]/ [or] attempting to manufacture) a weapon, specifically [(a/an)] _____ *<insert type of weapon from Pen. Code, § 4502, e.g., "explosive">*, **while (in a penal institution/under the custody of [an] (official[s]/officer[s]/employee[s]) of a penal institution).**

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

1. **The defendant was (present at or confined in any penal institution[,]/ [or] being taken to or from any penal institution[,]/ [or] under the custody of [an] (official[s]/officer[s]/employee[s]) of a penal institution);**

2. **The defendant (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) [(a/an)] _____** *<insert type of weapon from Pen. Code, § 4502, e.g., "explosive">*;

3. **The defendant knew that (he/she) (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) the _____** *<insert type of weapon from Pen. Code, § 4502, e.g., "explosive">*;

AND

4. **The defendant knew that the object (was [(a/an)] _____** *<insert type of weapon from Pen. Code, § 4502, e.g., "explosive">*/**could be used _____** *<insert description of weapon's use, e.g., "as a stabbing weapon," or "for purposes of offense or defense">*).

A *penal institution* is a (state prison[,]/ [or] any prison camp or farm[,]/ [or] a county jail[,]/ [or] county road camp).

[*Metal knuckles* means any device or instrument made wholly or partially of metal that is worn in or on the hand for purposes of offense or defense and that either protects the wearer's hand while striking a blow or increases the injury or force of

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impact from the blow. The metal contained in the device may help support the hand or fist, provide a shield to protect it, or consist of projections or studs that would contact the individual receiving a blow.]

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ *<insert type of explosive from Health & Saf. Code, § 12000>* **(is/are) [an] *explosive[s]*.]**

[*Fixed ammunition* is a projectile and powder enclosed together in a case ready for loading.]

[A *dirk or dagger* is a knife or other instrument, with or without a handguard, that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death.] [*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.] [A firearm need not be in working order if it was designed to shoot and appears capable of shooting.]

[*Tear gas* is a liquid, gaseous, or solid substance intended to produce temporary physical discomfort or permanent injury when vaporized or otherwise dispersed in the air.]

[A *tear gas weapon* is a shell, cartridge, or bomb capable of being discharged or exploded to release or emit tear gas.] [A *tear gas weapon* [also] means a revolver, pistol, fountain pen gun, billy, or other device, portable or fixed, intended specifically to project or release tear gas.] [A *tear gas weapon* does not include a device regularly manufactured and sold for use with firearm ammunition.]

[[(A/An)] _____ *<insert type of weapon from Pen. Code, § 4502, not covered in above definitions>* **(is/means/includes) _____** *<insert appropriate definition, see Bench Notes>*.**]**

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[The term[s] _____ <*insert term[s]*> (is/are) defined elsewhere in these instructions.]

The People do not have to prove that the defendant used or intended to use the object as a weapon.

[You may consider evidence that the object could be used in a harmless way in deciding if the object is (a/an) _____ <*insert type of weapon from Pen. Code, § 4502*>, as defined here.]

[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/visible)).]

[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/other people).]

[The People allege that the defendant (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) the following weapons: _____ <*insert types of weapons when multiple items alleged*>**. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) at least one of these weapons and you all agree on which weapon (he/she) (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture).]**

BENCH NOTES

Instructional Duty

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

Where indicated in the instruction, insert one or more of the following weapons from Penal Code section 4502, based on the evidence presented:

metal knuckles
explosive substance

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fixed ammunition
dirk or dagger
sharp instrument
pistol, revolver, or other firearm
tear gas or tear gas weapon
an instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag

Following the elements, give the appropriate definition of the alleged weapon. If the prosecution alleges that the defendant possessed an "instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, [or] sandbag," the court should give an appropriate definition based on case law. (See *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1402 [definition of "slungshot"]; *People v. Mulherin* (1934) 140 Cal.App. 212, 215 [definition of this class of weapons].) If the prosecution alleges that the defendant possessed a "sharp instrument," the court may consider *People v. Custodio* (1999) 73 Cal.App.4th 807, 810–813. If the court has already given the definition in other instructions, then the court may give the bracketed sentence stating that the term is defined elsewhere.

If the prosecution alleges under a single count that the defendant possessed multiple weapons, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65.) Give the bracketed paragraph that begins with "The People allege that the defendant possessed," inserting the items alleged.

If there is sufficient evidence of a harmless use for the object possessed, give the bracketed sentence that begins with "You may consider evidence that the object could be used in a harmless way . . . ." (*People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744.)

If the prosecution alleges that the defendant attempted to manufacture a weapon, give Instruction 504, Attempt Other Than Attempted Murder.

It is unclear if the defense of momentary possession for disposal applies to a charge of weapons possession in a penal institution. In *People v. Brown* (2000) 82 Cal.App.4th 736, 740, the court held that the defense was not available on the facts of the case before it but declined to consider whether "there can *ever* be a circumstance justifying temporary possession in a penal institution." (*Ibid.* [emphasis in original].) The California Supreme Court has reaffirmed that the momentary possession defense is available to a charge of illegal possession of a weapon. (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192.) However, the Supreme Court has yet to determine whether the defense is available in a penal

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institution. If the trial court determines that an instruction on momentary possession is warranted on the facts of the case before it, give a modified version of the instruction on momentary possession contained in Instruction 1810, Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction.

If there is sufficient evidence of imminent death or bodily injury, the defendant may be entitled to an instruction on the defense of duress or threats. (*People v. Otis* (1959) 174 Cal.App.2d 199, 125–126.) Give Instruction 610, Duress or Threats, modified as necessary.

AUTHORITY

Elements ▸ Pen. Code, § 4502.
Metal Knuckles Defined ▸ Pen. Code, § 12020(c)(7).
Explosive Defined ▸ Health & Saf. Code, § 12000.
Fixed Ammunition ▸ *The Department of Defense Dictionary of Military Terms*, http://www.dtic.mil/doctrine/jel/doddict/data/f/02074.html (accessed July 23, 2004).
Dirk or Dagger Defined ▸ Pen. Code, § 12020(c)(24).
Firearm Defined ▸ Pen. Code, § 12001(b).
Tear Gas Defined ▸ Pen. Code, § 12401.
Tear Gas Weapon Defined ▸ Pen. Code, § 12402.
Blackjack, etc., Defined ▸ *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1402; *People v. Mulherin* (1934) 140 Cal.App. 212, 215.
Sharp Instrument ▸ *People v. Custodio* (1999) 73 Cal.App.4th 807, 810–813.
Knowledge ▸ See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332; *People v. Reynolds* (1988) 205 Cal.App.3d 776, 779 [overruled on other grounds, *People v. Flood* (1998) 18 Cal.4th 470, 484].
Harmless Use ▸ *People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744; *People v. Martinez* (1998) 67 Cal.App.4th 905, 910–913.
Unanimity ▸ *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185.
Constructive vs. Actual Possession ▸ *People v. Reynolds* (1988) 205 Cal.App.3d 776, 782, fn. 5 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 182, 184.

RELATED ISSUES

Administrative Punishment Does Not Bar Criminal Action

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"[P]rison disciplinary measures do not bar subsequent prosecution in a criminal action for violation of a penal statute prohibiting the same act which was the basis of the prison discipline by virtue of the proscription against double punishment provided in section 654 [citation] or by the proscription against double jeopardy provided in the California Constitution (art. I, § 13) and section 1023." (*People v. Vatelli* (1971) 15 Cal.App.3d 54, 58 [citing *People v. Eggleston* (1967) 255 Cal.App.2d 337, 340].)

Possession of Multiple Weapons at One Time Supports Only One Conviction
"[D]efendant is subject to only one conviction for his simultaneous possession of three sharp wooden sticks in prison." (*People v. Rowland* (1999) 75 Cal.App.4th 61, 65.)

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STAFF NOTES

Penal Code, § 4502:

(a) Every person who, while at or confined in any penal institution, while being conveyed to or from any penal institution, or while under the custody of officials, officers, or employees of any penal institution, possesses or carries upon his or her person or has under his or her custody or control any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag, or metal knuckles, any explosive substance, or fixed ammunition, any dirk or dagger or sharp instrument, any pistol, revolver, or other firearm, or any tear gas or tear gas weapon, is guilty of a felony and shall be punished by imprisonment in the state prison for two, three, or four years, to be served consecutively.

(b) Every person who, while at or confined in any penal institution, while being conveyed to or from any penal institution, or while under the custody of officials, officers, or employees of any penal institution, manufactures or attempts to manufacture any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag, or metal knuckles, any explosive substance, or fixed ammunition, any dirk or dagger or sharp instrument, any pistol, revolver, or other firearm, or any tear gas or tear gas weapon, is guilty of a felony and shall be punished by imprisonment in the state prison for 16 months, or two or three years, to be served consecutively.

(c) For purposes of this section, "penal institution" means the state prison, a prison road camp, prison forestry camp, or other prison camp or farm, or a county jail or county road camp.

Penal Code, § 12020(c), in relevant part, “metal knuckles”:

(7) As used in this section, "metal knuckles" means any device or instrument made wholly or partially of metal which is worn for purposes of offense or defense in or on the hand and which either protects the wearer's hand while striking a blow or increases the force of impact from the blow or injury to the individual receiving the blow. The metal contained in the device may help support the hand or fist, provide a shield to protect it, or consist of projections or studs which would contact the individual receiving a blow.

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Penal Code, § 12001(b), "firearm":

> As used in this title, "firearm" means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.

Penal Code, § 12401, "tear gas":

> "Tear gas" as used in this chapter shall apply to and include all liquid, gaseous, or solid substances intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispersed in the air, but does not apply to, and shall not include, any substance registered as an economic poison as provided in Chapter 2 (commencing with Section 12751) of Division 7 of the Agricultural Code provided that such substance is not intended to be used to produce discomfort or injury to human beings.

Penal Code, § 12402, "tear gas weapon":

> The term "tear gas weapon" as used in this chapter shall apply to and include:
>
> (a) Any shell, cartridge, or bomb capable of being discharged or exploded, when the discharge or explosion will cause or permit the release or emission of tear gases.
>
> (b) Any revolvers, pistols, fountain pen guns, billies, or other form of device, portable or fixed, intended for the projection or release of tear gas except those regularly manufactured and sold for use with firearm ammunition.

Explosives—Defined

The definitions here are taken from Instruction 1871, Carrying or Placing Explosive or Destructive Device on Common Carrier.

Fixed Ammunition—Defined

Staff could not locate a statutory or case law definition of the term "fixed ammunition." The Department of Defense Dictionary of Military Terms states:

> Fixed ammunition, (DOD, NATO) Ammunition in which the cartridge case is permanently attached to the projectile. See also munition.

(http://www.dtic.mil/doctrine/jel/doddict/data/f/02072.html.)

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Other online dictionaries state:

> Fixed ammunition (Mil.), a projectile and powder inclosed together in a case ready for loading.

(http://dictionary.reference.com/search?q=fixed%20ammunition; http://dict.die.net/fixed%20ammunition/.)

Dirk or Dagger—Defined

The definition here is taken from Instruction 1801, Carrying Concealed Explosive or Dirk or Dagger.

Blackjack, Slungshot, Billy, Sandclub, Sap, or Sandbag—Defined

See Notes to Instruction 1800, Illegal Possession of Weapon, for complete discussion of the case law definitions of these terms.

Sharp Instrument

> During a search of defendant's cell, a correctional officer found a plastic barrel of a ballpoint pen with a piece of metal like a sewing machine needle sticking out of it. An expert opined that the object was "very capable of being used as a weapon" . . ..
>
> Defendant testified that he used the item for "artistic talents" to engrave his cup and sunglasses. He did not believe it was a weapon or sharp instrument. . . .
>
> Defendant claims the term "sharp instrument" in this section violates due process of law because it is unconstitutionally vague on its face and as applied in his case. . . .
>
> By prohibiting prison inmates from possessing any instrument or weapon of the kind specified in the statute, section 4502, subdivision (a) is intended to protect inmates and correctional staff "from the peril of assaults with dangerous weapons perpetrated by armed prisoners." (*People v. Wells* (1945) 68 Cal. App. 2d 476, 481.) It applies to instruments that can be used to inflict injury and that are not necessary for an inmate to have in the inmate's possession. (*People v. Morales* [1967] 252 Cal. App. 2d [537,] 541.) . . .

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> Evidence established that the sharp instrument seized from defendant's cell was capable of being used to inflict injury as a stabbing device, and that the instrument was not necessary for defendant to have in his possession. This is not a situation where a device used for artistic purposes was possessed in a prison craft room. . . .
>
> Considering the nature of the item found in defendant's cell (including its tapered shape and the length and firmness of its sharp metal point) and the fact it is not a necessary possession for an inmate, a person of ordinary intelligence would know it is a sharp instrument which falls within the prohibition of section 4502, subdivision (a).

(*People v. Custodio* (1999) 73 Cal.App.4th 807, 810–813.)

Intent to Use as a Weapon Not an Element

> Section 4502 proscribes possession of certain weapons in state prison. Cases interpreting section 4502 conclude intended use of any sort need not be proven. [Citations.] Both 4502 and 4574 proscribe simple possession and not use. The purpose of both sections is the same: to protect inmates and officers from the danger of armed assault. We hold section 4574 is subject to the same rule as section 4502: intended violent use is not an element of proof of possession.

(*People v. Rodriquez* (1975) 50 Cal.App.3d 389, 395 [footnote omitted]; see also *People v. Wells* (1945) 68 Cal.App.2d 476, 482.)

Knowledge--Required

> Proof of knowing possession of such an instrument by a state prison inmate is sufficient for conviction. The prosecution is not required to prove the intent or purpose for which the instrument is so possessed.

(*People v. Steely* (1968) 266 Cal.App.2d 591, 594; see also *People v. Reynolds* (1988) 205 Cal.App.3d 776, 779.)

The Supreme Court recently discussed the knowledge required for a violation of Penal Code section 12020, illegal possession of a dirk or dagger:

> By declining to make defendant's intended use of the instrument an element of the offense, we do not eliminate the mens rea requirement. Because the dirk or dagger portion of section 12020 criminalizes

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> "traditionally lawful conduct," we construe the statute to contain a "knowledge" element. [Citation omitted.] Thus, to commit the offense, a defendant must still have the requisite *guilty mind*: that is, the defendant must knowingly and intentionally carry concealed upon his or her person an instrument "that is capable of ready use as a stabbing weapon." (§ 12020, subds. (a), (c)(24).) A defendant who does not know that he is carrying the weapon or that the concealed instrument may be used as a stabbing weapon is therefore not guilty of violating section 12020.

(*People v. Rubalcava* (2000) 23 Cal.4th 322, 331-332 [emphasis in original].)
Prior to *Rubalcava, supra,* several cases held that Penal Code section 12020 did not require that the defendant know the contraband nature of the weapon. (*People v. Lanham* (1991) 230 Cal. App. 3d 1396, 1401-1405 [exploding bullets]; *People v. Valencia* (1989) 214 Cal.App.3d 1410, 1415 [sawed-off shot gun]; *People* v. *Azevedo* (1984) 161 Cal.App.3d 235, 240 [sawed-off shot gun].) The Supreme Court has questioned the continuing validity of these holdings:

> This court, however, recently reached a contrary conclusion as to section 12020's prohibition on carrying a concealed dirk or dagger, holding it requires knowledge that the instrument has the characteristics making it a dirk or dagger, despite the absence of any language of mens rea in that statute. (*People v. Rubalcava* (2000) 23 Cal. 4th 322, 331-332.)

(*In re Jorge M.* (2000) 23 Cal.4th 866, 876 n.6.)

Arguably, the *Rubalcava* holding does not apply to a charge of violating Penal Code section 4502, since weapons possession in a penal institution is not "traditionally lawful conduct." The corresponding CALJIC does not have a knowledge requirement. On the other hand, CALJIC does contain a knowledge requirement for possession of a deadly weapon, firearm or explosive by an inmate, Penal Code section 4574. These statutes are very similar and the courts have interpreted that language of the statutes together. (See *People v. Rodriquez* (1975) 50 Cal.App.3d 389, 395.) Thus, this instruction has been drafted in accordance with *Rubalcava* to require that the defendant know that the object is a prohibited weapon or is capable of use in the prohibited manner.

Objects that May Have Innocent Use

The issue of potentially harmless uses of objects possessed in penal institutions has been addressed by several courts in the context of Penal Code section 4574, which prohibits possession of deadly weapons, firearms or explosives:

> To inform the jury of the subject offense and its elements the trial court instructed them as follows: . . .

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"A deadly weapon means any weapon, instrument or object that is likely to inflict great bodily injury or death.

"Intended violent use is not an element of the crime and need not be proven. Evidence of harmless use may be considered if it bears on the likelihood that an item will cause death or violent injury."

Appellant does not fault this instruction, as far as it goes, but implies it is incomplete. He argues "other factors," omitted from the court's instruction but included in CALJIC No. 12.42 are relevant to determine whether or not the subject item was a deadly weapon.

As proposed, CALJIC No. 12.42 read:

"In determining if the instrument or object in this case was a weapon of the kind within the law as stated, you may consider the circumstances attending any possession of the instrument or object by the defendant, such as the time and place of its possession; the destination of the possessor; any alteration of the object from its standard form; and evidence, if any, indicating its intended use by the possessor for a dangerous rather than a harmless purpose."

Appellant is mistaken. The proposed instruction stems from *People v. Grubb* (1965) 63 Cal.2d 614 which construed not section 4574, subdivision (a) but section 12020. The former section concerns persons *in custody* and prohibits them from possessing *any* "deadly weapon." The latter section concerns *any person* and prohibits the possession of specified weapons such as, in *Grubb*, a "billy." . . .

Of the five factors identified by *Grubb* and included in the proposed CALJIC No. 12.42 instruction, four are inapplicable to the instant offense. Section 4574, subdivision (a) prohibits the unauthorized possession of deadly weapons by confined inmates at all *times*, in all (confined) *places*, at all *destinations*, regardless of *alteration.* As to the fifth factor, *intended use*, the trial court, in its instruction to the jury, covered the subject ("Evidence of harmless use may be considered if it bears on the likelihood that an item will cause death or violent injury.")

(*People v. Savedra* (1993) 15 Cal.App.4th 738, 742–744 [emphasis in original; defendant possessed nail attached to toilet paper role].)

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> Evidence of harmless use by jail inmates, including defendant, may be relevant if it bears on the likelihood that an item will cause death or serious bodily injury. Such evidence is defensive, however. It is not necessary for the People to prove the item has no harmless use. Such a construction of section 4574 would effectively nullify its purpose.

(*People v. Rodriquez* (1975) 50 Cal.App.3d 389, 396.)

In *People v. Martinez* (1998) 67 Cal.App.4th 905, 910–912, the defendant was charged with a violation of Penal Code section 4574 based on possession of a Swiss army knife, nail clippers and a lighter. The court quoted *Rodriquez*, above, for the proposition that evidence of harmless uses for the items could be presented as a defense but this was not an element of the offense that the prosecution was required to disprove. The court held further that the trial court was not required to instruct the jury to consider the surrounding circumstances:

> Appellant argues that [*People v. Pruett* (1997) 57 Cal. App. 4th 77] should govern the present case, and that the jury should have considered the circumstances under which appellant possessed his items before convicting him. However, *Pruett* and other similar cases were based on occurrences outside the prison setting; the overriding concern for prison security and safety was not considered by those courts. The pocketknife in *Pruett*, though ultimately employed for attack, could have been used for peaceful purposes in a street setting. Section 417.8 therefore required the court to consider Pruett's intended use for the weapon, and to use the circumstances of his actions to deduce that intent. In the present case, appellant was a prisoner at the time of the offense. Section 4574, subdivision (a), therefore governs the crime. Through that statute, the Legislature has made it clear that, in the interests of prison security, prisoners are forbidden to possess items that can be used as weapons even if those items can also be used for peaceful purposes. The *Savedra* court stated, and appellant concedes, that intent to use the items as weapons is not a necessary element of section 4574, subdivision (a). The unauthorized possession of a potentially dangerous instrument, alone, is sufficient to create the security risk sought to be controlled by that statute.

(*Id.*at pp. 912–913.)

Constructive Possession

The language of the instruction is derived from the Task Force controlled substances instructions. (See also *People v. Reynolds* (1988) 205 Cal.App.3d 776, 782, fn. 5 [instructions on actual and constructive possession should be given when Penal Code

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section 4502 charged, if appropriate based on the facts; overruled on other grounds, *People v. Flood* (1998) 18 Cal.4th 470, 484].)

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1947. Possession of Firearm, Deadly Weapon, or Explosive in a Jail or County Road Camp

---

The defendant is charged [in Count __] with possessing a weapon while confined in a (jail/county road camp).

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

4. **The defendant was lawfully confined in a (jail/county road camp);**

5. **While confined there, the defendant [unlawfully] possessed [(a/an)] (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon) within the (jail/county road camp);**

6. **The defendant knew that (he/she) possessed the (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon);**

AND

7. The defendant knew that the object was [(a/an)] (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon).

A *jail* is a place of confinement where people are held in lawful custody.

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.] [A firearm need not be in working order if it was designed to shoot and appears capable of shooting.]

[As used here, a *deadly weapon* is any weapon, instrument, or object that has the reasonable potential of being used in a manner that would cause great bodily injury or death.] [*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

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[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ *<insert type of explosive from Health & Saf. Code, § 12000>* **(is/are) [an] *explosive[s]*.]**

[*Tear gas* is a liquid, gaseous, or solid substance intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispersed in the air.]

[A *tear gas weapon* is a shell, cartridge, or bomb capable of being discharged or exploded to release or emit tear gas.] [A *tear gas weapon* [also] means a revolver, pistol, fountain pen gun, billy, or other device, portable or fixed, intended specifically to project or release tear gas.] [A *tear gas weapon* does not include a device regularly manufactured and sold for use with firearm ammunition.]

[The term[s] _____ *<insert term[s]>* **(is/are) defined elsewhere in these instructions.]**

The People do not have to prove that the defendant used or intended to use the object as a weapon.

[You may consider evidence that the object could be used in a harmless way in deciding if the object is a deadly weapon as defined here.]

[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/visible)).]

[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 knowingly has (control over it/ [or] the right to control it), either personally or through (another person/other people).]

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

<Defense: Possession Authorized>

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[The defendant is not guilty of this offense if (he/she) was authorized to possess the weapon by (law[,]/ [or] a person in charge of the (jail/county road camp)[,]/ [or] an officer of the (jail/county road camp) empowered by the person in charge of the (jail/camp) to give such authorization). The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess the weapon. If the People have not met this burden, you must find the defendant not guilty of this offense.]

BENCH NOTES

Instructional Duty

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

If the prosecution alleges under a single count that the defendant possessed multiple weapons, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65.) Give the bracketed paragraph that begins with "The People allege that the defendant possessed," inserting the items alleged.

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

Note that the definition of "deadly weapon" in the context of Penal Code section 4574 differs from the definition given in other instructions. (*People v. Martinez* (1998) 67 Cal.App.4th 905, 909.)

If there is sufficient evidence of a harmless use for the object possessed, give the bracketed sentence that begins with "You may consider evidence that the object could be used in a harmless way . . . ." (*People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744.)

If there is sufficient evidence that the defendant was authorized to possess the weapon, give the bracketed word "unlawfully" in element 2. Give also the bracketed paragraph headed "Defense: Possession Authorized."

It is unclear if the defense of momentary possession for disposal applies to a charge of weapons possession in a penal institution. In *People v. Brown* (2000) 82 Cal.App.4th 736, 740, the court held that the defense was not available on the facts of the case before it but declined to consider whether "there can *ever* be a

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circumstance justifying temporary possession in a penal institution." (*Ibid.* [emphasis in original].) The California Supreme Court has reaffirmed that the momentary possession defense is available to a charge of illegal possession of a weapon. (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192.) However, the Supreme Court has yet to determine whether the defense is available in a penal institution. If the trial court determines that an instruction on momentary possession is warranted on the facts of the case before it, give a modified version of the instruction on momentary possession contained in Instruction 1810, Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction.

If there is sufficient evidence of imminent death or bodily injury, the defendant may be entitled to an instruction on the defense of duress or threats. (*People v. Otis* (1959) 174 Cal.App.2d 199, 125–126.) Give Instruction 610, Duress or Threats, modified as necessary.

AUTHORITY

Elements ▸ Pen. Code, § 4574(a).
Firearm Defined ▸ Pen. Code, § 12001(b).
Explosive Defined ▸ Health & Saf. Code, § 12000.
Tear Gas Defined ▸ Pen. Code, § 12401.
Tear Gas Weapon Defined ▸ Pen. Code, § 12402.
Deadly Weapon Defined ▸ *People v. Martinez* (1998) 67 Cal.App.4th 905, 909.
Jail Defined ▸ *People v. Carter* (1981) 117 Cal.App.3d 546, 550.
Knowledge ▸ See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332; *People v. James* (1969) 1 Cal.App.3d 645, 650.
Harmless Use ▸ *People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744; *People v. Martinez* (1998) 67 Cal.App.4th 905, 910–913.
Unanimity ▸ *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185.
Firearm Need Not Be Operable ▸ *People v. Talkington* (1983) 140 Cal.App.3d 557, 563.
Constructive vs. Actual Possession ▸ *People v. Reynolds* (1988) 205 Cal.App.3d 776, 782, fn. 5 [overruled on other grounds, *People v. Flood* (1998) 18 Cal.4th 470, 484].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 182, 184.

RELATED ISSUES

Administrative Punishment Does Not Bar Criminal Action

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"[P]rison disciplinary measures do not bar subsequent prosecution in a criminal action for violation of a penal statute prohibiting the same act which was the basis of the prison discipline by virtue of the proscription against double punishment provided in section 654 [citation] or by the proscription against double jeopardy provided in the California Constitution (art. I, § 13) and section 1023." (*People v. Vatelli* (1971) 15 Cal.App.3d 54, 58; [citing *People v. Eggleston* (1967) 255 Cal.App.2d 337, 340].)

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STAFF NOTES

Penal Code, § 4574:

(a) Except when otherwise authorized by law, or when authorized by the person in charge of the prison or other institution referred to in this section or by an officer of the institution empowered by the person in charge of the institution to give such authorization, any person, who knowingly brings or sends into, or knowingly assists in bringing into, or sending into, any state prison or prison road camp or prison forestry camp, or other prison camp or prison farm or any other place where prisoners of the state prison are located under the custody of prison officials, officers or employees, or any jail or any county road camp in this state, or within the grounds belonging or adjacent to any such institution, any firearms, deadly weapons, or explosives, and any person who, while lawfully confined in a jail or county road camp possesses therein any firearm, deadly weapon, explosive, tear gas or tear gas weapon, is guilty of a felony and punishable by imprisonment in the state prison for two, three, or four years.

Penal Code, § 12001(b), "firearm":

As used in this title, "firearm" means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.

Penal Code, § 12401, "tear gas":

"Tear gas" as used in this chapter shall apply to and include all liquid, gaseous, or solid substances intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispersed in the air, but does not apply to, and shall not include, any substance registered as an economic poison as provided in Chapter 2 (commencing with Section 12751) of Division 7 of the Agricultural Code provided that such substance is not intended to be used to produce discomfort or injury to human beings.

Penal Code, § 12402, "tear gas weapon":

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The term "tear gas weapon" as used in this chapter shall apply to and include:

(a) Any shell, cartridge, or bomb capable of being discharged or exploded, when the discharge or explosion will cause or permit the release or emission of tear gases.

(b) Any revolvers, pistols, fountain pen guns, billies, or other form of device, portable or fixed, intended for the projection or release of tear gas except those regularly manufactured and sold for use with firearm ammunition.

Explosives—Defined

The definitions here are taken from Instruction 1871, Carrying or Placing Explosive or Destructive Device on Common Carrier. Note, however, that the court in *People v. Grayson* (2000) 83 Cal.App.4th 479, 486, held that the meaning of “explosive” in Penal Code section 4574 was not limited to the statutory definition in the Health and Safety Code and included ammunition.

Deadly Weapon—Defined

The court then defined "deadly weapon" as "any weapon, instrument or object that has the reasonable potential of being used in a manner that would cause great bodily injury or death." Appellant's sole contention on appeal is that "reasonable potential" sweeps too broadly and that the term "reasonable likelihood" should have been used instead. We disagree.

People v. Savedra, supra, 15 Cal. App. 4th 738, addressed the precise question at issue in this case. In *Savedra*, prison guards caught the defendant trying to conceal an unsharpened nail with a toilet paper handle in his pocket. (*Id*. at p. 741.) At trial, the court instructed the jury that " '[a] deadly weapon means any weapon, instrument or object that is likely to inflict great bodily injury or death.' " (*Id*. at p. 744.) The jury subsequently sent a note to the trial court, asking if the word "likely" in the instruction meant that " 'it must be 1) merely possible? [or] 2) more probable than not?' " (*Id*. at p. 744.) The court responded that "likely" " 'means: has the potential for use as a deadly weapon.' " (*Ibid*.) The Court of Appeal upheld the instruction, reasoning: " 'Section 4574 proscribes possession, not use, as noted above. Therefore, the statute is concerned with the *potential* of the item in question. . . . Effective protection of inmates and officers from armed attack depends upon the prohibition of possession of *all* deadly weapons in jail. This valid legislative objective does not except weapons

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> with dangerous *capabilities* which also have innocent uses . . . .' " (*Id*. at pp. 744-745, italics in original, quoting *People v. Rodriquez* (1975) 50 Cal. App. 3d 389, 396.) Thus, "[m]erely because slashing someone with a toothbrush-razor might 'inflict great bodily injury or death' only 49 percent or 32 percent of the time does *not* mean such an item is outside the definition of 'deadly weapon.' *Because* it might inflict such injury or death 49 percent or 32 percent of the time it has a 'potential,' a 'capability,' for causing 'great bodily injury or death' and thus is a 'deadly weapon.' " (15 Cal. App. 4th at p. 745, italics in original.) The court expressly acknowledged that in ordinary usage the word "likely" means "probable" or "more probable than not," but nonetheless deemed the alternative, legal meaning to be justified when defining "deadly weapon." (*Id*. at p. 744.)

(*People v. Martinez* (1998) 67 Cal.App.4th 905, 909–910 [footnote omitted].)

Jail Defined

> [A] jail is a place of confinement of persons held in lawful custody. Here, as the trial court found, the subject sheriff's facility was used for both temporary custody and for long term custody of trustee prisoners.

(*People v. Carter* (1981) 117 Cal.App.3d 546, 550.)

Elements

> The elements of this particular offense relevant to the instant case are taken from the statute: (1) possession (2) of a firearm, deadly weapon, or explosive, (3) without authorization, (4) by one lawfully committed to a county jail.

(*People v. Talkington* (1983) 140 Cal.App.3d 557, 561.)

Intent to Use as a Weapon Not an Element

> Section 4502 proscribes possession of certain weapons in state prison. Cases interpreting section 4502 conclude intended use of any sort need not be proven. [Citations.] Both 4502 and 4574 proscribe simple possession and not use. The purpose of both sections is the same: to protect inmates and officers from the danger of armed assault. We hold section 4574 is

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> subject to the same rule as section 4502: intended violent use is not an element of proof of possession.

(*People v. Rodriquez* (1975) 50 Cal.App.3d 389, 395 [footnote omitted]; see also *People v. Wells* (1945) 68 Cal.App.2d 476, 482.)

Knowledge--Required

> It is sufficient from the facts of this case that respondent knowingly possessed a firearm while in jail, after he had ample time to surrender it to the jailer. The fact that respondent had no choice about going to jail is irrelevant. He knew he had the gun and he knew he should have turned it over to the jailer when he was booked.

(*People v. James* (1969) 1 Cal.App.3d 645, 650.)

The Supreme Court recently discussed the knowledge required for a violation of Penal Code section 12020, illegal possession of a dirk or dagger:

> By declining to make defendant's intended use of the instrument an element of the offense, we do not eliminate the mens rea requirement. Because the dirk or dagger portion of section 12020 criminalizes "traditionally lawful conduct," we construe the statute to contain a "knowledge" element. [Citation omitted.] Thus, to commit the offense, a defendant must still have the requisite *guilty mind*: that is, the defendant must knowingly and intentionally carry concealed upon his or her person an instrument "that is capable of ready use as a stabbing weapon." (§ 12020, subds. (a), (c)(24).) A defendant who does not know that he is carrying the weapon or that the concealed instrument may be used as a stabbing weapon is therefore not guilty of violating section 12020.

(*People v. Rubalcava* (2000) 23 Cal.4th 322, 331-332 [emphasis in original].)
Prior to *Rubalcava, supra,* several cases held that Penal Code section 12020 did not require that the defendant know the contraband nature of the weapon. (*People v. Lanham* (1991) 230 Cal. App. 3d 1396, 1401-1405 [exploding bullets]; *People v. Valencia* (1989) 214 Cal.App.3d 1410, 1415 [sawed-off shot gun]; *People* v. *Azevedo* (1984) 161 Cal.App.3d 235, 240 [sawed-off shot gun].) The Supreme Court has questioned the continuing validity of these holdings:

> This court, however, recently reached a contrary conclusion as to section 12020's prohibition on carrying a concealed dirk or dagger, holding it requires knowledge that the instrument has the characteristics making it a

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> dirk or dagger, despite the absence of any language of mens rea in that statute. (*People v. Rubalcava* (2000) 23 Cal. 4th 322, 331-332.)

(*In re Jorge M.* (2000) 23 Cal.4th 866, 876 n.6.)

Arguably, the *Rubalcava* holding does not apply to a charge of violating Penal Code section 4574, since weapons possession in a penal institution is not "traditionally lawful conduct." However, the corresponding CALJIC does contain a knowledge requirement. Thus, this instruction has been drafted in accordance with *Rubalcava* to require that the defendant know that the object is a prohibited weapon or is capable of use in the prohibited manner.

Objects that May Have Innocent Use

> To inform the jury of the subject offense and its elements the trial court instructed them as follows: . . .
>
> "A deadly weapon means any weapon, instrument or object that is likely to inflict great bodily injury or death.
>
> "Intended violent use is not an element of the crime and need not be proven. Evidence of harmless use may be considered if it bears on the likelihood that an item will cause death or violent injury."
>
> Appellant does not fault this instruction, as far as it goes, but implies it is incomplete. He argues "other factors," omitted from the court's instruction but included in CALJIC No. 12.42 are relevant to determine whether or not the subject item was a deadly weapon.
>
> As proposed, CALJIC No. 12.42 read:
>
> "In determining if the instrument or object in this case was a weapon of the kind within the law as stated, you may consider the circumstances attending any possession of the instrument or object by the defendant, such as the time and place of its possession; the destination of the possessor; any alteration of the object from its standard form; and evidence, if any, indicating its intended use by the possessor for a dangerous rather than a harmless purpose."
>
> Appellant is mistaken. The proposed instruction stems from *People v. Grubb* (1965) 63 Cal.2d 614 which construed not section 4574, subdivision (a) but section 12020. The former section concerns persons *in*

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> *custody* and prohibits them from possessing *any* "deadly weapon." The latter section concerns *any person* and prohibits the possession of specified weapons such as, in *Grubb*, a "billy." . . .
>
> Of the five factors identified by *Grubb* and included in the proposed CALJIC No. 12.42 instruction, four are inapplicable to the instant offense. Section 4574, subdivision (a) prohibits the unauthorized possession of deadly weapons by confined inmates at all *times*, in all (confined) *places*, at all *destinations*, regardless of *alteration.* As to the fifth factor, *intended use*, the trial court, in its instruction to the jury, covered the subject ("Evidence of harmless use may be considered if it bears on the likelihood that an item will cause death or violent injury.")

(*People v. Savedra* (1993) 15 Cal.App.4th 738, 742–744 [emphasis in original; defendant possessed nail attached to toilet paper role].)

> Evidence of harmless use by jail inmates, including defendant, may be relevant if it bears on the likelihood that an item will cause death or serious bodily injury. Such evidence is defensive, however. It is not necessary for the People to prove the item has no harmless use. Such a construction of section 4574 would effectively nullify its purpose.

(*People v. Rodriquez* (1975) 50 Cal.App.3d 389, 396.)

In *People v. Martinez* (1998) 67 Cal.App.4th 905, 910–912, the defendant was charged with a violation of Penal Code section 4574 based on possession of a Swiss army knife, nail clippers and a lighter. The court quoted *Rodriquez*, above, for the proposition that evidence of harmless uses for the items could be presented as a defense but this was not an element of the offense that the prosecution was required to disprove. The court held further that the trial court was not required to instruct the jury to consider the surrounding circumstances:

> Appellant argues that [*People v. Pruett* (1997) 57 Cal. App. 4th 77] should govern the present case, and that the jury should have considered the circumstances under which appellant possessed his items before convicting him. However, *Pruett* and other similar cases were based on occurrences outside the prison setting; the overriding concern for prison security and safety was not considered by those courts. The pocketknife in *Pruett*, though ultimately employed for attack, could have been used for peaceful purposes in a street setting. Section 417.8 therefore required the court to consider Pruett's intended use for the weapon, and to use the circumstances of his actions to deduce that intent. In the present case,

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> appellant was a prisoner at the time of the offense. Section 4574, subdivision (a), therefore governs the crime. Through that statute, the Legislature has made it clear that, in the interests of prison security, prisoners are forbidden to possess items that can be used as weapons even if those items can also be used for peaceful purposes. The *Savedra* court stated, and appellant concedes, that intent to use the items as weapons is not a necessary element of section 4574, subdivision (a). The unauthorized possession of a potentially dangerous instrument, alone, is sufficient to create the security risk sought to be controlled by that statute.

(*Id.*at pp. 912–913.)

Firearm—Need Not Be Operable and Includes Homemade Weapon

> The second item is the subject of this appeal. Mills described the item as a tightly rolled tube of paper. One end had been closed with melted plastic. There was a hole in the tube near the closed end. Thirty matchheads were found in the tube. . . .
>
> As a qualified expert, Johansen explained the principle of the device: "The basic principle is the exact same as the old cannons that were ever first made. You have a tube. You put the powder inside them, you pack the powder in there. You put a projectile in there, you pack it up to the powder. And you touch it off through this hole in the top and it will shoot a projectile." Projectiles could include melted-down plastic pens, balls made out of tinfoil, and broken up pieces of plastic. . . .

(*People v. Talkington* (1983) 140 Cal.App.3d 557, 559, 560.) The court held that this object met the statutory definition of firearm contained in Penal Code section 12001 and that the fact that the weapon may have been inoperable was irrelevant. (*Id.* at pp. 562–563.)

Constructive Possession

The language of the instruction is derived from the Task Force controlled substances instructions. (See also *People v. Reynolds* (1988) 205 Cal.App.3d 776, 782, fn. 5 [instructions on actual and constructive possession should be given when Penal Code section 4502 charged, if appropriate based on the facts; overruled on other grounds, *People v. Flood* (1998) 18 Cal.4th 470, 484].)

Defense of Authorization

The statute creates a defense of possession based on authorization by an official of the jail or “as authorized by law.” There are no published cases on this defense. CALJIC

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considers this to be an affirmative defense. Based on the discussion of affirmative defenses in *People v. Mower* (2002) 28 Cal.4th 457, 478–480, the defendant's burden is to raise a reasonable doubt about the facts supporting the defense. *(Ibid.* [where affirmative defense goes to element of "lawful possession," defendant's burden only to raise a reasonable doubt].)

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1948. Bringing or Sending Firearm, Deadly Weapon, or Explosive Into Penal Institution

The defendant is charged [in Count __] with (bringing/sending/ [or] assisting in (bringing/sending)) a weapon into a penal institution.

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

8. **The defendant [unlawfully] (brought/sent/ [or] assisted in (bringing/sending)) [(a/an)] (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon) into a penal institution [or onto the grounds (of/ [or] adjacent to) a penal institution];**

9. **The defendant knew that (he/she) was (bringing/sending/ [or] assisting in (bringing/sending)) an object into a penal institution [or onto the grounds (of/ [or] adjacent to) a penal institution];**

AND

10. The defendant knew that the object was [(a/an)] (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon).

A *penal institution* is a (state prison[,]/ [or] prison camp or farm[,]/ [or] jail[,]/ [or] county road camp[,]/ [or] place where prisoners of the state prison are located under the custody of prison officials, officers, or employees).

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.] [A firearm need not be in working order if it was designed to shoot and appears capable of shooting.]

[As used here, a *deadly weapon* is any weapon, instrument or object that has the reasonable potential of being used in a manner that would cause great bodily injury or death.] [*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

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[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ *<insert type of explosive from Health & Saf. Code, § 12000>* **is an *explosive*.]**

[*Tear gas* means a liquid, gaseous, or solid substance intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispersed in the air.]

[A *tear gas weapon* means any shell, cartridge, or bomb capable of being discharged or exploded to release or emit tear gas.] [A *tear gas weapon* [also] means a revolver, pistol, fountain pen gun, billy, or other device, portable or fixed, intended specifically to project or release tear gas.] [A *tear gas weapon* does not include a device regularly manufactured and sold for use with firearm ammunition.]

[The term[s] _____ *<insert term[s]>* **(is/are) defined elsewhere in these instructions.]**

The People do not have to prove that the defendant used or intended to use the object as a weapon.

[You may consider evidence that the object could be used in a harmless way in deciding if the object is a deadly weapon as defined here.]

[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/visible)).]

[The People allege that the defendant (brought/sent/ [or] assisted in (bringing/sending)) the following weapons: _____ *<insert types of weapons when multiple items alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (brought/sent/ [or] assisted in (bringing/sending)) at least one of these weapons and you all agree on which weapon (he/she) (brought/sent/ [or] assisted in (bringing/sending)).]**

<Defense: Conduct Authorized>

[The defendant is not guilty of this offense if (he/she) was authorized to (bring/send) a weapon into the penal institution by (law[,]/ [or] a person in charge of the penal institution[,]/ [or] an officer of the penal institution empowered by the person in charge of the institution to give such authorization). The People have the burden of

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proving beyond a reasonable doubt that the defendant was not authorized to (bring/send) the weapon into the institution. If the People have not met this burden, you must find the defendant not guilty of this offense.]

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant brought or sent multiple weapons into the institution, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65.) Give the bracketed paragraph that begins with "The People allege that the defendant (brought/sent/ [or] assisted in (bringing/sending))," inserting the items alleged.

If the defendant is charged with a felony for bringing or sending tear gas or a tear gas weapon into a penal institution resulting in the release of tear gas (Pen. Code, § 4574(b)), the court has a **sua sponte** duty to instruct the jury on this additional allegation. The court should give the jury an additional instruction on this issue and a verdict form on which the jury may indicate if this fact has or has not been proved.

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

Note that the definition of "deadly weapon" in the context of Penal Code section 4574 differs from the definition given in other instructions. (*People v. Martinez* (1998) 67 Cal.App.4th 905, 909.)

If there is sufficient evidence of a harmless use for the object, give the bracketed sentence that begins with "You may consider evidence that the object could be used in a harmless way . . . ." (*People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744.)

If there is sufficient evidence that the defendant was authorized to bring or send the weapon, give the bracketed word "unlawfully" in element 1. Give also the bracketed paragraph headed "Defense: Conduct Authorized."

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AUTHORITY

Elements ▸ Pen. Code, § 4574(a), (b) & (c).
Firearm Defined ▸ Pen. Code, § 12001(b).
Explosive Defined ▸ Health & Saf. Code, § 12000.
Tear Gas Defined ▸ Pen. Code, § 12401.
Tear Gas Weapon Defined ▸ Pen. Code, § 12402.
Deadly Weapon Defined ▸ *People v. Martinez* (1998) 67 Cal.App.4th 905, 909.
Jail Defined ▸ *People v. Carter* (1981) 117 Cal.App.3d 546, 550.
Knowledge of Nature of Object ▸ See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332; *People v. James* (1969) 1 Cal.App.3d 645, 650.
Knowledge of Location as Penal Institution ▸ *People v. Seale* (1969) 274 Cal.App.2d 107, 111.
Harmless Use ▸ *People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744; *People v. Martinez* (1998) 67 Cal.App.4th 905, 910–913.
Unanimity ▸ *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185.
Firearm Need Not Be Operable ▸ *People v. Talkington* (1983) 140 Cal.App.3d 557, 563.
"Adjacent to" and "Grounds" Not Vague ▸ *People v. Seale* (1969) 274 Cal.App.2d 107, 114–115.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Government, § 100.

LESSER INCLUDED OFFENSES

Attempt to Bring or Send Weapon Into Penal Institution ▸ Pen. Code, §§ 664, 4574(a), (b), or (c); *People v. Carter* (1981) 117 Cal.App.3d 546, 548.

If the defendant is charged with bringing or sending tear gas or a tear gas weapon into a penal institution, the offense is a misdemeanor unless tear gas was released in the institution. (Pen. Code, § 4574(b) & (c).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has proved that tear gas was released. If the jury finds that this has not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

Inmate Transferred to Mental Hospital
A prison inmate transferred to a mental hospital for treatment pursuant to Penal Code section 2684 is not "under the custody of prison officials." (*People v. Superior Court (Ortiz)* (2004) 115 Cal.App.4th 995, 1002.)

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STAFF NOTES

Penal Code, § 4574:

> (a) Except when otherwise authorized by law, or when authorized by the person in charge of the prison or other institution referred to in this section or by an officer of the institution empowered by the person in charge of the institution to give such authorization, any person, who knowingly brings or sends into, or knowingly assists in bringing into, or sending into, any state prison or prison road camp or prison forestry camp, or other prison camp or prison farm or any other place where prisoners of the state prison are located under the custody of prison officials, officers or employees, or any jail or any county road camp in this state, or within the grounds belonging or adjacent to any such institution, any firearms, deadly weapons, or explosives, and any person who, while lawfully confined in a jail or county road camp possesses therein any firearm, deadly weapon, explosive, tear gas or tear gas weapon, is guilty of a felony and punishable by imprisonment in the state prison for two, three, or four years.

See Note to Instruction 1947.

Knowingly Brought Object Onto Grounds

> "[Any] person, who knowingly brings . . . into . . . any jail or any county road camp in this State, or within the grounds . . . adjacent to any such institution, any firearms, deadly weapons or explosives" is guilty of a criminal offense.
>
> Defendant argues that the evidence is insufficient to support the trial court's conclusion that he had *knowledge* that he was on grounds adjacent to the city jail.
>
> It would have been difficult for the trial court to conclude otherwise. In order to reach the position where he was when the officers arrived, defendant would have had to walk directly toward the entrance door over which appears the sign "City Jail" in letters 10 to 12 inches high. By selecting a position 3 feet away from that doorway, it is reasonable to conclude that defendant knew that he was just outside of the entrance to the jail. Certainly, the trier of fact was justified in reaching such conclusion . . . .

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> We think that the *undisputed* facts in the instant case and the inferences that "may logically and reasonably be drawn" therefrom sufficiently support the trial court's conclusion that defendant knew the location of the city jail and that he was on ground adjacent thereto. *There was no evidence offered or received in support of the defense of lack of such knowledge*.

(*People v. Seale* (1969) 274 Cal.App.2d 107, 111 [italics in original].)

Adjacent to Penal Institution

> The section itself expressly provides that it is a criminal offense for any person to knowingly bring or send into "any jail or . . . the *grounds* belonging or *adjacent to any such institution*, any firearms, . . ." (italics added). . . .
>
> Defendant . . . claims that the words, "adjacent," "any such institution," and "grounds," as used in section 4574 are ambiguous, vague and uncertain. We do not agree.
>
> The defendant was sitting on a concrete retaining wall which encloses a planter strip running along the front of the building proper. He was 3 feet from the building.
>
> "Adjacent" is a word in common usage and is defined as "near" or "close." (Webster's New World Dictionary.) We submit that there can be no vagueness or uncertainty with respect to whether the planter strip was within the grounds adjacent to the jail building.
>
> The fact that there may arise marginal cases in which it is difficult to determine whether certain ground is "adjacent" to a prison or jail is not a sufficient reason to hold that the use of such word makes the statute unconstitutionally vague and uncertain. [Citation.] All that is required is reasonable certainty. [Citation.]

(*People v. Seale* (1969) 274 Cal.App.2d 107, 114–115 [italics in original].)

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1949. Possession of Controlled Substance or Paraphernalia in Penal Institution

The defendant is charged [in Count __] with possessing (_____ *<insert type of controlled substance>*, a controlled substance/an object intended for use to inject or consume controlled substances), in a penal institution.

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

1. **The defendant [unlawfully] possessed (a controlled substance/an object intended for use to inject or consume controlled substances) in a penal institution [or on the grounds of a penal institution];**

2. **The defendant knew of the (substance's/object's) presence;**

[AND]

3. **The defendant knew (of the substance's nature or character as a controlled substance/that the object was intended to be used for injecting or consuming controlled substances)(;/.)**

<Give elements 4 and 5 if defendant is charged with possession of a controlled substance, not possession of paraphernalia.>

[4. The controlled substance that the defendant possessed was _____ *<insert type of controlled substance>***;**

AND

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

A *penal institution* is a (state prison[,]/ [or] prison camp or farm[,]/ [or] (county/ [or] city) jail[,]/ [or] county road camp[,]/ [or] county farm[,]/ [or] place where prisoners of the state prison are located under the custody of prison officials, officers, or employees/ [or] place where prisoners or inmates are being held under the custody of a (sheriff[,]/ [or] chief of police[,]/ [or] peace officer[,]/ [or] probation officer).

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

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usable amount does not have to be enough, in either amount or strength, to affect the user.

[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.]

[An object is *intended to be used* for injecting or consuming controlled substances if the defendant (1) actually intended it to be so used, or (2) should have known, based on the item's objective features, that it was intended for such use.]

[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/other people).]

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

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

<A. Defense: Prescription>

[The defendant is not guilty of unlawfully possessing _____ *<insert type of controlled substance>* **if (he/she) had a valid prescription for that substance written by a physician, dentist, podiatrist, or veterinarian licensed to practice in California. The People have the burden of proving beyond a reasonable doubt that the defendant did not have a valid prescription. If the People have not met this burden, you must find the defendant not guilty of possessing a controlled substance.]**

<B. Defense: Conduct Authorized>

[The defendant is not guilty of this offense if (he/she) was authorized to possess the (substance/item) by (the rules of the (Department of Corrections/prison/jail/institution/camp/farm/place)/ [or] the specific authorization of the (warden[,]/ [or] superintendent[,]/ [or] jailer[,]/ [or] other person in charge of the (prison/jail/institution/camp/farm/place)). The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess

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the (substance/item). If the People have not met this burden, you must find the defendant not guilty of this offense.]

BENCH NOTES

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

If the defendant is charged with possessing a controlled substance, give elements 1 through 5. If the defendant is charged with possession of paraphernalia, give elements 1 through 3 only.

If the prosecution alleges under a single count that the defendant possessed multiple items, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65.) Give the bracketed paragraph that begins with "The People allege that the defendant possessed," inserting the items alleged.

Give the bracketed sentence defining "intended to be used" if there is an issue over whether the object allegedly possessed by the defendant was drug paraphernalia. (See *People v. Gutierrez* (1997) 52 Cal.App.4th 380, 389.)

The prescription defense is codified in Health & Safety Code sections 11350 and 11377. This defense does apply to a charge of possession of a controlled substance in a penal institution. (*People v. Fenton* (1993) 20 Cal.App.4th 965, 969.) The defendant need only raise a reasonable doubt about whether his possession of the drug was lawful because of a valid prescription. (See *People v. Mower* (2002) 28 Cal.4th 457, 479.) If there is sufficient evidence of a prescription, give the bracketed "unlawfully" in element 1 and the bracketed paragraph headed "Defense: Prescription."

If there is sufficient evidence that the defendant was authorized to possess the substance or item, give the bracketed word "unlawfully" in element 1 and the bracketed paragraph headed "Defense: Conduct Authorized." (*People v. George* (1994) 30 Cal.App.4th 262, 275–276; *People v. Cardenas* (1997) 53 Cal.App.4th 240, 245–246.)

AUTHORITY

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Elements ▸ Pen. Code, § 4573.6; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242; *People v. Carrasco* (1981) 118 Cal.App.3d 936, 944–948.
Knowledge ▸ *People v. Carrasco* (1981) 118 Cal.App.3d 936, 944–947.
Usable Amount ▸ *People v. Carrasco* (1981) 118 Cal.App.3d 936, 948.
Prescription Defense ▸ Health & Saf. Code, §§ 11350, 11377.
Prescription ▸ Health & Saf. Code, §§ 11027, 11164, 11164.5.
Persons Authorized to Write Prescriptions ▸ Health & Saf. Code, § 11150.
Prescription Defense Applies ▸ *People v. Fenton* (1993) 20 Cal.App.4th 965, 969.
Authorization Is Affirmative Defense ▸ *People v. George* (1994) 30 Cal.App.4th 262, 275–276; *People v. Cardenas* (1997) 53 Cal.App.4th 240, 245–246.
Jail Defined ▸ *People v. Carter* (1981) 117 Cal.App.3d 546, 550.
Knowledge of Location as Penal Institution ▸ *People v. Seale* (1969) 274 Cal.App.2d 107, 111.
"Adjacent to" and "Grounds" Not Vague ▸ *People v. Seale* (1969) 274 Cal.App.2d 107, 114–115.
Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.
Unanimity ▸ *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 124.

RELATED ISSUES

Inmate Transferred to Mental Hospital
A prison inmate transferred to a mental hospital for treatment under Penal Code section 2684 is not "under the custody of prison officials." (*People v. Superior Court (Ortiz)* (2004) 115 Cal.App.4th 995, 1002.) However, the inmate is "held under custody by peace officers within the facility." (*Id.* at p. 1003.) Thus, Penal Code section 4573.6 does apply. *(Ibid.)*

Use of Controlled Substance Insufficient to Prove Possession
" '[*P*]*ossession*,' as used in that section, does not mean 'use' and mere evidence of use (or being under the influence) of a proscribed substance cannot circumstantially prove its '*possession*.' " (*People v. Spann* (1986) 187 Cal.App.3d 400, 408 [italics in original]; see also *People v. Carrasco* (1981) 118 Cal.App.3d 936, 947.)

Posting of Prohibition
Penal Code section 4573.6 requires that its "prohibitions and sanctions" be posted on the grounds of the penal institution. (Pen. Code, § 4573.6.) However, that

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requirement is not an element of the offense, and the prosecution is not required to prove compliance. (*People v. Gutierrez* (1997) 52 Cal.App.4th 380, 389; *People v. Cardenas* (1997) 53 Cal.App.4th 240, 246.)

Possession of Multiple Items at One Time
"[C]ontemporaneous possession in a state prison of two or more discrete controlled substances . . . at the same location constitutes but one offense under Penal Code section 4573.6." (*People v. Rouser* (1997) 59 Cal.App.4th 1065, 1067.)

Administrative Punishment Does Not Bar Criminal Action
"The protection against multiple punishment afforded by the Double Jeopardy Clause . . . is not implicated by prior prison disciplinary proceedings . . . ." (*Taylor v. Hamlet* (N.D.Cal., Oct. 29, 2003, No. C01-4331MMC (PR)) 2003 U.S.Dist. LEXIS 19451; see also *People v. Ford* (1959) 175 Cal.App.2d 37, 39 [Pen. Code, § 654 not implicated].)

Medical Use of Marijuana
The medical marijuana defense provided by Penal Code section 11362.5 is not available to a defendant charged with violating Penal Code section 4573.6. (*Taylor v. Hamlet* (N.D.Cal., Oct. 29, 2003, No. C01-4331MMC (PR)) 2003 U.S.Dist. LEXIS 19451.) However, the common law defense of medical necessity may be available. *(Ibid.)*

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STAFF NOTES

Penal Code, § 4573.6:

> Any person who knowingly has in his or her possession in any state prison, prison road camp, prison forestry camp, or other prison camp or prison farm or any place where prisoners of the state are located under the custody of prison officials, officers, or employees, or in any county, city and county, or city jail, road camp, farm, or any place or institution, where prisoners or inmates are being held under the custody of any sheriff, chief of police, peace officer, probation officer, or employees, or within the grounds belonging to any jail, road camp, farm, place or institution, any controlled substances, the possession of which is prohibited by Division 10 (commencing with Section 11000) of the Health and Safety Code, any device, contrivance, instrument, or paraphernalia intended to be used for unlawfully injecting or consuming controlled substances, without being authorized to so possess the same by the rules of the Department of Corrections, rules of the prison or jail, institution, camp, farm or place, or by the specific authorization of the warden, superintendent, jailer, or other person in charge of the prison, jail, institution, camp, farm or place, is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years.
>
> The prohibitions and sanctions addressed in this section shall be clearly and prominently posted outside of, and at the entrance to, the grounds of all detention facilities under the jurisdiction of, or operated by, the state or any city, county, or city and county.

Elements Consistent With Other Controlled Substances Statutes

> Possession within the meaning of the relevant Health and Safety Code sections includes the elements that the defendant know of the presence of the substance and, additionally, know the character of the substance possessed. [Citations.] The question arises whether possession within the meaning of Penal Code section 4573.6 includes the same dual knowledge elements. . . .
>
> In sum, principles of statutory construction and legislative intent reveal that the dual knowledge requirement is part of Penal Code section 4573.6 possession. . . .

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> Possession within the meaning of the relevant Health and Safety Code sections includes as an element that the substance be in a usable amount. [Citations.] The question arises whether possession within the meaning of Penal Code section 4573.6 includes the same element.
>
> A review of legislative intent and a pertinent Attorney General opinion shows that the usable quantity element is part of Penal Code section 4573.6 possession.

(*People v. Carrasco* (1981) 118 Cal.App.3d 936, 944–948.)

Prescription Defense Applies

> [W]e requested supplemental briefing on whether the language in section 4573, "any controlled substance, the possession of which is prohibited by Division 10 (commencing with Section 11000) of the Health and Safety Code," renders section 4573 inapplicable where, as here, defendant has a physician's prescription for the controlled substance. The only relevant prohibition in division 10 is contained in Health and Safety Code section 11350, subdivision (a), which proscribes possession of a controlled substance "unless upon the written prescription of a physician." . . .
>
> Contrary to the Attorney General's assertion, the reference to division 10 must include the prescription exception because section 4573 imports the prohibition against possession of controlled substances not the list of controlled substances. Thus, the "plain meaning" of the statute is that one may bring controlled substances into a penal institution if an exception contained in division 10 applies. Here, one does. Health and Safety Code section 11350 does not prohibit possession of a controlled substance with a prescription.

(*People v. Fenton* (1993) 20 Cal.App.4th 965, 967–969.)

In *People v. Mower* (2002) 28 Cal.4th 457, 479, the court observed that when presenting a defense of possession authorized by prescription, the defendant’s burden is only to raise a reasonable doubt.

Authorization Is Affirmative Defense

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> George contends the prosecution failed to prove the lack of authorization required for violation of section 4573.6; he further contends the trial court erred by failing to instruct the prosecution had the burden to prove lack of authorization. . . .
>
> George erroneously assumes that lack of authorization is an element of section 4573.6 that must be proved by the prosecution. Rather, authorization is a defense to the offense; the burden is on the defendant, not the prosecution.
>
> It is well established that where a statute first defines an offense in unconditional terms and then specifies an exception to its operation, the exception is an affirmative defense to be raised and proved by the defendant. [Citations.] . . .
>
> We find our interpretation analogous to that afforded to Health and Safety Code section 11350, which criminalizes possession of "any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician ... licensed to practice in this state." In a prosecution under Health and Safety Code section 11350, it is up to the defendant to prove the existence of a prescription; the prosecution need not prove the nonexistence of a prescription. [Citation.]

(*People v. George* (1994) 30 Cal.App.4th 262, 275–276; see also *People v. Cardenas* (1997) 53 Cal.App.4th 240, 245–246.) Based on the reasoning of *Mower, supra*, the defendant's burden would be to raise a reasonable doubt.

Paraphernalia—Intended Use

> Defendant contends that the trial court erred by failing to instruct the jury that a specific intent to use the syringe to inject a controlled substance was an element of the crime. . . .
>
> The required mental state is "knowingly." The words "intended to be used" apply to the "device, contrivance, instrument, or paraphernalia." The passive "intended" need not refer to the intent of any particular person . . . .
>
> Section 4573.6 . . . prohibits possession, not use; it is similarly concerned with the potential of the item in question. Even assuming defendant did not intend the syringe to be used to inject drugs, its mere presence in the jail posed the threat that *some* prisoner *would* use it for this purpose. . . .

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> We believe "intended to be used" has essentially the same meaning. Thus, an item is "intended to be used for unlawfully injecting or consuming controlled substances" if the defendant (1) actually intends it to be so used, or (2) should know, based on the item's objective features, that it is intended to be so used. Under this standard, possession of a bong in prison is a crime, regardless of the defendant's intended use; possession of a paper clip, by contrast, is not a crime unless the defendant in fact intends it to be used as a roach clip. This standard furthers the legislative intent of keeping drugs and drug paraphernalia out of prisons, while at the same time avoiding the problems potentially posed if the defendant's guilt could be predicated on the unknown intent of another. [Citation.]

(*People v. Gutierrez* (1997) 52 Cal.App.4th 380, 389 [italics in original].)

See Notes to Instruction 1700, Simple Possession.

See Notes to Instruction 1948, Bringing or Sending Firearm, Deadly Weapon Or Explosive Into Penal Institution.

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The defendant is charged [in Count __] with (escape/ [or] attempting to escape).

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

1. The defendant was ((arrested and booked for[,]/ [or] charged with[,]/ [or] convicted of) a (misdemeanor/felony)/committed by order of the juvenile court to an adult facility);

<Alternative 2A—confined in penal institution>

[2. The defendant was confined in (a/an) (county jail/city jail/prison/ industrial farm/industrial road camp);]

<Alternative 2B—engaged in county work>

[2. The defendant was working on (a county road/ [or other] county work) as an inmate;]

<Alternative 2C—lawful custody>

[2. The defendant was in the lawful custody of (an officer/ [or] a person);]

<Alternative 2D—work furlough>

[2. The defendant was confined in (a/an) (county jail/city jail/prison/ industrial farm/industrial road camp) but was authorized to be away from the place of confinement in connection with a work furlough program;]

<Alternative 2E—temporary release>

[2. The defendant was confined in (a/an) (county jail/city jail/prison/ industrial farm/industrial road camp) but was away from the place of confinement in connection with an authorized temporary release;]

<Alternative 2F—home detention>

[2. The defendant was a participant in a home detention program;]

<Alternative 2G—confined under Pen. Code, § 4011.9>

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[2. The defendant was confined as an inmate in a hospital for treatment even though no guard was present to detain the defendant;]

AND

<Alternative 3A—confined in penal institution>

[3. The defendant (escaped/ [or] attempted to escape) from the (jail/ prison/farm/camp).]

<Alternative 3B—engaged in county work>

[3. The defendant (escaped/ [or] attempted to escape) from the custody of the (officer/ [or] person in charge of (him/her)) while engaged in work at, or going to or returning from, the county work site.]

<Alternative 3C—lawful custody>

[3. The defendant (escaped/ [or] attempted to escape) from the custody of the (officer/ [or] person) who had lawful custody of the defendant.]

<Alternative 3D—work furlough>

[3. The defendant (escaped/ [or] attempted to escape) from the (jail/ prison/farm/camp) by failing to return to the place of confinement.]

<Alternative 3E—temporary release>

[3. The defendant (escaped/ [or] attempted to escape) from the (jail/ prison/farm/camp) by failing to return to the place of confinement.]

<Alternative 3F—home detention>

[3. The defendant (escaped/ [or] attempted to escape) from the place of confinement in the home detention program.]

<Alternative 3G—confined under Pen. Code, § 4011.9>

[3. The defendant (escaped/ [or] attempted to escape) from the place of hospital confinement.]

[A person has been *booked* for a (misdemeanor/felony) if he or she has been taken to a law enforcement office where an officer or employee has recorded the arrest and taken the person's fingerprints and photograph[s].]

[A person has been *charged* with a (misdemeanor/felony) if a formal complaint, information, or indictment has been filed in court alleging that the person committed a crime.]

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***Escape* means the unlawful departure of a prisoner from the physical limits of his or her custody. [It is not necessary for the prisoner to have left the outer limits of the institution's property. However, the prisoner must pass beyond some barrier, such as a fence or a wall, intended to keep the prisoner within a designated area.]**

[A prisoner [also] *escapes* if he or she willfully fails to return to his or her place of confinement within the period that he or she was authorized to be away from that place of confinement. Someone commits an act *willfully* when he or she does it willingly or on purpose.]

BENCH NOTES

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

In elements 2 and 3, select the location where the defendant was allegedly confined or the program that the defendant allegedly escaped from.

In the definition of escape, give the two bracketed sentences if there is an issue as to whether the defendant went far enough to constitute an escape. (See *People v. Lavaie* (1999) 70 Cal.App.4th 456, 459–461.)

Give the bracketed paragraph on willful failure to return if appropriate based on the evidence.

If the defendant is charged with attempt, give Instruction 504, Attempt Other Than Attempted Murder. (*People v. Gallegos* (1974) 39 Cal.App.3d 512, 517.)

If the prosecution alleges escape with force or violence (Pen. Code, § 4532(a)(2) or (b)(2)), give Instruction 1951, Escape With Force or Violence. (*People v. Gallegos, supra,* 39 Cal.App.3d at pp. 518–519.)

Defenses—Instructional Duty
If there is sufficient evidence of necessity, the court has a **sua sponte** duty to give Instruction 1954, Escape: Necessity Defense. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1008–1013; *People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831–832.)

AUTHORITY

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Elements ▸ Pen. Code, § 4532(a)(1) & (b)(1).
Specific Intent Not an Element of Completed Escape ▸ *People v. George* (1980) 109 Cal.App.3d 814, 819.
Attempt to Escape—Must Instruct on Direct Act and Specific Intent ▸ *People v. Gallegos* (1974) 39 Cal.App.3d 512, 517.
Escape Defined ▸ *People v. Lavaie* (1999) 70 Cal.App.4th 456, 459–461.
Arrested Defendant Must Be Booked Before Statute Applies ▸ *People v. Diaz* (1978) 22 Cal.3d 712, 716–717; see also *People v. Trotter* (1998) 65 Cal.App.4th 965, 967, 971.
Arrest of Probationer—Booking Not Required ▸ *People v. Cisneros* (1986) 179 Cal.App.3d 117, 120–123.
Must Be Confined in Adult Penal Institution ▸ *People v. Rackley* (1995) 33 Cal.App.4th 1659, 1668.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 82–97.

RELATED ISSUES

Violating Work Furlough Conditions

In order for an inmate assigned to work furlough to violate Penal Code section 4532, the inmate must "willfully" fail to return on time. (*Yost v. Superior Court* (1975) 52 Cal.App.3d 289, 292 [defendant who was arrested on other charges on his way back to camp did not willfully fail to return].) If the defendant merely violates conditions of the work furlough release, that conduct falls under Penal Code section 1208, not section 4532. (*Id.* at p. 295.)

Defendant Illegally Detained

If a person is detained in custody "without any process, . . . wholly without authority of law," or "where the judgment was void on its face," the detention is illegal and the defendant may "depart" without committing the crime of escape. (*People v. Teung* (1891) 92 Cal. 421, 421–422, 426; *In re Estrada* (1965) 63 Cal.2d 740, 749.) "But where the imprisonment is made under authority of law and the process is simply irregular in form, or the statute under which he is confined is unconstitutional, the escape is unlawful." (*In re Estrada, supra,* 63 Cal.2d at p. 749.) Note that this is a narrow exception, one that has not been applied by the courts since the case of *People v. Clark* (1924) 69 Cal.App. 520, 523.

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STAFF NOTES

Penal Code, § 4532, in relevant part:

(a) (1) Every prisoner arrested and booked for, charged with, or convicted of a misdemeanor, and every person committed under the terms of Section 5654, 5656, or 5677 of the Welfare and Institutions Code as an inebriate, who is confined in any county or city jail, prison, industrial farm, or industrial road camp, is engaged on any county road or other county work, is in the lawful custody of any officer or person, is employed or continuing in his or her regular educational program or authorized to secure employment or education away from the place of confinement, pursuant to the Cobey Work Furlough Law (Section 1208), is authorized for temporary release for family emergencies or for purposes preparatory to his or her return to the community pursuant to Section 4018.6, or is a participant in a home detention program pursuant to Section 1203.016, and who thereafter escapes or attempts to escape from the county or city jail, prison, industrial farm, or industrial road camp or from the custody of the officer or person in charge of him or her while engaged in or going to or returning from the county work or from the custody of any officer or person in whose lawful custody he or she is, or from the place of confinement in a home detention program pursuant to Section 1203.016, is guilty of a felony and, if the escape or attempt to escape was not by force or violence, is punishable by imprisonment in the state prison for a determinate term of one year and one day, or in a county jail not exceeding one year.

(2) If the escape or attempt to escape described in paragraph (1) is committed by force or violence, the person is guilty of a felony, punishable by imprisonment in the state prison for two, four, or six years to be served consecutively, or in a county jail not exceeding one year. When the second term of imprisonment is to be served in a county jail, it shall commence from the time the prisoner otherwise would have been discharged from jail. . . .

(b) (1) Every prisoner arrested and booked for, charged with, or convicted of a felony, and every person committed by order of the juvenile court, who is confined in any county or city jail, prison, industrial farm, or industrial road camp, is engaged on any county road or other county work, is in the lawful custody of any officer or person, or is confined pursuant to Section 4011.9, is a participant in a home detention program pursuant to

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Section 1203.016, who escapes or attempts to escape from a county or city jail, prison, industrial farm, or industrial road camp or from the custody of the officer or person in charge of him or her while engaged in or going to or returning from the county work or from the custody of any officer or person in whose lawful custody he or she is, or from confinement pursuant to Section 4011.9, or from the place of confinement in a home detention program pursuant to Section 1203.016, is guilty of a felony and, if the escape or attempt to escape was not by force or violence, is punishable by imprisonment in the state prison for 16 months, two years, or three years, to be served consecutively, or in a county jail not exceeding one year.

(2) If the escape or attempt to escape described in paragraph (1) is committed by force or violence, the person is guilty of a felony, punishable by imprisonment in the state prison for a full term of two, four, or six years to be served consecutively to any other term of imprisonment, commencing from the time the person otherwise would have been released from imprisonment and the term shall not be subject to reduction pursuant to subdivision (a) of Section 1170.1, or in a county jail for a consecutive term not to exceed one year, that term to commence from the time the prisoner otherwise would have been discharged from jail. . . .

(3) For the purposes of this subdivision, "main jail facility" means the facility used for the detention of persons pending arraignment, after arraignment, during trial, and upon sentence or commitment. The facility shall not include an industrial farm, industrial road camp, work furlough facility, or any other nonsecure facility used primarily for sentenced prisoners. As used in this subdivision, "secure" means that the facility contains an outer perimeter characterized by the use of physically restricting construction, hardware, and procedures designed to eliminate ingress and egress from the facility except through a closely supervised gate or doorway. . . .

(d) The willful failure of a prisoner, whether convicted of a felony or a misdemeanor, to return to his or her place of confinement no later than the expiration of the period that he or she was authorized to be away from that place of confinement, is an escape from that place of confinement. This subdivision applies to a prisoner who is employed or continuing in his or her regular educational program, authorized to secure employment or education pursuant to the Cobey Work Furlough Law (Section 1208), authorized for temporary release for family emergencies or for purposes preparatory to his or her return to the community pursuant to Section 4018.6, or permitted to participate in a home detention program pursuant

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> to Section 1203.016. A prisoner convicted of a misdemeanor who willfully fails to return to his or her place of confinement under this subdivision shall be punished as provided in paragraph (1) of subdivision (a). A prisoner convicted of a felony who willfully fails to return to his or her place of confinement shall be punished as provided in paragraph (1) of subdivision (b).

Pen. Code, § 4011.9:

> Notwithstanding the provisions of Sections 4011 and 4011.5, when it appears that the prisoner in need of medical or surgical treatment necessitating hospitalization or in need of medical or hospital care was arrested for, charged with, or convicted of an offense constituting a felony, the court in proceedings under Section 4011 or the sheriff or jailer in action taken under Section 4011.5 may direct that the guard be removed from the prisoner while he is in the hospital, if it reasonably appears that the prisoner is physically unable to effectuate an escape or the prisoner does not constitute a danger to life or property.

Specific Intent Not An Element of Completed Escape

> Specific intent is not an element of the crime of escape. The crime is completed when the prisoner wilfully leaves the prison camp, without authorization, and whether he intends to return is immaterial to the commission of the crime. Thus the lack of a specific intent to escape is not a valid defense where a completed escape has occurred. The defense of diminished capacity is inapplicable where a specific intent is not a necessary element of the offense charged and in the event the escape is completed, it is of no significance that the defendant denies an intent to escape.

(*People v. George* (1980) 109 Cal.App.3d 814, 819.)

Defendant Under Arrest Must Be Booked

> [I]n using the term "prisoner" the Legislature intended to connote a person who has been booked, incarcerated at the time of his escape, or previously so incarcerated and temporarily in custody outside the confinement facility. Contrary to the *Cheatham* analysis, such an interpretation neither ignores nor renders meaningless the words "charged with" in section 4532. Such words reasonably may have been intended to apply to a person who had escaped from a prison, jail or other confinement facility following the

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> filing of formal charges, but prior to conviction. It was not until 1961 that section 4532 was amended to add to both subdivisions (a) and (b) the words "arrested and booked for" to clarify the previous "charged with" language and to assure "some formality beyond arrest before a defendant may be deemed 'charged' within the meaning of section 4532." . . .
>
> As we explained in *Culver*, our construction of section 4532 does not immunize from other criminal sanctions those, not classified as "prisoners," who escape from arresting officers. There are several provisions proscribing resisting arrest and obstruction of justice. (See, e.g., §§ 148, 243, 834a; *Culver, supra*, at p. 905; *Redmond supra*, at pp. 862-863.)

(*People v. Diaz* (1978) 22 Cal.3d 712, 716-717; see also *In re Culver* (1968) 69 Cal.2d 898, 900; *People v. Redmond* (1966) 246 Cal.App.2d 852, 862–863.)

Arrest of Probationer—Need Not be Booked

> Was appellant then a "prisoner" within the meaning of this statute? He argues that since he had not completed the booking process he was not a "prisoner arrested and booked for a felony." However, as a probationer, when officer Odegard arrested him, appellant was already in a state of constructive incarceration. He was, thus, a "prisoner" within the meaning of section 4532, since he was a prisoner who had already been convicted of burglary; appellant's arrest for violation of his probation constituted a taking into actual custody of one who had been in constructive custody. . . .
>
> Our Supreme Court has stated that booking is only one of three distinct circumstances where a person can become a prisoner under the statute. (*People* v. *Diaz, supra*, 22 Cal.3d at p. 716.) . . .
>
> The term "prisoner" connotes "a person who has been booked, incarcerated at the time of his escape, or previously so incarcerated and temporarily in custody outside the confinement facility." (*Id*., at p. 716.)
>
> As a probationer in the constructive custody of the court, appellant clearly falls under the second definition of a prisoner which covers persons who had been incarcerated at the time of their escape.

(*People v. Cisneros* (1986) 179 Cal.App.3d 117, 120–123.)

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Defendant, Out of Custody, Runs From Courtroom At Arraignment

> [W]e concluded defendant, who was out of custody at the time of his municipal court arraignment when he ran from the courtroom, may not be convicted of escape within the meaning of section 4532, subdivision (b)(1). . . .
>
> In conclusion, there was no evidence presented at trial in this case that defendant was a person who had "been booked, incarcerated at the time of his escape, or previously so incarcerated and temporarily in custody outside the confinement facility" as required by *People v. Diaz, supra*, 22 Cal. 3d at page 716. As noted previously, there was no evidence presented to the jury he had ever been booked or confined in a "confinement facility" in connection with the present case. He was not in custody for purposes of section 4532, subdivision (b)(1) when he sprinted out the courtroom.

(*People v. Trotter* (1998) 65 Cal.App.4th 965, 967, 971.)

Escape Defined—Must Pass Barrier of the Prison

In *People v. Lavaie* (1999) 70 Cal.App.4th 456, 457, a guard saw two men walking towards the gate but did not see them leave the work camp. The guards were then unable to locate the defendant in the area of the camp he was supposed to be in. After an extensive search, the defendant was seen walking from the kitchen area, an area he did not have permission to be in. *(Ibid.)* The court concluded that this was not enough to show escape:

> During argument on appellant's motion to dismiss pursuant to section 1118, the court asked counsel to define escape. The prosecutor responded: "In the case of *People v. Temple* [(1962)] 203 Cal. App. 2d 654, unlawful departure of a prisoner from limits of his custody constitutes escape even though he does not leave prison. [P] *People v. Jones* [(1958)] 163 Cal. App. 2d 118 also reads: unlawful departure of a prisoner from limits of his custody constitutes escape." . . .
>
> In both *Temple* and *Quijada*, the prisoner had gone beyond one barrier, either a wall or a fence, but had not left the outer limits of the prison property.. . .
>
> We have found no cases recognizing an escape when a prisoner remains within the camp or prison barriers, but is outside the particular area within the camp or prison where he is permitted to be. The evidence in this case,

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> even when viewed in the light most favorable to the judgment, establishes only that much, and is hence insufficient.

(*Id.* at pp. 459–461.)

Escape Must Be From Adult Institution

In *People v. Rackley* (1995) 33 Cal.App.4th 1659, 1664, the 17 year old defendant had been found unfit for treatment as a juvenile and convicted as an adult for robbery. However, the defendant was still being housed at juvenile hall and was ordered committed to CYA. While in transit back to juvenile hall, the defendant escaped. *(Ibid.)* the court stated, "[t]he many references to 'prison' and 'jail' throughout these predecessor statutes lead to the conclusion that the statute was meant to apply to those persons incarcerated in an adult penal institution. Historically, juvenile hall has not been considered a jail or prison." *(Id.* at p. 1668.) Thus, the defendant could only be charged with Welfare and Institutions Code section 871.

Force or Violence—Must Submit to Jury

> There is only one crime of escape defined by Penal Code section 4532; if it is done by force and violence it is punishable more severely than if not done with force and violence. (See fn. 9 to *People* v. *Lynn, supra*, 16 Cal.App.3d at p. 269.) The issue should be presented to the jury as calling first for a finding whether there was an escape, and then a finding whether it was done by force and violence. If there were an affirmative finding as to escape, and a negative finding, or a failure to agree, that it was accomplished by force and violence, then the less severely punishable crime would have been committed.

(*People v. Gallegos* (1974) 39 Cal.App.3d 512, 518–519.)

Cannot Submit Force or Violence Alone, As an Enhancement

> Since under this section, forcible escape is a separate offense, it is clear that the trial court's instructions and the verdict form were misleading, if not erroneous. Where, as here, a defendant is charged with forcible escape, instructions should not treat the element of force or violence as an "enhancement" or "special allegation" to be found true or false. (Cf. *Morris* v. *United States* (9th Cir. 1946) 156 F.2d 525.) Rather, the jury should be instructed that use (or knowledge of another's use) of force or violence is an element of the offense. (See *People* v. *Davis, supra*, 166 Cal.App.3d 760, 767-768.) Likewise, a verdict form should not present the issue of force or violence as a special allegation but should allow the jury

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> simply to find defendant guilty or innocent of a single unified offense: forcible escape. Similarly, the document charging forcible escape should allege forcible escape as a single crime and not isolate certain elements in separate special allegations.

(*People v. Lozano* (1987) 192 Cal.App.3d 618, 633.)

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1951. Escape By Force or Violence

The defendant is charged [in Count __] with (escape/ [or] attempted escape) committed by force or violence.

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

2. The defendant was ((arrested and booked for[,]/ [or] charged with[,]/ [or] convicted of) a (misdemeanor/felony)/committed by order of the juvenile court to an adult facility);

<Alternative 2A—confined in penal institution>

[2. The defendant was confined in (a/an) (county jail/city jail/prison/ industrial farm/industrial road camp);]

<Alternative 2B—engaged in county work>

[2. The defendant was working on (a county road/ [or other] county work) as an inmate;]

<Alternative 2C—lawful custody>

[2. The defendant was in the lawful custody of (an officer/ [or] a person);]

<Alternative 2D—work furlough>

[2. The defendant was confined in (a/an) (county jail/city jail/prison/ industrial farm/industrial road camp) but was authorized to be away from the place of confinement in connection with a work furlough program;]

<Alternative 2E—temporary release>

[2. The defendant was confined in (a/an) (county jail/city jail/prison/ industrial farm/industrial road camp) but was away from the place of confinement in connection with an authorized temporary release;]

<Alternative 2F—home detention>

[2. The defendant was a participant in a home detention program;]

<Alternative 2G—confined under Pen. Code, § 4011.9>

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[2. The defendant was confined as an inmate in a hospital for treatment even though no guard was present to detain the defendant;]

<Alternative 3A—confined in penal institution>

[3. The defendant (escaped/ [or] attempted to escape) from the (jail/ prison/farm/camp);]

<Alternative 3B—engaged in county work>

[3. The defendant (escaped/ [or] attempted to escape) from the custody of the (officer/ [or] person in charge of (him/her)) while engaged in or going to or returning from the county work site;]

<Alternative 3C—lawful custody>

[3. The defendant (escaped/ [or] attempted to escape) from the custody of the (officer/ [or] person) who had lawful custody of the defendant;]

<Alternative 3D—work furlough>

[3. The defendant (escaped/ [or] attempted to escape) from the (jail/ prison/farm/camp) by failing to return to the place of confinement;]

<Alternative 3E—temporary release>

[3. The defendant (escaped/ [or] attempted to escape) from the (jail/ prison/farm/camp) by failing to return to the place of confinement;]

<Alternative 3F—home detention>

[3. The defendant (escaped/ [or] attempted to escape) from the place of confinement in the home detention program;]

<Alternative 3G—confined under Pen. Code, § 4011.9>

[3. The defendant (escaped/ [or] attempted to escape) from the place of hospital confinement;]

AND

4. The defendant committed the (escape/ [or] attempted escape) by force or violence.

[A person has been *booked* for a (misdemeanor/felony) if he or she has been taken to a law enforcement office where an officer or employee has recorded the arrest and taken the person's fingerprints and photograph[s].]

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[A person has been *charged* with a (misdemeanor/felony) if a formal complaint, information, or indictment has been filed in court alleging that the person committed a crime.]

***Escape* means the unlawful departure of a prisoner from the physical limits of his or her custody. [It is not necessary for the prisoner to have left the outer limits of the institution's property. However, the prisoner must pass beyond some barrier, such as a fence or a wall, intended to keep the prisoner within a designated area.]**

[A prisoner [also] *escapes* if he or she willfully fails to return to his or her place of confinement within the period that he or she was authorized to be away from that place of confinement. Someone commits an act *willfully* when he or she does it willingly or on purpose.]

To commit an act *by force or violence* means to wrongfully use physical force against the property or person of another. [To *use force* against a person means to touch the other person in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

[The People must prove that the defendant personally used force or violence or aided and abetted another in using force or violence. Mere knowledge that someone else used force or violence is not enough. Instruction[s] __ *<insert instruction numbers; see Bench Notes>* **explain[s] when a person aids and abets another.]**

BENCH NOTES

Instructional Duty

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

In elements 2 and 3, select the location where the defendant was allegedly confined or the program that the defendant allegedly escaped from and use the appropriate alternative paragraphs.

In the definition of escape, give the two bracketed sentences if there is an issue as to whether the defendant went far enough to constitute an escape. (See *People v. Lavaie* (1999) 70 Cal.App.4th 456, 459–461.)

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Give the bracketed paragraph on willful failure to return if appropriate based on the evidence.

In the definition of force or violence, use the bracketed sentences if the prosecution alleges that the defendant used force against a person. (*People v. Lozano* (1987) 192 Cal.App.3d 618, 627 [meaning of "force" in Pen. Code, § 4532 equivalent to simple battery].)

Give the bracketed paragraph that begins with "The People must prove that the defendant personally" if this is an issue in the case. (*People v. Moretto* (1994) 21 Cal.App.4th 1269, 1278.) Give also Instructions 500, Aiding and Abetting: General Principles, and 501, Aiding and Abetting: Intended Crimes.

If the defendant is charged with attempt, give Instruction 504, Attempt Other Than Attempted Murder. (*People v. Gallegos* (1974) 39 Cal.App.3d 512, 517.)

Defenses—Instructional Duty
If there is sufficient evidence of necessity, the court has a **sua sponte** duty to give Instruction 1954, Escape: Necessity Defense. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1008–1013; *People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831–832.)

AUTHORITY

Elements ▸ Pen. Code, § 4532(a)(1) & (b)(1).
Specific Intent Not an Element of Completed Escape ▸ *People v. George* (1980) 109 Cal.App.3d 814, 819.
Attempt to Escape—Must Instruct on Direct Act and Specific Intent ▸ *People v. Gallegos* (1974) 39 Cal.App.3d 512, 517.
Escape Defined ▸ *People v. Lavaie* (1999) 70 Cal.App.4th 456, 459–461.
Force or Violence Defined ▸ *People v. Lozano* (1987) 192 Cal.App.3d 618, 627; *People v. Bravot* (1986) 183 Cal.App.3d 93, 97.
Force Includes Damage to Property ▸ *People v. White* (1988) 202 Cal.App.3d 862, 866; *People v. Bravot* (1986) 183 Cal.App.3d 93, 97.
Defendant Must Personally Use Force or Aid and Abet Another ▸ *People v. Moretto* (1994) 21 Cal.App.4th 1269, 1278.
Arrested Defendant Must Be Booked Before Statute Applies ▸ *People v. Diaz* (1978) 22 Cal.3d 712, 716–717; see also *People v. Trotter* (1998) 65 Cal.App.4th 965, 967, 971.
Arrest of Probationer—Booking Not Required ▸ *People v. Cisneros* (1986) 179 Cal.App.3d 117, 120–123.
Must Be Confined in Adult Penal Institution ▸ *People v. Rackley* (1995) 33 Cal.App.4th 1659, 1668.

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2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 82–97.

LESSER INCLUDED OFFENSES

Escape carries a more severe penalty if done with force or violence. (Pen. Code, § 4532(a)(2) & (b)(2).) If the defendant is charged with using force or violence, then the escape without force or violence is a lesser included offense. (*People v. Gallegos* (1974) 39 Cal.App.3d 512, 518–519.) Note that the court must instruct on all the elements of escape with force or violence and must then give a separate instruction on the lesser offense, stating all of the elements except force or violence. (*People v. Lozano* (1987) 192 Cal.App.3d 618, 633.) The court may not give the jury a verdict form asking specifically if the element of force or violence has been proved. *(Ibid.)*

RELATED ISSUES

See Related Issues section in Instruction 1950, Escape.

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STAFF NOTES

Penal Code, § 4532, in relevant part:

> (a)(2) If the escape or attempt to escape described in paragraph (1) is committed by force or violence, the person is guilty of a felony, punishable by imprisonment in the state prison for two, four, or six years to be served consecutively, or in a county jail not exceeding one year. When the second term of imprisonment is to be served in a county jail, it shall commence from the time the prisoner otherwise would have been discharged from jail. . . .
>
> (b)(2) If the escape or attempt to escape described in paragraph (1) is committed by force or violence, the person is guilty of a felony, punishable by imprisonment in the state prison for a full term of two, four, or six years to be served consecutively to any other term of imprisonment, commencing from the time the person otherwise would have been released from imprisonment and the term shall not be subject to reduction pursuant to subdivision (a) of Section 1170.1, or in a county jail for a consecutive term not to exceed one year, that term to commence from the time the prisoner otherwise would have been discharged from jail. . . .

Force or Violence—Defined

> [W]here an escapee's force or violence is directed against a person, it is synonymous with the crime of battery as defined in section 242: "*any* willful and unlawful use of force or violence upon the person of another." (Italics added.) In other words, the line between simple and forcible escape is crossed upon the commission of a battery. To conclude otherwise would be to equate those who escape without any force or violence with those who commit "minor" batteries. Such an equation, however, would cloud the distinction between simple and forcible escape and weaken the statute's deterrent/protective purpose.

(*People v. Lozano* (1987) 192 Cal.App.3d 618, 627 [footnote omitted, italics in original].)

> "[The] words 'force' and 'violence' are synonymous and mean any wrongful application of physical force *against property* or the person of another." (CALJIC No. 7.31 (4th ed. 1979) italics added.) Section 4532, subdivision (b), speaks in general terms of "force or violence" and does not in any way indicate that it must be directed to a person. ". . . The words "force" and "violence" are not ambiguous or uncertain, and there is no doubt about the meaning of section 4532, subdivision

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> (b). The "fair import" of these words and common sense compel the conclusion that "force" and "violence" may be utilized against property and most assuredly are used when one seeks freedom by running through a glass door.

(*People v. Bravot* (1986) 183 Cal.App.3d 93, 97; see also *People v. White* (1988) 202 Cal.App.3d 862, 866 [holding that “force” includes force to property; sustaining conviction of defendant who made a hole in the ceiling of his cell.])

Defendant Must Personally Use Force or Aid and Abet Others in Use of Force

“As legislatively defined, the forcible escape statute requires the accused to either personally use force or violence or be criminally responsible for its use by others.” (*People v. Moretto* (1994) 21 Cal.App.4th 1269, 1278 [disagreeing with *People v. Davis* (1985) 166 Cal.App.3d 760, 767]; see also *People v. Lozano* (1987) 192 Cal.App.3d 618, 633 [also criticizing reasoning of *Davis*].)

Force or Violence—Must Submit to Jury

> There is only one crime of escape defined by Penal Code section 4532; if it is done by force and violence it is punishable more severely than if not done with force and violence. (See fn. 9 to *People* v. *Lynn, supra*, 16 Cal.App.3d at p. 269.) The issue should be presented to the jury as calling first for a finding whether there was an escape, and then a finding whether it was done by force and violence. If there were an affirmative finding as to escape, and a negative finding, or a failure to agree, that it was accomplished by force and violence, then the less severely punishable crime would have been committed.

(*People v. Gallegos* (1974) 39 Cal.App.3d 512, 518–519.)

Cannot Submit Force or Violence Alone, As an Enhancement

> Since under this section, forcible escape is a separate offense, it is clear that the trial court's instructions and the verdict form were misleading, if not erroneous. Where, as here, a defendant is charged with forcible escape, instructions should not treat the element of force or violence as an "enhancement" or "special allegation" to be found true or false. (Cf. *Morris* v. *United States* (9th Cir. 1946) 156 F.2d 525.) Rather, the jury should be instructed that use (or knowledge of another's use) of force or violence is an element of the offense. (See *People* v. *Davis, supra*, 166 Cal.App.3d 760, 767-768.) Likewise, a verdict form should not present the issue of force or violence as a special allegation but should allow the jury simply to find defendant guilty or innocent of a single unified offense:

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> forcible escape. Similarly, the document charging forcible escape should allege forcible escape as a single crime and not isolate certain elements in separate special allegations.

(*People v. Lozano* (1987) 192 Cal.App.3d 618, 633.)

See Notes to Instruction 1950.

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1952. Escape After Remand or Arrest

The defendant is charged [in Count __] with (escape/ [or] attempted escape) following (a remand/an arrest).

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

<Alternative 1A—remanded>

[1. The defendant was remanded, which means that a (magistrate/judge) ordered (him/her) placed into the custody of a (sheriff[,]/ [or] marshal[,]/ [or other] police agency);]

<Alternative 1B—arrested>

[1. The defendant was lawfully arrested by a peace officer and the defendant knew, or reasonably should have known, that (he/she) had been arrested;]

AND

2. The defendant (escaped/ [or] attempted to escape) from the custody of the (sheriff[,]/ marshal[,]/ [or other] (police agency/peace officer)).

***Escape* means the unlawful departure from the physical limits of custody.**

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

BENCH NOTES

Instructional Duty

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

If the defendant is charged with a felony for use of force or violence, give Instruction 1953, Escape After Remand or Arrest: Force or Violence with this instruction.

If the defendant is charged with attempt, give Instruction 504, Attempt Other Than Attempted Murder. (*People v. Gallegos* (1974) 39 Cal.App.3d 512, 517.)

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If lawfulness of the arrest is an issue, give the appropriate paragraphs from Instruction __, Lawful Performance.

The jury must determine whether the person who arrested the defendant is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445.) 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 person was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)*

Defenses—Instructional Duty
If there is sufficient evidence of necessity, the court has a **sua sponte** duty to give Instruction 1954, Escape: Necessity Defense. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1008–1013; *People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831–832.)

AUTHORITY

Elements ▸ Pen. Code, § 836.6
Specific Intent Not an Element of Completed Escape ▸ *People v. George* (1980) 109 Cal.App.3d 814, 819.
Attempt to Escape—Must Instruct on Direct Act and Specific Intent ▸ *People v. Gallegos* (1974) 39 Cal.App.3d 512, 517.
Escape Defined ▸ *People v. Lavaie* (1999) 70 Cal.App.4th 456, 459–461.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 97.

LESSER INCLUDED OFFENSES

Escape after remand or arrest is a misdemeanor unless the defendant used force or violence and caused serious bodily injury to a peace officer. (Pen. Code, § 836.6(c).) If the defendant is charged with the felony, then the misdemeanor is a lesser included offense. (See *People v. Gallegos* (1974) 39 Cal.App.3d 512, 518–519.) The court must provide the jury with a verdict form on which the jury will indicate if the additional elements have or have not been proved. If the jury finds that these elements have not been proved, then the offense should be set at a misdemeanor.

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STAFF NOTES

Penal Code, § 836.6:

> (a) It is unlawful for any person who is remanded by a magistrate or judge of any court in this state to the custody of a sheriff, marshal, or other police agency, to thereafter escape or attempt to escape from that custody.
>
> (b) It is unlawful for any person who has been lawfully arrested by any peace officer and who knows, or by the exercise of reasonable care should have known, that he or she has been so arrested, to thereafter escape or attempt to escape from that peace officer.
>
> (c) Any person who violates subdivision (a) or (b) is guilty of a misdemeanor, punishable by imprisonment in a county jail not to exceed one year. However, if the escape or attempted escape is by force or violence, and the person proximately causes a peace officer serious bodily injury, the person shall be punished by imprisonment in the state prison for two, three, or four years, or by imprisonment in a county jail not to exceed one year.

There are no reported cases on this statute. Thus, Staff drafted this instruction based on the authorities cited in the Staff Notes to Instructions 1950-1951, and on the other instructions already drafted by the Task Force.

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1953. Escape After Remand or Arrest: Force or Violence

If you find the defendant guilty of (escape/ [or] attempted escape) following (remand/arrest), you must then decide whether the People have proved the additional allegation that the defendant used force or violence and caused serious bodily injury to a peace officer.

To prove this allegation, the People must prove that:

1. **The defendant committed the (escape/ [or] attempted escape) by force or violence;**

AND

2. **The defendant caused serious bodily injury to a peace officer.**

As used here, *using force or violence* means the wrongful application of physical force against the person of another. To *use force* against a person means to touch the other person in a harmful or offensive manner.

[The People must prove that the defendant personally used force or violence or aided and abetted another in using force or violence. Mere knowledge that someone else used force or violence is not enough. Instruction[s] __ *<insert instruction numbers; see Bench Notes>* **explain[s] when a person aids and abets another.]**

A *serious bodily injury* means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (loss of consciousness/ concussion/ bone fracture/ protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).

[An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of injury. An act causes bodily injury to another person only if it is a substantial factor in causing the injury and the injury would not have happened without the act. A *substantial factor* is more than a trivial or

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remote factor. However, it does not need to be the only factor that causes the injury.]

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

The People have the burden of proving beyond a reasonable doubt that the defendant used force or violence and caused serious bodily injury to a peace officer. If the People have not met this burden, you must find that this allegation has not been proved.

_____

BENCH NOTES

Instructional Duty

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

This instruction **must** be given with Instruction 1952, Escape After Remand or Arrest. The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has or has not been proved the additional allegation of the use of force.

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.) If the evidence indicates that there was only one cause of injury, 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 injury, 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; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747.)

Give the bracketed paragraph that begins with "The People must prove that the defendant personally" if this is an issue in the case. (*People v. Moretto* (1994) 21 Cal.App.4th 1269, 1278.) Give also Instructions 500, Aiding and Abetting: General Principles, and 501, Aiding and Abetting: Intended Crimes.

The jury must determine whether the person who arrested the defendant is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445.) 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

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officers”). *(Ibid.)* However, the court may not instruct the jury that the person was a peace officer as a matter of law (e.g., “Officer Reed was a peace officer”). *(Ibid.)*

AUTHORITY

Elements ▸ Pen. Code, § 836.6.
Force or Violence Defined ▸ *People v. Lozano* (1987) 192 Cal.App.3d 618, 627; *People v. Bravot* (1986) 183 Cal.App.3d 93, 97.
Defendant Must Personally Use Force or Aid and Abet Another ▸ *People v. Moretto* (1994) 21 Cal.App.4th 1269, 1278.
Serious Bodily Injury Defined ▸ Pen. Code, § 243(f)(4); *People v. Talyor* (2004) 118 Cal.App.4th 11, 25, fn. 4.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 97.

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STAFF NOTES

See Notes to Instructions 1950-1952.

In the absence of other guidance, the definition of serious bodily injury from Penal Code section 243(f)(4) has been used.

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1954. Escape: Necessity Defense

If you conclude that the defendant (escaped/ [or] attempted to escape), that conduct was not illegal if the defendant can prove the defense of necessity. In order to establish this defense, the defendant must prove that:

1. **The defendant was faced with a specific threat of (death[,]/ [or] forcible sexual attack[,]/ [or] substantial bodily injury) in the immediate future;**

2. **(There was no time for the defendant to make a complaint to the authorities/ [or] (A/a) history of complaints that were not acted on existed, so that a reasonable person would conclude that any additional complaints would be ineffective);**

3. **There was no time or opportunity to seek help from the courts;**

4. **The defendant did not use force or violence against prison personnel or other people in the escape [other than the person who was the source of the threatened harm to the defendant];**

   AND

5. **The defendant immediately reported to the proper authorities when (he/she) had attained a position of safety from the immediate threat.**

The defendant has the burden of proving this defense by a preponderance of the evidence. This is a different standard of proof from proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each of the five listed items is true. If the defendant has not met this burden, (he/she) has not proved this defense.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the defense of necessity if there is sufficient evidence to raise a reasonable doubt. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1008–1013; *People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831–832.)

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AUTHORITY

Escape—Necessity Defense ▸ *People v. Condley* (1977) 69 Cal.App.3d 999, 1008–1013; *People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831–832.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 53.

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STAFF NOTES

Necessity Defense

> In *People* v. *Lovercamp*, [(1974)] 43 Cal.App.3d 823, this court held that in extremely limited circumstances a defense of necessity is available to prisoners charged with escape. In articulating the elements of the limited defense of necessity, we stated that the following conditions must exist: "(1) The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future; [para.] (2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory; [para.] (3) There is no time or opportunity to resort to the courts; [para.] (4) There is no evidence of force or violence used toward prison personnel or other 'innocent' persons in the escape; and [para.] (5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat. [Fn. omitted.]" (*Id*., at pp. 831-832.) . . .
>
> Under the limited circumstances described in *Lovercamp*, when the defendant's decision to escape is *objectively* the "only viable and reasonable choice available" we excuse the offense as being justified under the circumstances. . . .
>
> Unlike duress, under *Lovercamp* the threat is in the "immediate future." (Compare *People* v. *Otis*, *supra*, 174 Cal.App.2d 119, 125.) Furthermore, specific threats of substantial bodily injury, forcible sexual attack, as well as a threat against one's life may be utilized as a basis for the defense. Duress requires an imminent threat to one's life. . . .
>
> We conclude that by definition, the *Lovercamp* defense is founded upon public policy and provides a justification distinct from the elements required to prove escape. Therefore, the trial court correctly instructed the jury that the defendants had the burden of proving the defense by a preponderance of the evidence.

(*People v. Condley* (1977) 69 Cal.App.3d 999, 1008–1013; see also *People v. Webster* (1965) 237 Cal.App.2d 232, 237–238 [court correctly instructed that prisoner must turn himself in when coercion or threats have passed].)

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1960. Failure to File Tax Return

The defendant is charged [in Count __] with failing to (file a tax return with/ [or] supply information to) the Franchise Tax Board.

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

1. **The defendant was required to (file a tax return with/ [or] supply information to) the Franchise Tax Board;**

   AND

2. **The defendant did not (file the tax return/ [or] supply the information) by the required time.**

[If the People prove beyond a reasonable doubt that the Franchise Tax Board issued a certificate stating that (a return had not been filed/ [or] information had not been supplied) as required by law, you may but are not required to conclude that (the return was not filed/ [or] the information was not supplied).]

[If the People prove beyond a reasonable doubt that the defendant was the (president/ [or] chief operating officer) of a corporation, you may but are not required to conclude that the defendant is the person responsible for (filing a return with/ [or] supplying information to) the Franchise Tax Board as required for that corporation.]

[The People do not have to prove the exact amount of unreported income.]

[The People do not have to prove that the (unreported/ [or] underreported) income came from illegal activity.]

BENCH NOTES

Instructional Duty

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

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The two bracketed paragraphs that begin with "If the People prove beyond a reasonable doubt that" both explain rebuttable presumptions created by statute. (See Rev. & Tax. Code, §§ 19703, 19701(d); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505.) In accordance with *Roder*, the instructions have been written as permissive inferences. In addition, it is only appropriate to instruct the jury on a permissive inference if there is *no* evidence to contradict the inference. (Evid. Code, § 640.) If any evidence has been introduced to support the opposite factual finding, then the jury "shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." *(Ibid.)*

Therefore, the court **must not** give the bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that the Franchise Tax Board" if there is evidence that the return was filed or the information was supplied.

Similarly, the court **must not** give the bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that the defendant was the (president" if there is evidence that someone else was responsible for filing the return or supplying the information.

AUTHORITY

Elements ▸ Rev. & Tax. Code, § 19701(a).
Certificate of Franchise Tax Board ▸ Rev. & Tax. Code, § 19703.
President Responsible for Corporate Filings ▸ Rev. & Tax. Code, § 19701(d).
Mandatory Presumption Unconstitutional Unless Instructed as Permissive Inference ▸ *People v. Roder* (1983) 33 Cal.3d 491, 497–505.
Need Not Prove Exact Amount ▸ *United States v. Wilson* (3d Cir. 1979) 601 F.2d 95, 99; *United States v. Johnson* (1943) 319 U.S. 503, 517–518.
Need Not Prove From Illegal Activity ▸ *People v. Smith* (1984) 155 Cal.App.3d 1103, 1158.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 127.

COMMENTARY

Revenue and Taxation Code section 19701(a) does not require that the defendant's conduct be "willful" and specifically states that the act may be "[w]ith or without intent to evade." (Rev. & Tax. Code, § 19701(a).) Courts have held that this language creates a strict liability offense with no intent requirement. (*People v.*

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Allen (1993) 20 Cal.App.4th 846, 849; *People v. Kuhn* (1963) 216 Cal.App.2d 695, 698; *People v. Jones* (1983) 149 Cal.App.3d Supp. 41, 47.) In addition, in *People v. Hagen* (1998) 19 Cal.4th 652, 670, the court held that section 19701 was a lesser included offense of section 19705, willful failure to file a tax return. The court then concluded that the failure to instruct on the lesser included offense was not error since the "the evidence provided no basis for reasonable doubt as to willfulness." (*Id.* at p. 672.) Thus, it appears that "willfulness" is not an element of a violation of section 19701(a).

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STAFF NOTES

Rev. & Tax. Code, § 19701:

Any person who does any of the following is liable for a penalty of not more than five thousand dollars ($ 5,000):

(a) With or without intent to evade any requirement of Part 10 (commencing with Section 17001), Part 11 (commencing with Section 23001), or this part or any lawful requirement of the Franchise Tax Board, fails to file any return or to supply any information required, or who, with or without that intent, makes, renders, signs, or verifies any false or fraudulent return or statement, or supplies any false or fraudulent information.

(b) Aids, abets, advises, encourages, or counsels any person to evade the tax imposed by Part 10 (commencing with Section 17001) or Part 11 (commencing with Section 23001) by not filing any return or supplying any information required under Part 10 (commencing with Section 17001), Part 11 (commencing with Section 23001), or this part, or, by making, rendering, signing, or verifying any false or fraudulent return or statement, or by supplying false or fraudulent information.

(c) Under this part, is required to pay any estimated tax or tax, who willfully fails to pay that estimated tax or tax, at the time or times required by law or regulations.

The penalty shall be recovered in the name of the people in any court of competent jurisdiction. Counsel for the Franchise Tax Board may, upon request of the district attorney or other prosecuting attorney, assist the prosecuting attorney in presenting the law or facts to recover the penalty at the trial of a criminal proceeding for violation of this section.

That person is also guilty of a misdemeanor and shall upon conviction be fined not to exceed five thousand dollars ($ 5,000) or be imprisoned not to exceed one year, or both, at the discretion of the court, together with costs of investigation and prosecution.

(d) For purposes of subdivision (a), the president of a corporation, or the chief operating officer, is the person presumed to be responsible for filing any return or supplying information required from that corporation.

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Rev. & Tax. Code, § 19703:

> The certificate of the Franchise Tax Board to the effect that a return has not been filed or that information has not been supplied as required by this part is prima facie evidence that the return has not been filed or that the information has not been supplied.

Need Not Prove Exact Amount

> Because the defendants were indicted for preparing false returns, it was not necessary that the government prove the exact amounts of unreported income by the defendants. See *United States v. Johnson*, 319 U.S. 503, 517-18, 63 S. Ct. 1233, 87 L. Ed. 1546 (1943). It is enough if the prosecution shows that a substantial amount of income was not reported.

(*United States v. Wilson* (3rd Cir. 1979) 601 F.2d 95, 99.)

Federal pattern jury instructions on this issue state:

> The government must prove beyond a reasonable doubt that Defendant willfully attempted to evade or defeat a substantial portion of the tax owed.
>
> Although the government must prove a willful attempt to evade a substantial portion of tax, the government is not required to prove the precise amount of additional tax alleged in the indictment or the precise amount of (*additional*) tax owed.

(Federal Jury Practice and Instructions, Criminal (5th ed.), § 67.08.)

> The proof need not show the precise amount or all of the additional tax due as alleged in the indictment, but the government must prove beyond a reasonable doubt that the defendant attempted to evade or defeat payment of some substantial portion of the additional tax he knew he was required by law to pay.

(Pattern Jury Instructions of the District Judges Association of the Fifth Circuit, Criminal Cases, Instruction No. 2.95 (2001).)

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> Even though the indictment alleges a specific amount of tax due for each of the calendar years, the proof need not show the precise amount of the additional tax due. The Government is only required to establish, beyond a reasonable doubt, that the defendant attempted to evade a substantial income tax, whether greater or less than the amount charged in the indictment.

(Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 6.26.7201 (1997).)

> The proof need not show the precise amount of the additional tax due as alleged in the indictment, but it must be established beyond a reasonable doubt that the Defendant knowingly and willfully attempted to evade or defeat some substantial portion of such additional tax as charged.

(Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Offense Instruction No. 81.1 (1997).)

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> [N]either section 19405 nor 19406 require the prosecution to prove additionally the unreported or underreported income derived from any particular crime, such as theft. For tax fraud purposes, it is the falsity of the return which is important, and not whether the income was generated by legal or illegal means.

(*People v. Smith* (1984) 155 Cal.App.3d 1103, 1158; see also *Cohen* v. *United States* (9th Cir. 1962) 297 F.2d 760, 768, cert. den. 369 U.S. 865; *United States v. Miller* (9th Cir. 1976) 545 F.2d 1204, 1213, cert. den. 430 U.S. 930.)

Presumption re: Certificate

> Evid. Code, § 600:
>
> (a) A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence.
>
> (b) An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.

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Evid. Code, § 601:

> A presumption is either conclusive or rebuttable. Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof.

Evid. Code, § 602:

> A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption.

Evid. Code, § 604:

> The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate.

Evid. Code, § 607:

> When a presumption affecting the burden of proof operates in a criminal action to establish presumptively any fact that is essential to the defendant's guilt, the presumption operates only if the facts that give rise to the presumption have been found or otherwise established beyond a reasonable doubt, and, in such case, the defendant need only raise a reasonable doubt as to the existence of the presumed fact.

Based *solely* on the Evidence Code sections quoted above, Revenue and Taxation Code section 19703 creates a rebuttable presumption that if the Franchise Tax Board issued the certificate, the jury must conclude that the tax return was not filed. The prosecution must prove the basic fact beyond a reasonable doubt and the defendant can rebut the presumption by raising a reasonable doubt that he or she actually filed the document.

However, it would be reversible error for the court to instruct on this issue as a rebuttable presumption, as explained in *People v. Roder* (1983) 33 Cal.3d 491, 497–498:

> [The United States Supreme Court in *Ulster County Court v. Allen* (1979) 442 U.S. 140] emphasized that a sharp distinction must be drawn between two different types of devices: (1) "[an] entirely permissive inference or

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> presumption, which allows -- but does not require -- the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant" (*id*., at p. 157 [60 L.Ed.2d at p. 792]), and (2) "[a] mandatory presumption . . . [which] tells the trier that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." (Original italics.) (*Ibid*.) . . .
>
> [T]he court recognized that "[a] mandatory presumption is a far more troublesome evidentiary device" insofar as the reasonable doubt standard is concerned. (*Ibid*.) Because such a presumption tells the trier of fact that it *must* assume the existence of the ultimate, elemental fact from proof of specific, designated basic facts, it limits the jury's freedom independently to assess all of the prosecution's evidence in order to determine whether the facts of the particular case establish guilt beyond a reasonable doubt.n7
>
> N7. . . . Because a mandatory presumption *requires* the trier of fact to find that the elemental fact has been established when the presumption's terms have been met, such a device appears reconcilable with the prosecution's burden of proof under *Winship* only if the basic fact proved *compels* the inference of guilt beyond a reasonable doubt. . . .

Nor it the problem cured by the fact that the presumption is rebuttable:

> Although subdivision 2 also provides that this presumption "may . . . be rebutted by proof," the rebuttable nature of the presumption does not alter the fact that if the defendant decides to put the People to their proof, the statute *compels* the jury to presume that he had the requisite guilty knowledge simply from the prosecution's proof that he was a secondhand dealer who received stolen property under circumstances which called for a reasonable inquiry -- facts which might permit, but certainly would not require, the jury to find beyond a reasonable doubt that defendant knew the property was stolen. Thus, on its face, section 496 is a classic example of a "mandatory presumption" described in *Ulster County*, for it "tells the trier [of fact] that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts."

(*Id.* at p. 501.)

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The crucial inquiry is whether the jury was instructed in the language of a mandatory presumption or of a permissive inference:

> [A] determination of the nature of the presumption at issue in any case "requires careful attention to the words actually spoken to the jury [citation], for whether a defendant has been accorded his constitutional rights depends upon the way a reasonable juror could have interpreted the instruction" [Citation.] . . . .
>
> The instruction did not inform the jury that if it found the basic facts it could, but was not required to, infer guilty knowledge, but instead told the jury that upon finding the basic facts, it "shall presume" such knowledge unless it had a reasonable doubt. . . .
>
> [T]he presumption would not have operated merely as a permissive inference.

(*Id.* at pp. 502–505.)

Based on *Roder*, Staff has drafted the instruction regarding the relevance of the certificate as a permissive inference rather than a rebuttable presumption.

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1961. Willful Failure to File Tax Return

The defendant is charged [in Count __] with intentionally failing to (file a tax return with/ [or] supply information to) the Franchise Tax Board.

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

3. **The defendant was required to (file a tax return with/ [or] supply information to) the Franchise Tax Board;**

4. **The defendant did not (file the tax return/ [or] supply the information) by the time required;**

5. **The defendant voluntarily chose not to (file the tax return/ [or] supply the information), with the intent to violate a legal duty known to (him/her);**

   AND

6. **When the defendant made that choice, (he/she) intended to unlawfully evade paying a tax.**

[If the People prove beyond a reasonable doubt that the Franchise Tax Board issued a certificate stating that (a return had not been filed/ [or] information had not been supplied) as required by law, you may but are not required to conclude that (the return was not filed/ [or] the information was not supplied).]

[The People do not have to prove the exact amount of (unreported income/ [or] [additional] tax owed). The People must prove beyond a reasonable doubt that the defendant (failed to report a substantial amount of income/ [or] owed a substantial amount in [additional] taxes).]

[The People do not have to prove that the (unreported/ [or] underreported) income came from illegal activity.]

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

The statute states that the defendant's acts must be "willful." (Rev. & Tax. Code, § 19706.) As used in the tax code, "willful" means that the defendant must act "in voluntary, intentional violation of a known legal duty." (*People v. Hagen* (1998) 19 Cal.4th 652, 666.) The committee has chosen to use this description of the meaning of the term in place of the word "willful" to avoid confusion with other instructions that provide a different definition of "willful."

The bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that" explains a rebuttable presumption created by statute. (See Rev. & Tax. Code, § 19703; Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505.) In accordance with *Roder*, the instruction has been written as a permissive inference. In addition, it is only appropriate to instruct the jury on a permissive inference if there is *no* evidence to contradict the inference. (Evid. Code, § 640.) If any evidence has been introduced to support the opposite factual finding, then the jury "shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." *(Ibid.)*

Therefore, the court **must not** give the bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that" if there is evidence that the return was filed or the information was supplied.

Give the bracketed paragraph that begins with "The People do not have to prove the exact amount" on request. (*United States v. Wilson* (3d Cir. 1979) 601 F.2d 95, 99; Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08.) Federal cases have held that when intent to evade is an element of the offense, the prosecution must show that the amount owed in taxes or the amount of unreported income was substantial. (*United States v. Wilson, supra,* 601 F.2d at p. 99; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08.) "The word 'substantial' . . . is necessarily a relative term and not susceptible of an exact meaning." (*Canaday v. United States* (8th Cir. 1966) 354 F.2d 849, 852–853.) "It is not measured in terms of gross or net income nor by any particular percentage of the tax shown to be due and payable. All the attendant circumstances must be taken into consideration." (*United States v. Nunan* (2d Cir. 1956) 236 F.2d 576, 585, cert. den. (1957) 353 U.S. 912.) "Whether the tax evaded was 'substantial' is, therefore, a jury

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question . . . .” (Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08 [see also § 67.03, noting that “substantial” is generally not defined for the jury].)

Defenses—Instructional Duty
If there is sufficient evidence to raise a reasonable doubt that the defendant had a good faith belief that his or her conduct was legal, the court has a **sua sponte** duty to give the instruction on this defense. (*People v. Hagen* (1998) 19 Cal.4th 652, 660.) Give Instruction 1978, Defense: Good Faith Belief Conduct Legal.

If there is sufficient evidence to raise a reasonable doubt that the defendant relied on the advice of a professional, the court has a **sua sponte** duty to give the instruction on this defense. (*United States v. Mitchell* (4th Cir. 1974) 495 F.2d 285, 287–288; see Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.25.) Give Instruction 1979, Defense: Reliance on Professional Advice.

AUTHORITY

Elements ▸ Rev. & Tax. Code, § 19706.
Willful Requires Volitional Violation of Known Legal Duty ▸ *People v. Hagen* (1998) 19 Cal.4th 652, 666; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.20.
Evade a Tax Defined ▸ See *United States v. Bishop* (1973) 412 U.S. 346, 360, fn. 8; *Distinctive Theatres of Columbus v. Looker* (S.D.Ohio 1958) 165 F.Supp. 410, 411.
Certificate of Franchise Tax Board ▸ Rev. & Tax. Code, § 19703.
Mandatory Presumption Unconstitutional Unless Instructed as Permissive Inference ▸ *People v. Roder* (1983) 33 Cal.3d 491, 497–505.
Need Not Prove Exact Amount ▸ *United States v. Wilson* (3d Cir. 1979) 601 F.2d 95, 99; *United States v. Johnson* (1943) 319 U.S. 503, 517–518.
Need Not Prove From Illegal Activity ▸ *People v. Smith* (1984) 155 Cal.App.3d 1103, 1158.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 128.

LESSER INCLUDED OFFENSES

Failure to File Tax Return ▸ Rev. & Tax. Code, § 19701; *People v. Smith* (1984) 155 Cal.App.3d 1103, 1182–1183.

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STAFF NOTES

Rev. & Tax. Code, § 19706:

> Any person or any officer or employee of any corporation who, within the time required by or under the provisions of this part, willfully fails to file any return or to supply any information with intent to evade any tax imposed by Part 10 (commencing with Section 17001) or Part 11 (commencing with Section 23001), or who, willfully and with like intent, makes, renders, signs, or verifies any false or fraudulent return or statement or supplies any false or fraudulent information, is punishable by imprisonment in the county jail not to exceed one year, or in the state prison, or by fine of not more than twenty thousand dollars ($ 20,000), or by both the fine and imprisonment, at the discretion of the court, together with the costs of investigation and prosecution.

Rev. & Tax. Code, § 19703:

> The certificate of the Franchise Tax Board to the effect that a return has not been filed or that information has not been supplied as required by this part is prima facie evidence that the return has not been filed or that the information has not been supplied.

Willfully Requires Intentional Violation of Known Legal Duty

In *People v. Hagen* (1998) 19 Cal.4th 652, 666, the court held:

> [W]illfulness, as an element of the offense prohibited by former section 19405(a)(1) [current section 19705], requires the prosecution to prove the defendant made the perjurious statement in voluntary, intentional violation of a known legal duty.

The court analyzed the issue as follows:

> Section 7206(1) of the Internal Revenue Code (26 U.S.C. § 7206(1)) is virtually identical to our former section 19405(a)(1) and present section 19705, subdivision (a)(1). . . .
>
> In *United States v. Bishop* (1973) 412 U.S. 346 (*Bishop*), the high court comprehensively addressed the meaning of "willfully" in Internal Revenue Code section 7206(1) and other criminal tax fraud statutes. Echoing its earlier observation, in *United States v. Murdock* (1933) 290 U.S. 389, 394-

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> 395 [54 S. Ct. 223, 225-226, (*Murdock*), . . . the court held the term has a uniform meaning in the federal criminal tax statutes; it "generally connotes a voluntary, intentional violation of a known legal duty." (*Id*. at p. 360.) " 'It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care.' [Citation.] Degrees of negligence give rise in the tax system to civil penalties. . . . [Citations.]" (*Id*. at pp. 360-361.) In premising criminal liability on willfulness, the court explained, Congress "construct[ed] penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers." (*Id*. at p. 361.)
>
> In *United States v. Pomponio* (1976) 429 U.S. 10 (*Pomponio*), the high court addressed the adequacy of jury instructions defining "willfully" in a prosecution under Internal Revenue Code section 7206(1). The court reaffirmed its *Bishop* definition of willfulness as " 'a voluntary, intentional violation of a known legal duty' " (*Pomponio*, *supra*, at p. 12) and held the trial court adequately instructed on the subject when it told the jury a willful act was one done " 'voluntarily and intentionally and with the specific intent to do something which the law forbids, that is to say with [the] bad purpose either to disobey or to disregard the law.' " (*Id*. at p. 11, brackets in *Pomponio*.) . . .
>
> Congress, by including willfulness as an element of certain criminal tax laws, has accordingly created an exception to the common law presumption that ignorance or mistake of law is no defense. (*Ibid*.)

(*Id.* at pp. 659–660.)

In order to avoid confusion with other instructions, Staff has drafted the instruction without using the word “willfully,” using instead the definition provided by the court.

Federal Pattern Jury Instructions state:

> [Defendant] acted "willfully" if the law imposed a duty on him/her, he/she knew of the duty, and he/she voluntarily and intentionally violated that duty. Thus, if [defendant] acted in good faith, he/she cannot be guilty of this crime. The burden to prove intent, as with all other elements of the crime, rests with the government. This is a subjective standard: what did [defendant] honestly believe, not what a reasonable person should have believed. Negligence, even gross negligence, is not enough to meet the "willful" requirement.

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(Pattern Jury Instructions of the First Circuit, Criminal Cases, Instruction No. 4.25 (1998).)

> The word "willfully" means the voluntary and intentional violation of a known legal duty or the purposeful omission to do what the law requires. The defendant acted willfully if he/she was required by law to file an income tax return and intentionally failed to do so.

(Federal Criminal Jury Instructions of the Seventh Circuit, Instruction No. 7203, p. 419 (1999).)

> The word willfully means the voluntary and intentional violation of a known legal duty or the purposeful omission to do what the law requires. The defendant acted willfully if he/she knew it was his/her legal duty to file truthful [individual, corporate, partnership, trust] tax returns, and intentionally filed [a] false return[s].

(Federal Criminal Jury Instructions of the Seventh Circuit, Instruction No. 7206, p. 421 (1999).)

> To act "willfully" means to voluntarily and intentionally violate a known legal duty.

(Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction Nos. 6.26.7201, 6.26.7203, and 6.26.7206 (2000).)

See also pattern instruction cited in Staff Notes to Instruction 1965.

Intent to Evade—Must Be Shown in Addition to "Willfulness"

> To avoid reading this specific intent out of the statute, section 19406 violations must involve proof the defendant had an intent to evade taxation when he submitted a false return. **The wilfulness adds to the intent to evade that defendant achieved this intent voluntarily and intentionally. These elements together comprise the mental state involved in a section 19406 violation.**

(*People v. Smith* (1984) 155 Cal.App.3d 1103, 1157.)

In *Spies v. United States* (1943) 317 U.S. 492, 499, the defendant was charged with a federal offense for "willfully attempting to evade a tax" as a result of not filing returns.

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The court addressed the issue of what distinguished this offense from the misdemeanor offense of willfully failing to file a return:

> Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.
>
> Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished "in any manner." By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime.

Evade-Defined

The Eight Circuit Model Instruction provides this definition of “evade”:

> To "evade and defeat" a tax means to escape paying a tax by means other than lawful avoidance.

(Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 6.26.7201 (2003).)

In the use notes, the committee cites the following two passages:

> Semantic confusion sometimes has been created when courts discuss the express requirement of an "attempt to evade" in § 7201 as if it were implicit in the word "willfully" in that statute. This type of analysis produces language suggesting that "willfully" in § 7201 has a different meaning from the same term in § 7203. [Citations.] This Court may be somewhat responsible for this imprecision because a similar analysis was employed in *Spies* v. *United States*, 317 U.S. 492, 497-499 (1943). Greater clarity might well result from an analysis that distinguishes the express

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> elements, such as an "attempt to evade," prescribed by § 7201, from the uniform requirement of willfulness.

(*United States v. Bishop* (1973) 412 U.S. 346, 360, fn. 8.)

> It is generally considered that it is not wrong or illegal to 'avoid' taxes. Much literature is published on the subject of how to avoid taxes. The wrong and illegal procedure arises when people evade taxes. One meaning of the word 'avoid' as given in Webster's New International Dictionary is 'To keep away from; to keep clear of; to endeavor not to meet; to shun; to abstain from; as to avoid evil'. 'Evade' is defined as: 'To get away from by artifice; to avoid by dexterity, subterfuge, address, or ingenuity; to escape from cleverly'.

(*Distinctive Theatres of Columbus v. Looker* (S.D. Ohio 1958) 165 F.Supp. 410, 411.) In this case, theater did not charge patrons admissions but placed a basket for donations at the front and rear of the theater. The court held that although this was a means to "avoid" taxes, it was not a means to "evade" taxes. (*Ibid.)*

Need Not Prove Exact Amount—Must be Substantial

> Because the defendants were indicted for preparing false returns, it was not necessary that the government prove the exact amounts of unreported income by the defendants. See *United States v. Johnson*, 319 U.S. 503, 517-18, 63 S. Ct. 1233, 87 L. Ed. 1546 (1943). It is enough if the prosecution shows that a substantial amount of income was not reported.

(*United States v. Wilson* (3rd Cir. 1979) 601 F.2d 95, 99.)

"The word 'substantial' . . . is necessarily a relative term and not susceptible of an exact meaning." (*Canaday v. United States* (8th Cir.1966) 354 F.2d 849, 852–853.) "It is not measured in terms of gross or net income nor by any particular percentage of the tax shown to be due and payable. All the attendant circumstances must be taken into consideration." (*United States v. Nunan* (2d Cir.1956) 236 F.2d 576, 585, cert. denied, 353 U.S. 912, 77 S.Ct. 661, 1 L.Ed.2d 665 (1957)). "Whether the tax evaded was 'substantial' is, therefore, a jury question . . ." (Federal Jury Practice and Instructions, Criminal (5th ed.), § 67.08 [see also § 67.03, noting that "substantial" is generally not defined for the jury].)

Examples from prior cases of what has been found to be "substantial" are of limited use given the problem of accounting for inflation. May cases do not include precise numbers

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but simply conclude that the jury's determination that the amount was substantial is supported by the evidence.

Federal pattern jury instructions on this issue state:

> The government must prove beyond a reasonable doubt that Defendant willfully attempted to evade or defeat a substantial portion of the tax owed.
>
> Although the government must prove a willful attempt to evade a substantial portion of tax, the government is not required to prove the precise amount of additional tax alleged in the indictment or the precise amount of (*additional*) tax owed.

(Federal Jury Practice and Instructions, Criminal (5th ed.), § 67.08.)

> The proof need not show the precise amount or all of the additional tax due as alleged in the indictment, but the government must prove beyond a reasonable doubt that the defendant attempted to evade or defeat payment of some substantial portion of the additional tax he knew he was required by law to pay.

(Pattern Jury Instructions of the District Judges Association of the Fifth Circuit, Criminal Cases, Instruction No. 2.95 (2001).)

> Even though the indictment alleges a specific amount of tax due for each of the calendar years, the proof need not show the precise amount of the additional tax due. The Government is only required to establish, beyond a reasonable doubt, that the defendant attempted to evade a substantial income tax, whether greater or less than the amount charged in the indictment.

(Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 6.26.7201 (1997).)

> The proof need not show the precise amount of the additional tax due as alleged in the indictment, but it must be established beyond a reasonable doubt that the Defendant knowingly and willfully attempted to evade or defeat some substantial portion of such additional tax as charged.

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(Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Offense Instruction No. 81.1 (1997).)

Need Not Be From illegal Source
See Notes to Instruction 1960.

Presumption re: Certificate
See Notes to Instruction 1960.

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1962. False Tax Return

The defendant is charged [in Count __] with (supplying (false/ [or] fraudulent) information to the Franchise Tax Board/(making[,]/ [or] verifying[,]/ [or] signing[,]/ [or] rendering) a (false/ [or] fraudulent) (tax return/ [or] statement)).

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

7. The defendant (supplied information to the Franchise Tax Board/(made[,]/ [or] verified[,]/ [or] signed[,]/ [or] rendered) a (tax return/ [or] statement));

8. The (information[,]/ [or] tax return[,]/ [or] statement) was (false/ [or] fraudulent);

AND

<Alternative 3A—information>

[3. When the defendant supplied the information, (he/she) knew that it was (false/ [or] fraudulent).

<Alternative 3B—tax return or statement>

[3. When the defendant (made[,]/ [or] verified[,]/ [or] signed [,]/ [or] rendered) the (tax return/ [or] statement), (he/she) knew that it contained (false/ [or] fraudulent) information.]

[If the People prove beyond a reasonable doubt that the defendant was the (president/ [or] chief operating officer) of a corporation, you may but are not required to conclude that the defendant is the person responsible for (filing a return with / [or] supplying information to) the Franchise Tax Board as required for that corporation.]

[The People do not have to prove the exact amount of (unreported income/ [or] [additional] tax owed).]

[The People do not have to prove that the (unreported/ [or] underreported) income came from illegal activity.]

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BENCH NOTES

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

The bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that" explains a rebuttable presumption created by statute. (See Rev. & Tax. Code, § 19701(d); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505.) In accordance with *Roder*, the instruction has been written as a permissive inference. In addition, it is only appropriate to instruct the jury on a permissive inference if there is *no* evidence to contradict the inference. (Evid. Code, § 640.) If any evidence has been introduced to support the opposite factual finding, then the jury "shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." *(Ibid.)*

Therefore, the court **must not** give the bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that" if there is evidence that someone else was responsible for filing the return or supplying the information.

AUTHORITY

Elements ▸ Rev. & Tax. Code, § 19701(a).
President Responsible for Corporate Filings ▸ Rev. & Tax. Code, § 19701(d).
Mandatory Presumption Unconstitutional Unless Instructed as Permissive Inference ▸ *People v. Roder* (1983) 33 Cal.3d 491, 497–505.
Need Not Prove Exact Amount ▸ *United States v. Wilson* (3d Cir. 1979) 601 F.2d 95, 99; *United States v. Johnson* (1943) 319 U.S. 503, 517–518.
Need Not Prove From Illegal Activity ▸ *People v. Smith* (1984) 155 Cal.App.3d 1103, 1158.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 127.

COMMENTARY

Revenue and Taxation Code section 19701(a) does not require that the defendant's conduct be "willful" and specifically states that the act may be "[w]ith or without intent to evade." (Rev. & Tax. Code, § 19701(a).) In the context of failure to file a tax return, courts have held that this language creates a strict liability offense with

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no intent requirement. (*People v. Allen* (1993) 20 Cal.App.4th 846, 849; *People v. Kuhn* (1963) 216 Cal.App.2d 695, 698; *People v. Jones* (1983) 149 Cal.App.3d Supp. 41, 47.) In addition, in *People v. Hagen* (1998) 19 Cal.4th 652, 670, the court held that section 19701 was a lesser included offense of section 19705, willful failure to file a tax return. (*Id.* at p. 670.) The court then concluded that the failure to instruct on the lesser included offense was not error since the "the evidence provided no basis for reasonable doubt as to willfulness." (*Id.* at p. 672.) Thus, it appears that "willfulness" is not an element of a violation of section 19701(a).

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STAFF NOTES

Rev. & Tax. Code, § 19701:

> Any person who does any of the following is liable for a penalty of not more than five thousand dollars ($ 5,000):
>
> (a) With or without intent to evade any requirement of Part 10 (commencing with Section 17001), Part 11 (commencing with Section 23001), or this part or any lawful requirement of the Franchise Tax Board, fails to file any return or to supply any information required, or who, with or without that intent, makes, renders, signs, or verifies any false or fraudulent return or statement, or supplies any false or fraudulent information. . . .
>
> The penalty shall be recovered in the name of the people in any court of competent jurisdiction. Counsel for the Franchise Tax Board may, upon request of the district attorney or other prosecuting attorney, assist the prosecuting attorney in presenting the law or facts to recover the penalty at the trial of a criminal proceeding for violation of this section.
>
> That person is also guilty of a misdemeanor and shall upon conviction be fined not to exceed five thousand dollars ($ 5,000) or be imprisoned not to exceed one year, or both, at the discretion of the court, together with costs of investigation and prosecution.
>
> (d) For purposes of subdivision (a), the president of a corporation, or the chief operating officer, is the person presumed to be responsible for filing any return or supplying information required from that corporation.

Need Not Prove Exact Amount
See Notes to Instruction 1960.

Need Not Be From illegal Source
See Notes to Instruction 1960.

Presumption re: Certificate
See Notes to Instruction 1960.

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1963. Willfully Filing False Tax Return: Statement Made Under Penalty of Perjury

The defendant is charged [in Count __] with intentionally making and signing a (false/ [or] inaccurate) (tax return[,]/ [or] statement[,]/ [or other] document) provided to the Franchise Tax Board.

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

9. **The defendant made and signed a (tax return[,]/ [or] statement[,]/ [or other] document) provided to the Franchise Tax Board;**

10. **The (tax return[,]/ [or] statement[,]/ [or other] document) (contained/ [or] was verified by) a written declaration that it was made under penalty of perjury;**

11. **The (tax return[,]/ [or] statement[,]/ [or other] document) contained a material statement that was (false/ [or] inaccurate);**

12. **When the defendant made and signed the (tax return[,]/ [or] statement[,]/ [or other] document), (he/she) did not believe that the document was true and correct about every material matter;**

    AND

13. **When the defendant acted, (he/she) did so voluntarily, with the intent to violate a legal duty known to (him/her).**

A (false/ [or] inaccurate) statement is *material* if a reasonable person would believe that it could influence the calculation or monitoring of the tax a (person/ [or] corporation) owes. [Although the People must prove that the statement was material, the People do not have to prove that any additional tax was owed to the government.]

[If the People prove beyond a reasonable doubt that the defendant's name is signed to a (return[,]/ [or] statement[,]/ [or other] document) filed with the Franchise Tax Board, you may but are not required to conclude that the defendant was the person who actually signed the document.] [A document

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can be filed using (a/an) (computer modem[,]/ [or] magnetic media[,]/ [or] optical disk[,]/ [or] facsimile machine[,]/ [or] telephone).]

[The People do not have to prove the exact amount of (unreported income/ [or] [additional] tax owed).]

[The People do not have to prove that the (unreported/ [or] underreported) income came from illegal activity.]

BENCH NOTES

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

Two statutes prohibit willfully making a false return. (Rev. & Tax. Code, §§ 19705(a)(1), 19706.) Section 19705(a)(1) requires verification under penalty of perjury whereas section 19706 requires an intent to evade. (*People v. Hagen* (1998) 19 Cal.4th 652, 659.) Give this instruction if the defendant is charged with a violation of section 19705(a)(1). If the defendant is charged with a violation of section 19706, give Instruction 1964, Willfully Filing False Tax Return: Intent to Evade.

The statute states that the defendant's acts must be "willful." (Rev. & Tax. Code, § 19705(a)(1).) As used in the tax code, "willful" means that the defendant must act "in voluntary, intentional violation of a known legal duty." (*People v. Hagen* (1998) 19 Cal.4th 652, 666.) The committee has chosen to use this description of the meaning of the term in place of the word "willful" to avoid confusion with other instructions that provide a different definition of "willful."

In the definition of "material," give the bracketed sentence beginning with "Although the People must prove that the statement was material" if requested. (*United States v. Ballard* (8th Cir. 1976) 535 F.2d 400, 404; Federal Jury Practice and Instructions, Criminal (5th ed.) §§ 67.15, 67.19.)

The bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that" explains a rebuttable presumption created by statute. (See Rev. & Tax. Code, § 19075(c); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505.) In accordance with *Roder*, the instruction has been written as a permissive inference. In addition, it is only appropriate to instruct the jury on a permissive inference

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if there is *no* evidence to contradict the inference. (Evid. Code, § 640.) If any evidence has been introduced to support the opposite factual finding, then the jury "shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." *(Ibid.)*

Therefore, the court **must not** give the bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that" if there is evidence that the defendant did not sign the document.

Defenses—Instructional Duty

If there is sufficient evidence to raise a reasonable doubt that the defendant had a good faith belief that his or her conduct was legal, the court has a **sua sponte** duty to give the instruction on this defense. (*People v. Hagen* (1998) 19 Cal.4th 652, 660.) Give Instruction 1978, Defense: Good Faith Belief Conduct Legal.

If there is sufficient evidence to raise a reasonable doubt that the defendant relied on the advice of a professional, the court has a **sua sponte** duty to give the instruction on this defense. (*United States v. Mitchell* (4th Cir. 1974) 495 F.2d 285, 287–288; see Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.25.) Give Instruction 1979, Defense: Reliance on Professional Advice.

AUTHORITY

Elements ▸ Rev. & Tax. Code, § 19705(a)(1); see Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.15.

Willful Requires Volitional Violation of Known Legal Duty ▸ *People v. Hagen* (1998) 19 Cal.4th 652, 666; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.20.

False or Inaccurate Statement Required ▸ *People v. Hagen* (1998) 19 Cal.4th 652, 670.

Material Defined ▸ *People v. Hagen* (1998) 19 Cal.4th 652, 667–668.

Mandatory Presumption Unconstitutional Unless Instructed as Permissive Inference ▸ *People v. Roder* (1983) 33 Cal.3d 491, 497–505.

Need Not Prove Exact Amount ▸ *United States v. Wilson* (3d Cir. 1979) 601 F.2d 95, 99; *United States v. Johnson* (1943) 319 U.S. 503, 517–518.

Need Not Prove From Illegal Activity ▸ *People v. Smith* (1984) 155 Cal.App.3d 1103, 1158.

Electronic Technology Defined ▸ Rev. & Tax. Code, § 18621.5.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 128.

LESSER INCLUDED OFFENSES

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Filing False Tax Return ▸ Rev. & Tax. Code, § 19701; *People v. Hagen* (1998) 19 Cal.4th 652, 670.

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STAFF NOTES

Rev. & Tax. Code, § 19705, in relevant part:

(a) Any person who does any of the following shall be guilty of a felony and, upon conviction, shall be fined not more than fifty thousand dollars ($ 50,000) or imprisoned in the state prison, or both, together with the costs of investigation and prosecution:

(1) Willfully makes and subscribes any return, statement, or other document, that contains or is verified by a written declaration that it is made under penalty of perjury, and he or she does not believe to be true and correct as to every material matter. . . .

(b) In the case of a corporation, the fifty thousand dollars ($ 50,000) limitation specified in subdivision (a) shall be increased to two hundred thousand dollars ($ 200,000).

(c) The fact that an individual's name is signed to a return, statement, or other document filed, including a return, statement, or other document filed using electronic technology pursuant to Section 18621.5, shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him or her.

The penalty shall be recovered in the name of the people in any court of competent jurisdiction. Counsel for the Franchise Tax Board may, upon request of the district attorney or other prosecuting attorney, assist the prosecuting attorney in presenting the law or facts to recover the penalty at the trial of a criminal proceeding for violation of this section.

That person is also guilty of a misdemeanor and shall upon conviction be fined not to exceed five thousand dollars ($ 5,000) or be imprisoned not to exceed one year, or both, at the discretion of the court, together with costs of investigation and prosecution.

(d) For purposes of this section, "person" means the taxpayer, any member of the taxpayer's family, any corporation, agent, fiduciary, or representative of, or any other individual or entity acting on behalf of, the taxpayer, or any other corporation or entity owned or controlled by the taxpayer, directly or indirectly, or which owns or controls the taxpayer, directly or indirectly.

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Rev. & Tax. Code, § 18621.5, in relevant part:

> (f) "Electronic technology" includes, but is not limited to, computer modem, magnetic media, optical disk, facsimile machine, or telephone.

Federal Pattern Jury Instructions on Analogous Crime

> [Defendant] is charged with willfully filing a false federal income tax return. For you to find [defendant] guilty of this charge, the government must prove each of the following things beyond a reasonable doubt:
>
> *First,* that [defendant] signed a federal income tax return containing a written declaration that it was being signed under the penalties of perjury;
>
> *Second,* that [defendant] did not believe that every material matter in the return was true and correct; and
>
> *Third,* that [defendant] willfully made the false statement with the intent of violating his/her duty under the tax laws and not as a result of accident, negligence or inadvertence.
>
> A "material" matter is one that is likely to affect the calculation of tax due and payable, or to affect or influence the IRS in carrying out the functions committed to it by law, such as monitoring and verifying tax liability. A return that omits material items necessary to the computation of taxable income is not true and correct.

(Pattern Jury Instructions of the First Circuit, Criminal Cases, Instruction No. 4.27 (1998).)

> Title 26, United States Code, Section 7206(1), makes it a crime for anyone willfully to make a false material statement on an income tax return.
>
> For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:
>
> *First:* That the defendant signed an income tax return that contained a written declaration that it was made under penalties of perjury;

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Second: That in this return the defendant falsely stated that _____ [state material matters asserted, e.g., the defendant received gross income of $_____ during the year_____];
Third: That the defendant knew the statement was false;

Fourth: That the false statement was material; and

Fifth: That the defendant made the statement willfully, that is, with intent to violate a known legal duty.

A statement is "material" if it has a natural tendency to influence, or is capable of influencing, the Internal Revenue Service in investigating or auditing a tax return or in verifying or monitoring the reporting of income by a taxpayer.

(Pattern Jury Instructions of the District Judges Association of the Fifth Circuit, Criminal Cases, Instruction No. 2.96 (2001). **)**

The crime of willfully making and subscribing to a false (describe document, e.g., income tax return) as charged in [Count[s] _____ of] the indictment, has five essential elements, which are:

One, the defendant made and signed (describe document, e.g., an individual income tax return, Form 1040,) 1 for the year in question, that was false as to [describe material matters, e.g., income); 2

Two, the return contained a written declaration that it was signed under the penalties of perjury;

Three, the defendant did not believe the return to be true and correct as to [describe material matter, e.g., income]; 3

Four, the defendant acted willfully; and

Five, the false matter in the (describe document, e.g., income tax return) was material. 4

The tax return in question must be false as to (describe material matter, e.g., income) 5 that is (e.g., that the defendant must have received income in addition to that reported on [his] [her] return, regardless of the amount).

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> 6 However, the Government is not required to prove that the defendant owed an additional tax for the years in issue. Whether the Government has or has not suffered a monetary loss as a result of the alleged return is not an element of this offense. 7
>
> The fact that an individual's name 8 is signed to a return means that, unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find that a filed tax return was in fact signed by the person whose name appears to be signed to it. If you find proof beyond a reasonable doubt that the defendant had signed [his] [her] tax return, that is evidence from which you may, but are not required to, find or infer that the defendant had knowledge of the contents of the return. 9
>
> To act "willfully" means to voluntarily and intentionally violate a known legal duty. 10
>
> [False matter in a (describe document, e.g., income tax return) is "material" if the matter was capable of influencing the Internal Revenue Service.]

(Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 6.26.7206 (2003).)

Willfully Requires Intentional Violation of Known Legal Duty
See Notes to Instruction 1961.

Statement Must Be False or Inaccurate

> [Although] the statute does not explicitly require falsity, its language, history and purpose all suggest it was not intended to punish the purely subjective state of intending to lie on one's tax return. . . .
>
> [W]e conclude that falsity or inaccuracy of the return, statement or other document is an element of the offense prohibited in former section 19405(a)(1) and that the misdemeanor offense, former section 19401(a), is therefore necessarily included therein.

(*People v. Hagen* (1998) 19 Cal.4th 652, 667–670.)

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Materiality—Defined

> The test for materiality in this context has been variously stated. (See *U.S. v. Mittelstaedt* (2d Cir. 1994) 31 F.3d 1208, 1221 [information material because it " 'had the potential for hindering the IRS's efforts to monitor and verify [defendant's] tax liability' "]; *United States v. Taylor* (5th Cir. 1978) 574 F.2d 232, 235 ["whether the information is essential in order to permit the Internal Revenue Service to verify and monitor the reporting of income"]; *Smith, supra*, 155 Cal. App. 3d at p. 1157, quoting *United States v. Null* (4th Cir. 1969) 415 F.2d 1178, 1181 [" 'whether a particular item must be reported in order that the taxpayer estimate and compute his tax correctly' "].) Whatever the precise standard, materiality clearly requires some *objective* potential for interference with the calculation or monitoring of income or tax liability.

(*People v. Hagen* (1998) 19 Cal.4th 652, 667–668.)

> To obtain a conviction on the tax offense at issue, the Government must prove that the defendant filed a tax return "which he does not believe to be true and correct as to every material matter." 26 U.S.C. § 7206(1). In general, a false statement is material if it has "a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed." *United States* v. *Gaudin*, 515 U.S. 506 at 509, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (quoting *Kungys* v. *United States*, 485 U.S. 759, 770, 99 L. Ed. 2d 839, 108 S. Ct. 1537 (1988) (internal quotation marks omitted)).

(*Neder v. United States* (1999) 527 U.S. 1, 15.)

Need Not Prove Exact Amount

See Notes to Instruction 1960.

Need Not Be From illegal Source

See Notes to Instruction 1960.

Presumption re: Signature

See Notes to Instruction 1960.

Lack of Belief in Truth Not Same as Knowledge of Falsity

> Lack of belief in the return's correctness may not be precisely equivalent to knowledge of its falsity; the prosecutor in a given case might at least

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> argue that a taxpayer who recklessly failed to discover the truth regarding information demanded on a return and who, for that reason, did not know the return to be false, nonetheless did not "believe [the return] to be true and correct." (See *Bishop*, *supra*, 412 U.S. at p. 361, fn. 9 [declining to address this question].) A taxpayer, moreover, might knowingly omit information from a tax return in the mistaken belief that he or she was not required to report that information. Such a taxpayer, arguably, would not believe the return to be entirely "true and correct." He or she would also have acted "willfully" under the Penal Code section 7 definition, but not under the federal tax crime definition. For the reasons already given, we believe applying the latter definition accords with the probable object of former section 19405(a)(1); our Legislature, like the federal Congress, most likely did not intend to treat such a taxpayer as harshly as one who, knowing of a duty to report, intentionally fails to do so.

(*People v. Hagen* (1998) 19 Cal.4th 652, 665.)

Section 19705 Compared With Section 19706

> [Section 19706 is an] overlapping tax evasion statute that requires intent to evade taxation but does not require verification under penalty of perjury.

(*People v. Hagen* (1998) 19 Cal.4th 652, 659.)

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1964. Willfully Filing False Tax Return: Intent to Evade Tax

The defendant is charged [in Count __] with (supplying (false/ [or] fraudulent) information/(making[,]/ [or] verifying [,]/ [or] signing[,]/ [or] rendering) a (false/ [or] fraudulent) (tax return/ [or] statement) provided) to the Franchise Tax Board with intent to evade a tax.

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

14. The defendant (supplied information/(made[,]/ [or] verified[,]/ [or] signed[,]/ [or] rendered) a (tax return/ [or] statement) provided) to the Franchise Tax Board;

15. The (information[,]/[or] tax return[,]/ [or] statement) was (false/ [or] fraudulent);

<Alternative 3A—information>

[3. When the defendant supplied the information, (he/she) knew that it was (false/ [or] fraudulent);]

<Alternative 3B—tax return or statement>

[3. When the defendant (made[,]/ [or] verified[,]/ [or] signed[,]/ [or] rendered) the (tax return/ [or] statement), (he/she) knew that it contained false or fraudulent information;]

4. When the defendant acted, (he/she) did so voluntarily, with intent to violate a legal duty known to (him/her);

AND

5. When the defendant acted, (he/she) intended to unlawfully evade paying a tax.

[The People do not have to prove the exact amount of (unreported income/ [or] [additional] tax owed). The People must prove beyond a reasonable doubt that the defendant (failed to report a substantial amount of income/ [or] owed a substantial amount in [additional] taxes).]

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[The People do not have to prove that the (unreported/ [or] underreported) income came from illegal activity.]

BENCH NOTES

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

Two statutes prohibit willfully making a false return. (Rev. & Tax. Code, §§ 19705(a)(1), 19706.) Section 19705(a)(1) requires verification under penalty of perjury whereas section 19706 requires an intent to evade. (*People v. Hagen* (1998) 19 Cal.4th 652, 659.) Give this instruction if the defendant is charged with a violation of section 19706. If the defendant is charged with a violation of section 19705(a)(1), give Instruction 1963, Willfully Filing False Tax Return: Statement Made Under Penalty of Perjury.

The statute states that the defendant's acts must be "willful." (Rev. & Tax. Code, § 19706.) As used in the tax code, "willful" means that the defendant must act "in voluntary, intentional violation of a known legal duty." (*People v. Hagen* (1998) 19 Cal.4th 652, 666.) The committee has chosen to use this description of the meaning of the term in place of the word "willful" to avoid confusion with other instructions that provide a different definition of "willful."

Give the bracketed paragraph that begins with "The People do not have to prove the exact amount" on request. (*United States v. Wilson* (3d Cir. 1979) 601 F.2d 95, 99; Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08.) Federal cases have held that when intent to evade is an element of the offense, the prosecution must show that the amount owed in taxes or the amount of unreported income was substantial. (*United States v. Wilson, supra,* 601 F.2d at p. 99; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08.) "The word 'substantial' . . . is necessarily a relative term and not susceptible of an exact meaning." (*Canaday v. United States* (8th Cir. 1966) 354 F.2d 849, 852–853.) "It is not measured in terms of gross or net income nor by any particular percentage of the tax shown to be due and payable. All the attendant circumstances must be taken into consideration." (*United States v. Nunan* (2d Cir. 1956) 236 F.2d 576, 585, cert. den. (1957) 353 U.S. 912.) "Whether the tax evaded was 'substantial' is, therefore, a jury question . . . ." (Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08 [see also § 67.03, noting that "substantial" is generally not defined for the jury].)

Defenses—Instructional Duty

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If there is sufficient evidence to raise a reasonable doubt that the defendant had a good faith belief that his or her conduct was legal, the court has a **sua sponte** duty to give the instruction on this defense. (*People v. Hagen* (1998) 19 Cal.4th 652, 660.) Give Instruction 1978, Defense: Good Faith Belief Conduct Legal.

If there is sufficient evidence to raise a reasonable doubt that the defendant relied on the advice of a professional, the court has a **sua sponte** duty to give the instruction on this defense. (*United States v. Mitchell* (4th Cir. 1974) 495 F.2d 285, 287–288; see Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.25.) Give Instruction 1979, Defense: Reliance on Professional Advice.

AUTHORITY

Elements ▸ Rev. & Tax. Code, § 19706.

Evade a Tax Defined ▸ See *United States v. Bishop* (1973) 412 U.S. 346, 360, fn. 8; *Distinctive Theatres of Columbus v. Looker* (S.D.Ohio 1958) 165 F.Supp. 410, 411.

Willful Requires Volitional Violation of Known Legal Duty ▸ *People v. Hagen* (1998) 19 Cal.4th 652, 666; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.20.

Need Not Prove Exact Amount ▸ *United States v. Wilson* (3d Cir. 1979) 601 F.2d 95, 99; *United States v. Johnson* (1943) 319 U.S. 503, 517–518.

Need Not Prove From Illegal Activity ▸ *People v. Smith* (1984) 155 Cal.App.3d 1103, 1158.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 128.

LESSER INCLUDED OFFENSES

Filing False Tax Return ▸ Rev. & Tax. Code, § 19701; *People v. Hagen* (1998) 19 Cal.4th 652, 670.

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STAFF NOTES

Rev. & Tax. Code, § 19706:

> Any person or any officer or employee of any corporation who, within the time required by or under the provisions of this part, willfully fails to file any return or to supply any information with intent to evade any tax imposed by Part 10 (commencing with Section 17001) or Part 11 (commencing with Section 23001), or who, willfully and with like intent, makes, renders, signs, or verifies any false or fraudulent return or statement or supplies any false or fraudulent information, is punishable by imprisonment in the county jail not to exceed one year, or in the state prison, or by fine of not more than twenty thousand dollars ($ 20,000), or by both the fine and imprisonment, at the discretion of the court, together with the costs of investigation and prosecution.

Willfully Requires Intentional Violation of Known Legal Duty

See Notes to Instructions 1961.

Intent to Evade

See Notes to Instruction 1961.

Need Not Prove Exact Amount

See Notes to Instruction 1960.

Need Not Be From illegal Source

See Notes to Instruction 1960.

Section 19705 Compared With Section 19706

> [Section 19706 is an] overlapping tax evasion statute that requires intent to evade taxation but does not require verification under penalty of perjury.

(*People v. Hagen* (1998) 19 Cal.4th 652, 659.)

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1965. Aiding in Preparation of False Tax Return

The defendant is charged [in Count __] with (aiding in[,]/ [or] assisting in[,]/ [or] procuring[,]/ [or] counseling[,]/ [or] advising) the (preparation/ [or] presentation) of a (false/ [or] fraudulent) (tax return[,]/ [or] affidavit[,]/ [or] claim[,]/ [or other] document).

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

16. The defendant (aided in[,]/ assisted in[,]/ [or] procured[,]/ [or] counseled[,]/ [or] advised) the (preparation/ [or] presentation) of a (tax return[,]/ [or] affidavit[,]/ [or] claim[,]/ [or other] document) required under the (personal income/corporation) tax laws;

17. The (tax return[,]/ [or] affidavit[,]/ [or] claim[,]/ [or other] document) contained a material statement that was (false/ [or] fraudulent);

<See Bench Notes on element 3.>

[3. The defendant knew that the (tax return[,]/ [or] affidavit[,]/ [or] claim[,]/ [or other] document) contained a (false/ [or] fraudulent) statement;]

AND

(3/4). When the defendant acted, (he/she) did so voluntarily, with intent that a known legal duty would be violated.

A (false/ [or] fraudulent) statement is *material* if a reasonable person would believe that it could influence the calculation or monitoring of the tax a (person/ [or] corporation) owes. [Although the People must prove that the statement was material, the People do not have to prove that any additional tax was owed to the government.]

The People do not need to prove that the taxpayer knew the (tax return[,]/ [or] affidavit[,]/ [or] claim[,]/ [or other] document) contained a (false/ [or] fraudulent) statement.

[Someone *aids* in the (preparation/ [or] presentation) of a (false/ [or] fraudulent) (tax return[,]/ [or] affidavit[,]/ [or] claim[,]/ [or other] document) if, before or during the (preparation/ [or] presentation) of the document, he or she does

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something that encourages another person to (prepare/ [or] present) the (false/ [or] fraudulent) document.] [The defendant does not need to personally prepare the document or even be present when the document is completed.]

BENCH NOTES

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

The statute states that the defendant's acts must be "willful." (Rev. & Tax. Code, § 19705(a)(2).) As used in the tax code, "willful" means that the defendant must act "in voluntary, intentional violation of a known legal duty." (*People v. Hagen* (1998) 19 Cal.4th 652, 666.) The committee has chosen to use this description of the meaning of the term in place of the word "willful" to avoid confusion with other instructions that provide a different definition of "willful."

Element 3 contains a knowledge requirement. The statute does not specifically require that the defendant knew that the return contained false information. (Rev. & Tax. Code, § 19705(a)(2).) However, federal pattern jury instructions for the analogous federal crime (26 U.S.C. § 7206(2)) require that the defendant must have known that the document was false even though the federal statute also does not explicitly contain a knowledge requirement. (Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Offense Instruction No. 95 (2003); Pattern Jury Instructions of the District Judges Association of the Fifth Circuit, Criminal Cases, Instruction No. 2.97 (2001); but see Pattern Jury Instructions of the Committee on Model Jury Instructions for the Ninth Circuit, Criminal Cases, Instruction No. 9.38 (2003) [knowledge not specifically required, defendant must assist in preparing "false" return].) Element 3 is included for the court to give at its discretion. The committee recommends that the court review current federal case law, as advised in *People v. Hagen* (1998) 19 Cal.4th 652.

In the definition of "material," give the bracketed sentence beginning with "Although the People must prove that the statement was material" if requested. (*Edwards v. United States* (9th Cir. 1967) 375 F.2d 862, 865.)

Give the bracketed sentence that begins with "Someone *aids*" if the defendant is charged with aiding or aiding and abetting. (*United States v. Graham* (3d Cir. 1985) 758 F.2d 879, 885; *United States v. Buttorff* (8th Cir. 1978) 572 F.2d 619, 623.)

Defenses—Instructional Duty

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If there is sufficient evidence to raise a reasonable doubt that the defendant had a good faith belief that his or her conduct was legal, the court has a **sua sponte** duty to give the instruction on this defense. (*People v. Hagen* (1998) 19 Cal.4th 652, 660.) Give Instruction 1978, Defense: Good Faith Belief Conduct Legal.

AUTHORITY

Elements ▸ Rev. & Tax. Code, § 19705(a)(2).
Willful Requires Volitional Violation of Known Legal Duty ▸ *People v. Hagen* (1998) 19 Cal.4th 652, 666.
Material Defined ▸ *People v. Hagen* (1998) 19 Cal.4th 652, 667–668.
Aiding and Abetting ▸ *United States v. Graham* (3d Cir. 1985) 758 F.2d 879, 885; *United States v. Buttorff* (8th Cir. 1978) 572 F.2d 619, 623.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 128.

RELATED ISSUES

Defendant Need Not Personally Prepare Document
Federal courts have held that the analogous federal statute applies to individuals who counsel and advise the preparation of fraudulent documents. (*United States v. Clark* (5th Cir. 1998) 139 F.3d 485, 489–490; *United States v. Bryan* (5th Cir. 1990) 896 F.2d 68, 74.) The defendant need not personally prepare the document or even be present when the document is completed. (*United States v. Clark, supra,* 139 F.3d at pp. 489–490; *United States v. Bryan, supra,* 896 F.2d at p. 74; see also *United States v. Buttorff* (8th Cir. 1978) 572 F.2d 619, 623 [sufficient evidence of aiding where defendants lectured about antitax views to large groups].)

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STAFF NOTES

Rev. & Tax. Code, § 19705, in relevant part:

(a) Any person who does any of the following shall be guilty of a felony and, upon conviction, shall be fined not more than fifty thousand dollars ($ 50,000) or imprisoned in the state prison, or both, together with the costs of investigation and prosecution: . . .

(2) Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the Personal Income Tax Law or the Corporation Tax Law, of a return, affidavit, claim, or other document, that is fraudulent or is false as to any material matter, whether or not that falsity or fraud is with the knowledge or consent of the person authorized or required to present that return, affidavit, claim, or document. . . .

(b) In the case of a corporation, the fifty thousand dollars ($ 50,000) limitation specified in subdivision (a) shall be increased to two hundred thousand dollars ($ 200,000).

(c) The fact that an individual's name is signed to a return, statement, or other document filed, including a return, statement, or other document filed using electronic technology pursuant to Section 18621.5, shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him or her.

(d) For purposes of this section, "person" means the taxpayer, any member of the taxpayer's family, any corporation, agent, fiduciary, or representative of, or any other individual or entity acting on behalf of, the taxpayer, or any other corporation or entity owned or controlled by the taxpayer, directly or indirectly, or which owns or controls the taxpayer, directly or indirectly.

Federal Pattern Jury Instructions on Analogous Crime

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

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First: That the defendant aided in [assisted in] [procured] [counseled] [advised] the preparation [presentation] of a return [an affidavit] [a claim] arising under [in connection with any matter arising under] the internal revenue laws;

Second: That this return [affidavit] [claim] falsely stated that _____ [state material matters asserted, e.g., _____ received gross income of $_____ during the year _____];

Third: That the defendant knew that the statement in the return [affidavit] [claim] was false;

Fourth: That the false statement was material; and

Fifth: That the defendant aided in [assisted in] [procured] [counseled] [advised] the preparation [presentation] of this false statement willfully, that is, with intent to violate a known legal duty.

It is not necessary that the government prove that the falsity or fraud was with the knowledge or consent of the person authorized or required to present such return [claim] [affidavit] [document].

A statement is "material" if it has a natural tendency to influence, or is capable of influencing, the Internal Revenue Service in investigating or auditing a tax return or in verifying or monitoring the reporting of income by a taxpayer.

(Pattern Jury Instructions of the District Judges Association of the Fifth Circuit, Criminal Cases, Instruction No. 2.97 (2001).)

In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant willfully assisted or advised [*person*] in the preparation of an income tax return that was false; and

Second, the return was false as to something necessary to a determination of whether income tax was owed.

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A person acts "willfully" by voluntarily and intentionally assisting or advising another to do something that the person knows disobeys or disregards the law. [A person does not act "willfully" if the person acts as a result of a good faith misunderstanding of the requirements of the law.]

The government is not required to prove that the taxpayer knew that the return was false.

[It is not a defense that the defendant believed the income tax laws are wrong or unconstitutional.]

(Pattern Jury Instructions of the Committee on Model Jury Instructions for the Ninth Circuit, Criminal Cases, Instruction No. 9.38 (2003).)

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant aided or assisted in the preparation and filing of an income tax return which was false in a material way as charged in the indictment; and

Second: That the Defendant did so knowingly and willfully.

A declaration is "false" if it was untrue when made and was then known to be untrue by the person making it. A declaration contained within a document is "false" if it was untrue when the document was used and was then known to be untrue by the person using it.

A declaration is "material" if it relates to a matter of significance or importance as distinguished from a minor or insignificant or trivial detail. It is not necessary, however, that the Government be deprived of any tax by reason of the filing of the false return, or that it be shown that additional tax is due, only that the Defendant willfully aided and abetted the filing of a materially false return.

(Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Offense Instruction No. 95 (2003).)

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Aiding and Abetting

> To establish aiding and abetting the filing of a false tax return "there must exist some affirmative participation which at least encourages the perpetrator." *United States v. Buttorff*, 572 F.2d 619, 623 (8th Cir. 1978) (quoting *United States v. Thomas*, 469 F.2d 145, 147 (8th Cir. 1972), *cert. denied*, 410 U.S. 957, 35 L. Ed. 2d 690, 93 S. Ct. 1429, 93 S. Ct. 1430 (1973)).

(*United States v. Graham* (3d Cir. 1985) 758 F.2d 879, 885.)

Willfully Requires Intentional Violation of Known Legal Duty
See Notes to Instruction 1961.

Materiality—Defined
See Notes to Instruction 1963.

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1966. Willful Failure to Pay Tax

The defendant is charged [in Count __] with intentionally failing to pay a required (tax/estimated tax) to the Franchise Tax Board.

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

18. The defendant was required to pay a (tax/estimated tax) to the Franchise Tax Board;

19. The defendant failed to pay the (tax/estimated tax) by the date it was due;

AND

20. The defendant voluntarily chose not to pay, with intent to violate a legal duty known to (him/her).

[The People do not have to prove the exact amount of (unreported income/ [or] [additional] tax owed). The People must prove beyond a reasonable doubt that the defendant (failed to report a substantial amount of income/ [or] owed a substantial amount in [additional] taxes).]

BENCH NOTES

Instructional Duty

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

The statute states that the defendant's acts must be "willful." (Rev. & Tax. Code, § 19701(c).) As used in the tax code, "willful" means that the defendant must act "in voluntary, intentional violation of a known legal duty." (*People v. Hagen* (1998) 19 Cal.4th 652, 666.) The committee has chosen to use this description of the meaning of the term in place of the word "willful" to avoid confusion with other instructions that provide a different definition of "willful."

Give the bracketed paragraph that begins with "The People do not have to prove the exact amount" on request. (*United States v. Wilson* (3d Cir. 1979) 601 F.2d 95, 99; Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08.) Federal

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cases have held that when intent to evade is an element of the offense, the prosecution must show that the amount owed in taxes or the amount of unreported income was substantial. (*United States v. Wilson, supra,* 601 F.2d at p. 99; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08.) "The word 'substantial' . . . is necessarily a relative term and not susceptible of an exact meaning." (*Canaday v. United States* (8th Cir. 1966) 354 F.2d 849, 852–853.) "It is not measured in terms of gross or net income nor by any particular percentage of the tax shown to be due and payable. All the attendant circumstances must be taken into consideration." (*United States v. Nunan* (2d Cir. 1956) 236 F.2d 576, 585, cert. den. (1957) 353 U.S. 912.) "Whether the tax evaded was 'substantial' is, therefore, a jury question . . . ." (Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08 [see also § 67.03, noting that "substantial" is generally not defined for the jury].)

Defenses—Instructional Duty

If there is sufficient evidence to raise a reasonable doubt that the defendant had a good faith belief that his or her conduct was legal, the court has a **sua sponte** duty to give the instruction on this defense. (*People v. Hagen* (1998) 19 Cal.4th 652, 660.) Give Instruction 1978, Defense: Good Faith Belief Conduct Legal.

If there is sufficient evidence to raise a reasonable doubt that the defendant relied on the advice of a professional, the court has a **sua sponte** duty to give the instruction on this defense. (*United States v. Mitchell* (4th Cir. 1974) 495 F.2d 285, 287–288; see Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.25.) Give Instruction 1979, Defense: Reliance on Professional Advice.

AUTHORITY

Elements ▸ Rev. & Tax. Code, § 19701(c).

Willful Requires Volitional Violation of Known Legal Duty ▸ *People v. Hagen* (1998) 19 Cal.4th 652, 666; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.20.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 127.

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STAFF NOTES

Rev. & Tax. Code, § 19701:

> Any person who does any of the following is liable for a penalty of not more than five thousand dollars ($ 5,000): . . .
>
> (c) Under this part, is required to pay any estimated tax or tax, who willfully fails to pay that estimated tax or tax, at the time or times required by law or regulations.
>
> The penalty shall be recovered in the name of the people in any court of competent jurisdiction. Counsel for the Franchise Tax Board may, upon request of the district attorney or other prosecuting attorney, assist the prosecuting attorney in presenting the law or facts to recover the penalty at the trial of a criminal proceeding for violation of this section.
>
> That person is also guilty of a misdemeanor and shall upon conviction be fined not to exceed five thousand dollars ($ 5,000) or be imprisoned not to exceed one year, or both, at the discretion of the court, together with costs of investigation and prosecution.

Willfully Requires Intentional Violation of Known Legal Duty

See Notes to Instructions 1961.

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1967. Concealing Property With Intent to Evade Tax

The defendant is charged [in Count __] with (removing[,]/ [or] depositing[,]/ [or] concealing) property with intent to evade a tax.

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

21. The defendant (removed[,]/ [or] deposited[,]/ [or] concealed) (property[,]/ [or] goods[,]/ [or] commodities);

<Alternative 2A—concealment of goods or commodities to avoid tax>

[2. A tax was (imposed on/ [or] legally authorized for) the (goods/ [or] commodities);]

<Alternative 2B—concealment of property to avoid levy>

[2. A levy was legally authorized against the property;]

AND

3. When the defendant acted, (he/she) intended to unlawfully (evade/ [or] defeat) the (assessment/ [or] collection) of [a] (tax[,]/ additions to a tax[,]/ penalty[,]/ [or] interest) imposed under the tax laws.

[To *levy property* means to seize, attach, or garnish the property as payment for a debt owed. A levy is *legally authorized* against property if:

1. The Franchise Tax Board has assessed a tax against the defendant and sent the defendant a notice demanding payment;

2. The defendant has neglected or refused to pay;

AND

3. The defendant owns the property that is the subject of the levy.]

[As used here, a person *removes* an item when he or she takes it from the place [where it was made and] where a tax was supposed to be assessed and paid on the item.]

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BENCH NOTES

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

Revenue and Taxation Code section 19705(a)(4) applies to two situations: (1) when a person conceals or removes goods or commodities that are subject to taxation in order to prevent paying the tax owed on those goods; and (2) when a person who has failed to pay a tax owed conceals property that the government has the right to levy as payment for the tax.

In element 2, give alternative 2A if the defendant is charged with concealing goods or commodities to avoid a tax assessment. Give alternative 2B and the bracketed definition of "levy" if the defendant is charged with concealing property to avoid a levy. (*United States v. Swarthout* (6th Cir. 1970) 420 F.2d 831, 833–835.) Depending on the legal basis of the levy, the court may need to add additional items to the explanation of "legally authorized." (See Rev. & Tax. Code, § 19705(a)(4) and statutes cited therein on when a levy is legally authorized.)

Give the bracketed definition of "remove" if the defendant is charged with removing goods or commodities subject to taxation. (*Price v. United States* (5th Cir. 1945) 150 F.2d 283, 285.) Give the bracketed phrase "where it was made" if the defendant is charged with removing an item from the site of manufacture. *(Ibid.)*

Revenue and Taxation Code section 19705(a)(4) also penalizes anyone "concerned in removing, depositing, or concealing" property. If the defendant is charged with "being concerned in" the conduct, the court should instruct on aiding and abetting. (See Instruction 500, Aiding and Abetting: General Principles, et seq.)

Defenses—Instructional Duty
If there is sufficient evidence to raise a reasonable doubt that the defendant had a good faith belief that his or her conduct was legal, the court has a **sua sponte** duty to give the instruction on this defense. (*People v. Hagen* (1998) 19 Cal.4th 652, 660.) Give Instruction 1978, Defense: Good Faith Belief Conduct Legal.

If there is sufficient evidence to raise a reasonable doubt that the defendant relied on the advice of a professional, the court has a **sua sponte** duty to give the

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instruction on this defense. (*United States v. Mitchell* (4th Cir. 1974) 495 F.2d 285, 287–288; see Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.25.) Give Instruction 1979, Defense: Reliance on Professional Advice.

AUTHORITY

Elements ▸ Rev. & Tax. Code, § 19705(a)(4).
Concealment to Avoid Levy: Tax Must Have Been Assessed ▸ *United States v. Swarthout* (6th Cir. 1970) 420 F.2d 831, 833–835; *United States v. Inarik* (6th Cir. 1989) 875 F.2d 1186, 1195.
Removal Defined ▸ *Price v. United States* (5th Cir. 1945) 150 F.2d 283, 285.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 128.

RELATED ISSUES

Physical Concealment Not Required
A defendant may "conceal" property for the purposes of this statute by making a false record that he or she does not own the property. (*United States v. Bregman* (3d Cir. 1962) 306 F.2d 653, 654–655.)

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STAFF NOTES

Rev. & Tax. Code, § 19705, in relevant part:

> (a) Any person who does any of the following shall be guilty of a felony and, upon conviction, shall be fined not more than fifty thousand dollars ($ 50,000) or imprisoned in the state prison, or both, together with the costs of investigation and prosecution: . . .
>
> (4) Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by Chapter 5 (commencing with Section 19201); or Chapter 8 (commencing with Section 688.010) of Division 1 of, and Chapter 5 (commencing with Section 706.010) of Division 2 of, Title 9 of the Code of Civil Procedure, with intent to evade or defeat the assessment or collection of any tax, additions to tax, penalty, or interest imposed by Part 10 (commencing with Section 17001), Part 11 (commencing with Section 23001), or this part. . . .
>
> (b) In the case of a corporation, the fifty thousand dollars ($ 50,000) limitation specified in subdivision (a) shall be increased to two hundred thousand dollars ($ 200,000).
>
> (c) The fact that an individual's name is signed to a return, statement, or other document filed, including a return, statement, or other document filed using electronic technology pursuant to Section 18621.5, shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him or her.
>
> (d) For purposes of this section, "person" means the taxpayer, any member of the taxpayer's family, any corporation, agent, fiduciary, or representative of, or any other individual or entity acting on behalf of, the taxpayer, or any other corporation or entity owned or controlled by the taxpayer, directly or indirectly, or which owns or controls the taxpayer, directly or indirectly.

Rev. & Tax. Code, § 19201, "Franchise Tax Board certification of nonpayment of amount collectible as tax"—Authorizing Levy:

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> If any amount due under Part 10 (commencing with Section 17001), Part 11 (commencing with Section 23001), or any amount that may be collected by the Franchise Tax Board as though it were a tax, is not paid, the Franchise Tax Board may file in the Office of the County Clerk of Sacramento County, or any other county, a certificate specifying the amount due, the name and last known address of the taxpayer liable for the amount due, and the fact that the Franchise Tax Board has complied with all provisions of the law in the computation and levy of the amount due, and a request that judgment be entered against the taxpayer in the amount set forth in the certificate.

The other code sections cited in Rev. & Tax. Code 19706(a)(4) also relate to procedures for the collection of owed taxes or judgments through levy and the garnishment of wages.

Concealment to Avoid Levy Requires Tax to Have Been Assessed and Person Failed to Pay

> The trouble with this is that the alleged acts of concealment which are the operative facts charged in Count I took place before an income tax return had been filed, before there had been any assessment of tax by the Internal Revenue Service, and before there had been any notice and demand for payment as required in 26 U.S.C. § 6331 (1964). . . .

Section 6331, as the emphasized portions indicate, authorizes levy only after one "liable to pay" a tax "neglects or refuses" to do so after "notice and demand" by the government's agent. . . .

> The legislative history of section 7206 (4) indicates that this provision resulted from amendment of § 3321(a) of the Int. Rev. Code of 1939. The previous provision related only to concealment of goods or commodities. It was amended in the Int.Rev.Code of 1954 to cover "offenses committed in order to avoid levy." H.R.Rep.No. 1337 in 3 U.S.C. Cong. & Ad. News, p. 4573 (1954). If in amending this sentence Congress had intended to make it an offense to conceal property before levy was authorized (i. e. before assessment), it knew how to do so. Congress was careful to authorize prospective effect in relation to concealing to avoid assessment or collection of taxes on "goods or commodities" by making the modifying clause as to them read "for or in respect whereof any tax is *or shall be* imposed." Thus Congress could have made the critical language involved in this section (and therefore, this indictment) read "or any property upon which levy is *or shall be* authorized by section 6331." . . .

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> It might, of course, be argued that the concealment of Vitale's ownership of Herc's Snack Shack represented concealment with intent to defeat "assessment" of the 1961 tax within the meaning of § 7206(4). The answer to this is that appellant was not indicted for concealment with intent to defeat assessment. He was indicted for concealment with intent to defeat collection.

(*United States v. Swarthout* (6th Cir. 1970) 420 F.2d 831, 833–835.)

Likewise, a levy is not “authorized” under the analogous California statutes until a tax assessment has been made and the tax payer has declined to pay.

Removal—Defined

> [W]e agree with appellant that 'remove' in the statute means more than 'transport,' and has reference to removing the liquor from the place where made and where the tax thereon was supposed to be paid . . ..

(*Price v. United States* (5th Cir. 1945) 150 F.2d 283, 285.)

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1968. Failure to Withhold Tax

The defendant is charged [in Count __] with intentionally failing to (withhold/ collect, or truthfully account for,) and pay (a/an) (tax/ [or] amount required to be withheld) to the Franchise Tax Board.

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

22. Under state tax laws, the defendant was required to (withhold/collect, truthfully account for,) and pay (a/an) (tax/ [or] amount required to be withheld) to the Franchise Tax Board;

23. The defendant did not do so;

AND

24. The defendant voluntarily chose not to do so, with intent to violate a legal duty known to (him/her).

[The People do not have to prove the exact amount owed. The People must prove beyond a reasonable doubt that the amount the defendant failed to (withhold/collect, or truthfully account for,) and pay to the Franchise Tax Board was substantial.]

BENCH NOTES

Instructional Duty

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

If the defendant is charged with a violation of Revenue and Taxation Code section 19709, give the option "withhold" in the introduction, element 1, and the last bracketed paragraph. If the defendant is charged with a violation of Revenue and Taxation Code section 19708, give the option "collect or truthfully account for." See Commentary below on the use of the term "willful."

Give the bracketed paragraph that begins with "The People do not have to prove the exact amount" on request. (*United States v. Wilson* (3d Cir. 1979) 601 F.2d 95, 99; Federal Jury

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Practice and Instructions, Criminal (5th ed.) § 67.08.) Federal cases have held that when intent to evade is an element of the offense, the prosecution must show that the amount owed in taxes or the amount of unreported income was substantial. (*United States v. Wilson, supra,* 601 F.2d at p. 99; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08.) "The word 'substantial' . . . is necessarily a relative term and not susceptible of an exact meaning." (*Canaday v. United States* (8th Cir. 1966) 354 F.2d 849, 852–853.) "It is not measured in terms of gross or net income nor by any particular percentage of the tax shown to be due and payable. All the attendant circumstances must be taken into consideration." (*United States v. Nunan* (2d Cir. 1956) 236 F.2d 576, 585, cert. den. (1957) 353 U.S. 912.) "Whether the tax evaded was 'substantial' is, therefore, a jury question . . . ." (Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.08 [see also § 67.03, noting that "substantial" is generally not defined for the jury].)

Defenses—Instructional Duty

If there is sufficient evidence to raise a reasonable doubt that the defendant had a good faith belief that his or her conduct was legal, the court has a **sua sponte** duty to give the instruction on this defense. (*People v. Hagen* (1998) 19 Cal.4th 652, 660.) Give Instruction 1978, Defense: Good Faith Belief Conduct Legal.

If there is sufficient evidence to raise a reasonable doubt that the defendant relied on the advice of a professional, the court has a **sua sponte** duty to give the instruction on this defense. (*United States v. Mitchell* (4th Cir. 1974) 495 F.2d 285, 287–288; see Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.25.) Give Instruction 1979, Defense: Reliance on Professional Advice.

AUTHORITY

Elements ▸ Rev. & Tax. Code, §§ 19708, 19709.

Violation of Section 19709 Must Be Willful ▸ *People v. Singer* (1980) 115 Cal.App.3d Supp. 7, 10.

Willful Requires Volitional Violation of Known Legal Duty ▸ *People v. Hagen* (1998) 19 Cal.4th 652, 666; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.20.

Need Not Prove Exact Amount ▸ *United States v. Wilson* (3d Cir. 1979) 601 F.2d 95, 99; *United States v. Johnson* (1943) 319 U.S. 503, 517–518.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 129.

COMMENTARY

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Element 3 contains the definition of "willful" violation of a tax law derived from *People v. Hagen* (1998) 19 Cal.4th 652, 659–660, and *United States v. Bishop* (1973) 412 U.S. 346, 360–361. Revenue and Taxation Code section 19708 specifically requires that the defendant's act be willful, but section 19709 does not explicitly include the element of willfulness. In *People v. Singer* (1980) 115 Cal.App.3d Supp. 7, 10, the court construed section 19709 as also requiring a willful violation. Although it is unclear, it appears that based on this ruling, the *Hagen-Bishop* definition of willful also applies to a violation of section 19709.

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STAFF NOTES

Rev. & Tax. Code, § 19708:

> Any person required under this part to collect, account for, and pay over any tax or amount required to be withheld who willfully fails to collect or truthfully account for and pay over the tax or amount shall, in addition to other penalties provided by law, be guilty of a felony, and, upon conviction thereof, shall be fined not more than two thousand dollars ($ 2,000) or imprisoned in the state prison, or both.

Rev. & Tax. Code, § 19709:

> Any person who, with or without intent to evade, fails to withhold, pursuant to Section 18662 or 18666, or pay over any tax withheld, is guilty of a misdemeanor, and, upon conviction be fined an amount not to exceed one thousand dollars ($ 1,000) or imprisoned for not more than one year, or both, at the discretion of the court.

Violation of Section 19709 Must Be Willful

> With respect to the two convictions of Revenue and Taxation Code section 19409 [now section 19709], she claims that under article I, section 10 of the California Constitution she may not be imprisoned for the failure to pay a debt. Section 19409 does not expressly include a requirement of proof of willfulness in not withholding or in failing to pay over withheld taxes. Applying Penal Code section 20 to this statute, we construe section 19409 to require the proof of willfulness.

(*People v. Singer* (1980) 115 Cal.App.3d Supp. 7, 10.)

Willfully Requires Intentional Violation of Known Legal Duty

See Notes to Instructions 1961

Need Not Prove Exact Amount

See Notes to Instruction 1960.

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1970. Evidence of Uncharged Tax Offense: Failed to File Previous Returns

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The People presented evidence that the defendant did not file [a] tax return[s] for [a] year[s] not charged in this case.

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant did not file [a] tax return[s] for (that/those) year[s]. Proof by a preponderance of the evidence is a different standard of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

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

If you conclude that the defendant did not file [a] tax return[s] for (that/those) year[s], you may, but are not required to, consider that evidence for the limited purpose of deciding whether:

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

<B. Accident or Mistake>
[The defendant's alleged actions were the result of mistake or accident.]

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

If you conclude that the defendant did not file [a] tax return[s] for (that/those) year[s], that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of _____ *<insert charged offense>***. The People must still prove each element of _____** *<insert charged offense>* **beyond a reasonable doubt.**

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

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BENCH NOTES

Instructional Duty
The court must give this instruction on request when evidence of other offenses has been introduced under Evidence Code section 1101(b). (Evid. Code, § 1101(b); *People v. Carpenter* (1997) 15 Cal.4th 312, 382; *People v. Collie* (1981) 30 Cal.3d 43, 63–64.)

Evidence of the failure of the defendant to file tax returns in previous years may be admitted as evidence of prior illegal acts tending to show intent or lack of accident or mistake. (*United States v. Fingado* (10th Cir. 1991) 934 F.2d 1163, 1165–1166.)

The court **must** identify for the jury what issue the evidence has been admitted for: to prove mental state, to prove lack of accident or mistake, or to prove both.

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

Related Instructions
Instruction 360, Evidence of Uncharged Offenses to Prove Identity, Intent, or Common Scheme, etc.

AUTHORITY

Evidence of Prior Uncharged Acts ▸ Evid. Code, § 1101(b).
Standard of Proof Preponderance of Evidence ▸ *People v. Carpenter* (1997) 15 Cal.4th 312, 382.
Previous Failure to File Tax Returns ▸ *United States v. Fingado* (1991) 934 F.2d 1163, 1165–1166.

RELATED ISSUES

See Bench Notes and Related Issues section in Instruction 360, Evidence of Uncharged Offenses of Prove Identity, Intent, or Common Scheme, etc.

STAFF NOTES

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Prior Failure to File

The government introduced evidence relating to Fingado's failure to file tax returns from 1974 to 1980 under Fed. R. Evid. 404(b) [identical to Cal. Evid. Code, § 1101(b).] Fingado contends that the trial court should not have admitted the evidence because the government had failed to satisfy its burden of identifying the particular 404(b) issues for which the evidence was offered . . . .

On review of the record, we find that the admission of the evidence complied with the four *Huddleston* requirements. [Citation.] First, the evidence was offered for a proper purpose -- to establish Fingado's willfulness in failing to file his tax returns between 1981 and 1983.

Second, the evidence was relevant to resolving a material issue in controversy -- whether Fingado knew of his duty to file and willfully failed to do so. Evidence of failure to file in prior years is relevant to the issue of willfulness. [Citations.]

Third, the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice. . . .

And, fourth, since Fingado did not request a limiting instruction, the magistrate was not required to give one.

. . . Fingado goes on to argue that the jury instruction given at the end of trial was overly broad and inadequately identified the 404(b) issue for which the evidence was admitted. n2 . . . Even if the instructions were imperfect, the

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defect clearly does not rise to the level of plain error. Indeed, viewing the instructions as a whole, we find that the jury was fully and adequately instructed on the proper use of the prior bad acts evidence.

n2 The magistrate instructed the jury to use the evidence of Fingado's prior failure to file "for such light as it may shed, in your opinion, on his knowledge, intent, lack of accident or lack of mistake in each of the years in question." Tr. Vol. III at 11.

(*United States v. Fingado* (1991) 934 F.2d 1163, 1165–1166.)

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1971. No Deductions on Gross Income From Illegal Conduct

When computing taxable income, no deductions are allowed on gross income derived directly from illegal activities, including _____ *<insert activity from Rev. & Tax Code, § 17282(a)>***.**

In addition, no deductions are allowed on gross income that is derived from any other activities directly connected or associated with illegal activities, or that directly tend to promote or to further illegal activities.

[Prohibited deductions include deductions for cost of goods sold.]

BENCH NOTES

Instructional Duty
Give this instruction if requested and relevant based on the evidence.

Where indicated, insert the specific offense from Revenue and Taxation Code section 17282(a) that was allegedly the source of the income.

AUTHORITY

Statute ▸ Rev. & Tax. Code, § 17282(a).

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STAFF NOTES

Rev. & Tax. Code, § 17282:

(a) In computing taxable income, no deductions (including deductions for cost of goods sold) shall be allowed to any taxpayer on any of his or her gross income directly derived from illegal activities as defined in Sections 266h or 266i of, or in Chapter 4 (commencing with Section 211) of Title 8 of, Chapter 7.5 (commencing with Section 311) of Title 9 of, Chapter 8 (commencing with Section 314) of Title 9 of, or Chapter 2 (commencing with Section 459), Chapter 5 (commencing with Section 484), or Chapter 6 (commencing with Section 503) of Title 13 of, Part 1 of the Penal Code, or as defined in Chapter 6 (commencing with Section 11350) of Division 10 of the Health and Safety Code; nor shall any deductions be allowed to any taxpayer on any of his or her gross income derived from any other activities which directly tend to promote or to further, or are directly connected or associated with, those illegal activities.

(b) A prior, final determination by a court of competent jurisdiction of this state in any criminal proceedings or any proceeding in which the state, county, city and county, city, or other political subdivision was a party thereto on the merits of the legality of the activities of a taxpayer or predecessor in interest of a taxpayer shall be binding upon the Franchise Tax Board and the State Board of Equalization.

(c) This section shall be applied with respect to taxable years which have not been closed by a statute of limitations, res judicata, or otherwise.

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Staff was unable to locate any cases on this statute.

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1972. Determining Income: Net Worth Method

In this case, the People are using what is called the *net worth method* to try to prove that the defendant had unreported taxable income. I will now explain the net worth method.

On any given date, a person's *net worth* is the value of everything that person owns minus the value of all that person's debts and financial obligations. It is the difference between what a person owns and what that person owes. The value of any item that a person owns is measured by what it was worth when it was acquired, not its current market value.

If the People prove that the defendant's net worth increased during _____ *<insert year alleged>***, then you may but are not required to conclude that the defendant received money or property during that year.**

In order to prove that the money or property received was taxable income, the People must also prove that: (1) the defendant had one or more sources of taxable income, and (2) the money or property the defendant received during the year did not come from nontaxable sources. Nontaxable sources of income include gifts, inheritances, loans, or redeposits or transfers of funds between bank accounts.

If the People have proved that: (a) the defendant's net worth increased during _____ *<insert year alleged>***, (b) the defendant had one or more sources of taxable income, and (c) the money or property the defendant received during that year did not come from nontaxable sources, then you may but are not required to conclude that the money or property received was taxable income to the defendant. If you have a reasonable doubt about whether the People have proved (a), (b), or (c), you must find that the People have not proved under the net worth method that the defendant had unreported taxable income.**

In order to prove that the defendant had *unreported* taxable income [using the net worth method], the People must also prove that the defendant's net worth increased by an amount that was substantially greater than the income that the defendant reported on (his/her) tax return for _____ *<insert year alleged>***.**

[There is another factor you may consider in deciding whether the People have proved that the defendant had unreported taxable income under the net worth method. If the People have proved beyond a reasonable doubt that:

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(1) during the year, the defendant spent money in ways that did not change (his/her) net worth at the end of the year and (2) those expenditures would not be valid tax deductions, then you may but are not required to conclude that the defendant received money or property during the year. If the People also prove beyond a reasonable doubt that the money or property received did not come from nontaxable sources, then you may but are not required to conclude that the money or property was also taxable income. If you have a reasonable doubt about whether the People have proved any of these factors, you may not take the expenditures into account in applying the net worth method.]

In order to rely on the net worth method of proving income, the People must prove the defendant's net worth at the starting point with reasonable certainty. Here the starting point is January 1, _____ *<insert year alleged>***. The People are not required to prove the exact value of each and every asset the defendant owned at the starting point. However, the People must prove beyond a reasonable doubt that all the assets the defendant owned at the starting point were not enough to account for any proven increase in (his/her) net worth during the year.**

In deciding whether the defendant's net worth at the starting point has been proved with reasonable certainty and whether the People have proved that any money or property the defendant received during the year did not come from nontaxable sources, consider whether law enforcement agents sufficiently investigated all reasonable "leads" concerning the existence and value of other assets and sources of nontaxable income. Law enforcement agents must investigate all reasonable leads that arise during the investigation or that the defendant suggests regarding assets and income. This duty to reasonably investigate applies only to leads that arise during the investigation or to explanations the defendant gives during the investigation. Law enforcement agents are not required to investigate every conceivable asset or source of nontaxable funds.

If you have a reasonable doubt about any of the following:

A. Whether the investigation reasonably pursued or refuted the defendant's explanations or other leads regarding defendant's assets or income during the year,

B. Whether the People have proved the defendant's net worth at the beginning of **_____ <*insert year alleged*>** to a reasonable degree of certainty,

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OR

C. Whether the People have proved that any increase in the defendant's net worth[, together with any nondeductible expenditures the defendant made during the year,] was substantially more than the income that the defendant reported on (his/her) tax return for _____ ***<insert year alleged>***,

then you must find that the People have not proved under the net worth method that the defendant had unreported taxable income.

[If, on the other hand, you conclude that the defendant did have unreported taxable income, you must still decide whether the People have proved all elements of the crime[s] charged [in Count[s] __].]

BENCH NOTES

Instructional Duty

If the prosecution is relying on the net worth method, the court has a **sua sponte** duty to give this instruction. (*Holland v. United States* (1954) 348 U.S. 121, 129; *United States v. Hall* (9th Cir. 1981) 650 F.2d 994, 998.)

The court **must also give** the appropriate instruction on the elements of the offense charged.

Give the bracketed sentence that begins with "If, on the other hand, you conclude" in every case, unless the court is giving Instruction 1976, Proof of Unreported Taxable Income: Must Still Prove Elements of Offense.

AUTHORITY

Net Worth Method Explained ▸ *Holland v. United States* (1954) 348 U.S. 121, 129; see also Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Offense Instruction No. 93.2 (2003); Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.05.

Sua Sponte Duty to Instruct on Method ▸ *Holland v. United States* (1954) 348 U.S. 121, 129; *United States v. Hall* (9th Cir. 1981) 650 F.2d 994, 998.

Requirements for Proof ▸ *Holland v. United States* (1954) 348 U.S. 121, 129–138; see also *United States v. Sabino* (6th Cir. 2001) 274 F.3d 1053, 1071.

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STAFF NOTES

Proof of Defendant's Income by Various Methods

> In the 'direct' or 'specific item' method, specific items are demonstrated as the source of unreported income. In the 'indirect' method, the defendant's finances are reconstructed via circumstantial evidence including (1) net worth analysis; (2) bank deposits; and (3) cash expenditures in excess of reported income." . . . In "indirect method" cases, "the evidence of guilt is largely circumstantial, and the net worth method is, at best, only an approximation."

(*United States v. Sabino* (2001) 274 F.3d 1053, 1071 [citations omitted].)

Source of Task Force Instruction

The CALJIC instruction on the "net worth method" is nearly a word for word copy of the Ninth Circuit Pattern Instruction in place in 1995. However, the Ninth Circuit deleted this instruction in 2000. The Eleventh Circuit is the only circuit that currently has a pattern instruction on the "net worth method." The Federal Jury Practice and Instructions, Criminal, also provides an instruction on this topic. Staff has drafted this instruction based on these two samples. We began with the Eleventh Circuit instruction as a model and then edited the language in an effort to make the instruction more understandable. No substantive changes have been made to the instruction.

Eleventh Circuit Pattern Instruction:

In this case the Government relies upon the so-called "net worth method" of proving unreported income.

A person's "net worth" at any given date is the difference between such person's total assets and total liabilities on that date. It is the difference between what one owns and what one owes (measuring the value of what one owns by its cost rather than unrealized increases in market value).

If the evidence establishes beyond a reasonable doubt that the Defendant's net worth increased during a taxable year, then you may infer that the Defendant had receipts of money or property during that year; and if the evidence also establishes that those receipts cannot be accounted for by non-taxable sources, then you may further infer that those receipts were taxable income to the Defendant.

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In addition to the matter of the Defendant's net worth, if the evidence establishes beyond a reasonable doubt that the Defendant spent money during the year on living expenses, taxes and other expenditures, which did not add to the Defendant's net worth at the end of the year, then you may infer that those expenditures also came from funds received during the year; and, again, if the evidence establishes that those receipts cannot be accounted for by non-taxable sources, then you may further infer that those funds were also taxable income to the Defendant (provided, of course, the expenditures were not for items which would be deductible on the Defendant's tax return).

Because the “net worth method” of proving unreported income involves a comparison of the Defendant's net worth at the beginning of the year and the Defendant's net worth at the end of the year, the result cannot be accepted as correct unless the starting net worth is reasonably accurate. In that regard the proof need not show the exact value of all the assets owned by the Defendant at the starting point so long as it is established that the assets owned by the Defendant at that time were insufficient by themselves to account for the subsequent increases in the Defendant's net worth. So, if you should decide that the evidence does not establish with reasonable certainty what the Defendant's net worth was at the beginning of the year, you should find the Defendant not guilty.

In determining whether or not the claimed net worth of the Defendant at the starting point (or the beginning of the year) is reasonably accurate, you may consider whether Government agents sufficiently investigated all reasonable "leads" suggested to them by the Defendant, or which otherwise surfaced during the investigation, concerning the existence and value of other assets. If you should find that the Government's investigation has either failed to reasonably pursue, or to refute, plausible explanations advanced by the Defendant or which otherwise arose during the investigation concerning other assets the Defendant had at the beginning of the year (or other non-taxable sources of income the Defendant had during the year), then you should find the Defendant not guilty. Notice, however, that this duty to reasonably investigate applies only to suggestions or explanations made by the Defendant, or to reasonable leads that otherwise turn up; the Government is not required to investigate every conceivable asset or source of non-taxable funds.

If you decide the evidence in the case establishes beyond a reasonable doubt the maximum possible amount of the Defendant's net worth at the beginning of the tax year, and further establishes that any increase in the Defendant's net worth at the end of that year, together with non-deductible expenditures made during the year, did substantially exceed the amount of income reported on the Defendant's tax return for that year, you should then proceed to decide whether the evidence also establishes beyond a reasonable doubt that such additional funds represented taxable income (that

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is, income from taxable sources) on which the Defendant willfully attempted to evade and defeat the tax as charged in the indictment.

(Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Offense Instruction No. 93.2 (2003).)

Federal Jury Practice and Instructions, Criminal:

To establish a substantial understatement of the tax on the income tax return of the Defendant _____ for the year(s) _____, the government has relied upon proof by the so-called “net worth method” of determining income for that particular period. This “net worth method,” if used correctly, is an indirect or circumstantial way to reliably determine income.

A person's "net worth" is the difference between that person's total assets and total liabilities on any given day. Said another way, a person's net worth is the difference between what a person owns and what that person owes at any particular time. If a person has more assets at the end of the year than at the beginning of that year, and if that person's liabilities remained the same during that same year, then that person's net worth has increased.

In determining net worth, however, only the cost price of the defendant's assets is to be considered. Mere increases in market value, which have not been actually realized through sale or conversion into cash, must not be taken into account in computing net worth in a case such as this.

If the evidence in the case shows beyond a reasonable doubt that the defendant's net worth, computed in this manner, has increased during the year(s) in question, then the jury may find that Defendant _____ had receipts of either money or property during that year. If the evidence in the case also establishes beyond a reasonable doubt that the defendant had one or more sources of taxable income, and that the receipts just referred to did not come from non-taxable income, then the jury may find that such receipts constituted taxable income to the defendant during that period.

To show that the defendant's net worth increased in this case, the government has undertaken to prove the defendant's net worth at the beginning of the year [*19*] [*20*]__, and also attempted to prove the defendant's net worth at the end of that same year. The government has also introduced evidence in an effort to prove that the defendant paid out various amounts of money during the taxable year for such non-deductible items as personal and living expenses.

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Because the “net worth method” of determining income involves a comparison of the net worth of the defendant at the beginning and again at the end of the year in question, the result cannot be accepted as correct unless this starting net worth figure, the beginning point, is reasonably accurate. Although the government is not required to prove the exact value of each and every asset owned by the defendant at the starting point, the evidence in the case must establish beyond a reasonable doubt that all assets owned by the defendant at the starting date were not sufficient to account for any subsequent increase in the defendant's net worth. Said another way, the evidence in the case must establish beyond a reasonable doubt that the defendant's assets at the beginning of the year, plus the defendant's reported income for that same taxable year, do not add up to an amount sufficient to account for the increases in net worth, plus non-deductible expenditures during that same year.

The government contends that any increases in the net worth of Defendant _____ during the taxable year [*19*] [*20*]__, plus any non-deductible expenditures by the defendant for that year as shown by the evidence in the case, represent the defendant's true and correct net income for that year. These resulting figures are alleged by the government to be a reasonable approximation of what the defendant _____ should have reported on [*his*][*her*] income tax return for the calendar year [*19*] [*20*]__.

The burden is always upon the government to establish beyond a reasonable doubt that any amounts reflected in the defendant's increased net worth, plus non- deductible expenditures, were from taxable, rather than non-taxable sources. In this regard, you are instructed that federal income tax is levied on income derived from compensation for personal services of every kind, and in whatever form paid, as well as on income from interest, dividends, gains, profits, and certain other items not pertinent to this case.

The law provides, however, that funds or property received from certain sources do not constitute taxable income. Since no federal income tax is levied on such funds or property, such funds or property do not need to be reported as income. Non-taxable funds or non-taxable property include such items as gifts, inheritances, the proceeds of life insurance policies, and certain other items not pertinent to this case.

If it appears from the evidence in the case that during the course of the investigation of [*his*] [*her*] income tax return and before the trial of this case, Defendant _____ offered to Treasury agents certain explanations of the sources of certain funds or property and these sources of funds or property were reasonably capable of being checked and verified by Treasury agents, the government may not unreasonably disregard such explanations. In evaluating the evidence in this case you may take into consideration any failure of the government to reasonably investigate the truth of any such explanations as well as the trustworthiness of the explanations provided.

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On the other hand, the government is not required, without suggestion or explanation from Defendant _____, to investigate every conceivable source of nontaxable funds. If it appears from the evidence in the case that the defendant did not provide an explanation as to the source or sources of any increase in [*his*] [*her*] net worth, then the jury may consider such failure as one of the circumstances in evidence in the case, bearing in mind always that the law never imposes upon a defendant in a criminal case the burden or duty to offer or produce any evidence. The burden is always upon the government to establish beyond a reasonable doubt from the evidence in the case every essential element of the crime charged, including the claim that any increase in the defendant's net worth was from taxable sources.

If the jury should find that the evidence in the case does not establish the net worth of the defendant to a reasonable degree of certainty at the beginning of the year [*19*] [*20*]__, then the jury should find Defendant _____ not guilty. If the jury should find that any increase in net worth is not substantially in excess of the income reported by the defendant _____ on [*his*] [*her*] return for [*19*] [*20*]__, then the jury should find Defendant _____ not guilty.

On the other hand, if the evidence in the case establishes beyond a reasonable doubt the amount of the net worth of Defendant _____ as of the beginning of the calendar year [*19*] [*20*]__, and further establishes beyond a reasonable doubt that funds reflected in any increased net worth, plus the defendant's expenditures, during the same year, substantially exceed the income reported on the defendant's tax return, the jury should then proceed to determine whether the evidence in the case also establishes beyond a reasonable doubt that such additional funds represented taxable income, and then proceed to determine whether the government has proven that the defendant acted willfully in attempting to evade or defeat the additional tax, as charged in Count ___ of the indictment.

(Federal Jury Practice and Instructions, Criminal (5th ed.), § 67.05.)

Leading Supreme Court Case On Net Worth Method

In *Holland v. United States* (1954) 348 U.S. 121, the Supreme Court discussed the dangers of the net worth method at length. The court also articulated certain requirements for proof using this method and for jury instruction explaining this method. The case is quoted at length here:

> In a typical net worth prosecution, the Government, having concluded that the taxpayer's records are inadequate as a basis for determining income tax liability, attempts to establish an "opening net worth" or total net value of the taxpayer's assets at the beginning of a given year. It then proves

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> increases in the taxpayer's net worth for each succeeding year during the period under examination and calculates the difference between the adjusted net values of the taxpayer's assets at the beginning and end of each of the years involved. The taxpayer's nondeductible expenditures, including living expenses, are added to these increases, and if the resulting figure for any year is substantially greater than the taxable income reported by the taxpayer for that year, the Government claims the excess represents unreported taxable income. In addition, it asks the jury to infer willfulness from this understatement, when taken in connection with direct evidence of "conduct, the likely effect of which would be to mislead or to conceal." [Citation.] . . .
>
> [C]areful study indicates that [the net worth method] is so fraught with danger for the innocent that the courts must closely scrutinize its use.
>
> One basic assumption in establishing guilt by this method is that most assets derive from a taxable source, and that when this is not true the taxpayer is in a position to explain the discrepancy. The application of such an assumption raises serious legal problems in the administration of the criminal law. Unlike civil actions for the recovery of deficiencies, where the determinations of the Commissioner have *prima facie* validity, the prosecution must always prove the criminal charge beyond a reasonable doubt. This has led many of our courts to be disturbed by the use of the net worth method, particularly in its scope and the latitude which it allows prosecutors. [Citations.] . . .

[*Id.* at pp. 125–126.]

> This leads us to point out the dangers that must be consciously kept in mind in order to assure adequate appraisal of the specific facts in individual cases.
>
> 1. Among the defenses often asserted is the taxpayer's claim that the net worth increase shown by the Government's statement is in reality not an increase at all because of the existence of substantial cash on hand at the starting point. . . . . Obviously, the Government has great difficulty in refuting such a contention. However, taxpayers too encounter many obstacles in convincing the jury of the existence of such hoards. This is particularly so when the emergence of the hidden savings also uncovers a fraud on the taxpayer's creditors.
>
> In this connection, the taxpayer frequently gives "leads" to the

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> Government agents indicating the specific sources from which his cash on hand has come, such as prior earnings, stock transactions, real estate profits, inheritances, gifts, etc. Sometimes these "leads" point back to old transactions far removed from the prosecution period. Were the Government required to run down all such leads it would face grave investigative difficulties; still its failure to do so might jeopardize the position of the taxpayer. . . .

[*Id.* at p. 127; 2) the method assumes that increases are due to taxable income rather than non-taxable sources such as gifts; 3) the tax payer may be “unable to recount his financial history”; 4) deficiencies may be as consistent with innocent mistakes as with willful violation; 5) prosecution is often based on tax payer’s statements; and 6) evidence may relate to several years but may be insufficiently specific to show violation in tax year charged.]

> While we cannot say that these pitfalls inherent in the net worth method foreclose its use, they do require the exercise of great care and restraint. The complexity of the problem is such that it cannot be met merely by the application of general rules. Cf. *Universal Camera Corp*. v. *Labor Board*, 340 U.S. 474, 489. Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute. Charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused. Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation. . . .

[*Id.* at p. 129.]

Beginning Net Worth Must Be Established With Reasonable Certainty

> [A]n essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset.

(*Holland v. United States* (1954) 348 U.S. 121, 132.)

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> It is clear that the government bears the burden of establishing the opening net worth with reasonable certainty.

(*Yoon v. Commissioner of IRS* (5th Cir. 1998) 135 F.3d 1007, 1012.)

Government Must Pursue Leads Offered By Defendant

> So overwhelming, indeed, was the Government's proof on the issue of cash on hand that the Government agents did not bother to check petitioners' story that some of the cash represented proceeds from the sales of two cafes in the 20's; and that in 1933 an additional portion of this $ 113,000 in currency was obtained by exchanging some $ 12,000 in gold at a named bank. While sound administration of the criminal law requires that the net worth approach -- a powerful method of proving otherwise undetectable offenses -- should not be denied the Government, its failure to investigate leads furnished by the taxpayer might result in serious injustice. It is, of course, not for us to prescribe investigative procedures, but it is within the province of the courts to pass upon the sufficiency of the evidence to convict. When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the taxpayer -- leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury.

(*Holland v. United States* (1954) 348 U.S. 121, 135–136, footnote omitted.)

> As an added measure of protection the government is required to demonstrate that it has investigated the existence of sources of net worth other than unreported taxable income.

(*United States v. Sabino* (6th Cir. 2001) 274 F.3d 1053, 1071 [citations omitted].)

Proof of Likely Taxable Source or Refuting All Non-Taxable Sources

> Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source, from

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> which the jury could reasonably find that the net worth increases sprang, is sufficient. . . .
> Any other rule would burden the Government with investigating the many possible nontaxable sources of income, each of which is as unlikely as it is difficult to disprove. This is not to say that the Government may disregard explanations of the defendant reasonably susceptible of being checked. But where relevant leads are not forthcoming, the Government is not required to negate every possible source of nontaxable income, a matter peculiarly within the knowledge of the defendant.

(*Holland v. United States* (1954) 348 U.S. 121, 137–138.)

> The Court of Appeals has based its remand in part on the absence of "proof of likely source," which it regards as an "indispensable" element of the net worth method, citing *Holland* v. *United States*, 348 U.S. 121, in support of its conclusion. In *Holland* we held that proof of a likely source was "sufficient" to convict in a net worth case where the Government did not negative all the possible nontaxable sources of the alleged net worth increase. This was not intended to imply that proof of a likely source was necessary in every case. On the contrary, should all possible sources of nontaxable income be negatived, there would be no necessity for proof of a likely source. The above explanation must be taken into consideration in applying the *Holland* doctrine to this case.

(*United States v. Massei* (1958) 355 U.S. 595, 595–596.)

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1973. Determining Income: Bank Deposits Method

In this case, the People are [also] using what is called the *bank deposits method* to try to prove that the defendant had unreported taxable income. I will now explain the bank deposits method.

If the People prove that: (a) the defendant engaged in an activity that produced taxable income, (b) the defendant periodically deposited money in bank accounts in (his/her) name or under (his/her) control, and (c) the money deposited did not come from nontaxable sources, then you may but are not required to conclude that these bank deposits are taxable income. Nontaxable sources of the bank deposits include gifts, inheritances, loans, or redeposits or transfers of funds between accounts. If you have a reasonable doubt about whether the People have proved (a), (b), or (c), you must find that the People have not proved under the bank deposits method that the defendant had unreported taxable income.

In order to prove that the defendant had *unreported* taxable income [using the bank deposits method], the People must also prove that the defendant's total taxable bank deposits were substantially greater than the income that the defendant reported on (his/her) tax return for **_____ <*insert year alleged*>**.

There is another factor you may consider in deciding whether the People have proved that the defendant had unreported taxable income under the bank deposits method. If the People have proved beyond a reasonable doubt that: (1) during the year, the defendant spent money from funds not deposited in any bank and (2) those expenditures would not be valid tax deductions, then you may but are not required to conclude that the defendant received money or property during the year. If the People also prove beyond a reasonable doubt that the money or property received did not come from nontaxable sources, then you may but are not required to conclude that the money or property was also taxable income. If you have a reasonable doubt about whether the People have proved any of these factors, you may not take the expenditures into account in applying the bank deposits method.

In order to rely on the bank deposits method of proving taxable income, the People must prove the defendant's cash on hand at the starting point with reasonable certainty. Here the starting point is January 1, **_____ <*insert***

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year alleged>. *Cash on hand* is cash that the defendant had in (his/her) possession at the starting point that was not in a bank account. The People do not need to show the exact amount of the cash on hand at the starting point, but the People's claimed cash-on-hand figure must be reasonably certain.

In deciding whether the claimed cash-on-hand figure has been proved with reasonable certainty and whether the People have proved that any money or property the defendant received during the year did not come from nontaxable sources, consider whether law enforcement agents sufficiently investigated all reasonable "leads" concerning the existence and value of other assets and sources of nontaxable income. Law enforcement agents must investigate all reasonable leads that arise during the investigation or that the defendant suggests regarding assets and income. This duty to reasonably investigate applies only to leads that arise during the investigation or to explanations the defendant gives during the investigation. Law enforcement agents are not required to investigate every conceivable asset or source of nontaxable funds.

If you have a reasonable doubt about any of the following:

A. Whether the investigation reasonably pursued or refuted the defendant's explanations or other leads regarding defendant's assets or income during the year,

B. Whether the People have proved the defendant's cash on hand at the beginning of **_____** <***insert year alleged***> to a reasonable degree of certainty,

OR

C. Whether the People have proved that the defendant's total bank deposits, together with any nondeductible expenditures the defendant made during the year, were substantially more than the income that the defendant reported on (his/her) tax return for **_____** <***insert year alleged***>,

then you must find that the People have not proved under the bank deposits method that the defendant had unreported taxable income.

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[If, on the other hand, you conclude that the defendant did have unreported taxable income, you must still decide whether the People have proved all elements of the crime[s] charged [in Count[s] __].]

BENCH NOTES

Instructional Duty

If the prosecution is relying on the bank deposits method, the court has a **sua sponte** duty to give this instruction. (See *Holland v. United States* (1954) 348 U.S. 121, 129; *United States v. Hall* (9th Cir. 1981) 650 F.2d 994, 999.)

The court **must also give** the appropriate instruction on the elements of the offense charged.

Give the bracketed sentence that begins with "If, on the other hand, you conclude" in every case, unless the court is giving Instruction 1976, Proof of Unreported Taxable Income: Must Still Prove Elements of Offense.

AUTHORITY

Bank Deposits Method Explained ▸ *United States v. Hall* (9th Cir. 1981) 650 F.2d 994, 997, fn. 4; see also Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Offense Instruction No. 93.3 (2003); Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.07.

Sua Sponte Duty to Instruct on Method ▸ *United States v. Hall* (9th Cir. 1981) 650 F.2d 994, 999.

Requirements for Proof ▸ *United States v. Conaway* (5th Cir. 1993) 11 F.3d 40, 43–44; *United States v. Abodeely* (8th Cir. 1986) 801 F.2d 1020, 1024; *United States v. Boulet* (5th Cir. 1978) 577 F.2d 1165, 1167.

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STAFF NOTES

Source of Task Force Instruction

The Eleventh Circuit is the only circuit that currently has a pattern instruction on the "bank deposits method." The Federal Jury Practice and Instructions, Criminal, also provides an instruction on this topic. Staff has drafted this instruction based on these two samples. We began with the Eleventh Circuit instruction and then made some modifications in an effort to make the instruction more understandable. No substantive changes have been made to the instruction.

Eleventh Circuit Pattern Instruction:

In this case the Government relies upon the so-called "bank deposits method" of proving unreported income.

This method of proof proceeds on the theory that if a taxpayer is engaged in an income producing business or occupation and periodically deposits money in bank accounts in the taxpayer's name or under the taxpayer's control, an inference arises that such bank deposits represent taxable income unless it appears that the deposits represented re-deposits or transfers of funds between accounts, or that the deposits came from non-taxable sources such as gifts, inheritances or loans. This theory also contemplates that any expenditures by the Defendant of cash or currency from funds not deposited in any bank and not derived from a non-taxable source, similarly raises an inference that such cash or currency represents taxable income.

Because the "bank deposits method" of proving unreported income involves a review of the Defendant's deposits and cash expenditures that came from taxable sources, the Government must establish an accurate cash-on-hand figure for the beginning of the tax year. The proof need not show the exact amount of the beginning cash-on-hand so long as it is established that the Government's claimed cash-on-hand figure is reasonably accurate. So, if you should decide that the evidence does not establish with reasonable certainty what the Defendant's cash-on-hand was at the beginning of the year, you should find the Defendant not guilty.

In determining whether or not the claimed cash-on-hand of the Defendant at the starting point (or the beginning of the year) is reasonably accurate, you may consider whether Government agents sufficiently investigated all reasonable "leads" suggested to them by the Defendant, or which otherwise surfaced during the investigation, concerning the existence of other funds at that time. If you should find that the Government's investigation has either failed to reasonably pursue, or to refute, plausible explanations which were advanced by the Defendant, or which otherwise

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arose during the investigation, concerning the Defendant's cash-on-hand at the beginning of the year, then you should find the Defendant not guilty. Notice, however, that this duty to reasonably investigate applies only to suggestions or explanations made by the Defendant, or to reasonable leads that otherwise turn up; the Government is not

required to investigate every conceivable source of non-taxable funds.
If you decide that the evidence in the case establishes beyond a reasonable doubt that the Defendant's bank deposits together with non-deductible cash expenditures during the year did substantially exceed the amount of income reported on the Defendant's tax return for that year, you should then proceed to decide whether the evidence also establishes beyond a reasonable doubt that such additional deposits and expenditures represented taxable income (that is, income from taxable sources) on which the Defendant willfully attempted to evade and defeat the tax as charged in the indictment.

(Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Offense Instruction No. 93.3 (2003).)

Federal Jury Practice and Instructions, Criminal:

To establish a substantial understatement of the tax on the income tax return of Defendant _____ for the year(s) [*19*][*20*]_____, the government has relied upon proof by the so-called “bank deposits method" of determining income during a particular period. This " bank deposits method", of done correctly, is an indirect or circumstantial way to reliably determine income.
The theory of this method of proof is that if a taxpayer is engaged in an activity that produces income and if that taxpayer periodically deposits money in bank accounts under the taxpayer's name, or under the taxpayer's control, it may be inferred, unless otherwise explained, that these bank deposits represent taxable income. If there are expenditures of cash by the taxpayer from funds not deposited in any bank and not from any non-taxable source, such as by gift or from inheritance, it may be inferred, unless otherwise explained, that this cash represents unreported income.

In this method of proof, a taxpayer's bank deposits for the tax year are totaled, with adjustments made for funds in transit at the beginning and again at the end of that year. Any "non-income" deposits are excluded from this total and income which has not been deposited is included in the total. This procedure provides a gross income figure.

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Income tax is then calculated in the usual way with legitimate credits and legitimate deductions taken into account. If the resulting figure is greater than that which the taxpayer reported on [*his*] [*her*] tax return for that year,
then that taxpayer has unreported income in that amount.

Because the "bank deposits method" of determining income involves a review of bank deposits and cash expenditures during a taxable year, the government must establish with a reasonable degree of certainty an accurate "cash on hand" figure for the beginning of the tax year in question. The government is not required to prove an exact "cash on hand" figure, but must prove a figure that is reasonably accurate.

If, therefore, you do not find that the government has established to a reasonable degree of certainty what the defendant's "cash on hand" was at the beginning of the year [*19*][*20*]_____, then you should find the defendant not guilty.

If on the other hand, you find that the government has proven to a reasonable degree of certainty what the defendant's "cash on hand" was at the beginning of the year [*19*][*20*]_____, you must then proceed to decide whether the evidence in the case establishes beyond a reasonable doubt that the bank deposits and non-deductible cash expenditures of Defendant _____ substantially exceeded the amount reported on [*his*][*her*] tax return for that year. If so, you should then proceed to decide whether or not the government has proven, beyond a reasonable doubt, that the defendant willfully attempted to evade or defeat the additional tax as charged in Count ___ of the
indictment.

(Federal Jury Practice and Instructions, Criminal (5th ed.), § 67.07.)

Method Explained

The bank deposits method of proof is also a circumstantial way of establishing unreported income. It purports to demonstrate that excess income must exist by showing excessive unaccounted for bank deposits. The bank deposits for the tax year are totaled, with adjustments made for funds in transit at the beginning and the end of the year. Non-income deposits are then excluded, and non-deposited income is included. This constitutes a reconstructed gross income. Calculation of taxable income then proceeds in the usual way, taking into account the legitimate deductions, exceptions, exclusions, and credits. In the case of a business, these would include the business's cost of goods sold and other expenses. If the resulting figure differs

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> from what the taxpayer has reported, the Government will contend that the difference is unreported taxable income.

(*United States v. Hall* (1981) 650 F.2d 994, 997, fn. 4.)

> The government used a different method of proving unreported income, which analyzed Conaway's cash expenditures and bank deposits. Cash expenditures and bank deposits exceeding reported income after adjustment for applicable exemptions and deductions supports an inference that the taxpayer had unreported income. [*United States v.] Boulet* [(5th Cir. 1978)] 577 F.2d [1165] at 1167; *United States v. Parks*, 489 F.2d 89, 90 (5th Cir. 1974) (per curiam). This method does not require proof of net worth. See *Boulet*, 577 F.2d at 1167 & n.3. See also *United States v. Abodeely*, 801 F.2d 1020, 1024 (8th Cir. 1986). Such proof is not required because the evidence of bank deposits suffices to raise the inference that the taxpayer's income came from a taxable source. . . .
>
> [T]he government must establish the defendant's cash on hand at the beginning of each of the disputed years with reasonable certainty, while negating all other sources of nontaxable income during the same period. It may negate other income sources by proving that an adequate investigation did not disclose nontaxable sources of income. *Id.* If the trial judge does not believe the government has met these burdens, it can take the case from the jury because the government has not demonstrated the reliability of the circumstantial evidence upon which the jury would base its decision.

(*United States v. Conaway* (1993) 11 F.3d 40, 43–44; see also *United States v. Brickey* (2002) 289 F.3d 1144, 1152; *United States v. Abodeely* (8th Cir. 1986) 801 F.2d 1020, 1023–1024 [“Under any method the government must demonstrate, beyond a reasonable doubt, that the unreported income came from a taxable source.”])

Must Instruct Jury on Method

> Like the net worth method of proof, the bank deposits method seeks to show by circumstantial means that the defendant had income which was not reported. n8 And like the net worth method, it asks the jury to infer that this excess income was from a taxable source. Although the mechanics of arriving at an income figure are different, both methods involve similar underlying assumptions and afford

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> much the same inferences for and against the accused. Moreover, these assumptions and inferences are not self-evident, and the technicalities of the bank deposits method of proof are just as subtle as those of the net worth method. For the reasons detailed in Section II-A above, we conclude that comprehensive explanatory instructions must be given when the bank deposits method of proof is used, just as is required by Holland for the net worth method.

(*United States v. Hall* (1981) 650 F.2d 994, 999 [footnote quoted above].)

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1974. Determining Income: Cash Expenditures Method

In this case, the People are [also] using the *cash expenditures method* to try to prove that the defendant had unreported taxable income. I will now explain the cash expenditures method.

The cash expenditures method involves an examination of money the defendant spent during the taxable year along with (his/her) net worth at the beginning and at the end of that year.

On any given date, a person's *net worth* is the value of everything that person owns minus the value of all that person's debts and financial obligations. It is the difference between what a person owns and what that person owes. The value of any item that a person owns is measured by what it was worth when acquired, not its current market value.

If the People have proved beyond a reasonable doubt that: (1) during the year, the defendant spent money in ways that did not change (his/her) net worth at the end of the year and (2) those expenditures would not be valid tax deductions, then you may but are not required to conclude that the defendant received money or property during the year.

The People must also prove that the money or property was taxable income. In order do so, the People must prove that: (a) the defendant had one or more sources of taxable income, and (b) the money or property the defendant received during the year did not come from nontaxable sources. Nontaxable sources of income include gifts, inheritances, loans, or redeposits or transfers of funds between bank accounts. If you have a reasonable doubt about whether the People have proved any of these factors, you must find that the People have not proved under the cash expenditures method that the defendant had unreported taxable income.

In order to prove that the defendant had *unreported* taxable income [using the cash expenditures method], the People must prove that the defendant's cash expenditures establish taxable income that was substantially greater than the income that (he/she) reported on (his/her) tax return for _____ *<insert year alleged>***.**

There is another factor you may consider in deciding whether the People have proved that the defendant had unreported taxable income under the cash expenditures method. If the People prove that the defendant's net worth increased

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during _____ <*insert year alleged*>, then you may but are not required to conclude that the defendant received money or property during that year. In order to prove that the money or property received was taxable income, the People must also prove that: (1) the defendant had one or more sources of taxable income and (2) the money or property the defendant received during the year did not come from nontaxable sources. If the People have proved that: (a) the defendant's net worth increased during _____ <*insert year alleged*>, (b) the defendant had one or more sources of taxable income, and (c) the money or property the defendant received during the year did not come from nontaxable sources, then you may but are not required to conclude that the money or property received was taxable income to the defendant. If you have a reasonable doubt about whether the People have proved (a), (b), or (c), you may not take any increase in the defendant's net worth into account in applying the cash expenditures method.

In order to rely on the an increase in the defendant's net worth to prove unreported taxable income under the cash expenditures method, the People must prove the defendant's net worth at the starting point with reasonable certainty. Here the starting point is January 1, _____ <*insert year alleged*>. The People are not required to prove the exact value of each and every asset defendant owned at the starting point. However, the People must prove beyond a reasonable doubt that all the assets defendant owned at the starting point were not enough to account for any proven increase in the defendant's net worth during the year.

In deciding whether the defendant's net worth at the starting point has been proved with reasonable certainty and whether the People have proved that any money or property the defendant received during the year did not come from nontaxable sources, consider whether law enforcement agents sufficiently investigated all reasonable "leads" concerning the existence and value of other assets and sources of nontaxable income. Law enforcement agents must investigate all reasonable leads that arise during the investigation or that defendant suggests regarding assets and income. This duty to reasonably investigate applies only to leads that arise during the investigation or to explanations the defendant gives during the investigation. Law enforcement agents are not required to investigate every conceivable asset or source of nontaxable funds.

If you have a reasonable doubt about any of the following:

A. Whether the investigation reasonably pursued or refuted the defendant's explanations or other leads regarding defendant's assets or income during the year,

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B. Whether the People have proved the defendant's net worth at the beginning of _____ <***insert year alleged***> to a reasonable degree of certainty,

OR

C. Whether the People have proved that any nondeductible expenditures the defendant made during the year, together with any increase in the defendant's net worth, were substantially more than the income that the defendant reported on (his/her) tax return for _____ <***insert year alleged***>,

then you must find that the People have not proved under the cash expenditures method that the defendant had unreported taxable income.

[If, on the other hand, you conclude that the defendant did have unreported taxable income, you must still decide whether the People have proved all elements of the crime[s] charged [in Count[s] __].]

BENCH NOTES

Instructional Duty

If the prosecution is relying on the cash expenditures method, the court has a **sua sponte** duty to give this instruction. (See *Holland v. United States* (1954) 348 U.S. 121, 129; *United States v. Hall* (1981) 650 F.2d 994, 998.)

The court **must also give** the appropriate instruction on the elements of the offense charged.

Give the bracketed sentence that begins with "If, on the other hand, you conclude" in every case, unless the court is giving Instruction 1976, Proof of Unreported Taxable Income: Must Still Prove Elements of Offense.

AUTHORITY

Cash Expenditures Method Explained ▸ *United States v. Caswell* (8th Cir. 1987) 825 F.2d 1228, 1231–1232; see also Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Offense Instruction No. 93.4 (2003); Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.07.

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Sua Sponte Duty to Instruct on Method ▸ See *Holland v. United States* (1954) 348 U.S. 121, 129; *United States v. Hall* (1981) 650 F.2d 994, 998.

Requirements for Proof ▸ *United States v. Caswell* (8th Cir. 1987) 825 F.2d 1228, 1231–1232; *United States v. Citron* (2d Cir. 1986) 783 F.2d 307, 315–316; *Taglianetti v. United States* (1st Cir. 1968) 398 F.2d 558, 562–563, 565.

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STAFF NOTES

Source of Task Force Instruction

The Eleventh Circuit is the only circuit that currently has a pattern instruction on the "cash expenditures method." The Federal Jury Practice and Instructions, Criminal, also provides an instruction on this topic. Staff has drafted this instruction based on these two samples. We began with the Eleventh Circuit instruction and then made some modifications in an effort to make the instruction more understandable. No substantive changes have been made to the instruction.

Eleventh Circuit Pattern Instruction:

> In this case the Government relies upon the so-called "cash expenditures method" of proving unreported income. The theory of this method of proof is that if a taxpayer's expenditures and disbursements for a particular taxable year, together with any increase in net worth exceed the total of the taxpayer's reported income together with non-taxable receipts and available cash at the beginning of the year, then the taxpayer has understated [his] [her] income.
>
> The "cash expenditures method" necessarily involves not only the examination of the Defendant's expenditures and disbursements during the taxable year, but also an examination of the Defendant's "net worth" at the beginning and at the end of that year.
>
> A person's "net worth" at any given date is the difference between such person's total assets and total liabilities on that date. It is the difference between what one owns and what one owes (measuring the value of what one owns by its cost rather than unrealized increases in market value).
>
> If the evidence establishes beyond a reasonable doubt that the Defendant's net worth increased during a taxable year, then you may infer that the Defendant had receipts of money or property during that year; and if the evidence also establishes that those receipts cannot be accounted for by non-taxable sources, then you may further infer that those receipts were taxable income to the Defendant.
>
> In addition to the matter of the Defendant's net worth, if the evidence establishes beyond a reasonable doubt that the Defendant spent money during the year on living expenses, taxes and other expenditures, which did not add to the Defendant's net worth at the end of the year, then you may infer that those expenditures also came from funds received during the year; and, again,

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if the evidence establishes that those receipts cannot be accounted for by non-taxable sources, then you may further infer that those funds were also taxable income to the Defendant (provided, of course, the expenditures were not for items which would be deductible on the Defendant's tax return).

Because the "net worth method" of proving unreported income involves a comparison of the Defendant's net worth at the beginning of the year and the Defendant's net worth at the end of the year, the result cannot be accepted as correct unless the starting net worth is reasonably accurate. In that regard the proof need not show the exact value of all the assets owned by the Defendant at the starting point so long as it is established that the assets owned by the Defendant at that time were insufficient by themselves to account for the subsequent increases in the Defendant's net worth. So, if you should decide that the evidence does not establish with reasonable certainty what the Defendant's net worth was at the beginning of the year, you should find the Defendant not guilty.

In determining whether or not the claimed net worth of the Defendant at the starting point (or the beginning of the year) is reasonably accurate, you may consider whether Government agents sufficiently investigated all reasonable "leads" suggested to them by the Defendant, or which otherwise surfaced during the investigation, concerning the existence and value of other assets. If you should find that the Government's investigation has either failed to reasonably pursue, or to refute, plausible explanations advanced by the Defendant or which otherwise arose during the investigation concerning other assets the Defendant had at the beginning of the year (or other non-taxable sources of income the Defendant had during the year), then you should find the Defendant not guilty. Notice, however, that this duty to reasonably investigate applies only to suggestions or explanations made by the Defendant, or to reasonable leads that otherwise turn up; the Government is not required to investigate every conceivable asset or source of non-taxable funds.

If you decide the evidence in the case establishes beyond a reasonable doubt the maximum possible amount of the Defendant's net worth at the beginning of the tax year, and further establishes that any increase in the Defendant's net worth at the end of that year, together with non-deductible expenditures made during the year, did substantially exceed the amount of income reported on the Defendant's tax return for that year, you should then proceed to decide whether the evidence also establishes beyond a reasonable doubt that such additional funds represented taxable income (that is, income from taxable

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sources) on which the Defendant willfully attempted to evade and defeat the tax as charged in the indictment.

(Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Offense Instruction No. 93.4 (2003).)

Federal Jury Practice and Instructions, Criminal:

To establish a substantial understatement of the tax on the income tax return of Defendant _____ for the year(s) _____, the government has relied upon proof by the so-called "cash expenditures method" of determining income for that particular period. This "cash expenditures method," if done correctly, is an indirect or circumstantial way to reliably determine income.

In this method of proof, if a taxpayer's expenditures and disbursements for a particular taxable year, together with any increase in net worth, exceed the total of reported income together with non-taxable receipts for that same year and available cash at the beginning of the year, then the taxpayer has unreported income.

A person's net worth is the difference between a person's total assets and that person's total liabilities on any given date. Said another way, net worth is the difference between what a person owns and what that person owes at any particular time.

The " cash expenditures method" necessarily involves not only the examination of the defendant's expenditures and disbursements during the taxable year in question, but also an examination of the defendant's net worth at the beginning and again at the end of that year.

NOTES

. . .

The pertinent portions of the instruction on the "Net Worth Method", Section 67.05, should be given to the jury in conjunction with this instruction.

(Federal Jury Practice and Instructions, Criminal (5th ed.), § 67.07.)

Method Explained

Under the "cash expenditures" method of proof, the government is required to show either a "likely source" of the allegedly unreported income or that it has negated all reasonably possible nontaxable sources of income. . . .

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In a "cash expenditures" case, the government must also prove to a reasonable certainty "(i) expenditures during the period in question and (ii) the opening net worth of the taxpayer, including cash on hand." *Citron*, 783 F.2d at 315 (citing *Bianco*, 534 F.2d at 504). In contrast to a tax evasion case prosecuted under the "net worth" method, however, the government need not prepare a formal net worth statement. *Id.* at 315, 316. "Rather, accurate inclusion of diminution of resources serves the function of enabling the jurors to determine if expenditures were financed by liquidation of assets, depletion of a cash hoard, or unreported income." *Id.* at 315 (citation omitted); *see Taglianetti v. United States*, 398 F.2d 558, 565 (1st Cir. 1968), *aff'd*, 394 U.S. 316, 22 L. Ed. 2d 302, 89 S. Ct. 1099 (1969). n6

n6 Although courts sometime blur the distinction between the "net worth" and "cash expenditures" methods of proof, the expenditures method is a variant of the "net worth" method, *e.g., Citron*, 783 F.2d at 310, and encompasses different elements of proof. *See Taglianetti*, 398 F.2d at 562-63. One example of these differing elements is the requirement related to the presentation of the defendant's net worth.

The government has this burden whether it is prosecuting an individual for tax evasion for one year or successive years. In the latter case, however, the government has the duty only to establish the opening cash on hand balance for the beginning year; the income received less disbursements paid during that year will establish the opening funds for the next year, and so on. *United States v. Marshall*, 557 F.2d 527, 530 (5th Cir. 1977). Furthermore, when an individual is charged with tax evasion in successive years, the government has the added responsibility of showing diminution of resources for *each* year under investigation in order to prove that the expenditures in each year were not made from other nontaxable sources of income such as gifts, loans, or bequests. *Id.*

(*United States v. Caswell* (8th Cir. 1987) 825 F.2d 1228, 1231–1232.)

The government proceeded on a "cash expenditure" theory. This is a variant of the net worth method of establishing unreported taxable income. Both proceed by indirection to overcome the absence of direct proof. The net worth method involves the ascertaining of a taxpayer's net worth positions at the beginning and end of a tax period, and deriving that part of any increase not attributable to reported income. n3 This method, while effective against taxpayers who channel their income into investment or

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> durable property, is unavailing against the taxpayer who consumes his self-determined tax free dollars during the year and winds up no wealthier than before. The cash expenditure method is devised to reach such a taxpayer by establishing the amount of his purchases of goods and services which are not attributable to the resources at hand at the beginning of the year or to non-taxable receipts during the year. n4 The beginning and ending net worth positions must be identified with sufficient particularity to rule out or account for the use of a taxpayer's capital to pay for his purchases. If the end-of-year net worth position is equal to that at the beginning of the year, and if there are no non-taxable sources of income during the year, such as gifts or inheritances, the totality of the year's expenditures reflects total taxable income. If ending net worth shows an increase, the increase reflects an added component of income. If ending net worth shows a diminution, the decrease reduces pro tanto the extent to which expenditures reflect income. . . .
>
> This state of the proof fully satisfies the requirement in *Holland v. United States*, 348 U.S. 121, 132, 75 S. Ct. 127, 134, 99 L. Ed. 150 (1954), of "the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets." n6 In a typical net worth case, as *Holland*, precise figures would have to be attached to opening and closing net worth positions for each of the taxable years to provide a basis for the critical subtraction. In a cash expenditures case reasonable certainty may be established without such a presentation, as long as the proof -- as in this case -- makes clear the extent of any contribution which beginning resources or a diminution of resources over time could have made to expenditures. We recognize that courts occasionally blur the distinction between the two approaches and use language implying that they are subject not only to the same principle of excluding the availability of nontaxable resources but also to the same method of implementing that principle, i. e., establishing net worth figures. Appellant has cited several cash expenditure cases for the latter proposition. A careful review of the language used and the problems addressed in these opinions indicates that they cannot be fairly read as embracing such an inflexible formal requirement.

(*Taglianetti v. United States* (1st Cir. 1968) 398 F.2d 558, 562–563, 565 [footnotes omitted.]; see also *United States v. Citron* (2nd Cir. 1986) 783 F.2d 307, 315–316.)

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1975. Determining Income: Specific Items Method

In this case, the People are [also] using the *specific items method* to try to prove that the defendant had unreported taxable income. I will now explain the specific items method.

In order to prove that the defendant received unreported taxable income under the specific items method, the People must prove that:

1. **The defendant received income during _____** *<insert year alleged>***;**

2. **The income the defendant received was taxable;**

AND

3. **The income the defendant received was substantially greater than the income (he/she) reported on (his/her) tax return for _____** *<insert year alleged>***.**

If you have a reasonable doubt about whether the People have proved 1, 2, or 3, you must find that the People have not proved under the specific items method that the defendant had unreported taxable income.

If, on the other hand, you conclude that the defendant did have unreported taxable income, you must still decide whether the People have proved all elements of the crimes[s] charged [in Count[s] __].

BENCH NOTES

Instructional Duty

It is unclear if the court has a **sua sponte** duty to instruct on the specific items method of proof. If the prosecution is relying on this method and another method of proof, the court should instruct on both methods. (See *United States v. Meriwether* (1971) 440 F.2d 753, 756–757 [reversed because instructions on specific items and net worth method not sufficiently clear].)

The court **must also give** the appropriate instruction on the elements of the offense charged.

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AUTHORITY

Specific Items Method Explained ▸ *United States v. Hart* (6th Cir. 1995) 70 F.3d 854, 860; *United States v. Black* (D.C. Cir. 1988) 843 F.2d 1456, 1459; *United States v. Marabelles* (9th Cir. 1984) 724 F.2d 1374, 1379, fn. 3.

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STAFF NOTES

Proof of Defendant's Income by Various Methods

> In the 'direct' or 'specific item' method, specific items are demonstrated as the source of unreported income. In the 'indirect' method, the defendant's finances are reconstructed via circumstantial evidence including (1) net worth analysis; (2) bank deposits; and (3) cash expenditures in excess of reported income." . . . In "indirect method" cases, "the evidence of guilt is largely circumstantial, and the net worth method is, at best, only an approximation."

(*United States v. Sabino* (2001) 274 F.3d 1053, 1071 [citations omitted].)

Source of Task Force Instruction

No federal circuits have a pattern instruction on the specific items method. The Federal Jury Practice and Instructions, Criminal, also does not have an instruction on this topic. The CALJIC instruction is a word for word copy of the instruction contained in Modern Federal Jury Instructions. (See attached.) Staff has drafted this instruction based on this example but has written the instruction to be more consistent with instructions 1972-1974.

Method Explained

> There are two methods of proof in a tax case. In the "direct" or "specific item" method, specific items are demonstrated as the source of unreported income. In the "indirect" method, the defendant's finances are reconstructed via circumstantial evidence including (1) net worth analysis; (2) bank deposits; and (3) cash expenditures in excess of reported income. The safeguards required for indirect methods of proof, such as the establishment of an accurate opening net worth, are not necessary when the government utilizes a specific item method. *See generally United States v. Black*, 269 U.S. App. D.C. 128, 843 F.2d 1456 (D.C. Cir. 1988).

(*United States v. Hart* (6th Cir. 1995) 70 F.3d 854, 860.)

> [W]here the Government's case is based on evidence showing *specific items* of unreported income, the safeguards required for indirect methods of proof are not necessary, as the possibility that the defendant may be convicted because non-taxable income is mistakenly presumed to be taxable income, or because cash expenditures are mistakenly assumed to be made from taxable income, is not present. n2

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> n2 There remains, of course, the possibility that legitimate deductions would cancel out the unreported income, but no such claim is made in this case.

(*United States v. Black* (D.C. Cir. 1988) 843 F.2d 1456, 1459.)

No Duty to Follow Reasonable Leads & Defendant Must Prove Deductions

> (1) in "specific items" cases, the Government has no burden to follow all "reasonable leads" as it does in circumstantial evidence (net worth) cases, *United States v. Lawhon*, 499 F.2d 352, 356-57 (5th Cir. 1974), *cert. denied*, 419 U.S. 1121, 42 L. Ed. 2d 820, 95 S. Ct. 804 (1975); and
>
> (2) the burden is on the defendant to prove that he had allowable deductions that were not shown in his return, once the Government establishes unreported income and allows the deductions claimed by the defendant in this return and others that it can calculate without his assistance, *Elwert v. United States*, 231 F.2d 928, 933 (9th Cir. 1956); *see also Marks v. United States*, 391 F.2d 210, 211 (9th Cir.) (in "specific items" case, burden of proof for deductions is on defendant), *cert. denied*, 393 U.S. 839, 21 L. Ed. 2d 109, 89 S. Ct. 116 (1968).

(*United States v. Marabelles* (9th Cir. 1984) 724 F.2d 1374, 1379, fn. 3.)

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1976. Proof of Unreported Taxable Income: Must Still Prove Elements of Offense

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If you conclude based on the (net worth[,]/ [or] bank deposits[,]/ [or] cash expenditures[,]/ [or] specific items) method that the defendant did have unreported taxable income, you must still decide whether the People have proved all elements of the crime[s] charged [in Count[s] __].

BENCH NOTES

Instructional Duty

If the court is instructing on multiple methods of proving unreported taxable income, the court may give this instruction once, after explaining some or all of the methods, rather than repeating the last paragraph of each instruction on each method.

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1978. Defense: Good Faith Belief Conduct Legal

The defendant did not voluntarily and intentionally violate a legal duty known to (him/her) if (he/she) had a good faith but mistaken understanding of what (his/her) duty was under the law. This is so even if the mistaken understanding was due to (his/her) own negligence. If the defendant actually believed that (he/she) was meeting the requirements of the tax laws, (his/her) belief did not have to be reasonable.

[A person's (opinion that the tax laws violate his or her constitutional rights/ [or] disagreement with the government's tax collection system) does not constitute a good faith misunderstanding of the law.]

The People have the burden of proving beyond a reasonable doubt that the defendant did not act in good faith. If the People have not met this burden, you must find the defendant not guilty of the crime[s] charged [in Count[s] __][or the lesser offense[s] of _____ *<insert description of lesser offense[s]>***].**

BENCH NOTES

Instructional Duty

The defendant may assert as a defense a good faith belief that his or her conduct was legal. (*People v. Hagen* (1998) 19 Cal.4th 652, 660; *Cheek v. United States* (1991) 498 U.S. 192, 201.) This includes asserting that the defendant was ignorant of the law or mistaken in his or her interpretation of it. (*People v. Hagen, supra,* 19 Cal.4th at p. 660; *Cheek v. United States, supra,* 498 U.S. at p. 201.) Further, the defendant's belief need not be objectively reasonable. (*People v. Hagen, supra,* 19 Cal.4th at p. 660; *Cheek v. United States, supra,* 498 U.S. at p. 201.) If there is sufficient evidence to raise a reasonable doubt about a good faith belief, the court has a **sua sponte** duty to give this instruction.

The good faith belief defense does not apply to a "tax protestor," who asserts that the tax law is illegal or unconstitutional. (*Cheek v. United States* (1991) 498 U.S. 192, 206; *United States v. Bressler* (7th Cir. 1985) 772 F.2d 287, 291.) On the other hand, "[w]e must remind ourselves here that the good-faith defense need not be rational, if there is sufficient evidence from which a reasonable jury could conclude that even irrational beliefs were truly held." (*United States v. Mann* (10th Cir. 1989) 884 F.2d 532, 536–537 [reversing for failure to properly instruct on good faith defense where defendant asserted that the tax laws were invalid, that he

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believed he did not fall under them, and that the system was maintained by "Satan's little helpers"]; see also *Cheek v. United States, supra,* 498 U.S. at p. 203 [preventing jury from considering good faith defense based on "irrational belief" would raise constitutional problems].) Thus, while the court may exclude evidence that the defendant disagreed with the tax laws (*Cheek v. United States, supra,* 498 U.S. at p. 206), the court should use caution. If the court concludes that there is sufficient basis to instruct on the good faith defense but evidence that the defendant actions were based on a disagreement with the tax system has also been admitted, the court may give the bracketed sentence that begins with "A person's opinion . . . ."

AUTHORITY

Good Faith Belief Defense ▸ *People v. Hagen* (1998) 19 Cal.4th 652, 660; *Cheek v. United States* (1991) 498 U.S. 192, 201; see Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.25.

Disagreement With Law Is Not Good Faith Misunderstanding ▸ *Cheek v. United States* (1991) 498 U.S. 192, 206; *United States v. Bressler* (7th Cir. 1985) 772 F.2d 287, 291.

Belief Need Not Be Rational ▸ *Cheek v. United States* (1991) 498 U.S. 192, 203; *United States v. Mann* (10th Cir. 1989) 884 F.2d 532, 536–537.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 128.

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STAFF NOTES

Good Faith Defense

> Most recently, in the case of a man who claimed to believe that wages are not income and that he therefore was not obliged to pay taxes or file returns, the high court explained that, under the *Bishop-Pomponio* definition, such a good faith belief, even if objectively unreasonable, would indeed negate the required element of willfulness. (*Cheek v. United States* (1991) 498 U.S. 192, 201.) "Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty. . . . [C]arrying this burden [of showing the defendant knew his legal duty] requires negating a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws." (*Id*. at pp. 201-202 [111 S. Ct. at p. 610].)

(*People v. Hagen* (1998) 19 Cal.4th 652, 660; see also *United States v. Turner* (10th Cir. 1986) 799 F.2d 627, 629–630 [whether defendant actually held belief is issue for trier of fact].)

Tax Protestors

> Claims that some of the provisions of the tax code are unconstitutional are submissions of a different order. They do not arise from innocent mistakes caused by the complexity of the Internal Revenue Code. Rather, they reveal full knowledge of the provisions at issue and a studied conclusion, however wrong, that those provisions are invalid and unenforceable. Thus in this case, Cheek paid his taxes for years, but after attending various seminars and based on his own study, he concluded that the income tax laws could not constitutionally require him to pay a tax.
>
> We do not believe that Congress contemplated that such a taxpayer, without risking criminal prosecution, could ignore the duties imposed upon him by the Internal Revenue Code and refuse to utilize the mechanisms provided by Congress to present his claims of invalidity to the courts and to abide by their decisions. . . .
> We thus hold that in a case like this, a defendant's views about the validity of the tax statutes are irrelevant to the issue of willfulness and need not be

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> heard by the jury, and, if they are, an instruction to disregard them would be proper. For this purpose, it makes no difference whether the claims of invalidity are frivolous or have substance. It was therefore not error in this case for the District Judge to instruct the jury not to consider Cheek's claims that the tax laws were unconstitutional. However, it was error for the court to instruct the jury that petitioner's asserted beliefs that wages are not income and that he was not a taxpayer within the meaning of the Internal Revenue Code should not be considered by the jury in determining whether Cheek had acted willfully.

(*Cheek v. United States* (1991) 498 U.S. 192, 205–207.)

> Mr. Bressler has refused to file income tax returns and pay the amounts due not because he misunderstands the law, but because he disagrees with it. As the jury in the instant situation was properly instructed, disagreement with the law does not constitute a good faith defense sufficient to negate a finding of willfulness (Tr. 1355). Just as an individual who is required to register for the draft, but refuses to do so on grounds of conscience, is subject to prosecution, so one who refuses to file income tax returns and pay the tax owing is subject to prosecution, even though the tax protester believes the laws requiring the filing of income tax returns and the payment of income tax are unconstitutional.

(*United States v. Bressler* (7th Cir. 1985) 772 F.2d 287, 291.)

> We have held that a defendant's good-faith belief that he is not required to file a return is a valid defense in this context, and the beliefs need not be reasonable if actually held in good faith. [Citations.]
>
> Mann testified at length regarding the beliefs underlying his decision not to file, citing a wide range of legal authority, including United States Supreme Court opinions, in support of his position. Although Mann's varied arguments are difficult to distill into a unified theme, the most basic thrust of his asserted beliefs seems to be that the law as articulated in various court opinions supports the application of the income tax only to corporations, and that the enforcement of the individual income tax is carried out only by threats and coercion from "Satan's little helpers," *see supra* note 1, the IRS. n2 We must remind ourselves here that the good-faith defense need not be rational, if there is sufficient evidence from which a reasonable jury could conclude that even irrational beliefs were truly held. n3 [Citations.] . . .

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n2 It is no defense in the willful failure to file context that a defendant disagrees with the income tax laws or believes them to be unconstitutional. *Hairston*, 819 F.2d at 971. While some of Mann's beliefs appear to be constitutional challenges to the income tax as applied to him, some of his contentions are not.

n3 Of course, although not itself the standard by which to evaluate good faith, the reasonableness of a good-faith defense is a factor which the jury may properly consider in determining whether a defendant's asserted beliefs are genuinely held. *See United States v. Payne*, 800 F.2d 227, 229 (10th Cir. 1986).

(*United Sattes v. Mann* (10th Cir. 1989) 884 F.2d 532, 536–537.)

Federal Pattern Jury Instructions and Instructions Approved in Case Law on Good Faith Defense

The good faith of Defendant _____ is a complete defense to the tax charge in Count ___ of the indictment because good faith is simply inconsistent with willfully [*attempting to evade or defeat any tax*] [*filing a fraudulent tax return*].

While the term "good faith" has no precise definition, it means, among other things, an honest belief, a lack of malice, and the intent to perform all lawful obligations. A person who acts on a belief or on an opinion honestly held is not punishable under this statute merely because that honest belief turns out to be incorrect or wrong. The tax laws subject to criminal punishment only those people who willfully [*attempt to evade or defeat tax*] [*file a fraudulent tax return*].

If a person acts without reasonable grounds for belief that [*his*] [*her*] conduct is lawful, it is for the jury to decide whether that person has acted in good faith in order to comply with the law or whether that person has willfully [*attempted to evade or defeat the tax*] [*file a fraudulent return*].

[*A person who believes that [his] [her] tax return truthfully reports the taxable income and allowable deductions under the tax law acts in good faith and cannot be found guilty of "wilfully" filing a false return as charged in Count ___ of the indictment.*]

In determining whether or not the government has proven that the defendant willfully [*attempted to evade or defeat a tax*] [*filed a fraudulent tax return*] or

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whether the defendant acted in good faith, the jury must consider all of the evidence received in the case bearing on the defendant's state of mind.

The burden of proving good faith does not rest with the defendant because the defendant has no obligation to prove anything to you. The government has the burden of proving to you beyond a reasonable doubt that the defendant acted wilfully.

If the evidence in the case leaves the jury with a reasonable doubt as to whether Defendant _____acted in good faith or acted wilfully [*in an attempt to evade or defeat a tax*] [*in filing a fraudulent tax return*], the jury must acquit Defendant _____.

(Federal Jury Practice and Instructions, Criminal (5th ed.), § 67.25.)

One of the issues in this case is whether defendant acted in good faith. Good faith is a complete defense to the charge of [insert charge] if it is inconsistent with [insert mental state required by statute, e.g., intent to defraud or willfully]1 which is an essential element of the charge.

[Insert further instruction defining good faith in terms of the particular statute and requisite mental state, incorporating the specific factors on which defendant relies, if appropriate.]2

Evidence that defendant acted in good faith may be considered by you, together with all the other evidence, in determining whether or not [he] [she] acted [insert mental state required by statute, e.g., with intent to defraud or willfully].

(Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 9.08 (2000).)

The district court instructed the jury that "good faith," which "means, among other things, an honest belief, a lack of malice, and the intent to perform all lawful obligations," is a defense to conduct otherwise punishable under the tax laws, I R. Doc. 40, Instruction No. 30, and that "a person's opinion that the tax laws violate his constitutional rights does not constitute a good faith misunderstanding of the law. Furthermore, a person's disagreement with the government's tax collection system and policies does not constitute a good faith misunderstanding of the law."

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(*United States v. Lindsay* (10th Cir.1999) 184 F.3d 1138, 1140-1141.)

> The question of fact for you to decide is whether the Defendant honestly thought that he was within the statutory exemption from withholding requirements.
>
> If he had such a good faith belief, then he was not willfully supplying his employer with false or fraudulent information, and he could not be found guilty of the charge made against him.... The question in fact for the jury to decide is whether the Defendant Stephen Peister had a good faith belief and opinion that he was entitled to the exemption from withholding as he claimed.
>
> Such a belief goes to the essential element of willfulness, and a failure to understand the law or a misinterpretation of the law if honestly held would entitle the Defendant to an acquittal of the charge here made against him....

(*United States v. Peister*, 631 F.2d 658, 664 (10th Cir.1980), cert. denied, 449 U.S. 1126, 101 S.Ct. 945, 67 L.Ed.2d 113 (1981).)

The First Circuit includes an explanation of the good faith belief defense in the elements of the crime and in the definition of “willfully”:

> *Third*, that [defendant] willfully made the false statement with the intent of violating his/her duty under the tax laws and not as a result of accident, negligence or inadvertence.

(Pattern Jury Instructions of the First Circuit, Criminal Cases, Instruction No. 4.27 (1998).)

> [Defendant] acted "willfully" if the law imposed a duty on him/her, he/she knew of the duty, and he/she voluntarily and intentionally violated that duty. Thus, if [defendant] acted in good faith, he/she cannot be guilty of this crime. The burden to prove intent, as with all other elements of the crime, rests with the government. This is a subjective standard: what did [defendant] honestly believe, not what a reasonable person should have believed. Negligence, even gross negligence, is not enough to meet the "willful" requirement.

(Pattern Jury Instructions of the First Circuit, Criminal Cases, Instruction No. 4.25 (1998).)

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1979. Defense: Reliance on Professional Advice

The defendant did not voluntarily and intentionally violate a legal duty known to (him/her) if, (in preparing (his/her) (tax return[,]/ [or] statement[,]/ [or other] document[s] filed with the Franchise Tax Board)/ [or] failing to file a tax return), (he/she) relied in good faith on the advice of _____ *<insert name of person allegedly relied on>***, who represented (himself/herself) to be (a/an) (accountant/attorney/_____** *<insert other professional>***) qualified to provide such advice.**

The defendant did not rely on the advice in good faith if:

1. **The defendant did not give _____** *<insert name of person allegedly relied on>* **all the information about the defendant's income and expenses for the year(;/.)**

[OR]

<Alternative A—defendant charged with filing false or inaccurate document>

[2. When the defendant submitted the (tax return[,]/ [or] statement[,]/ [or other] document) to the Franchise Tax Board, (he/she) knew or had reason to believe that the information contained in the document was incorrect or false.]

[OR]

<Alternative B—defendant charged with failing to file>

[(2/3). When the defendant chose not to file a tax return based on **_____**'s ***<insert name of person allegedly relied on>*** advice, (he/she) knew or had reason to believe that the advice was incorrect or false.]

The People have the burden of proving beyond a reasonable doubt that the defendant did not rely in good faith on the advice of _____ *<insert name of person allegedly relied on>***. If the People have not met this burden, you must find the defendant not guilty of the crime[s] charged [in Count[s] __] [or the lesser offense[s] of _____** *<insert description of lesser offense[s]>***].**

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BENCH NOTES

Instructional Duty

The defendant may assert as a defense good faith reliance on the advice of a professional. (*United States v. Segal* (8th Cir. 1988) 867 F.2d 1173, 1179; *United States v. Mitchell* (4th Cir. 1974) 495 F.2d 285, 287–288; see Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.25.) "[T]he defendant must show he actually relied on expert advice and that his reliance was in good faith." (*United States v. Segal, supra,* 867 F.2d at p. 1179.) Further, this defense is not available if the defendant failed to provide the professional with all of the relevant information or knew that the document was false or inaccurate when submitted. (*United States v. Claiborne* (9th Cir. 1985) 765 F.2d 784, 798; see also *United States v. Segal, supra,* 867 F.2d at p. 1179 [defendant, charged with failing to file tax return, knew advice was inaccurate].) If there is sufficient evidence to raise a reasonable doubt that the defendant relied on professional advice, the court has a **sua sponte** duty to give this instruction.

Give alternative A if the defendant is charged with filing a false tax return or document. Give alternative B if the defendant is charged with failing to file a tax return. The court may give both alternatives if appropriate based on the evidence.

AUTHORITY

Reliance on Advice Defense ▸ *United States v. Mitchell* (4th Cir. 1974) 495 F.2d 285, 287–288; *United States v. Platt* (2d Cir. 1970) 435 F.2d 789, 792–793; *Bursten v. United States* (5th Cir. 1968) 395 F.2d 976, 981; *United States v. Duncan* (6th Cir. 1988) 850 F.2d 1104, 1117; *United States v. Phillips* (7th Cir. 1954) 217 F.2d 435, 440; *United States v. Claiborne* (9th Cir. 1985) 765 F.2d 784, 798; see also Federal Jury Practice and Instructions, Criminal (5th ed.) § 67.25.

Reliance Must Be Actual and in Good Faith ▸ *United States v. Segal* (8th Cir. 1988) 867 F.2d 1173, 1179; *United States v. Duncan* (6th Cir. 1988) 850 F.2d 1104, 1116.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 128.

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STAFF NOTES

Reliance on Advice Defense

> Defendant also asserted a second defense. Its evidentiary basis was defendant's testimony that he had his 1969 return prepared by Mr. Joseph A. Whitehead who operated a Montgomery Ward tax service. Defendant testified that he gave all of his tax information -- including his records of his income and expenses from Pomponio -- to a young man in Mr. Whitehead's office, that the young man told him to return later in the day, and that when he returned Mr. Whitehead was completing the return. According to defendant, after a brief conversation, Mr. Whitehead gave him the return, and then, without reviewing the return because he was tired from having worked for twenty-four consecutive hours, defendant signed the return and filed it. Based on this testimony, defendant asked that the jury be instructed that if it found that defendant provided full information regarding his taxable income and expenses for 1969 to a person holding himself out as qualified to prepare federal income tax returns for others, and that defendant adopted, signed and filed his return as prepared without having reason to believe that it was incorrect, then defendant should be found not guilty. The district court refused this instruction and its refusal was reversible error. . . .
>
> The government does not dispute that defendant's requested instructions were accurate as statements of law. We think that there was a foundation in the evidence for them and, as a consequence, they should have been granted. The district court's charge to the jury should have at least included the substance of the requested instructions in language sufficiently precise to instruct the jury in the defendant's theory of defense. *See Bursten v. United States*, 395 F.2d 976, 981-82 (5 Cir. 1968); *Perez v. United States*, 297 F.2d 12, 15-16 (5 Cir. 1961).

(*United States v. Mitchell* (4th Cir. 1974) 495 F.2d 285, 287–288; see also *United States v. Platt* (2nd Cir. 1970) 435 F.2d 789, 792–793; *Bursten v. United States* (5th Cir. 1968) 395 F.2d 976, 981; *United States v. Duncan* (6th Cir. 1988) 850 F.2d 1104, 1117; *United States v. Phillips* (7th Cir. 1954) 217 F.2d 435, 440; *United States v. Claiborne* (9th Cir. 1985) 765 F.2d 784, 798; but see *United States v. Dorotich* (9th Cir. 1990) 900 F.2d 192, 193–194 [not reversible error to refuse instruction where jury adequately instructed on specific intent; recognizing split from other circuits].)

Reliance Must Be Actual and in Good Faith

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> Next Segal argues that he had a good and full defense for his failure to file with the IRS as a bookmaker: his accountant told him it was not necessary. Reliance on expert advice can be an exonerating defense in criminal tax cases. *United States v. Meyer*, 808 F.2d 1304, 1306 (8th Cir. 1987). However, to prevail the defendant must show he actually relied on expert advice and that his reliance was in good faith. This defense was offered to the jury, which rejected it. The jury's verdict is supportable when we consider that the jury may have decided Segal did not rely on the accountant's advice in good faith. The jury heard evidence that Segal was a successful and sophisticated businessman. It also was presented with testimony that bookmakers are widely aware of the tax code provisions affecting them.

(*United States v. Segal* (8th Cir. 1988) 867 F.2d 1173, 1178–1179; see also *United States v. Duncan* (6th Cir. 1988) 850 F.2d 1104, 1116.)

See also Federal Jury Practice and Instructions, Criminal (5th ed.), § 67.25

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200. Prior Conviction: Nonbifurcated Trial

If you find the defendant guilty of a crime, you must also decide whether the People have proved the additional allegation that the defendant was previously convicted of (another/other) crime[s]. It has already been determined that the defendant is the person named in exhibits _____ *<insert numbers or descriptions of exhibits>***. You must decide whether the evidence proves that the defendant was convicted of the alleged crime[s].**

The People allege that the defendant has been convicted of:

> **[1.] A violation of _____** *<insert code section alleged>***, on _____** *<insert date of conviction>***, in the _____** *<insert name of court>***, in Case Number _____** *<insert docket or case number>***(;/.)**
>
> **[AND** *<Repeat for each prior conviction alleged.>***]**

[Consider the evidence presented on this allegation only when deciding whether the defendant was previously convicted of the crime[s] alleged [or for the limited purpose of **_____** ***<insert other permitted purpose, e.g., assessing credibility of the defendant>***]. Do not consider this evidence for any other purpose.]

[You must consider each alleged conviction separately.] The People have the burden of proving (the/each) alleged conviction beyond a reasonable doubt. If the People have not met this burden [for any alleged conviction], you must find that the alleged conviction has not been proved.

BENCH NOTES

Instructional Duty

If the defendant is charged with a prior conviction, the court has a **sua sponte** duty to instruct on the allegation. Give this instruction if the defendant does not admit the prior conviction and the court has not granted a bifurcated trial on the prior conviction.

If the court grants bifurcation, do not give this instruction. Give Instruction 201, Prior Conviction: Bifurcated Trial.

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If the defendant is charged with a prison prior, the court must determine whether the jury should decide if the defendant served a separate prison term for the conviction and whether the defendant remained free of prison custody for the "washout" period. (Pen. Code, § 667.5(a) & (b).) The Commentary below discusses these issues further. If the court chooses to submit these issues to the jury, give Instruction 202, Prior Conviction: Prison Prior, with this instruction.

If the court determines that there is a factual issue regarding the prior conviction that must be submitted to the jury, give Instruction 203: Prior Conviction: Factual Issue for Jury, with this instruction. The Commentary below discusses this issue further.

On request, the court should give the limiting instruction that begins with "Consider the evidence presented on this allegation only when deciding. . . ." (See *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7.) There is no sua sponte duty to give the limiting instruction, and the defense may request that no limiting instruction be given. (See *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139.)

The court must provide the jury with a verdict form on which the jury will indicate whether the prior conviction has been proved. (Pen. Code, § 1158.)

AUTHORITY

Statutory Authority ▸ Pen. Code, §§ 1025, 1158.

Bifurcation ▸ *People v. Calderon* (1994) 9 Cal.4th 69, 77–79; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336.

Judge Determines If Defendant Is Person Named in Documents ▸ Pen. Code, § 1025(b); *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165.

Limiting Instruction on Prior Conviction ▸ See *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139.

Disputed Factual Issues ▸ See *People v. Epps* (2001) 25 Cal.4th 19, 23; *People v. Kelii* (1999) 21 Cal.4th 452, 458–459; *People v. Wiley* (1995) 9 Cal.4th 580, 592; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *People v. McGee* (2004) 115 Cal.App.4th 819, DEPUBLISHED AND REVIEW GRANTED, April 28, 2004, S123474; *People v. Winslow* (1995) 40 Cal.App.4th 680, 687.

Three-Strikes Statutes ▸ Pen. Code, §§ 667(e), 1170.12.

Five-Year Enhancement for Serious Felony ▸ Pen. Code, § 667(a)(1).

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Three-Year Enhancement for Prison Prior If Violent Felony ▸ Pen. Code, § 667.5(a).
One-Year Enhancement for Prison Prior ▸ Pen. Code, § 667.5(b).
Serious Felony Defined ▸ Pen. Code, § 1192(c).
Violent Felony Defined ▸ Pen. Code, 667.5(c).

5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 515.

COMMENTARY

Factual Issues—Decided by Jury or Court?

A prior conviction may present an ancillary factual issue that must be decided before the conviction may be used under a particular enhancement or sentencing statute. For example, the prosecution might seek sentencing under the "three strikes" law, alleging that the defendant was previously convicted of two burglaries. These prior convictions would qualify as "strikes" only if the burglaries were residential. (See *People v. Kelii* (1999) 21 Cal.4th 452, 455.) If the defendant had been specifically convicted of first degree burglary of an inhabited dwelling, then there would be no issue over whether the prior convictions qualified. If, on the other hand, the defendant had been convicted simply of "burglary," then whether the offenses were residential would be a factual issue . *(Ibid.)* The question, who decides these ancillary factual issues, the jury or the court? then arises.

Penal Code sections 1025(b) and 1158 specifically state that the jury must decide if the defendant "suffered the prior conviction." The California Supreme Court has observed that "sections 1025 and 1158 are limited in nature. [Citation.] By their terms, [these sections] grant a defendant the right to have the jury determine only whether he or she 'suffered' the alleged prior conviction." (*People v. Epps* (2001) 25 Cal.4th 19, 23 [internal quotation marks and citation omitted].) Thus, the California Supreme Court has held that the court, not the jury, must decide ancillary facts necessary to establish that a prior conviction comes within a particular recidivist statute. (*People v. Kelii, supra,* 21 Cal.4th at pp. 458–459; *People v. Wiley* (1995) 9 Cal.4th 580, 592.) Specifically, the court must determine whether the facts of a prior conviction make the conviction a "serious" felony (*People v. Kelii, supra,* 21 Cal.4th at p. 457); and whether prior convictions charged as serious felonies were "brought and tried separately." (*People v. Wiley, supra,* 9 Cal.4th at p. 592.)

Penal Code section 1025(b) was amended in 1997 to further provide that the court, not the jury, must determine if the defendant is the person named in the documents submitted to prove the prior conviction. (Pen. Code, § 1025(c); see also *People v. Epps, supra,* 25 Cal.4th at pp. 24–25.) The California Supreme Court has held that the defendant still has a statutory right to a jury trial on whether he or she "suffered" the prior conviction, which

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"may include the question whether the alleged prior conviction *ever even occurred*. For example, in a rare case, the records of the prior conviction may have been fabricated, or they may be in error, or they may otherwise be insufficient to establish the existence of the prior conviction." (*People v. Epps, supra,* 25 Cal.4th at p. 25 [italics in original].) At the same time, the court also observed that "[t]his procedure would appear to leave the jury little to do except to determine whether those documents are authentic and, if so, are sufficient to establish that the convictions the defendant suffered are indeed the ones alleged." (*Id.* at p. 27 [quoting *People v. Kelii, supra,* 21 Cal.4th at p. 459].)

However, in 2000, the United States Supreme Court held that the federal due process clause requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; see also *Blakely v. Washington* (June 24, 2004, 02-1632) __ U.S. __, __.) In *People v. Epps, supra,* 25 Cal.4th at p. 28, the California Supreme Court noted that *Apprendi* might have overruled the holdings of *Kelii* and *Wiley*. Not confronted with the issue directly, the court declined to indicate how the conflict should be resolved. *(Ibid.)* The issue has been presented squarely in *People v. McGee* (2004) 115 Cal.App.4th 819, DEPUBLISHED AND REVIEW GRANTED, April 28, 2004, S123474. In *McGee*, the court held that under *Apprendi*, the federal due process clause requires that the jury determine any ancillary facts necessary to establish that a prior conviction qualifies as a serious felony under the "three strikes" law. (*Id.* at p. 834.)

Until the California Supreme Court rules on *McGee*, the court must decide whether to submit any ancillary factual issues on a prior conviction to the jury. The court may use Instruction 203: Prior Conviction: Factual Issue for Jury, inserting an appropriate description of the factual issue presented.

Prior Prison Term and "Washout" Period

A similar issue arises over whether the jury or the court must decide if the defendant served a prison term as a result of a particular conviction and if the defendant has been free of custody for sufficient time to satisfy the "washout" period. (See Pen. Code, § 667.5(a) & (b).) In *People v. Winslow* (1995) 40 Cal.App.4th 680, 687, the Court of Appeal held that the jury must determine whether the defendant served a prior prison term for a felony conviction. The other holdings in *Winslow* were rejected by the California Supreme Court. (*People v. Kelii, supra,* 21 Cal.4th at pp. 458–459; *People v. Wiley, supra,* 9 Cal.4th at p. 592.) However, the *Winslow* holding that the jury must determine if the defendant served a prison term for a felony conviction remains controlling authority.

But, in* People v. Epps, supra*, 25 Cal.4th at pp. 25–26, the court expressed doubt, in dicta, about whether the fact of having served a prison term is properly

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submitted to the jury. Discussing the 1997 amendment to Penal Code section 1025, the court noted that

> *[t]he analysis lists the following questions that the jury would still decide if Senate Bill 1146 became law: . . . 'Was the defendant sentenced to prison based on that conviction? How long has the defendant been out of custody since he or she suffered the prior conviction?' . . .*
>
> *[T]hough we do not have a case before us raising the issue, it appears that many of the listed questions are the sort of legal questions that are for the court under [***Wiley***]. For example, determining . . . whether the defendant was sentenced to prison is largely legal (***Kelii, supra***, 21 Cal. 4th at p. 455, quoting* **Wiley, supra***, 9 Cal. 4th at p. 590), and though these questions require resolution of some facts, a factual inquiry, limited to examining court documents, is the type of inquiry traditionally performed by judges as part of the sentencing function. (***Kelii***, at p. 457, quoting* **Wiley***, at p. 590.) . . .*
>
> *Therefore, the list of questions in the committee analysis should not be read as creating new jury trial rights that did not exist under* **Wiley.**

(Ibid.)

On the other hand, **Apprendi** *and* **McGee***, discussed above, could be interpreted as requiring the jury to make these factual findings. (But see* **People v. Thomas** *(2001) 91 Cal.App.4th 212, 223 [even under* **Apprendi***, no federal due process right to have jury determine whether defendant served a prior prison term].)*

Until the California Supreme Court resolves this question, the court should consider submitting to the jury the issues of whether the defendant served a prison term and whether the defendant has remained free of custody for sufficient time to satisfy the "washout" period. The court may use Instruction 202, Prior Conviction: Prison Prior.

RELATED ISSUES

Review Limited to Record of Conviction

When determining if a prior conviction comes under a particular recidivist statute, "the trier of fact may consider the entire record of the proceedings leading to imposition of judgment on the prior conviction" but may not consider

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facts outside the record of conviction. (*People v. Myers *(1993) 5 Cal.4th 1193, 1195; see also* People v. Riel *(2000) 22 Cal.4th 1153, 1204–1205;* People v. Henley *(1999) 72 Cal.App.4th 555, 564.) The prosecution bears the burden of proving that the prior conviction meets the requirements of the enhancement statute. (*People v. Henley, supra*, 72 Cal.App.4th at pp. 564–565.)

Constitutionality of Prior

The prosecution is not required to prove the constitutional validity of a prior conviction as an "element" of the enhancement. (*People v. Walker *(2001) 89 Cal.App.4th 380, 386.) Rather, following the procedures established in* People v. Sumstine *(1984) 36 Cal.3d 909, 922–924, and* People v. Allen *(1999) 21 Cal.4th 424, 435–436, the defense may bring a motion challenging the constitutional validity of the prior. These questions are matters of law to be determined by the trial court.

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STAFF NOTES

Pen. Code, § 1025:

(a) When a defendant who is charged in the accusatory pleading with having suffered a prior conviction pleads either guilty or not guilty of the offense charged against him or her, he or she shall be asked whether he or she has suffered the prior conviction. If the defendant enters an admission, his or her answer shall be entered in the minutes of the court, and shall, unless withdrawn by consent of the court, be conclusive of the fact of his or her having suffered the prior conviction in all subsequent proceedings. If the defendant enters a denial, his or her answer shall be entered in the minutes of the court. The refusal of the defendant to answer is equivalent to a denial that he or she has suffered the prior conviction.

(b) Except as provided in subdivision (c), the question of whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty, or in the case of a plea of guilty or nolo contendere, by a jury impaneled for that purpose, or by the court if a jury is waived.

(c) Notwithstanding the provisions of subdivision (b), the question of whether the defendant is the person who has suffered the prior conviction shall be tried by the court without a jury.

(d) Subdivision (c) shall not apply to prior convictions alleged pursuant to Section 190.2 or to prior convictions alleged as an element of a charged offense.

(e) If the defendant pleads not guilty, and answers that he or she has suffered the prior conviction, the charge of the prior conviction shall neither be read to the jury nor alluded to during trial, except as otherwise provided by law.

(f) Nothing in this section alters existing law regarding the use of prior convictions at trial.

Pen. Code, § 1158:

Whenever the fact of a previous conviction of another offense is charged in an accusatory pleading, and the defendant is found guilty

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of the offense with which he is charged, the jury, or the judge if a jury trial is waived, must unless the answer of the defendant admits such previous conviction, find whether or not he has suffered such previous conviction. The verdict or finding upon the charge of previous conviction may be: "We (or I) find the charge of previous conviction true" or "We (or I) find the charge of previous conviction not true," according as the jury or the judge find that the defendant has or has not suffered such conviction. If more than one previous conviction is charged a separate finding must be made as to each.

Bifurcation

Having a jury determine the truth of a prior conviction allegation at the same time it determines the defendant's guilt of the charged offense often poses a grave risk of prejudice. . . .

[A] trial court . . . *may* order that the determination of the truth of a prior conviction allegation be determined in a separate proceeding before the same jury, after the jury has returned a verdict of guilty of the charged offense. The more difficult question is under what circumstances, if any, *must* a trial court bifurcate the trial in this manner? . . .

[T]he state's legitimate interest in conserving judicial resources is insufficient to justify denying a defendant's request to bifurcate the trial when having the jury determine the truth of a prior conviction allegation concurrently with the defendant's guilt of the currently charged offense would pose a substantial risk of undue prejudice to the defendant.

We conclude, therefore, that the denial of a defendant's timely request to bifurcate the determination of the truth of a prior conviction allegation from the determination of the defendant's guilt is an abuse of discretion where admitting, for purposes of sentence enhancement, evidence of an alleged prior conviction during the trial of the currently charged offense would pose a substantial risk of undue prejudice to the defendant. . . .

Contrary to the holding of the Court of Appeal in *Bracamonte*, however, bifurcation is *not* required *in every instance*. In some cases, a trial court properly may determine, prior to trial, that a unitary trial of the defendant's guilt or innocence of the charged offense and of the truth of a prior conviction allegation will not unduly prejudice the defendant. Perhaps the most common situation in which bifurcation of the determination of the truth of a prior conviction allegation is *not* required arises when, even if

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> bifurcation were ordered, the jury still would learn of the existence of the prior conviction before returning a verdict of guilty. . . .
>
> In ruling upon a defendant's timely request for bifurcation, the trial court first should consider the potential prejudicial effect of admission of evidence that the defendant has suffered the alleged prior conviction. As noted above, this court long has "recognized the substantial prejudicial effect inherent in evidence of prior offenses [citation] ...." [Citation.] The potential for prejudice will vary, however, depending upon the circumstances of each case. Factors that affect the potential for prejudice include, but are not limited to, the degree to which the prior offense is similar to the charged offense, [citations] how recently the prior conviction occurred, and the relative seriousness or inflammatory nature of the prior conviction as compared with the charged offense [citations].”
>
> If it appears likely that admission of evidence of the prior conviction would unduly prejudice the defendant, the court should consider whether this potential for prejudice will be lessened for some reason, such as because evidence that the defendant has committed one or more uncharged criminal offenses will be admitted for purposes other than sentence enhancement. The determination whether the risk of undue prejudice to the defendant requires that the trial be bifurcated rests within the sound discretion of the trial court, and that determination will be reversed on appeal only if the trial court abuses its discretion. We observe, however, that the risk of undue prejudice posed by the admission of evidence of a prior conviction, considered against the minimal inconvenience generally caused by bifurcating the trial, frequently will militate in favor of granting a defendant's timely request for bifurcation.

(*People v. Calderon* (1994) 9 Cal.4th 69, 75–79 [italics in original].)

Limiting Instruction

> [W]here the fact of a prior conviction is admitted solely to establish ex-felon status as an element of violation of section 12021, the trial court, at defendant's request, should give an instruction limiting the jury's consideration of the prior to that single purpose.

(*People v. Valentine* (1986) 42 Cal.3d 170, 182 n.7.)

> [W]hether to seek a limiting instruction is a tactical decision properly left to defense counsel, since defense counsel might conclude that the risk of a

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> limiting instruction (unnecessarily highlighting a defendant's status as a felon) outweighed the questionable benefits such an instruction would provide.

(*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1141 [holding no sua sponte duty to give limiting instruction].)

Determination to be Made By Court

Penal Code section 1025 was amended in 1997 to provide that the court shall determine if the defendant is the person named in the documents. (Pen. Code, § 1025(c).) In discussing this amendment, the Supreme Court stated:

> Perhaps because the final statutory enactment was a compromise, with the Legislature reducing, but not entirely eliminating, the jury's role, the answer is not readily apparent. The trial court might choose to determine first whether the defendant is the person who suffered the conviction. A determination that the defendant is not that person would clearly end the matter. If, however, as would usually be the case, the court finds the defendant is that person, the jury apparently would then make a determination like the one it made in this case--that the defendant suffered the prior burglary and attempted burglary convictions. The court would, however, instruct the jury to the effect that the defendant is the person whose name appears on the documents admitted to establish the conviction. This procedure would appear to leave the jury little to do except to determine whether those documents are authentic and, if so, are sufficient to establish that the convictions the defendant suffered are indeed the ones alleged.

(*People v. Kelii* (1999) 21 Cal.4th 452, 458–459.)

See discussion of issue in Commentary section of Instruction.

Defendant Person Named in Documents

> Where the trial court finds that the defendant is the person who is named in the conviction records, it may so instruct the jury. (*People v. Kelii* (1999) 21 Cal.4th 452, 458.)

(*People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165.)

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The People have alleged that the defendant was previously convicted of (another/other) crime[s]. It has already been determined that the defendant is the person named in exhibits _____ *<insert numbers or descriptions of exhibits>***. You must decide whether the evidence proves that the defendant was convicted of the alleged crime[s].**

The People allege that the defendant has been convicted of:

> **[1.] A violation of _____** *<insert code section[s] alleged>***, on _____** *<insert date>***, in the _____** *<insert name of court>***, Case Number _____** *<insert docket or case number>***(;/.)**
>
> **[AND** *<Repeat for each prior conviction alleged.>***]**

[In deciding whether the People have proved the allegation[s], consider only the evidence presented in this proceeding. Do not consider your verdict or any evidence from the earlier part of the trial.]

You may not return a finding that (the/any) alleged conviction has or has not been proved unless all 12 of you agree on that finding.

BENCH NOTES

Instructional Duty

If the defendant is charged with a prior conviction, the court has a sua sponte **duty to instruct on the allegation. Give this instruction if the court has granted a bifurcated trial. The court** must also give **Instruction 115, Reasonable Doubt: For Use in Special Proceeding Including Bifurcated Trial on Enhancement or Sentencing Factor.**

If the defendant is charged with a prison prior, the court must determine whether the jury should decide if the defendant served a separate prison term for the conviction and whether the defendant remained free of prison custody for the "washout" period. (Pen. Code, § 667.5(a) & (b).) The Commentary to Instruction 200 discusses this issue. If the court chooses to submit these issues to the jury, give Instruction 202, Prior Conviction: Prison Prior, with this instruction.

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If the court determines that there is a factual issue regarding the prior conviction that must be submitted to the jury, give Instruction 203: Prior Conviction: Factual Issue for Jury, with this instruction. The Commentary to Instruction 200 discusses this issue.

Give the bracketed paragraph that begins with "In deciding whether the People have proved" on request.

The court must provide the jury with a verdict form on which the jury will indicate whether each prior conviction has been proved. (Pen. Code, § 1158.)

AUTHORITY

Statutory Authority ▸ Pen. Code, §§ 1025, 1158.
Bifurcation ▸ *People v. Calderon* (1994) 9 Cal.4th 69, 77–79; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336.
Judge Determines If Defendant Is Person Named in Documents ▸ Pen. Code, § 1025(b); *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165.
Disputed Factual Issues ▸ See *People v. Epps* (2001) 25 Cal.4th 19, 23; *People v. Kelii* (1999) 21 Cal.4th 452, 458–459; *People v. Wiley* (1995) 9 Cal.4th 580, 592; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *People v. McGee* (2004) 115 Cal.App.4th 819, DEPUBLISHED AND REVIEW GRANTED, April 28, 2004, S123474; *People v. Winslow* (1995) 40 Cal.App.4th 680, 687.
Three-Strikes Statutes ▸ Pen. Code, §§ 667(e), 1170.12.
Five-Year Enhancement for Serious Felony ▸ Pen. Code, § 667(a)(1).
Three-Year Enhancement for Prison Prior If Violent Felony ▸ Pen. Code, § 667.5(a).
One-Year Enhancement for Prison Prior ▸ Pen. Code, § 667.5(b).
Serious Felony Defined ▸ Pen. Code, § 1192(c).
Violent Felony Defined ▸ Pen. Code, 667.5(c).

5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 515.

RELATED ISSUES

See the Related Issues section of Instruction 200, Prior Conviction: Nonbifurcated Trial.

STAFF NOTES

See Notes to Instruction 200.

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202. Prior Conviction: Prison Prior

If you find that the defendant was previously convicted of _____ *<insert description of prior conviction>***, you must also decide whether the People have proved that the defendant served a separate prison term for the crime and did not remain (out of prison custody/ [and] free of a new felony conviction) for (5/10) years.**

To prove this allegation, the People must prove that:

> **1. The defendant served a separate prison term for the crime of _____** *<insert description of prior conviction>***;**
>
> **AND [EITHER]**
>
> **[2. The defendant did not remain out of prison custody for (5/10) years after (he/she) was no longer in prison custody for that crime(;/.)]**
>
> **[OR]**
>
> **[(2/3). The defendant was convicted of a new felony that (he/she) committed within (5/10) years after (he/she) was no longer in prison custody.]**

A person *served a separate prison term for a crime* if he or she served a continuous period of prison confinement imposed for that crime. [The prison term may have been served for that crime alone or in combination with prison terms imposed at the same time for other crimes.] [A person is still *serving a separate prison term for a crime* if he or she is placed back in custody (following an escape/ [or] for a parole violation).] [If a person is returned to custody following (an escape/ [or] a parole violation) and is also sentenced to prison for a new crime, then that person is serving a new separate prison term.]

A person is *in prison custody* until he or she is discharged from prison or released on parole, whichever happens first. [A person is also *in prison custody* if he or she (is placed back in custody for a parole violation/ [or] has unlawfully escaped from custody).]

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A *prison term* includes confinement in [(a/the)] (state prison/federal penal institution/California Youth Authority/_____ *<insert name of hospital or other institution where confinement entitles person to prison credits>***).**

[A *prison term* includes commitment to the State Department of Mental Health as a mentally disordered sex offender following a felony conviction if the commitment lasts more than one year.]

[A conviction of _____ *<insert name of offense from other state or federal offense>* **is the same as a conviction for a felony if the defendant served one year or more in prison for the crime.]**

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

BENCH NOTES

Instructional Duty

Review the Commentary to Instruction 200, Prior Conviction: Nonbifurcated Trial, regarding the current state of the law on whether the court must submit these issues to the jury.

The court must give one of the bracketed elements (did not remain out of prison custody or was convicted of a new felony), depending on the prosecution's theory. The court may give both of the bracketed elements with the bracketed words "either" and "or."

The court may give the bracketed sentence that begins with "If a person is returned to custody following (an escape/ [or] a parole violation) and is also sentenced to prison for a new offense" on request if relevant based on the evidence. (*People v. Langston* (Aug. 17, 2004, S115998) __ Cal.4th __, __.)

If the court gives this instruction, the court must provide the jury with a verdict form on which the jury will indicate whether the allegation has been proved. (Pen. Code, § 1158.)

AUTHORITY

Disputed Factual Issues ▸ See *People v. Epps* (2001) 25 Cal.4th 19, 23; *People v. Kelii* (1999) 21 Cal.4th 452, 458–459; *People v. Wiley* (1995) 9 Cal.4th 580, 592; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *People v.*

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McGee (2004) 115 Cal.App.4th 819, DEPUBLISHED AND REVIEW GRANTED, April 28, 2004, S123474; *People v. Winslow* (1995) 40 Cal.App.4th 680, 687.

Burden of Proof ▸ *People v. Fielder* (2004) 114 Cal.App.4th 1221, 1233.

Continuous, Completed Term ▸ *People v. Medina* (1988) 206 Cal.App.3d 986, 991–992; *People v. Cardenas* (1987) 192 Cal.App.3d 51, 56.

Term for Offense Committed in Prison Is Separate ▸ *People v. Langston* (Aug. 17, 2004, S115998) __ Cal.4th __, __; *People v. Walkkein* (1993) 14 Cal.App.4th 1401, 1410; *People v. Cardenas* (1987) 192 Cal.App.3d 51, 56.

Direct Commitment to Youth Authority as Minor Is Not Prison Prior ▸ *People v. Seals* (1993) 14 Cal.App.4th 1379, 1384–1385.

New Commitment Following Escape Is Separate Prison Term ▸ *People v. Langston* (Aug. 17, 2004, S115998) __ Cal.4th __, __.

Three-Year Enhancement for Prison Prior If Violent Felony ▸ Pen. Code, § 667.5(a).

One-Year Enhancement for Prison Prior ▸ Pen. Code, § 667.5(b).

Violent Felony Defined ▸ Pen. Code, 667.5(c).

RELATED ISSUES

Commitment to Youth Authority

A direct commitment to the California Youth Authority (CYA) under Welfare and Institutions Code section 1731.5(a) is not a prison prior for the purposes of Penal Code section 667.5. (Pen. Code, § 667.5(j);* People v. Seals *(1993) 14 Cal.App.4th 1379, 1383–1385.) Time at the CYA qualifies as a prison prior only if the person was sentenced to state prison and transferred to the CYA for housing under Welfare and Institutions Code section 1731.5(c). (*People v. Seals, supra, *14 Cal.App.4th at pp. 1383–1385.)

Term for Offense Committed in Prison Is Separate

"When a consecutive sentence is imposed under section 1170.1, subdivision (c), for an offense committed in state prison, section 1170.1 requires such sentence to commence *after* the completion of the term for which the defendant was originally imprisoned. Thus, each term is a separate, 'continuous completed' term, which is available for enhancement under section 667.5 if the defendant is subsequently convicted of a felony." (*People v. Walkkein* (1993) 14 Cal.App.4th 1401, 1409–1410 [footnote and citations omitted; italics in original]; see also *People v. Langston* (Aug. 17, 2004, S115998) __ Cal.4th __, __.)

Calculating "Washout" Period

Penal Code section 667.5, subdivisions (a) and (b), contain "washout" periods of 10 and 5 years, respectively. The prosecution bears the burden of proving that the "washout" period does not apply to a particular conviction. (*People v. Fielder* (2004) 114 Cal.App.4th 1221, 1233.) The "washout" period commences when the defendant is discharged from custody or released on parole, "whichever first occurs." (Pen. Code, § 667.5(d); *People v. Nobleton* (1995) 38 Cal.App.4th 76, 84–85.) Any return to prison on a parole violation is considered part of the original prison term. (Pen. Code, § 667.5(d).) Thus, in calculating whether the defendant has remained free of prison custody and a felony conviction for sufficient time, the calculation begins from when the defendant was released on parole without subsequently returning to prison on a parole violation. (*People v. Nobleton, supra,* 38 Cal.App.4th at pp. 84–85.) The calculation ends when the defendant commits a new offense that ultimately results in a felony conviction. (*People v. Fielder, supra,* 114 Cal.App.4th at p. 1233.) The date the offense is committed, not the date of the ultimate conviction, is controlling. (*Id.* at pp. 1233–1234.) The new felony ends the allowable time for the "washout" period regardless of whether the defendant was sentenced to prison for the new felony. (*Id.* at p. 1230.)

See the Related Issues section of Instruction 200, Prior Conviction: Nonbifurcated Trial.

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Pen. Code, § 667.5, in relevant part:

Enhancement of prison terms for new offenses because of prior prison terms shall be imposed as follows:

(a) Where one of the new offenses is one of the violent felonies specified in subdivision (c), in addition to and consecutive to any other prison terms therefor, the court shall impose a three-year term for each prior separate prison term served by the defendant where the prior offense was one of the violent felonies specified in subdivision (c). However, no additional term shall be imposed under this subdivision for any prison term served prior to a period of 10 years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction.

(b) Except where subdivision (a) applies, where the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefor, the court shall impose a one-year term for each prior separate prison term served for any felony; provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of five years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction. . . .

(d) For the purposes of this section, the defendant shall be deemed to remain in prison custody for an offense until the official discharge from custody or until release on parole, whichever first occurs, including any time during which the defendant remains subject to reimprisonment for escape from custody or is reimprisoned on revocation of parole. The additional penalties provided for prior prison terms shall not be imposed unless they are charged and admitted or found true in the action for the new offense.

(e) The additional penalties provided for prior prison terms shall not be imposed for any felony for which the defendant did not serve a prior separate term in state prison.

(f) A prior conviction of a felony shall include a conviction in another jurisdiction for an offense which, if committed in California, is punishable by imprisonment in the state prison if the defendant served one year or more in prison for the offense in the other jurisdiction. A prior conviction

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of a particular felony shall include a conviction in another jurisdiction for an offense which includes all of the elements of the particular felony as defined under California law if the defendant served one year or more in prison for the offense in the other jurisdiction.

(g) A prior separate prison term for the purposes of this section shall mean a continuous completed period of prison incarceration imposed for the particular offense alone or in combination with concurrent or consecutive sentences for other crimes, including any reimprisonment on revocation of parole which is not accompanied by a new commitment to prison, and including any reimprisonment after an escape from incarceration.

(h) Serving a prison term includes any confinement time in any state prison or federal penal institution as punishment for commission of an offense, including confinement in a hospital or other institution or facility credited as service of prison time in the jurisdiction of the confinement.

(i) For the purposes of this section, a commitment to the State Department of Mental Health as a mentally disordered sex offender following a conviction of a felony, which commitment exceeds one year in duration, shall be deemed a prior prison term.

(j) For the purposes of this section, when a person subject to the custody, control, and discipline of the Director of Corrections is incarcerated at a facility operated by the Department of the Youth Authority, that incarceration shall be deemed to be a term served in state prison.

Continuous, Completed Term

Using these principles of statutory construction, we find that the obvious intent of section 667.5 is to count each period of confinement in prison as one that can be used as an enhancement, not to enhance a defendant's sentence more than once for a single prison confinement where there were multiple counts. Under the plain meaning of the words used in subdivision (g), it is clear that this defendant's sentence could not be enhanced twice under section 667.5 for the single term of confinement he served for the two robberies.

. . . The plain meaning of section 667.5, subdivision (g) is to prevent multiple one-year enhancements under section 667.5 itself where the offender has served one period of prison confinement, or block of time, for multiple offenses or convictions. Extra section 667.5 enhancements may only be added for additional periods of prison confinement.

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(*People v. Medina* (1988) 206 Cal.App.3d 986, 991–992.)

> Generally, the number of separate prison terms available for enhancement is determined by identifying the "continuous completed" terms of prison incarceration served. [Citations.] For example, multiple prior convictions served concurrently constitute one separate prison term for which only one sentence enhancement can be imposed. [Citations.] Recommitment to prison for a new offense after the earlier term is "completed" results in two separate prison terms.

(*People v. Cardenas* (1987) 192 Cal.App.3d 51, 56.)

Term for Offense Committed in Prison is Separate

> When a consecutive sentence is imposed under section 1170.1, subdivision (c), for an offense committed in state prison, section 1170.1 requires such sentence to commence *after* the completion of the term for which the defendant was originally imprisoned. n5 Thus, each term is a separate, "continuous completed" term, which is available for enhancement under section 667.5 if the defendant is subsequently convicted of a felony. (*People v. Carr* (1988) 204 Cal.App.3d 774, 780; *People v. Cardenas* (1987) 192 Cal.App.3d 51, 60.)

(*People v. Walkkein* (1993) 14 Cal.App.4th 1401, 1409–1410.)

Direct Commitment to Youth Authority as Minor Is Not Prison Prior

> [A]fter a review of the superior court file and the legislative history of the 1983 amendment to Penal Code section 667.5, the prosecution has conceded defendant was committed directly to the CYA pursuant to Welfare and Institutions Code section 1731.5, subdivision (a), and that such a direct commitment to the CYA does not constitute a prior prison term within the meaning of Penal Code section 667.5, subdivisions (b) and (j). We agree with defendant and accept the prosecution's concession.
>
> The language of subdivision (j) of Penal Code section 667.5 appears on its face to apply only to transfers of youthful offenders to the CYA pursuant to subdivision (c) of Welfare and Institutions Code section 1731.5 and not to direct commitments to the CYA pursuant to subdivision (a) of that section. Penal Code section 667.5,

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> subdivision (j) refers to "a person subject to the custody, control, and discipline of the Director of Corrections." A youthful offender who is directly committed to the CYA is not a person subject to the custody, control or discipline of the Department of Corrections. On the other hand, a youthful offender who is transferred to the CYA pursuant to subdivision (c) of Welfare and Institutions Code section 1731.5 is "deemed to be committed to the Department of Corrections" and remains "subject to the jurisdiction of the Department of Corrections and the Board of Prison Terms."

(*People v. Seals* (1993) 14 Cal.App.4th 1379, 1383–1385.)

See Notes to Instruction 200.

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203. Prior Conviction: Factual Issue for Jury

If you find that the defendant was previously convicted of the crime of _____ <*insert description of prior conviction*>, you must also decide whether the People have proved that in the commission of that prior crime _____ <*insert description of other factual issue, e.g., the defendant personally used a firearm*>.

To prove this allegation, the People must prove that:

<*INSERT ELEMENTS REQUIRED.*>

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

BENCH NOTES

Instructional Duty

To determine whether or not this instruction is required, review the Commentary to Instruction 200, Prior Conviction: Nonbifurcated Trial, regarding the current state of the law on whether the jury must determine ancillary factual issues.

If the court gives this instruction, the court must provide the jury with a verdict form on which the jury will indicate whether the allegation has been proved. (Pen. Code, § 1158.)

AUTHORITY

Statutory Authority ▸ Pen. Code, §§ 1025, 1158.

Disputed Factual Issues ▸ See *People v. Epps* (2001) 25 Cal.4th 19, 23; *People v. Kelii* (1999) 21 Cal.4th 452, 458–459; *People v. Wiley* (1995) 9 Cal.4th 580, 592; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *People v. McGee* (2004) 115 Cal.App.4th 819, DEPUBLISHED AND REVIEW GRANTED, April 28, 2004, S123474; *People v. Winslow* (1995) 40 Cal.App.4th 680, 687.

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RELATED ISSUES

See the Related Issues section of Instruction 200, Prior Conviction: Nonbifurcated Trial.

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STAFF NOTES

See Notes to Instruction 200.

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210. Armed With Firearm, Pen. Code, § 12022(a)(1)

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]][or the lesser 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 one of the principals was armed with a firearm during 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 person is a *principal* in a crime if he or she directly commits [or attempts to commit] the crime or if he or she aids and abets someone else who commits [or attempts to commit] the 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 principal is *armed* with a firearm when that person:

1. Carries a firearm [or has a firearm available] for use in either offense or defense;

AND

2. Knows that he or she is carrying the firearm [or has it available].

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

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

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BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

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.

When two or more defendants are charged with an arming enhancement for the same offense, the preferred approach is for the court to provide the jury with a separate verdict form for the enhancement for each defendant. (*People v. Paul* (1998) 18 Cal.4th 698, 708.) However, this procedure is not required. (*Id.* at p. 705.)

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; see also *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [language of instruction approved; sufficient evidence defendant had firearm available for use]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [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 principal was armed "during the commission of" the offense, the court may give Instruction 739, During Commission of Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25 Cal.4th 98, 109; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.)

If there is evidence that the defendant was an aider and abettor, give the appropriate instructions on aider and abettor liability, Instructions 500–510.

AUTHORITY

Enhancement ▸ Pen. Code, § 12022(a)(1).
Principal Defined ▸ Pen. Code, § 31.
Firearm Defined ▸ Pen. Code, § 12001(b).

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Armed ▸ *People v. Marvin Bland* (1995) 10 Cal.4th 991, 997–998; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422; *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928.

Firearm Need Not Be Operable ▸ *People v. Nelums* (1982) 31 Cal.3d 355, 360.

Firearm Need Not Be Loaded ▸ See *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795.

"In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.

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

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

RELATED ISSUES

Defendant Need Not Know Principal Armed

For an enhancement charged under Penal Code section 120221(a) where the prosecution is pursuing vicarious liability, it is not necessary for the prosecution to prove that the defendant knew that the principal was armed. (*People v. Overten* (1994) 28 Cal.App.4th 1497, 1501.)

Conspiracy

A defendant convicted of conspiracy may also receive an enhancement for being armed during the conspiracy, regardless of whether the defendant is convicted of the offense alleged to be the target of the conspiracy. (*People v. Becker* (2000) 83 Cal.App.4th 294, 298.)

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STAFF NOTES

Penal Code, § 12022, in relevant part:

(a)(1) Except as provided in subdivisions (c) and (d), any person who is armed with a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless the arming is an element of that offense. This additional term shall apply to any person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm.

(2) Except as provided in subdivision (c), and notwithstanding subdivision (d), if the firearm is an assault weapon, as defined in Section 12276 or Section 12276.1, or a machinegun, as defined in Section 12200, the additional and consecutive term described in this subdivision shall be three years whether or not the arming is an element of the offense of which the person was convicted. The additional term provided in this paragraph shall apply to any person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with an assault weapon or machinegun whether or not the person is personally armed with an assault weapon or machinegun.

(c) Notwithstanding the enhancement set forth in subdivision (a), any person who is personally armed with a firearm in the commission of a violation or attempted violation of Section 11351, 11351.5, 11352, 11366.5, 11366.6, 11378, 11378.5, 11379, 11379.5, or 11379.6 of the Health and Safety Code, shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years.

(d) Notwithstanding the enhancement set forth in subdivision (a), any person who is not personally armed with a firearm who, knowing that another principal is personally armed with a firearm, is a principal in the commission of an offense or attempted offense specified in subdivision (c), shall be punished by an additional and consecutive term of imprisonment in the state prison for one, two, or three years.

Pen. Code, § 31:

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All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed.

Pen. Code, § 12001(b):

As used in this title, "firearm" means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.

Pen. Code, § 1203.06—Armed with Firearm Defined:

(4) As used in subdivision (a), "armed with a firearm" means to knowingly carry a firearm as a means of offense or defense.

Pen. Code, § 1158a:

(a) Whenever the fact that a defendant was armed with a weapon either at the time of his commission of the offense or at the time of his arrest, or both, is charged in accordance with section 969c of this code, in any count of the indictment or information to which the defendant has entered a plea of not guilty, the jury, if they find a verdict of guilty of the offense with which the defendant is charged, or of any offense included therein, must also find whether or not the defendant was armed as charged in the count to which the plea of not guilty was entered. The verdict of the jury upon a charge of being armed may be: "We find the charge of being armed contained in the . . . . . count true," or "We find the charge of being armed contained in the . . . . . count not true," as they find that the defendant was or was not armed as charged in any particular count of the indictment or information. A separate verdict upon the charge of being armed must be returned for each count which alleges that the defendant was armed.

Armed Defined—Available for Offense or Defense

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> In contrast [to use], *arming* under the sentence enhancement statutes does not require that a defendant utilize a firearm or even carry one on the body. A defendant is *armed* if the defendant has the specified weapon available for use, either offensively or defensively. [Citations] As a recent Court of Appeal decision observed, "a firearm that is available for use as a weapon creates the very real danger it will be used." (*People v. Mendival* (1992) 2 Cal. App. 4th 562, 573.) Therefore, "[i]t is the availability--the ready access--of the weapon that constitutes arming." (*Id*. at p. 574.) Other Courts of Appeal have come to a similar conclusion. Thus, evidence that during the defendant's commission of a rape, a screwdriver left at the foot of the bed by the defendant's crime partner would have been visible to the defendant, was sufficient to show that the defendant was "armed" with a deadly weapon during the rape. [Citation.] Similarly, a burglar who, before entering a house through a garage, left a loaded handgun on a low wall outside the garage, was found to be "armed" in the commission of the burglary. [Citation.] So too a drug dealer who sold cocaine from his car was deemed to be "armed" when he kept a loaded .357 Ruger in an unlocked compartment in the back of his car. [Citation.] In each case the firearm was available to the defendant to use in furtherance of the underlying felony.

(*People v. Bland* (1995) 10 Cal.4th 991, 997–998 [italics in original].)

> Defendant contends the court erred in modifying the definition of "armed" in CALJIC No. 17.15. CALJIC No. 17.15 states that "[t]he term 'armed with a firearm' means knowingly to carry a firearm as a means of offense or defense." The instruction given to the jury defined "armed" as follows: "As used in this instruction, the term armed with a firearm means knowingly to carry a firearm or have it available as a means of offense or defense." . . .
>
> In *People* v. *Reaves* (1974) 42 Cal.App.3d 852, the court [stated] . . . : . . . "A person is armed with a deadly weapon when he simply carries such weapon *or has it available for use* in either offense or defense." (*Id*. at pp. 856-857, italics added.)
>
> That conclusion in *People* v. *Reaves* is dictum but it was approved in *People* v. *Garcia* (1986) 183 Cal.App.3d 335. [discussing cases described above in quote from *Bland*.] . . .
>
> Further, the underlying intent of the Legislature to deter persons from creating a potential for death or injury resulting from the very presence of

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> a firearm at the scene of the crime (*People* v. *Reaves, supra*, 42 Cal.App.3d at p. 856) is served by using a definition of "armed" which includes having the weapon available for use. Thus, under the facts of this case, the court properly gave the modified version of CALJIC No. 17.15.

(*People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928.)

> Evidence a gun was in a car two blocks away from where the crimes occurred is insufficient evidence of the presence of a firearm "at the scene of the crime" (*Reaves*). Nor from this distance of two blocks was the gun "available for use" as that phrase is defined where he could not reach it or have "ready access" to the gun (*Mendival*). The same can be said of the crimes committed in the motel room. The evidence supporting these two counts established the crimes were committed in a motel room while the gun was stored under the seat in the car some undetermined distance away. The gun was not within his reach, nor had it been placed in a position of especially ready access (*Balbuena*).
>
> As noted, the purpose behind the sentence enhancement provisions for crimes where firearms are involved is to "deter persons from creating the potential for death or injury resulting from the very presence of a firearm at the scene of the crime." (*People v. Reaves, supra*, 42 Cal. App. 3d at p. 856.) However, this threat is appreciably diminished, if not removed, where access to a firearm is only a theoretical possibility. For this reason, as the foregoing authorities point out, to warrant the increased punishment for being armed with a firearm there must be some evidence the presence of the gun at the scene of the crime created an increased risk because it was within reach, handy or accessible to the defendant.

(*People v. Jackson* (1995) 32 Cal.App.4th 411, 421–422.)

Armed—Knowledge

> In instructing the jury on the meaning of "armed with an assault rifle," the trial court gave a modified version of CALJIC No. 17.15, a standard jury instruction that defines the term " armed with a firearm" as "*knowingly* to carry a firearm or have it available as a means of offense or defense." (Italics added.) The trial court's modified instruction, however, left out the word "knowingly." n7 According to defendant, this omission requires setting aside the sentence enhancement. We disagree.

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> n7 As relevant here, the modified instruction told the jury that a person is armed with an assault rifle "when he simply carries an assault rifle or has an assault rifle available for use in either offense or defense."
>
> In finding defendant guilty of possessing cocaine base for the purpose of sale, the jury necessarily found, based on evidence presented by the prosecution, that the bedroom in which police found the cocaine base and the assault rifle was defendant's. Also recovered from that bedroom was a photograph of defendant posing with the assault rifle. **On this evidence, it is not reasonably probable that, had the proper instruction been given, the jury would have made a finding favorable to defendant on the "arming" enhancement**.

(*People v. Bland* (1995) 10 Cal.4th 991, 10051006 [emphasis added].)

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211. Armed With Firearm: Assault Weapon or Machine Gun, Pen. Code, § 12022(a)(2)

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 one of the principals was armed with (an assault weapon/a machine gun) during 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 person is a *principal* in a crime if he or she directly commits [or attempts to commit] the crime or if he or she aids and abets someone else who commits [or attempts to commit] the crime.

[(A/An) _____ *<insert type of weapon from Pen. Code, § 12276 or description from § 12276.1>* **is an *assault weapon*.]**

[A *machine gun* is any weapon that (shoots[,]/ [or] is designed to shoot[,]/ [or] can readily be restored to shoot) automatically more than one shot by a single function of the trigger and without manual reloading.] [A _____ *<insert name of weapon deemed by the federal Bureau of Alcohol, Tobacco, and Firearms as readily convertible to a machine gun>* **is [also] a *machine gun*.]]**

[The term *(assault weapon/machine gun)* is defined in another instruction.]

[(An assault weapon/A machine gun) does not need to be in working order if it was designed to shoot and appears capable of shooting.] [(An assault weapon/A machine gun) does not need to be loaded.]

A principal is *armed* with (an assault weapon/a machine gun) when that person:

3. Carries (an assault weapon/a machine gun) [or has (an assault weapon/a machine gun) available] for use in either offense or defense;

[AND]

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4. Knows that he or she is carrying the weapon [or has it available](./;)

<See Bench Notes regarding element 3.>

[AND

5. Knows or reasonably should know that the weapon has characteristics that make it (an assault weapon/a machine gun).]

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

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

The Supreme Court has held that for the crime of possession of an assault weapon, the prosecution must prove that the defendant knew or reasonably should have known that the weapon possessed the characteristics of an assault weapon. (*In re Jorge M.* (2000) 23 Cal.4th 866, 887.) It is unclear if this holding applies to an enhancement for being armed with an assault weapon. Element 3 is provided for the court to use at its discretion.

The court should give the bracketed definition of "assault weapon" or "machine gun" 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.

When two or more defendants are charged with an arming enhancement for the same offense, the preferred approach is for the court to provide the jury with a separate verdict form for the enhancement for each defendant. (*People v. Paul* (1998) 18 Cal.4th 698, 708.) However, this procedure is not required. (*Id.* at p. 705.)

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In the definition of "armed," the court may give the bracketed phrase "or has (an assault weapon/a machine gun) available" on request if the evidence shows that the weapon 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; see also *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [language of instruction approved; sufficient evidence defendant had firearm available for use]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [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 principal was armed "during the commission of" the offense, the court may give Instruction 739, During Commission of Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25 Cal.4th 98, 109; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.)

If there is evidence that the defendant was an aider and abettor, give the appropriate instructions on aider and abettor liability, Instructions 500–510.

AUTHORITY

Enhancement ▸ Pen. Code, § 12022(a)(2).
Principal Defined ▸ Pen. Code, § 31.
Assault Weapon Defined ▸ Pen. Code, §§ 12276, 12276.1.
Machine Gun Defined ▸ Pen. Code, § 12200.
Knowledge Required for Possession of Assault Weapon ▸ *In re Jorge M.* (2000) 23 Cal.4th 866, 887.
Armed ▸ *People v. Marvin Bland* (1995) 10 Cal.4th 991, 997–998; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422; *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928.
Firearm Need Not Be Operable ▸ *People v. Nelums* (1982) 31 Cal.3d 355, 360.
Firearm Need Not Be Loaded ▸ See *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795.
"In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 320, 329.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

RELATED ISSUES

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See the Related Issues section of Instruction 210, Armed With Firearm, Pen Code § 12022(a)(1).

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STAFF NOTES

Penal Code, § 12022, in relevant part:

(a)(1) Except as provided in subdivisions (c) and (d), any person who is armed with a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless the arming is an element of that offense. This additional term shall apply to any person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm.

(2) Except as provided in subdivision (c), and notwithstanding subdivision (d), if the firearm is an assault weapon, as defined in Section 12276 or Section 12276.1, or a machinegun, as defined in Section 12200, the additional and consecutive term described in this subdivision shall be three years whether or not the arming is an element of the offense of which the person was convicted. The additional term provided in this paragraph shall apply to any person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with an assault weapon or machinegun whether or not the person is personally armed with an assault weapon or machinegun.

Pen. Code, § 12200:

The term "machinegun" as used in this chapter means any weapon which shoots, is designed to shoot, or can readily be restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person. The term also includes any weapon deemed by the federal Bureau of Alcohol, Tobacco, and Firearms as readily convertible to a machinegun under Chapter 53 (commencing with Section 5801) of Title 26 of the United States Code.

Pen. Code, § 12276:

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As used in this chapter, "assault weapon" shall mean the following designated semiautomatic firearms:

(a) All of the following specified rifles:

(1) All AK series including, but not limited to, the models identified as follows:

(A) Made in China AK, AKM, AKS, AK47, AK47S, 56, 56S, 84S, and 86S.

(B) Norinco 56, 56S, 84S, and 86S.

(C) Poly Technologies AKS and AK47.

(D) MAADI AK47 and ARM.

(2) UZI and Galil.

(3) Beretta AR-70.

(4) CETME Sporter.

(5) Colt AR-15 series.

(6) Daewoo K-1, K-2, Max 1, Max 2, AR 100, and AR 110C.

(7) Fabrique Nationale FAL, LAR, FNC, 308 Match, and Sporter.

(8) MAS 223.

(9) HK-91, HK-93, HK-94, and HK-PSG-1.

(10) The following MAC types:

(A) RPB Industries Inc. sM10 and sM11.

(B) SWD Incorporated M11.

(11) SKS with detachable magazine.

(12) SIG AMT, PE-57, SG 550, and SG 551.

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(13) Springfield Armory BM59 and SAR-48.

(14) Sterling MK-6.

(15) Steyer AUG.

(16) Valmet M62S, M71S, and M78S.

(17) Armalite AR-180.

(18) Bushmaster Assault Rifle.

(19) Calico M-900.

(20) J & R ENG M-68.

(21) Weaver Arms Nighthawk.

(b) All of the following specified pistols:

(1) UZI.

(2) Encom MP-9 and MP-45.

(3) The following MAC types:

(A) RPB Industries Inc. sM10 and sM11.

(B) SWD Incorporated M-11.

(C) Advance Armament Inc. M-11.

(D) Military Armament Corp. Ingram M-11.

(4) Intratec TEC-9.

(5) Sites Spectre.

(6) Sterling MK-7.

(7) Calico M-950.

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(8) Bushmaster Pistol.

(c) All of the following specified shotguns:

(1) Franchi SPAS 12 and LAW 12.

(2) Striker 12.

(3) The Streetsweeper type S/S Inc. SS/12.

(d) Any firearm declared by the court pursuant to Section 12276.5 to be an assault weapon that is specified as an assault weapon in a list promulgated pursuant to Section 12276.5.

(e) The term "series" includes all other models that are only variations, with minor differences, of those models listed in subdivision (a), regardless of the manufacturer.

(f) This section is declaratory of existing law, as amended, and a clarification of the law and the Legislature's intent which bans the weapons enumerated in this section, the weapons included in the list promulgated by the Attorney General pursuant to Section 12276.5, and any other models which are only variations of those weapons with minor differences, regardless of the manufacturer. The Legislature has defined assault weapons as the types, series, and models listed in this section because it was the most effective way to identify and restrict a specific class of semiautomatic weapons.

Pen. Code, § 12276.1, in relevant part:

(a) Notwithstanding Section 12276, "assault weapon" shall also mean any of the following:

(1) A semiautomatic, centerfire rifle that has the capacity to accept a detachable magazine and any one of the following:

(A) A pistol grip that protrudes conspicuously beneath the action of the weapon.

(B) A thumbhole stock.

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(C) A folding or telescoping stock.

(D) A grenade launcher or flare launcher.

(E) A flash suppressor.

(F) A forward pistol grip.

(2) A semiautomatic, centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds.

(3) A semiautomatic, centerfire rifle that has an overall length of less than 30 inches.

(4) A semiautomatic pistol that has the capacity to accept a detachable magazine and any one of the following:

(A) A threaded barrel, capable of accepting a flash suppressor, forward handgrip, or silencer.

(B) A second handgrip.

(C) A shroud that is attached to, or partially or completely encircles, the barrel that allows the bearer to fire the weapon without burning his or her hand, except a slide that encloses the barrel.

(D) The capacity to accept a detachable magazine at some location outside of the pistol grip.

(5) A semiautomatic pistol with a fixed magazine that has the capacity to accept more than 10 rounds.

(6) A semiautomatic shotgun that has both of the following:

(A) A folding or telescoping stock.

(B) A pistol grip that protrudes conspicuously beneath the action of the weapon, thumbhole stock, or vertical handgrip.

(7) A semiautomatic shotgun that has the ability to accept a detachable magazine.

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(8) Any shotgun with a revolving cylinder.

Armed Defined—Available for Offense or Defense
See Notes to Instruction 210.

Armed—Knowledge
See Notes to Instruction 210.

Assault Weapon—Knowledge

> Although the [Assault Weapon Control Act] can be characterized as a remedial law aimed at protecting public welfare, its text, history and surrounding statutory context provide no compelling evidence of legislative intent to exclude all scienter from the offense defined in section 12280(b). Section 20's generally applicable presumption that a penal law requires criminal intent or negligence, the severity of the felony punishment imposed for violation of section 12280(b), and the significant possibility innocent possessors would become subject to that weighty sanction were the statute construed as dispensing entirely with mens rea, convince us section 12280(b) was not intended to be a strict liability offense. The gravity of the public safety threat addressed in the AWCA, however, together with the substantial number of prosecutions to be expected under it and the potential difficulty of routinely proving actual knowledge on the part of defendants, convince us section 12280(b) was not intended to contain such an actual knowledge element. Consequently, we construe section 12280(b) as requiring knowledge of, or negligence in regard to, the facts making possession criminal. In a prosecution under section 12280(b), that is to say, the People bear the burden of proving the defendant *knew or reasonably should have known* the firearm possessed the characteristics bringing it within the AWCA.

(*In re Jorge M.* (2000) 23 Cal.4th 866, 887 [emphasis in original, footnote omitted].)

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212. Armed With Firearm: Knowledge That Coparticipant Armed, Pen. Code, § 12022(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 knew that someone who was a principal was armed with a firearm during 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.]

To prove this allegation [for each crime], the People must prove that:

1. **Someone who was a principal in the crime was armed with a firearm during the commission [or attempted commission] of that crime;**

AND

2. **The defendant was also a principal in the crime and knew that the other person was armed with a firearm.**

A person is a *principal* in a crime if he or she directly commits [or attempts to commit] the crime or if he or she aids and abets someone else who commits [or attempts to commit] the 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 principal is *armed* with a firearm when that person:

6. **Carries a firearm [or has a firearm available] for use in either offense or defense;**

AND

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7. Knows that he or she is carrying the firearm [or has it available].

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

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

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

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.

When two or more defendants are charged with an arming enhancement for the same offense, the preferred approach is for the court to provide the jury with a separate verdict form for the enhancement for each defendant. (*People v. Paul* (1998) 18 Cal.4th 698, 708.) However, this procedure is not required. (*Id.* at p. 705.)

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; see also *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [language of instruction approved; sufficient evidence defendant had firearm available for use]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [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 principal was armed "during the commission" of the offense, the court may give Instruction 739, During Commission of Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25 Cal.4th 98, 109; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.)

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If there is evidence that the defendant was an aider and abettor, give the appropriate instructions on aider and abettor liability, Instructions 500–510.

AUTHORITY

Enhancement ▸ Pen. Code, § 12022(d).
Principal Defined ▸ Pen. Code, § 31.
Firearm Defined ▸ Pen. Code, § 12001(b).
Armed ▸ *People v. Marvin Bland* (1995) 10 Cal.4th 991, 997–998; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422; *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928.
Firearm Need Not Be Operable ▸ *People v. Nelums* (1982) 31 Cal.3d 355, 360.
Firearm Need Not Be Loaded ▸ See *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795.
"In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 320, 329.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

RELATED ISSUES

Conspiracy
A defendant convicted of conspiracy may also receive an enhancement for being armed during the conspiracy, regardless of whether the defendant is convicted of the offense alleged to be the target of the conspiracy. (*People v. Becker* (2000) 83 Cal.App.4th 294, 298.)

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STAFF NOTES

Penal Code, § 12022, in relevant part:

> (d) Notwithstanding the enhancement set forth in subdivision (a), any person who is not personally armed with a firearm who, knowing that another principal is personally armed with a firearm, is a principal in the commission of an offense or attempted offense specified in subdivision (c), shall be punished by an additional and consecutive term of imprisonment in the state prison for one, two, or three years.

Armed Defined—Available for Offense or Defense
See Notes to Instruction 210.

Armed—Knowledge
See Notes to Instruction 210.

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213. Personally Armed With Deadly Weapon: Specified Sexual Offenses

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 that the defendant was personally armed with a deadly weapon during 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 *deadly weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.

[When deciding whether an object is a deadly weapon, consider all the surrounding circumstances relating to that question, including when and where the object was possessed[,] [and] [where the person who possessed the object was going][,] [and] [whether the object was changed from its standard form].]

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

A person is *armed* with a deadly weapon when that person:

8. Carries a deadly weapon [or has a deadly weapon available] for use in either offense or defense;

AND

9. Knows that he or she is carrying the deadly weapon [or has it available].

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

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

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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.)

Give the bracketed portion that begins with "When deciding whether" if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574.)

In the definition of "armed," the court may give the bracketed phrase "or has a deadly weapon available" on request if the evidence shows that the weapon 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; see also *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [language of instruction approved; sufficient evidence defendant had firearm available for use]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [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 Instruction 739, During Commission of Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25 Cal.4th 98, 109; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.)

AUTHORITY

Enhancement ▸ Pen. Code, § 12022.3.
Deadly Weapon Defined ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086–1087.
Objects With Innocent Uses ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574.
Armed ▸ *People v. Marvin Bland* (1995) 10 Cal.4th 991, 997–998; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422; *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928.
Must Be Personally Armed ▸ *People v. Rener* (1994) 24 Cal.App.4th 258, 267; *People v. Reed* (1982) 135 Cal.App.3d 149, 152–153.

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"In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 311, 329.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

RELATED ISSUES

Penal Code Section 220
A defendant convicted of violating Penal Code section 220 may receive an enhancement under Penal Code section 12022.3 even though the latter statute does not specifically list section 220 as a qualifying offense. (*People v. Rich* (2003) 109 Cal.App.4th 255, 261.) Section 12022.3 does apply to attempts to commit one of the enumerated offenses, and a conviction for violating section 220, assault with intent to commit a sexual offense, "translates into an attempt to commit" a sexual offense. (*People v. Rich, supra,* 109 Cal.App.4th at p. 261.)

Multiple Weapons
There is a split in the Court of Appeal over whether a defendant may receive multiple enhancements under Penal Code section 12022.3 if the defendant has multiple weapons in his or her possession during the offense. (*People v. Maciel* (1985) 169 Cal.App.3d 273, 279 [defendant may only receive one enhancement for each sexual offense, either for being armed with a rifle or for using a knife, but not both]; *People v. Stiltner* (1982) 132 Cal.App.3d 216, 232 [defendant may receive both enhancement for being armed with a knife and enhancement for using a pistol for each sexual offense].) The court should review the current state of the law before sentencing a defendant to multiple weapons enhancements under Penal Code section 12022.3.

Pepper Spray
In *People v. Blake* (2004) 117 Cal.App.4th 543, 559, the court upheld the jury's determination that pepper spray was a deadly weapon.

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STAFF NOTES

Penal Code, § 12022.3, in relevant part:

> For each violation or attempted violation of Section 261, 262, 264.1, 286, 288, 288a, or 289, and in addition to the sentence provided, any person shall receive the following: . . .
>
> (b) A one-, two-, or five-year enhancement if the person is armed with a firearm or a deadly weapon. The court shall order the middle term unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its enhancement choice on the record at the time of the sentence.

Deadly or Dangerous Weapon

> As used in section 245, subdivision (a)(1), a "deadly weapon" is "any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury." [Citation.] Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citation.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]

(*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029; see also *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086–1087.)

> In *People v. Reid*, the court explained: "There are two categories of 'dangerous or deadly weapons.' First, there are those instrumentalities which are weapons in the strict sense of the word, such a guns, dirks, etc. Second there are those instrumentalities which are not weapons in the strict sense of the word, but which *may* be used as such, such as razors, pocket knives, hat pins, canes, hammers, hatchets, and other sharp or heavy objects. These are not weapons in the strict sense of the word and are not 'dangerous or deadly' to others in the ordinary use for which they are designed. As such, they may not be said as a matter of law to be dangerous or deadly weapons. . . . When it appears that an instrumentality other than one falling within the first category is *capable* of being used in

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> a dangerous or deadly manner, and it may be *fairly inferred* from the evidence that its possessor *intended* on a particular occasion to use it as a weapon should the circumstances require, its character as a dangerous or deadly weapon may be established, at least for purposes of that occasion. [Citations.]" [Citations.]

(*People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [italics in original].)

> In determining whether an object which is not inherently deadly or dangerous has been used as a dangerous or deadly weapon, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue.

(*People v. Blake* (2004) 117 Cal.App.4th 543, 555 [quotation marks and citation omitted.])

Armed Defined—Available for Offense or Defense
See Notes to Instruction 210.

Armed—Knowledge
See Notes to Instruction 210.

Defendant Must be Personally Armed—No Vicarious Liability

> In *People v. Reed*, *supra*, 135 Cal.App.3d 149, the Third Appellate District concluded section 12022.3, subdivision (b) applies only when a defendant is personally armed with a firearm or other deadly weapon. Comparing the use of "personally" in sections 12022, subdivision (b), 12022.5, and 12022.7 with the express language of 12022, subdivision (a) allowing vicarious liability, the court observed the Legislature knows how to limit or impose derivative liability by using express language which unmistakably declares its intent. The court reasoned the Legislature's failure to do so in section 12022.3 created an ambiguity which requires judicial interpretation. Finding no assistance in the legislative history, the court concluded vicarious liability could not be imposed in the absence of express legislative directive.
>
> The Fourth District disagreed with *Reed* in *People v. Le* (1984) 154 Cal.App.3d 1. It stated *Reed* would lead to an absurd result, i.e., if two perpetrators commit a rape, one holding the gun while the other rapes the victim, only the one holding the gun would receive the enhancement. It reasoned since the Legislature knows how to limit vicarious liability, it

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> would have done so as it did in sections 12022, subdivision (b), 12022.5 and 12022.7 had this been its intent. (*People v. Le*, *supra*, 154 Cal.App.3d at p. 11.)
>
> [The Supreme Court later cited *Reed* with approval and criticized the holding of *Le*. (*People v. Piper* (1986) 42 Cal.3d 471, 477).] . . .
>
> We conclude that the language of section 12022.3 (either subd. (a) or (b)) must be read as imposing direct liability only.

(*People v. Rener* (1994) 24 Cal.App.4th 258, 267.)

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214. Personally Armed With Firearm

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 that the defendant was personally armed with a firearm during 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:

10. Carries a firearm [or has a firearm available] for use in either offense or defense;

AND

11. Knows that he or she is carrying the firearm [or has it available].

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

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

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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.)

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; see also *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [language of instruction approved; sufficient evidence defendant had firearm available for use]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [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 Instruction 739, During Commission of Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25 Cal.4th 98, 109; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.)

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 Instruction 200, 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(a)(2), 12022(c), 12022.3.
Firearm Defined ▸ Pen. Code, § 12001(b).
Armed ▸ *People v. Marvin Bland* (1995) 10 Cal.4th 991, 997–998; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422; *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928.
Personally Armed ▸ *People v. Smith* (1992) 9 Cal.App.4th 196, 203–208.

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Must Be Personally Armed for Enhancement Under Penal Code Section 12022.3 ▸ *People v. Rener* (1994) 24 Cal.App.4th 258, 267; *People v. Reed* (1982) 135 Cal.App.3d 149, 152–153.

Defendant Not Present When Drugs and Weapon Found ▸ *People v. Bland* (1995) 10 Cal.4th 991, 995.

Firearm Need Not Be Operable ▸ *People v. Nelums* (1982) 31 Cal.3d 355, 360.

Firearm Need Not Be Loaded ▸ See *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795.

"In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 311, 320, 329.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

RELATED ISSUES

Defendant Not Present When Drugs and Weapon Found

In *People v. Marvin Bland* (1995) 10 Cal.4th 991, 995, 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*. [footnote omitted].)

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:

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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 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 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.) 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 Instruction 213, Personally Armed With Deadly Weapon: Specified Sexual Offenses.

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STAFF NOTES

Penal Code, § 12022, in relevant part:

> (c) Notwithstanding the enhancement set forth in subdivision (a), any person who is personally armed with a firearm in the commission of a violation or attempted violation of Section 11351, 11351.5, 11352, 11366.5, 11366.6, 11378, 11378.5, 11379, 11379.5, or 11379.6 of the Health and Safety Code, shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years.

Penal Code, § 12022.3, in relevant part:

> For each violation or attempted violation of Section 261, 262, 264.1, 286, 288, 288a, or 289, and in addition to the sentence provided, any person shall receive the following: . . .
>
> (b) A one-, two-, or five-year enhancement if the person is armed with a firearm or a deadly weapon. The court shall order the middle term unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its enhancement choice on the record at the time of the sentence.

Armed Defined—Available for Offense or Defense
See Notes to Instruction 210.

Armed—Knowledge
See Notes to Instruction 210.

"Personally" Armed—Jury Must be Instructed on "Personal Arming" But Need Not Define "Personal

> Defendants claim the trial court erred because (1) it did not instruct the jury that a defendant must be "personally armed" for purposes of section 12022, subdivision (c); and (2) the instruction actually given improperly permitted a jury finding of "true" based solely on vicarious liability. We agree. . . .
>
> [S]ubdivision (c) of section 12022 expressly provides *only* for personal liability. . . .

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The words "personally armed" in section 12022, subdivision (c) do not require that the firearm be physically carried on the defendant's person. . . .

Instead, "[i]t is the availability--the ready access--of the weapon that constitutes arming." [Citation.] . . .

We urge the CALJIC committee to promulgate a new instruction for use when a personal arming allegation under section 12022, subdivision (c) is in issue. Such an instruction might read:

"It is alleged in [Count[s]] that in the [attempted] commission of the crime therein described defendant[s] [and] [was] [were] personally armed with a firearm.

"If you find a defendant guilty of the crime[s] thus charged, you must determine whether or not such defendant was personally armed with a firearm at the time of the [attempted] commission of the crime[s].

"The term 'armed with a firearm' means knowingly to carry a firearm [or have it available for use] as a means of offense or defense. n21

n21 "Personally" need not be separately defined. Various other CALJIC instructions use the term without definition. Since " '[p]ersonally' refers to the person who engages in this prohibited conduct" (*People v. Mendival, supra*, 2 Cal.App.4th at p. 574), its insertion into the instruction should to be sufficient to tell the jury that the defendant him--or herself had to knowingly carry the firearm or have it available for use to be found liable. For purpose of clarity, we have inserted "for use" in the optional "or have it available" clause. (Cf. CALJIC No. 17.15 (1991 rev.) (5th ed. pocket pt.).) [End Footnote]

"The word 'firearm' includes a pistol, revolver, shotgun, [or] rifle [or any other device, designed to be used as a weapon from which a projectile may be expelled by the force of an explosion or other form of combustion.]

"The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.

"You will include a special finding on that question using a form that will be supplied for that purpose."

(*People v. Smith* (1992) 9 Cal.App.4th 196, 203–208.)

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Defendant Must be Personally Armed—No Vicarious Liability Under § 12022.3

See Notes to Instruction 213.

Defendant Not Present When Drugs and Weapon Found

> Penal Code section 12022 imposes an additional prison term for anyone "armed with a firearm in the commission" of a felony. The question we resolve here is this: is a defendant convicted of a possessory drug offense subject to this "arming" enhancement when the defendant possesses both drugs and a gun, and keeps them together, but is not present when the police seize them from the defendant's house? The answer is: yes.
>
> Possessory drug offenses are continuing crimes that extend throughout a defendant's assertion of dominion and control over the drugs, even when the drugs are not in the defendant's immediate physical presence. Therefore, when 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.

(*People v. Bland* (1995) 10 Cal.4th 991, 995 [footnote omitted].)

The *Bland* case held that the evidence was sufficient to support the jury's finding that the defendant was armed during the drug offense. The case did not state that the jury must be instructed on these inferences. However, CALJIC has created a special jury instruction based on *Bland*. The working group concluded that the case did not support inclusion of a special jury instruction. The working group recommends a bench note with suggested language in the event that a trial court is looking for an instruction on this topic.

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216. Personally Armed With Firearm: Unlawfully Armed When Arrested

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 that the defendant was unlawfully armed with a firearm when (he/she) was arrested for that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation [for each crime], the People must prove that:

1. **The defendant was personally armed with a firearm when (he/she) was arrested for the crime;**

AND

2. **The defendant possessed the firearm unlawfully.**

[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:

12. Carries a firearm [or has a firearm available] for use in either offense or defense;

AND

13. Knows that he or she is carrying the firearm [or has it available].

Other instructions explain what is necessary for the People to prove that the defendant possessed the firearm unlawfully. You must apply those

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instructions when you decide whether the People have proved this additional allegation.

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

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.)

The court **must also give** the appropriate instruction on unlawful possession of a firearm under Penal Code section 12021, 12025, or 12031. See Instructions 1800 et seq., on weapons.

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; see also *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928 [language of instruction approved; sufficient evidence defendant had firearm available for use]; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422 [evidence that firearm was two blocks away from scene of rape insufficient to show available to defendant].)

If the defendant is charged with being ineligible for probation under Penal Code section 1203.06 for being armed when arrested and having been convicted of a specified prior crime, the court should also give Instruction 200, 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(a)(2).
Firearm Defined ▸ Pen. Code, § 12001(b).

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Armed ▸ *People v. Marvin Bland* (1995) 10 Cal.4th 991, 997–998; *People v. Jackson* (1995) 32 Cal.App.4th 411, 419–422; *People v. Wandick* (1991) 227 Cal.App.3d 918, 927–928.

Personally Armed ▸ *People v. Smith* (1992) 9 Cal.App.4th 196, 203–208.

Firearm Need Not Be Operable ▸ See *People v. Nelums* (1982) 31 Cal.3d 355, 360.

Firearm Need Not Be Loaded ▸ See *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795.

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

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

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STAFF NOTES

Pen. Code, § 1203.06, in relevant part:

> (2) Any person previously convicted of a felony specified in subparagraphs (A) to (L), inclusive, of paragraph (1), or assault with intent to commit murder under former Section 217, who is convicted of a subsequent felony and who was personally armed with a firearm at any time during its commission or attempted commission or was unlawfully armed with a firearm at the time of his or her arrest for the subsequent felony.

Armed Defined—Available for Offense or Defense
See Notes to Instruction 210.

Armed—Knowledge
See Notes to Instruction 210.

"Personally" Armed—Jury Must be Instructed on "Personal Arming" But Need Not Define "Personal"
See Notes to Instruction 214.

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220. Personally Used Deadly Weapon

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

[When deciding whether an object is a deadly weapon, consider all the surrounding circumstances relating to that question, including when and where the object was possessed[,] [and] [where the person who possessed the object was going][,] [and] [whether the object was changed from its standard form].]

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

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

[1.] Displays the weapon in a menacing manner(./;)

[OR]

[2. Hits someone with the weapon(./;)]

[OR

(3/2). Fires the weapon.]

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

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

Give all of the bracketed "or dangerous" phrases if the enhancement charged uses both the words "deadly" and "dangerous" to describe the weapon. (Pen. Code, §§ 667.61, 1192.7(c)(23), 12022(b).) Do not give these bracketed phrases if the enhancement uses only the word "deadly." (Pen. Code, § 12022.3.)

Give the bracketed portion that begins with "When deciding whether" if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574.)

In the definition of "personally uses," the court may give the bracketed item 3 if the case involves an object that may be "fired."

If the case involves an issue of whether the defendant used the weapon "during the commission of" the offense, the court may give Instruction 739, During Commission of Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25 Cal.4th 98, 109; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.)

AUTHORITY

Enhancements ▸ Pen. Code, §§ 667.61(e)(4), 1192.7(c)(23), 12022(b)(1) & (2), 12022.3.

Deadly Weapon Defined ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086–1087.

Objects With Innocent Uses ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574.

Personally Uses ▸ *People v. Marvin Bland* (1995) 10 Cal.4th 991, 997; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320; see also Pen. Code, § 1203.06(b)(3).

"In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.

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May Not Receive Enhancement for Both Using and Being Armed With One Weapon ▸ *People v. Wischemann* (1979) 94 Cal.App.3d 162, 175–176.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 40.
3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 320, 324–332.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

RELATED ISSUES

No Duty to Instruct on "Lesser Included Enhancements"
"[A] trial court's sua sponte obligation to instruct on lesser included offenses does not encompass an obligation to instruct on 'lesser included enhancements.' " (*People v. Majors* (1998) 18 Cal.4th 385, 411.) Thus, if the defendant is charged with an enhancement for use of a weapon, the court does not need to instruct on an enhancement for being armed.

Weapon Displayed Before Felony Committed
Where a weapon is displayed initially and the underlying crime is committed some time after the initial display, the jury may conclude that the defendant used the weapon in the commission of the offense if the display of the weapon was "at least an aid in completing an essential element of the subsequent crimes . . . ." (*People v. Masbruch* (1996) 13 Cal.4th 1001, 1014.)

Weapon Used Did Not Cause Death
In *People v. Lerma* (1996) 42 Cal.App.4th 1221, 1224, the defendant stabbed the victim and then kicked him. The coroner testified that the victim died as a result of blunt trauma to the head and that the knife wounds were not life threatening. *(Ibid.)* The court upheld the finding that the defendant had used a knife during the murder even though the weapon was not the cause of death. (*Id.* at p. 1226.) The court held that in order for a weapon to be used in the commission of the crime, there must be "a nexus between the offense and the item at issue, [such] that the item was an instrumentality of the crime." *(Ibid.)* Here, the court found that "[t]he knife was instrumental to the consummation of the murder and was used to advantage." *(Ibid.)*

"One Strike" Law and Use Enhancement
Where the defendant's use of a weapon has been used as a basis for applying the "one strike" law for sex offenses, the defendant may not also receive a separate

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enhancement for use of a weapon in commission of the same offense. (*People v. Mancebo* (2002) 27 Cal.4th 735, 754.)

Assault and Use of Deadly Weapon Enhancement
"A conviction [for assault with a deadly weapon or by means of force likely to cause great bodily injury] under [Penal Code] section 245, subdivision (a)(1) cannot be enhanced pursuant to section 12022, subdivision (b)." (*People v. Summersville* (1995) 34 Cal.App.4th 1062, 1070.)

Robbery and Use of Deadly Weapon Enhancement
A defendant may be convicted and sentenced for both robbery and an enhancement for use of a deadly weapon during the robbery. (*In re Michael L.* (1985) 39 Cal.3d 81, 88.)

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STAFF NOTES

Pen. Code, § 667.61, "One Strike Sex Law," in relevant part:

(a) A person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 25 years except as provided in subdivision (j).

(b) Except as provided in subdivision (a), a person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years except as provided in subdivision (j). . . .

(e). . . (4) The defendant personally used a dangerous or deadly weapon or firearm in the commission of the present offense in violation of Section 12022, 12022.3, 12022.5, or 12022.53.

Pen. Code, § 1192.7(c)(23), "Serious Felony" defined, in relevant part:

(c) As used in this section, "serious felony" means any of the following:

(23) any felony in which the defendant personally used a dangerous or deadly weapon;

Penal Code, § 12022, in relevant part:

(b)(1) Any person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense.

(2) If the person described in paragraph (1) has been convicted of carjacking or attempted carjacking, the additional term shall be one, two, or three years.

(3) When a person is found to have personally used a deadly or dangerous

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weapon in the commission of a felony or attempted felony as provided in this subdivision and the weapon is owned by that person, the court shall order that the weapon be deemed a nuisance and disposed of in the manner provided in Section 12028.

Pen. Code, § 12022.3, in relevant part:

For each violation or attempted violation of Section 261, 262, 264.1, 286, 288, 288a, or 289, and in addition to the sentence provided, any person shall receive the following:

(a) A 3-, 4-, or 10-year enhancement if the person uses a firearm or a deadly weapon in the commission of the violation.

Pen. Code, § 1203.06—Definition of “Personally Use":

(3) As used in subdivision (a), "used a firearm" means to display a firearm in a menacing manner, to intentionally fire it, or to intentionally strike or hit a human being with it.

Personally Use

In *People v. Chambers* (1972) 7 Cal. 3d 666, 672, we explained the distinction between *use* and *arming* this way: "By employing the term 'uses' instead of 'while armed' the Legislature requires something more than merely being armed. [Citation.] One who is armed with a concealed weapon may have the potential to harm or threaten harm to the victim and those who might attempt to interrupt the commission of the crime or effect an arrest. [Citation.] Although the use of a firearm connotes something more than a bare potential for use, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means or display of a firearm in aiding the commission of one of the specified felonies. 'Use' means, among other things, 'to carry out a purpose or action by means of,' to 'make instrumental to an end or process,' and to 'apply to advantage.' (Webster's New Internat. Dict. (3d ed. 1961).)" We then concluded in *Chambers* (7 Cal. 3d at pp. 672-673) that the defendant, who had demanded money from the victim at gunpoint, *used* the gun "at least as an aid" in the commission of the completed crime of robbery.

(*People v. Bland* (1995) 10 Cal.4th 991, 997.)

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> The definition of personal use given in section 1203.06 has been accepted as applicable to section 12022.5(a) [personal use of a firearm] and has been incorporated in CALJIC No. 17.19, which was given to the jury. . . .
>
> Defendant argues that CALJIC No. 17.19 thus has a major gap: it makes no mention of the mental state which must accompany the menacing display variety of personal use. Thus, defendant maintains that the trial court has a sua sponte duty to modify the instruction by describing the requisite mental state. We agree with defendant's position and hold that personal use by menacing display, just as with firing or striking, must be done intentionally and that the jury must be instructed accordingly.

(*People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320; see also *People v. Wims* (1995) 10 Cal.4th 293, 303 [also approving use of definition from 1203.06 and requiring that menacing display be intentional].)

Deadly or Dangerous Weapon

> As used in section 245, subdivision (a)(1), a "deadly weapon" is "any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury." [Citation.] Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citation.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]

(*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029; see also *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086–1087.)

> In *People v. Reid*, the court explained: "There are two categories of 'dangerous or deadly weapons.' First, there are those instrumentalities which are weapons in the strict sense of the word, such a guns, dirks, etc. Second there are those instrumentalities which are not weapons in the strict sense of the word, but which *may* be used as such, such as razors, pocket knives, hat pins, canes, hammers, hatchets, and other sharp or heavy objects. These are not weapons in the strict sense of the word and are not 'dangerous or deadly' to others in the ordinary use for which they are designed. As such, they may not be said as a matter of law to be

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> dangerous or deadly weapons. . . . When it appears that an instrumentality other than one falling within the first category is *capable* of being used in a dangerous or deadly manner, and it may be *fairly inferred* from the evidence that its possessor *intended* on a particular occasion to use it as a weapon should the circumstances require, its character as a dangerous or deadly weapon may be established, at least for purposes of that occasion. [Citations.]" [Citations.]

(*People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [italics in original].)

"In the Commission"

> We conclude that the phrase "in the commission of" has the same meaning for the purposes of Penal Code sections 12022.3, subdivision (a), and 667.61, subdivision (e)(4), as it does under the felony-murder provisions. As the Court of Appeal herein explained, the "commission" of a sexual offense specified in Penal Code section 12022.3, subdivision (a), does not end with the completion of the sex act, but continues as long as the assailant maintains control over the victim.
>
> Moreover, as we explained in *People v. Masbruch, supra,* 13 Cal. 4th at page 1006, the legislative intent to deter the use of firearms in the commission of specified felonies requires that "use" be broadly construed. In the case of a weapons-use enhancement, such use may be deemed to occur "in the commission of" the offense if it occurred *before, during, or after* the technical completion of the felonious sex act. The operative question is whether the sex offense posed a greater threat of harm--i.e., was more culpable--because the defendant used a deadly weapon to threaten or maintain control over his victim.

(*People v. Jones* (2001) 25 Cal.4th 98, 109–110 [emphasis in original].)

"In the Commission"—Initial Display

> Here, defendant tied up Mary and Marietta immediately after his initial gun display. Having thereby incapacitated his victims, defendant was free to commit whatever crimes he desired at his leisure and in any location. Thus, neither the fact that defendant left the room on numerous occasions, nor that he spent an hour robbing and torturing Mary and her mother before raping and sodomizing Mary, had any bearing on her continuing state of helplessness engendered directly by the gun use. Given the control

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> that defendant's initial gun display effected, use findings under section 12022.3(a) were permissible even if he did not "continually display the weapon during the course of later crimes." (*People v. Turner*, *supra*, 145 Cal. App. 3d at p. 685.) Under these circumstances, the jury could reasonably conclude that defendant, by his initial display, "utilized the gun at least as an aid in completing an essential element of" the crimes of rape and sodomy, i.e., that he accomplished these acts against Mary's will "by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury" on the victim or another person. (*People v. Chambers*, *supra*, 7 Cal. 3d at pp. 672-673; § 261, subd. (a)(2), 286, subd. (c).) . . .
>
> [W]e hold only that the jury may find true a gun use allegation when it concludes a defendant "utilized the gun at least as an aid in completing an essential element of" a subsequent crime. (*People v. Chambers*, *supra*, 7 Cal. 3d at pp. 672-673.)

(*People v. Masbruch* (1996) 13 Cal.4th 1001, 1011–1013.)

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221. Personally Used Firearm

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 used a firearm during 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.]

Someone *personally uses* a firearm if he or she intentionally does any of the following:

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

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

OR

3. **Fires the firearm.**

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

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

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BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

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.

If the case involves an issue of whether the defendant used the weapon "during the commission of" the offense, the court may give Instruction 739, During Commission of Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25 Cal.4th 98, 109; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.)

AUTHORITY

Enhancements ▸ Pen. Code, §§ 667.5(c)(8), 667.61(e)(4), 1203.06, 1192.7(c)(8), 12022.3, 12022.5, 12022.53(b).
Firearm Defined ▸ Pen. Code, § 12001(b).
Firearm Need Not Be Operable ▸ *People v. Nelums* (1982) 31 Cal.3d 355, 360; see also Pen. Code, § 12022.53(b).
Firearm Need Not Be Loaded ▸ See *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795; see also Pen. Code, § 12022.53(b).
Personally Uses ▸ *People v. Marvin Bland* (1995) 10 Cal.4th 991, 997; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320; see also Pen. Code, § 1203.06(b)(3).
"In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.
May Not Receive Enhancement for Both Using and Being Armed With One Weapon ▸ *People v. Wischemann* (1979) 94 Cal.App.3d 162, 175–176.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 321–332.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

RELATED ISSUES

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Assault With Firearm
An enhancement under Penal Code section 12022.5 may be applied to a conviction for assault with a firearm. (Pen. Code, § 12022.5(d).) The enhancements provided by Penal Code section 12022.53 may be applied to assault with a firearm on a peace officer, but to no other charge of assault. (Pen. Code, § 12022.53(a).)

Multiple Victims—Penal Code Section 12022.5
A defendant may receive multiple use enhancements under Penal Code section 12022.5 if convicted of multiple charges based on multiple victims even if the crimes occurred in a single "transaction" or "occurrence." (*In re Tameka C.* (2000) 22 Cal.4th 190, 195–198.) Thus, where the defendant was convicted of two counts of assault based on firing a single shot at one person, injuring a second, unintended victim, the defendant properly received two use enhancements. (*Id.* at p. 200.)

See the Related Issues section of Instruction 220, Personally Used Deadly Weapon.

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STAFF NOTES

Penal Code, § 667.5, "Violent Felony" defined, in relevant part:

(a) Where one of the new offenses is one of the violent felonies specified in subdivision (c), in addition to and consecutive to any other prison terms therefor, the court shall impose a three-year term for each prior separate prison term served by the defendant where the prior offense was one of the violent felonies specified in subdivision (c). . . .

(c) For the purpose of this section, "violent felony" shall mean any of the following: . . .

(8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7 or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in Section 12022.5 or 12022.55.

Pen. Code, § 667.61, "One Strike Sex Offense Law," in relevant part:

(a) A person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 25 years except as provided in subdivision (j).

(b) Except as provided in subdivision (a), a person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years except as provided in subdivision (j).

. . .

(e). . . (3) The defendant personally inflicted great bodily injury on the victim or another person in the commission of the present offense in violation of Section 12022.53, 12022.7, or 12022.8.

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(4) The defendant personally used a dangerous or deadly weapon or firearm in the commission of the present offense in violation of Section 12022, 12022.3, 12022.5, or 12022.53.

Pen. Code, § 1203.06:

(a) Probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any of the following persons:

(1) Any person who personally used a firearm during the commission or attempted commission of any of the following crimes:

(A) Murder.

(B) Robbery, in violation of Section 211.

(C) Kidnapping, in violation of Section 207 .

(D) Kidnapping in violation of Section 209.

(E) Burglary of the first degree, as defined in Section 460.

(F) Except as provided in Section 1203.065, rape in violation of paragraph (2) of subdivision (a) of Section 261.

(G) Assault with intent to commit rape or sodomy, in violation of Section 220.

(H) Escape, in violation of Section 4530 or 4532.

(I) Carjacking, in violation of Section 215.

(J) Any person convicted of aggravated mayhem in violation of Section 205.

(K) Torture, in violation of Section 206.

(L) Kidnapping, in violation of Section 209.5.

(M) A felony violation of Section 136.1 or 137.

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(3) As used in subdivision (a), "used a firearm" means to display a firearm in a menacing manner, to intentionally fire it, or to intentionally strike or hit a human being with it.

Pen. Code, § 1192.7(c)(8), "Serious Felony" defined, in relevant part:

(c) As used in this section, "serious felony" means any of the following:

(8) any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm;

Pen. Code, § 12022.3, in relevant part:

For each violation or attempted violation of Section 261, 262, 264.1, 286, 288, 288a, or 289, and in addition to the sentence provided, any person shall receive the following:

(a) A 3-, 4-, or 10-year enhancement if the person uses a firearm or a deadly weapon in the commission of the violation.

Penal Code, § 12022.5, in relevant part:

(a) Except as provided in subdivision (b), any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense.

(b) Notwithstanding subdivision (a), any person who personally uses an assault weapon, as specified in Section 12276 or Section 12276.1, or a machinegun, as defined in Section 12200, in the commission of a felony or attempted felony, shall be punished by an additional and consecutive term of imprisonment in the state prison for 5, 6, or 10 years. . . .

(d) Notwithstanding the limitation in subdivision (a) relating to being an element of the offense, the additional term provided by this section shall be imposed for any violation of Section 245 if a firearm is used, or for murder if the killing is perpetrated by means of shooting a firearm from a

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motor vehicle intentionally at another person outside of the vehicle with the intent to inflict great bodily injury or death.

Penal Code, § 12022.53, in relevant part:

(a) This section applies to the following felonies:

(1) Section 187 (murder).

(2) Section 203 or 205 (mayhem).

(3) Section 207, 209, or 209.5 (kidnapping).

(4) Section 211 (robbery).

(5) Section 215 (carjacking).

(6) Section 220 (assault with intent to commit a specified felony).

(7) Subdivision (d) of Section 245 (assault with a firearm on a peace officer or firefighter).

(8) Section 261 or 262 (rape).

(9) Section 264.1 (rape or sexual penetration in concert).

(10) Section 286 (sodomy).

(11) Section 288 or 288.5 (lewd act on a child).

(12) Section 288a (oral copulation).

(13) Section 289 (sexual penetration).

(14) Section 4500 (assault by a life prisoner).

(15) Section 4501 (assault by a prisoner).

(16) Section 4503 (holding a hostage by a prisoner).

(17) Any felony punishable by death or imprisonment in the state prison for life.

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(18) Any attempt to commit a crime listed in this subdivision other than an assault.

(b) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply. . . .

(f) Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment. An enhancement involving a firearm specified in Section 12021.5, 12022, 12022.3, 12022.4, 12022.5, or 12022.55 shall not be imposed on a person in addition to an enhancement imposed pursuant to this section. An enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d). . . .

(j) For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the information or indictment and either admitted by the defendant in open court or found to be true by the trier of fact. When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment.

Personally Uses

See Notes to Instruction 220.

"In the Commission"

See Notes to Instruction 220.

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222. Personally Used Firearm: Assault Weapon or Machine Gun

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 used (an assault weapon/a machine gun) during 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/An)_____ *<insert type of weapon from Pen. Code, § 12276 or description from § 12276.1>* **is an *assault weapon*.]**

[A *machine gun* is any weapon that (shoots[,]/ [or] is designed to shoot[,]/ [or] can readily be restored to shoot) automatically more than one shot by a single function of the trigger and without manual reloading.] [A _____ *<insert name of weapon deemed by the federal Bureau of Alcohol, Tobacco, and Firearms as readily convertible to a machine gun>* **is [also] a *machine gun.*]]**

[The term *(assault weapon/machine gun)* is defined in another instruction.]

[(An assault weapon/A machine gun) does not need to be in working order if it was designed to shoot and appears capable of shooting.] [(An assault weapon/A machine gun) does not need to be loaded.]

Someone *personally uses* (an assault weapon/a machine gun) if he or she [knows or reasonably should know that the weapon has characteristics that make it (an assault weapon/a machine gun) and] intentionally does any of the following:

4. Displays the (assault weapon/machine gun) in a menacing manner;

5. Hits someone with the (assault weapon/machine gun);

OR

6. Fires the (assault weapon/machine gun).

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

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

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

The Supreme Court has held that for the crime of possession of an assault weapon, the prosecution must prove that the defendant knew or reasonably should have known that the weapon possessed the characteristics of an assault weapon. (*In re Jorge M.* (2000) 23 Cal.4th 866, 887.) It is unclear if this holding applies to an enhancement for using an assault weapon. In the definition of "personally uses," the court may give the bracketed phrase that begins "knows or reasonably should know" at its discretion.

The court should give the bracketed definition of "assault weapon" or "machine gun" 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.

If the case involves an issue of whether the defendant used the weapon "during the commission of" the offense, the court may give Instruction 739, During Commission of Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25 Cal.4th 98, 109; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.)

AUTHORITY

Enhancement ▸ Pen. Code, § 12022.5(b).
Assault Weapon Defined ▸ Pen. Code, §§ 12276, 12276.1.
Machine Gun Defined ▸ Pen. Code, § 12200.
Knowledge Required for Assault Weapon Possession ▸ *In re Jorge M.* (2000) 23 Cal.4th 866, 887.
Firearm Need Not Be Operable ▸ *People v. Nelums* (1982) 31 Cal.3d 355, 360; see also Pen. Code, § 12022.53(b).
Firearm Need Not Be Loaded ▸ See *People v. Steele* (1991) 235 Cal.App.3d 788, 791–795; see also Pen. Code, § 12022.53(b).
Personally Uses ▸ *People v. Marvin Bland* (1995) 10 Cal.4th 991, 997; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320; see also Pen. Code, § 1203.06(b)(3).

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"In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.

May Not Receive Enhancement for Both Using and Being Armed With One Weapon ▸ *People v. Wischemann* (1979) 94 Cal.App.3d 162, 175–176.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 321–332.

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

RELATED ISSUES

See the Related Issues sections of Instruction 220, Personally Used Deadly Weapon, and Instruction 221, Personally Used Firearm.

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STAFF NOTES

Penal Code, § 12022.5, in relevant part:

> (a) Except as provided in subdivision (b), any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense.
>
> (b) Notwithstanding subdivision (a), any person who personally uses an assault weapon, as specified in Section 12276 or Section 12276.1, or a machinegun, as defined in Section 12200, in the commission of a felony or attempted felony, shall be punished by an additional and consecutive term of imprisonment in the state prison for 5, 6, or 10 years. . . .
>
> (d) Notwithstanding the limitation in subdivision (a) relating to being an element of the offense, the additional term provided by this section shall be imposed for any violation of Section 245 if a firearm is used, or for murder if the killing is perpetrated by means of shooting a firearm from a motor vehicle intentionally at another person outside of the vehicle with the intent to inflict great bodily injury or death.

Personally Uses

See Notes to Instruction 220.

"In the Commission"

See Notes to Instruction 220.

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223. Personally Used Firearm: Intentional Discharge

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 and intentionally discharged a firearm during that offense. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

To prove this allegation [for each crime], the People must prove that:

1. **The defendant personally discharged a firearm during the commission [or attempted commission] of the crime;**

AND

2. **The defendant intended to discharge the firearm.**

[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.]

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

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) If the defendant is charged with an enhancement for both intentional discharge *and* intentional discharge causing great bodily injury or death, the court may give Instruction 224B, Personally

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Used Firearm: Intentional Discharge and Discharge Causing Injury or Death Both Charged, instead of this instruction.

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.

If the case involves an issue of whether the defendant used the weapon "during the commission of" the offense, the court may give Instruction 739, During Commission of Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25 Cal.4th 98, 109; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.)

AUTHORITY

Enhancement ▸ Pen. Code, § 12022.53(c).
Firearm Defined ▸ Pen. Code, § 12001(b).
"In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 322.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

RELATED ISSUES

Self-Defense and Imperfect Self-Defense
Penal Code section 12022.53(*l*) provides that "[t]he enhancements specified in this section shall not apply to the lawful use or discharge of a firearm . . . by any person in lawful self-defense, lawful defense of another, or lawful defense of property, as provided in Sections 197, 198, and 198.5." In *People v. Watie* (2002) 100 Cal.App.4th 866, 884, the court held, "[t]his subdivision, on its face, exempts lawful (perfect) self-defense from the section's application. It does not exempt imperfect self-defense." Further, an instruction informing the jury that the defense of self-defense applies to the enhancement is not necessary. (*Id.* at p. 886.)

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STAFF NOTES

Penal Code, § 12022.53, in relevant part:

(a) This section applies to the following felonies:

[See Notes to Instruction 221.] . . .

(c) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally and intentionally discharges a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 20 years.

(d) Notwithstanding any other provision of law, any person who , in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 12034, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life.. . . .

(f) Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment. An enhancement involving a firearm specified in Section 12021.5, 12022, 12022.3, 12022.4, 12022.5, or 12022.55 shall not be imposed on a person in addition to an enhancement imposed pursuant to this section. An enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d). . . .

(j) For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the information or indictment and either admitted by the defendant in open court or found to be true by the trier of fact. When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment. . . .

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(*l*) The enhancements specified in this section shall not apply to the lawful use or discharge of a firearm by a public officer, as provided in Section 196, or by any person in lawful self-defense, lawful defense of another, or lawful defense of property, as provided in Sections 197, 198, and 198.5.

Personally Uses

See Notes to Instruction 220.

"In the Commission"

See Notes to Instruction 220.

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224A. Personally Used Firearm: Intentional Discharge Causing Injury or Death

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 and intentionally discharged a firearm during that crime causing (great bodily injury/ [or] death). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation [for each crime], the People must prove that:

3. **The defendant personally discharged a firearm during the commission [or attempted commission] of the crime;**

4. **The defendant intended to discharge the firearm;**

AND

5. **The defendant's act caused (great bodily injury to/ [or] the death of) a person [who was not an accomplice to the 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.]

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

[An act causes (great bodily injury/ [or] death) if the (injury/ [or] death) is the direct, natural, and probable consequence of the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

[There may be more than one cause of (great bodily injury/ [or] death). An act causes (injury/ [or] death) only if it is a substantial factor in causing the (injury/ [or] death) and the (injury/ [or] death) would not have happened

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without the act. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the (injury/ [or] death).]

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

3. **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 used the firearm "during the commission of" the offense, see Bench Notes.>

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) If the defendant is charged with an enhancement for both intentional discharge *and* intentional discharge causing great bodily injury or death, the court may give Instruction 224B, Personally Used Firearm: Intentional Discharge and Discharge Causing Injury or Death Both Charged, instead of this instruction.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause (*People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335); give the bracketed paragraph that begins with "An act causes . . . ." If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with "There may be more than one cause . . . ." (*Id.* at pp. 335–338.)

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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.

If the case involves an issue of whether the defendant used the firearm "during the commission of" the offense, the court may give Instruction 739, During Commission of Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25 Cal.4th 98, 109; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.)

If, in element 3, the court gives the bracketed phrase "who 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.) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in Instruction 480, 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.

AUTHORITY

Enhancement ▸ Pen. Code, §§ 667.61(e)(3), 12022.53(d).
Firearm Defined ▸ Pen. Code, § 12001(b).
"In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.
Proximate Cause ▸ *People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335–338.
Accomplice Defined ▸ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 322.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

RELATED ISSUES

Need Not Personally Cause Injury or Death
"[Penal Code] Section 12022.53(d) requires that the defendant 'intentionally and *personally* discharged a firearm' (italics added), but only that he 'proximately caused' the great bodily injury or death. . . . The statute states nothing else that defendant must *personally* do. Proximately causing and personally inflicting harm are two different things." (*People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335–336 [italics in original].)

Person Injured or Killed Need Not Be Victim of Crime

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In *People v. Oates* (2004) 32 Cal.4th 1048, 1052, the defendant fired two shots into a group of people, hitting and injuring one. He was convicted of five counts of premeditated attempted murder. The court held that the subdivision (d) enhancement for causing great bodily injury applied to each of the five counts even though the defendant only injured one person. (*Id.* at p. 1056.) The court observed that "the phrase, 'any person other than an accomplice,' does not mean 'the victim' of the underlying crime." (*Id.* at p. 1055.)

Multiple Enhancements for Single Injury
The court in *Oates* ((2004) 32 Cal.4th 1048; discussed above) also held that the trial court was required to impose all five subdivision (d) enhancements because Penal Code section 12022.53(f) requires a court to impose the longest enhancement available. (*Id.* at p. 1056.) The court further found that Penal Code section 654 did not preclude imposition of multiple subdivision (d) enhancements due to "the long-recognized, judicially-created exception for cases involving multiple victims of violent crime." (*Id.* at p. 1062.)

Self-Defense and Imperfect Self-Defense
Penal Code section 12022.53(*l*) provides that "[t]he enhancements specified in this section shall not apply to the lawful use or discharge of a firearm by a public officer, as provided in Section 196, or by any person in lawful self-defense, lawful defense of another, or lawful defense of property, as provided in Sections 197, 198, and 198.5." In *People v. Watie* (2002) 100 Cal.App.4th 866, 884, the court held, "[t]his subdivision, on its face, exempts lawful (perfect) self-defense from the section's application. It does not exempt imperfect self-defense." Further, an instruction informing the jury that the defense of self-defense applies to the enhancement is not necessary. (*Id.* at p. 886.)

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STAFF NOTES

Pen. Code, § 667.61, "One Strike Sex Offense Law," in relevant part:

(a) A person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 25 years except as provided in subdivision (j).

(b) Except as provided in subdivision (a), a person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years except as provided in subdivision (j).

. . .

(e). . . (3) The defendant personally inflicted great bodily injury on the victim or another person in the commission of the present offense in violation of Section 12022.53, 12022.7, or 12022.8.

Penal Code, § 12022.53, in relevant part:

(a) This section applies to the following felonies: . . . [See Notes to Instruction 221.]

(d) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 12034, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life.. . . .

(f) Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment. An enhancement involving a firearm specified in Section 12021.5, 12022, 12022.3, 12022.4, 12022.5, or 12022.55 shall not be imposed on a person in addition to an enhancement imposed pursuant to this section. An

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enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d). . . .

(j) For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the information or indictment and either admitted by the defendant in open court or found to be true by the trier of fact. When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment. . . .

(*l*) The enhancements specified in this section shall not apply to the lawful use or discharge of a firearm by a public officer, as provided in Section 196, or by any person in lawful self-defense, lawful defense of another, or lawful defense of property, as provided in Sections 197, 198, and 198.5.

Personally Uses

See Notes to Instruction 220.

"In the Commission"

See Notes to Instruction 220.

Proximate Cause

Section 12022.53(d) enhances the sentence of anyone who, in the commission of specified felonies including murder and attempted murder (Pen. Code, § 12022.53, subd. (a)(1), (18)), "intentionally and personally discharged a firearm and proximately caused great bodily injury, as defined in [Penal Code] Section 12022.7, or death, to any person other than an accomplice . . . ." . . . The trial court instructed the jury on these statutory elements, but it did not define the term "proximately caused." . . .

We . . . conclude the court erred in not defining proximate causation. . . .

To determine whether the error was prejudicial we must decide what instruction the court should have given. CALJIC No. 17.19.5 (2002 rev.) (6th ed. 1996) is the current standard instruction regarding the section 12022.53(d) enhancement, although it did not exist at the time of trial here. It defines proximate causation in terms substantially identical to

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CALJIC No. 3.40 but adapted to the provisions of section 12022.53(d): "A proximate cause of great bodily injury or death is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the great bodily injury or death and without which the great bodily injury or death would not have occurred." (Brackets omitted.) The Use Note to CALJIC No. 17.19.5, *supra*, states, "If there is more than one cause of the bodily injury or death, CALJIC 3.41 should also be given." CALJIC No. 3.41, in turn, as adapted to the provisions of section 12022.53(d), provides: "There may be more than one cause of the [great bodily injury or death]. When the conduct of two or more persons contributes concurrently as a cause of the [great bodily injury or death], the conduct of each is a cause of the [great bodily injury or death] if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the moment of the [great bodily injury or death] and acted with another cause to produce the [great bodily injury or death]. [P] [If you find that the defendant's conduct was a cause of [great bodily injury or death] to another person, then it is no defense that the conduct of some other person [, even the [injured] [deceased] person,] contributed to the [great bodily injury or death].]" (Bracketed references to "great bodily injury or death" added to adapt the instruction to § 12022.53(d); other brackets in original.)

The Court of Appeal found CALJIC No. 17.19.5 "is not a proper definition of proximate cause. That instruction would permit a true finding on the enhancement based [on] the cohort's inflicting the death and injuries and defendant's aiding and abetting him simply by also firing a gun. The enhancement cannot be found true unless defendant personally fired the bullets which struck the victim. We note that the Attorney General does not contend otherwise." The Attorney General contends in this court that CALJIC No. 17.19.5 correctly states the law. He argues that "proximately caus[ing]" injury or death is different from *personally* inflicting the injury or death, and that defendant could indeed proximately cause injury or death even if his own bullets did not hit anyone. . . .

We believe that CALJIC No. 17.19.5 does correctly define proximate causation. Section 12022.53(d) requires that the defendant "intentionally and *personally* discharged a firearm" (italics added), but only that he "proximately caused" the great bodily injury or death. The jury, properly instructed, reasonably found that defendant did personally discharge a firearm. The statute states nothing else that defendant must *personally* do. Proximately causing and personally inflicting harm are two different things. . . .

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> A person can proximately cause a gunshot injury without personally firing the weapon that discharged the harm-inflicting bullet. For example, in *People v. Sanchez*, *supra*, 26 Cal. 4th 834, two persons engaged in a gun battle, killing an innocent bystander. Who fired the fatal bullet, and thus who personally inflicted the harm, was unknown, but we held that the jury could find that *both* gunmen proximately caused the death. (*Id*. at pp. 848-849.) The same is true here. If defendant did not fire the bullets that hit the victims, he did not *personally inflict*, but he may have *proximately caused*, the harm. CALJIC Nos. 3.40 and 3.41, and hence 17.19.5, correctly define proximate causation. [Citations.] Accordingly, the trial court should have given an instruction like CALJIC No. 3.40 and, because the evidence suggested more than one cause, No. 3.41 (today CALJIC No. 17.19.5, augmented, when the evidence suggests more than one cause, by CALJIC No. 3.41).

(*People v. Bland* (2002) 28 Cal.4th 313, 333–338 [italics in original.])

Accomplice

The definition of accomplice is taken from Instruction 480, Accomplice Testimony Must Be Corroborated—Dispute Whether Witness Is Accomplice.

Person Injured or Killed Need Not be Victim of Crime

In *People v. Oates* (2004) 32 Cal.4th 1048, 1052, the defendant fired two shots into a group of people, hitting and injuring one. He was convicted of five counts of premeditated attempted murder. The court held that the subdivision (d) enhancement for causing great bodily injury applied to each of the five counts even though the defendant only injured one person. (*Id.* at p. 1056.) The court stated,

> Notably, the parties here agree that the phrase, "any person other than an accomplice," does not mean "the victim" of the underlying crime. For example, defendant asserts in his brief that the elements of a subdivision (d) enhancement "require the imposition of the enhancement even if the injured person is not a victim of crime, such as if he or she was injured by a stray bullet." Thus, "[i]f there is a qualifying substantive offense, if a firearm is intentionally discharged, and if anyone (but an accomplice), i.e., either the victim or a nearby 'non-victim'--a person who is injured but is not the victim of an enumerated offense--suffers great bodily injury, the enhancement attaches to the offense." In other words, as defendant explains, "the 'any person other than an accomplice' language is sufficiently indisputable to ensure the imposition of the enhancement if a

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> person other than the victim of the qualifying felony suffers a great bodily injury." . . .

(*Id.* at pp. 1055–1056.)

Court Must Impose Multiple Enhancements Even if Only One Injury

The court in *Oates* then held that the trial court was required to impose all five subdivision (d) enhancements:

> Because the requirements of the subdivision (d) enhancement have been satisfied as to each of defendant's attempted murder convictions, subdivision (f) of section 12022.53 *requires* that the enhancement be imposed as to each conviction. That subdivision provides in part: "If more than one enhancement per person is found true under this section, the court *shall impose* upon that person the enhancement that provides the longest term of imprisonment." (§ 12022.53, subd. (f).) Defendant argues that we should limit the number of subdivision (d) enhancements imposed "to the same number of great bodily injuries inflicted," such that he should receive one subdivision (d) enhancement for injuring Barrera and one subdivision (c) enhancement as to each of his remaining attempted murder convictions. However, because the requirements of subdivision (d) have been met as to each conviction, defendant's solution contravenes the direction of section 12022.53, subdivision (f), that the court "shall impose upon that person the enhancement that provides the longest term of imprisonment." Had the Legislature wanted to limit the number of subdivision (d) enhancements imposed to the number of injuries inflicted, or had it not wanted subdivision (d) to serve as the enhancement applicable to each qualifying conviction where there is only one qualifying injury, it could have said so.

(*Id.* at p. 1056 [italics in original].) The court further found that Penal Code section 654 did not preclude imposition of multiple subdivision (d) enhancements due to “the long-recognized, judicially-created exception for cases involving multiple victims of violent crime.” (*Id.* at p. 1062.)

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224B. Personally Used Firearm: Intentional Discharge and Discharge Causing Injury or Death Both Charged

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If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ *<insert name[s] of alleged lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegations that the defendant personally and intentionally discharged a firearm during (that/those) crime[s] and, if so, whether the defendant's act caused (great bodily injury/ [or] death). [You must decide whether the People have proved these allegations for each crime and return a separate finding for each crime.]

To prove that the defendant intentionally discharged a firearm [for each crime], the People must prove that:

6. The defendant personally discharged a firearm during the commission [or attempted commission] of the crime;

AND

7. The defendant intended to discharge the firearm.

If the People have proved both 1 and 2, you must then decide whether the People also have proved that the defendant's act caused (great bodily injury to/ [or] the death of) a person [who was not an accomplice to the 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.]

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

[An act causes (great bodily injury/ [or] death) if the (injury/ [or] death) is the direct, natural, and probable consequence of the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

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[There may be more than one cause of (great bodily injury/ [or] death). An act causes (injury/ [or] death) only if it is a substantial factor in causing the (injury/ [or] death) and the (injury/ [or] death) would not have happened without the act. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the (injury/ [or] death).]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. A person is subject to prosecution if he or she 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 used the firearm "during the commission of" the offense, see Bench Notes.>

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) This instruction may be used when the defendant is charged with an enhancement both for intentional discharge *and* for intentional discharge causing great bodily injury or death. If only one of these enhancements is charged, do not use this instruction. Instead, give Instruction 223, Personally Used Firearm: Intentional Discharge, or Instruction 224A, Personally Used Firearm: Intentional Discharge Causing Injury or Death, whichever is appropriate.

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If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause (*People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335); give the bracketed paragraph that begins with "An act causes . . . ." If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins wtih "There may be more than one cause . . . ." (*Id.* at pp. 335–338.)

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.

If the case involves an issue of whether the defendant used the weapon "during the commission of" the offense, the court may give Instruction 739, During Commission of Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25 Cal.4th 98, 109; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.)

If, in the paragraph following the elements, the court gives the bracketed phrase "who 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.) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in Instruction 480, 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.

AUTHORITY

Enhancement ▸ Pen. Code, §§ 667.61(e)(3), 12022.53(d).
Firearm Defined ▸ Pen. Code, § 12001(b).
"In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.
Proximate Cause ▸ *People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335–338.
Accomplice Defined ▸ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 322.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

RELATED ISSUES

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See the Related Issues sections of Instructions 223, Personally Used Firearm: Intentional Discharge, and 224A, Personally Used Firearm: Intentional Discharge Causing Injury or Death.

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STAFF NOTES

Pen. Code, § 667.61, "One Strike Sex Offense Law," in relevant part:

(a) A person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 25 years except as provided in subdivision (j).

(b) Except as provided in subdivision (a), a person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years except as provided in subdivision (j).

. . .

(e). . . (3) The defendant personally inflicted great bodily injury on the victim or another person in the commission of the present offense in violation of Section 12022.53, 12022.7, or 12022.8.

Penal Code, § 12022.53, in relevant part:

(a) This section applies to the following felonies: . . . [See Notes to Instruction 221.]

(d) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 12034, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life.. . . .

(f) Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment. An enhancement involving a firearm specified in Section 12021.5, 12022, 12022.3, 12022.4, 12022.5, or 12022.55 shall not be imposed on a person in addition to an enhancement imposed pursuant to this section. An

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enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d). . . .

(j) For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the information or indictment and either admitted by the defendant in open court or found to be true by the trier of fact. When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment. . . .

(*l*) The enhancements specified in this section shall not apply to the lawful use or discharge of a firearm by a public officer, as provided in Section 196, or by any person in lawful self-defense, lawful defense of another, or lawful defense of property, as provided in Sections 197, 198, and 198.5.

Personally Uses

See Notes to Instruction 220.

"In the Commission"

See Notes to Instruction 220.

Proximate Cause

Section 12022.53(d) enhances the sentence of anyone who, in the commission of specified felonies including murder and attempted murder (Pen. Code, § 12022.53, subd. (a)(1), (18)), "intentionally and personally discharged a firearm and proximately caused great bodily injury, as defined in [Penal Code] Section 12022.7, or death, to any person other than an accomplice . . . ." . . . The trial court instructed the jury on these statutory elements, but it did not define the term "proximately caused." . . .

We . . . conclude the court erred in not defining proximate causation. . . .

To determine whether the error was prejudicial we must decide what instruction the court should have given. CALJIC No. 17.19.5 (2002 rev.) (6th ed. 1996) is the current standard instruction regarding the section 12022.53(d) enhancement, although it did not exist at the time of trial here. It defines proximate causation in terms substantially identical to

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CALJIC No. 3.40 but adapted to the provisions of section 12022.53(d): "A proximate cause of great bodily injury or death is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the great bodily injury or death and without which the great bodily injury or death would not have occurred." (Brackets omitted.) The Use Note to CALJIC No. 17.19.5, *supra*, states, "If there is more than one cause of the bodily injury or death, CALJIC 3.41 should also be given." CALJIC No. 3.41, in turn, as adapted to the provisions of section 12022.53(d), provides: "There may be more than one cause of the [great bodily injury or death]. When the conduct of two or more persons contributes concurrently as a cause of the [great bodily injury or death], the conduct of each is a cause of the [great bodily injury or death] if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the moment of the [great bodily injury or death] and acted with another cause to produce the [great bodily injury or death]. [P] [If you find that the defendant's conduct was a cause of [great bodily injury or death] to another person, then it is no defense that the conduct of some other person [, even the [injured] [deceased] person,] contributed to the [great bodily injury or death].]" (Bracketed references to "great bodily injury or death" added to adapt the instruction to § 12022.53(d); other brackets in original.)

The Court of Appeal found CALJIC No. 17.19.5 "is not a proper definition of proximate cause. That instruction would permit a true finding on the enhancement based [on] the cohort's inflicting the death and injuries and defendant's aiding and abetting him simply by also firing a gun. The enhancement cannot be found true unless defendant personally fired the bullets which struck the victim. We note that the Attorney General does not contend otherwise." The Attorney General contends in this court that CALJIC No. 17.19.5 correctly states the law. He argues that "proximately caus[ing]" injury or death is different from *personally* inflicting the injury or death, and that defendant could indeed proximately cause injury or death even if his own bullets did not hit anyone. . . .

We believe that CALJIC No. 17.19.5 does correctly define proximate causation. Section 12022.53(d) requires that the defendant "intentionally and *personally* discharged a firearm" (italics added), but only that he "proximately caused" the great bodily injury or death. The jury, properly instructed, reasonably found that defendant did personally discharge a firearm. The statute states nothing else that defendant must *personally* do. Proximately causing and personally inflicting harm are two different things. . . .

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> A person can proximately cause a gunshot injury without personally firing the weapon that discharged the harm-inflicting bullet. For example, in *People v. Sanchez*, *supra*, 26 Cal. 4th 834, two persons engaged in a gun battle, killing an innocent bystander. Who fired the fatal bullet, and thus who personally inflicted the harm, was unknown, but we held that the jury could find that *both* gunmen proximately caused the death. (*Id*. at pp. 848-849.) The same is true here. If defendant did not fire the bullets that hit the victims, he did not *personally inflict*, but he may have *proximately caused*, the harm. CALJIC Nos. 3.40 and 3.41, and hence 17.19.5, correctly define proximate causation. [Citations.] Accordingly, the trial court should have given an instruction like CALJIC No. 3.40 and, because the evidence suggested more than one cause, No. 3.41 (today CALJIC No. 17.19.5, augmented, when the evidence suggests more than one cause, by CALJIC No. 3.41).

(*People v. Bland* (2002) 28 Cal.4th 313, 333–338 [italics in original.])

Accomplice

The definition of accomplice is taken from Instruction 480, Accomplice Testimony Must Be Corroborated—Dispute Whether Witness Is Accomplice.

Person Injured or Killed Need Not be Victim of Crime

In *People v. Oates* (2004) 32 Cal.4th 1048, 1052, the defendant fired two shots into a group of people, hitting and injuring one. He was convicted of five counts of premeditated attempted murder. The court held that the subdivision (d) enhancement for causing great bodily injury applied to each of the five counts even though the defendant only injured one person. (*Id.* at p. 1056.) The court stated,

> Notably, the parties here agree that the phrase, "any person other than an accomplice," does not mean "the victim" of the underlying crime. For example, defendant asserts in his brief that the elements of a subdivision (d) enhancement "require the imposition of the enhancement even if the injured person is not a victim of crime, such as if he or she was injured by a stray bullet." Thus, "[i]f there is a qualifying substantive offense, if a firearm is intentionally discharged, and if anyone (but an accomplice), i.e., either the victim or a nearby 'non-victim'--a person who is injured but is not the victim of an enumerated offense--suffers great bodily injury, the enhancement attaches to the offense." In other words, as defendant explains, "the 'any person other than an accomplice' language is sufficiently indisputable to ensure the imposition of the enhancement if a

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> person other than the victim of the qualifying felony suffers a great bodily injury." . . .

(*Id.* at pp. 1055–1056.)

Court Must Impose Multiple Enhancements Even if Only One Injury

The court in *Oates* then held that the trial court was required to impose all five subdivision (d) enhancements:

> Because the requirements of the subdivision (d) enhancement have been satisfied as to each of defendant's attempted murder convictions, subdivision (f) of section 12022.53 *requires* that the enhancement be imposed as to each conviction. That subdivision provides in part: "If more than one enhancement per person is found true under this section, the court *shall impose* upon that person the enhancement that provides the longest term of imprisonment." (§ 12022.53, subd. (f).) Defendant argues that we should limit the number of subdivision (d) enhancements imposed "to the same number of great bodily injuries inflicted," such that he should receive one subdivision (d) enhancement for injuring Barrera and one subdivision (c) enhancement as to each of his remaining attempted murder convictions. However, because the requirements of subdivision (d) have been met as to each conviction, defendant's solution contravenes the direction of section 12022.53, subdivision (f), that the court "shall impose upon that person the enhancement that provides the longest term of imprisonment." Had the Legislature wanted to limit the number of subdivision (d) enhancements imposed to the number of injuries inflicted, or had it not wanted subdivision (d) to serve as the enhancement applicable to each qualifying conviction where there is only one qualifying injury, it could have said so.

(*Id.* at p. 1056 [italics in original].) The court further found that Penal Code section 654 did not preclude imposition of multiple subdivision (d) enhancements due to “the long-recognized, judicially-created exception for cases involving multiple victims of violent crime.” (*Id.* at p. 1062.)

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225. Gang-Related Firearm Enhancement

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 one of the principals (personally used/personally and intentionally discharged) a firearm during that crime [and caused (great bodily injury/ [or] death)]. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation [for each crime], the People must prove that:

[1.] Someone who was a principal in the crime personally (used/discharged) a firearm during the commission [or attempted commission] of the crime(./;)

[AND]

[2. That person intended to discharge the firearm(./;)]

[AND

3. That person's act caused (great bodily injury to/ [or] the death of) another person [who was not an accomplice to the crime].]

A person is a *principal* in a crime if he or she directly commits [or attempts to commit] the crime or if he or she aids and abets someone else who commits [or attempts to commit] the 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.]

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[A principal *personally uses* a firearm if he or she intentionally does any of the following:

7. Displays the firearm in a menacing manner.

8. Hits someone with the firearm.

OR

9. Fires the firearm.]

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

[An act causes (great bodily injury/ [or] death) if the (injury/ [or] death) is the direct, natural, and probable consequence of the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

[There may be more than one cause of (great bodily injury/ [or] death). An act causes (injury/ [or] death) only if it is a substantial factor in causing the (injury/ [or] death) and the (injury/ [or] death) would not have happened without the act. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the (injury/ [or] death).]

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

2. 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 used the firearm "during the commission of" the offense, see Bench Notes.>

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

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

In order for the defendant to receive an enhancement under Penal Code section 12022.53(e), the jury must find both that the defendant committed a felony for the benefit of a street gang and that a principal used or intentionally discharged a firearm in the offense. Thus, the court **must give** Instruction 541, Felony Committed for Benefit of Criminal Street Gang, with this instruction and the jury must find both allegations have been proved before the enhancement may be applied.

In this instruction, the court **must** select the appropriate options based on whether the prosecution alleges that the principal used the firearm, intentionally discharged the firearm, or intentionally discharged the firearm causing great bodily injury or death. The court should review Instructions 221, 223, and 224 for guidance. Give the bracketed definition of "personally used" only if the prosecution specifically alleges that the principal "personally used" the firearm. Do not give the bracketed definition of "personally used" if the prosecution alleges intentional discharge or intentional discharge causing great bodily injury or death.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause (*People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335); give the bracketed paragraph that begins with "An act causes . . . ." If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with "There may be more than one cause . . . ." (*Id.* at pp. 335–338.)

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.

If the case involves an issue of whether the principal used the weapon "during the commission of" the offense, the court may give Instruction 739, During Commission of Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25

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Cal.4th 98, 109; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.)

If, in the elements, the court gives the bracketed phrase "who 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.) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in Instruction 480, 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.

AUTHORITY

Enhancement ▸ Pen. Code, § 12022.53(e).
Vicarious Liability Under Subdivision (e) ▸ *People v. Garcia* (2002) 28 Cal.4th 1166, 1171; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 12.
Principal Defined ▸ Pen. Code, § 31.
Firearm Defined ▸ Pen. Code, § 12001(b).
Personally Uses ▸ *People v. Marvin Bland* (1995) 10 Cal.4th 991, 997; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320; see also Pen. Code, § 1203.06(b)(3).
"In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.
Proximate Cause ▸ *People v. Jomo K. Bland* (2002) 28 Cal.4th 313, 335–338.
Accomplice Defined ▸ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 322.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

RELATED ISSUES

Principal Need Not Be Convicted
It is not necessary that the principal who actually used or discharged the firearm be convicted. (*People v. Garcia* (2002) 28 Cal.4th 1166, 1176.)

Defendant Need Not Know Principal Armed
For an enhancement charged under Penal Code section 12022.53(e) where the prosecution is pursuing vicarious liability, it is not necessary for the prosecution to prove that the defendant knew that the principal intended to use or discharge a firearm. (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 14–15.)

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See the Related Issues sections of Instructions 221–224.

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STAFF NOTES

Penal Code, § 12022.53, in relevant part:

(e) (1) The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved:

(A) The person violated subdivision (b) of Section 186.22.

(B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d).

(2) An enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1 shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense.

(f) Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment. An enhancement involving a firearm specified in Section 12021.5, 12022, 12022.3, 12022.4, 12022.5, or 12022.55 shall not be imposed on a person in addition to an enhancement imposed pursuant to this section. An enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d). . . .

(j) For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the information or indictment and either admitted by the defendant in open court or found to be true by the trier of fact. When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment. . . .

(*l*) The enhancements specified in this section shall not apply to the lawful use or discharge of a firearm by a public officer, as provided in Section

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196, or by any person in lawful self-defense, lawful defense of another, or lawful defense of property, as provided in Sections 197, 198, and 198.5.

Personally Uses
See Notes to Instruction 220.

"In the Commission"
See Notes to Instruction 220.

Proximate Cause
See Notes to Instruction 224.

Accomplice
See Notes to Instruction 224.

Person Injured or Killed Need Not be Victim of Crime
See Notes to Instruction 224.

Court Must Impose Multiple Enhancements Even if Only One Injury
See Notes to Instruction 224.

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230. Great Bodily Injury

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. [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.**

[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, but are not required to, 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

3. 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.]**

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

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

AND

4. **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 (this/each) allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

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.)

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 [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. (*People v. Corona* (1989) 213 Cal.App.3d 589, 594.) However, there is currently a split in the Court of Appeal over whether a "group beating" instruction is proper and what form it should take. (Compare *People v. Banuleos* (2003) 106 Cal.App.4th 1332, 1136–1338 [instruction on group beating approved] with *People v. Modiri* (2003) 112 Cal.App.4th 123, 136–137 [reversed for erroneous instruction on group beating], REVIEW GRANTED AND DEPUBLISHED December 23, 2003, S120238.) The issue is currently pending before the Supreme Court. The court should review these decisions and any current law before giving the bracketed instruction on group beatings.

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If the court gives the bracketed sentence 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.) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in Instruction 480, 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; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If there is an issue in the case over whether the defendant inflicted the injury "during the commission of" the offense, the court may give Instruction 739, During Commission of Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25 Cal.4th 98, 109; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.)

AUTHORITY

Enhancements ▸ Pen. Code, §§ 667.5(c)(8), 667.61(e)(3), 1192.7(c)(8), 12022.7, 12022.8.

Great Bodily Injury Defined ▸ Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750.

Must Personally Inflict Injury ▸ *People v. Lee* (2003) 31 Cal.4th 613, 631; *People v. Cole* (1982) 31 Cal.3d 568, 571; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [Pen. Code, § 12022.8].

Sex Offenses—Injury Must Be More Than Incidental to Offense ▸ *People v. Escobar* (1992) 3 Cal.4th 740, 746.

Group Beating Instruction ▸ *People v. Corona* (1989) 213 Cal.App.3d 589, 594; *People v. Banuleos* (2003) 106 Cal.App.4th 1332, 1136–1338 [instruction on group beating approved]; *People v. Modiri* (2003) 112 Cal.App.4th 123, 136–137 [reversed for erroneous instruction on group beating], REVIEW GRANTED AND DEPUBLISHED December 23, 2003, S120238.

Accomplice Defined ▸ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91.

"In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.

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

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RELATED ISSUES

Specific Intent Not Required
Penal Code section 12022.7 was amended in 1995, deleting the requirement that the defendant act with "the intent to inflict such injury." (Stats. 1995, ch. 341, § 1; see also *People v. Carter* (1998) 60 Cal.App.4th 752, 756 [noting amendment].)

Instructions on Aiding and Abetting
In *People v. Magana* (1993) 17 Cal.App.4th 1371, 1378–1379, the evidence indicated that the defendant and another person both shot at the victims. The jury asked for clarification of whether the evidence must establish that the bullet from the defendant's gun struck the victim in order to find the enhancement for personally inflicting great bodily injury true. (*Id.* at p. 1379.) The trial court responded by giving the instructions on aiding and abetting. *(Ibid.)* The Court of Appeal reversed, finding the instructions erroneous in light of the requirement that the defendant must personally inflict the injury for the enhancement to be found true. (*Id.* at p. 1381.)

Sex Offenses—Examples of Great Bodily Injury
The following have been held to be sufficient to support a finding of great bodily injury: transmission of a venereal disease (*People v. Johnson* (1986) 181 Cal.App.3d 1137, 1140); pregnancy (*People v. Sargent* (1978) 86 Cal.App.3d 148, 151); and a torn hymen (*People v. Williams* (1981) 115 Cal.App.3d 446, 454).

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STAFF NOTES

Penal Code, § 667.5, "Violent Felony" defined, in relevant part:

(a) Where one of the new offenses is one of the violent felonies specified in subdivision (c), in addition to and consecutive to any other prison terms therefor, the court shall impose a three-year term for each prior separate prison term served by the defendant where the prior offense was one of the violent felonies specified in subdivision (c). . . .

(c) For the purpose of this section, "violent felony" shall mean any of the following: . . .

(8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7 or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in Section 12022.5 or 12022.55.

Pen. Code, § 667.61, "One Strike Sex Offense Law," in relevant part:

(a) A person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 25 years except as provided in subdivision (j).

(b) Except as provided in subdivision (a), a person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years except as provided in subdivision (j).
. . .

(e). . . (3) The defendant personally inflicted great bodily injury on the victim or another person in the commission of the present offense in violation of Section 12022.53, 12022.7, or 12022.8.

Pen. Code, § 1192.7(c)(8), "Serious Felony" defined, in relevant part:

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(c) As used in this section, "serious felony" means any of the following:

(8) any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm;

Penal Code, § 12022.7:

(a) Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years.

(b) Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony which causes the victim to become comatose due to brain injury or to suffer paralysis of a permanent nature, shall be punished by an additional and consecutive term of imprisonment in the state prison for five years. As used in this subdivision, "paralysis" means a major or complete loss of motor function resulting from injury to the nervous system or to a muscular mechanism.

(c) Any person who personally inflicts great bodily injury on a person who is 70 years of age or older, other than an accomplice, in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for five years.

(d) Any person who personally inflicts great bodily injury on a child under the age of five years in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for four, five, or six years.

(e) Any person who personally inflicts great bodily injury under circumstances involving domestic violence in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years. As used in this subdivision, "domestic violence" has the meaning provided in subdivision (b) of Section 13700.

(f) As used in this section, "great bodily injury" means a significant or

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substantial physical injury.

(g) This section shall not apply to murder or manslaughter or a violation of Section 451 or 452. Subdivisions (a), (b), (c), and (d) shall not apply if infliction of great bodily injury is an element of the offense.

(h) The court shall impose the additional terms of imprisonment under either subdivision (a), (b), (c), or (d), but may not impose more than one of those terms for the same offense.

Penal Code, § 12022.8:

Any person who inflicts great bodily injury, as defined in Section 12022.7, on any victim in a violation or attempted violation of paragraph (2), (3), or (6) of subdivision (a) of Section 261, paragraph (1) or (4) of subdivision (a) of Section 262, Section 264.1, subdivision (b) of Section 288, subdivision (a) of Section 289, or sodomy or oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person as provided in Section 286 or 288a shall receive a five-year enhancement for each such violation in addition to the sentence provided for the felony conviction.

Must Personally Inflict GBI

We have concluded that the Legislature intended to impose an additional penalty for causing great bodily injury only on those principals who perform the act that directly inflicts the injury, and that one who merely aids, abets, or directs another to inflict the physical injury is not subject to the enhanced penalty of section 12022.7.

(*People v. Cole* (1982) 31 Cal.3d 568, 571.)

The Supreme Court's analysis of enhancement provisions with similar semantic characteristics to section 12022.8 compels us to view that section as entailing a requirement that the defendant personally inflict great bodily injury.

(*People v. Ramirez* (1987) 189 Cal.App.3d 603, 627.)

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Specific Intent Not Required

Penal Code section 12022.7 was amended in 1995, deleting the requirement that the defendant acted with "the intent to inflict such injury." (See also *People v. Carter* (1998) 60 Cal.App.4th 752, 756.)

Corona Instruction—Group Beating

There is currently a split in the Court of Appeal as to whether the "group beating" instruction is proper and the issue is pending before the Supreme Court. The Fourth District has upheld the instruction, as follows:

> Banuelos contends the trial court prejudicially erred by instructing the jury with the "*Corona* instruction" contained within CALJIC No. 17.20 which permits a jury to find personal infliction of GBI even where the evidence is insufficient to determine who actually inflicted such injury. . . .
>
> In [*People v. Corona* (1989) 213 Cal.App.3d 589], we recognized the holding in *Cole, supra,* 31 Cal.3d 568, and the legislative intent of section 12022.7, but found that "applying *Cole* uncritically in the context of [a case involving a group beating] does not create a deterrent effect. Rather it would lead to the insulation of individuals who engage in group beatings. Only those whose foot could be traced to a particular kick, whose fist could be patterned to a certain blow or whose weapon could be aligned with a visible injury would be punished." (*Corona, supra,* 213 Cal. App. 3d at p. 594.) Although we did not set out a test for determining when a person becomes a direct participant to the infliction of GBI, we concluded that only "when a defendant participates in a group beating and when it is not possible to determine which assailant inflicted which injuries, the defendant may be punished with a [GBI] enhancement if his conduct was of a nature that it could have caused the [GBI] suffered." (*Ibid*.)
>
> CALJIC No. 17.20 was revised in 1999 based on our holding in *Corona, supra,* 213 Cal. App. 3d 589, to include a fourth paragraph designed for use when there is a group beating and it is not possible to determine who caused what injury. That paragraph provides:
>
> "When a person participates in a group beating and it is not possible to determine which assailant inflicted a particular injury, he or she may be found to have personally inflicted [GBI] upon the victim if 1) the application of unlawful physical force upon the victim was of such a nature that, by itself, it could have caused the [GBI] suffered by the victim; or 2) that at the time the defendant personally applied unlawful physical force to the victim, the defendant knew that other persons, as part

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> of the same incident, had applied, were applying, or would apply unlawful physical force upon the victim and the defendant then knew, or reasonably should have known, that the cumulative effect of all the unlawful physical force would result in [GBI] to the victim." (CALJIC No. 17.20 (1999 Rev.).)
>
> Contrary to Banuelos's arguments otherwise, this language is consistent with the holding in *Cole* that a mere aider and abetter cannot receive the special GBI enhancement; only a person who directly participates in the physical attack can receive the enhancement. (*Cole, supra,* 31 Cal.3d at p. 571.) So too does the language of paragraph four of CALJIC No. 17.20 comport with the intent of the Legislature to deter personal infliction of GBI in the future by preventing that intent from being frustrated in cases where multiple assailants directly cause the GBI. Because the instruction requires that it be proven a defendant has personally inflicted an injury on the victim during a group attack, such instruction does not lighten the People's burden of proof as Banuelos asserts.
>
> We conclude that *Corona, supra,* 213 Cal. App. 3d 589, is still good law and that the fourth paragraph of CALJIC No. 17.20 based upon such holding is a correct statement of the law.

(*People v. Banuleos* (2003) 106 Cal.App.4th 1332, 1136–1338.)

The Sixth Circuit found that at least a part of this instruction is erroneous, requiring reversal, as follows:

> The California Supreme Court held in *Cole* that the words "personally inflicts" are clear and unambiguous and apply only to "a *person who himself inflicts the injury*." (*Cole, supra,* 31 Cal.3d at p. 572, italics added.) The Fourth District reasoned in *Corona* that proof that a defendant personally "joined" in the "delivery" of "blows" by a group of attackers that caused great bodily injury to the victim could be sufficient to uphold a jury's true finding on a GBI enhancement allegation against a sufficiency of the evidence challenge on appeal if it was "not possible to determine which assailant inflicted which injuries" and the defendant's "conduct was of a nature that it could have caused the great bodily injury suffered." (*Corona, supra,* 213 Cal. App. 3d at p. 594.)
>
> Assuming arguendo that the Fourth District's holding in *Corona* does not violate *Cole*, it does not resolve the issue before us in this case. In *Corona*, the jury had not been given any special instructions on the enhancement

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> allegation that permitted it to return a true finding on any basis other than a conclusion beyond a reasonable doubt that Corona had *personally inflicted* great bodily injury on the victim. . . .
>
> Here, on the other hand, the question is whether a *jury instruction* that provided *two additional alternative bases* for a true finding by the jury on the personal infliction of great bodily injury allegation erroneously obviated the need for the jury to find beyond a reasonable doubt that defendant *personally inflicted* great bodily injury on Schon. . . .
>
> [Instruction quoted—same portion as noted above in *Banuelos*.]
>
> The first alternative basis for finding the allegation true tracks language in *Corona*. The second alternative basis does not find any basis in the holding of *Corona* and is not facially consistent with the statutory language of Penal Code section 1192.7, subdivision (c)(8) requiring a finding that the defendant *personally inflicted* great bodily injury. Neither Penal Code section 1192.7, subdivision (c)(8) nor Penal Code section 12022.7 nor any other section of the Penal Code applicable to great bodily injury allegations permits a knowledge finding to obviate the need for a finding that defendant "himself inflict[ed] the injury." (*Cole, supra,* 31 Cal.3d at p. 572.) Instead, the "clear and unambiguous" statutory language "limit[s] the category of persons subject to the enhancement to those who *directly perform the act that causes the physical injury to the victim*." (*Id.* at p. 579, italics added.)
>
> We encounter no difficulty in concluding that the second alternative basis in CALJIC 17.20 is erroneous to the extent that it permits the jury to substitute a knowledge finding for a finding that the defendant "directly perform[ed] the act that cause[d] the physical injury to the victim" as required by the plain and unambiguous language of the statute as construed by the California Supreme Court in *Cole*.

(*People v. Modiri* (2003) 112 Cal.App.4th 123, 136–137 [italics in original] REVIEW GRANTED AND DEPUBLISHED (Dec. 23, 2003) S120238.)

The Supreme Court has granted review in *Modiri*.

Sex Offenses—Injury Must be More than Present in Every Offense of that Type But Need Not be Protracted or Prolonged

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> After a review of the legislative history and decisional law, the *Caudillo* court determined that the enhancement provisions of sections 461, 213 and 264 were designed to deter the infliction of gratuitous injury over and above that necessarily present in the commission of the offenses themselves. "[T]he Legislature indicated an intent that rape by force or violence was *not* synonymous with rape by means of great and immediate bodily harm." (21 Cal.3d at p. 583, original italics.) Thus, although the victim in *Caudillo*, *supra*, was raped, sodomized and forced to orally copulate the defendant, the court concluded that the resulting physical effects--gagging, vomiting, defecation and superficial cuts--did not constitute "substantial or significant injury 'in addition to that which must be present in every case of rape.' " [Citations.] . . .
>
> [However,] *Caudillo* erred in concluding that the Legislature intended no change in the definition of "great bodily injury" when it discarded the specific criteria set forth in the original version of section 12022.7 and substituted the more general "significant or substantial physical injury" test then in use. Clearly, the latter standard contains no specific requirement that the victim suffer "permanent," "prolonged" or "protracted" disfigurement, impairment, or loss of bodily function. Indeed, nothing in the statutory definition precludes a jury from finding great bodily injury based on precisely the quantum of evidence presented here: extensive bruises and abrasions over the victim's legs, knees and elbows, injury to her neck and soreness in her vaginal area of such severity that it significantly impaired her ability to walk. As the Court of Appeal correctly concluded, these are not the type of injuries "routinely associated with rape," but reflect a degree of brutality and violence substantially beyond that necessarily present in the offense.

(*People v. Escobar* (1992) 3 Cal.4th 740, 746, 749–750.)

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231. Great Bodily Injury: Causing Victim to Become Comatose or Paralyzed

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 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 [for each crime], 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, but are not required to, conclude that the defendant**

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

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

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

AND

6. 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.]**

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

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

AND

6. 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 (this/each) allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

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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.)

The bracketed section beneath the heading "Group Assault" is designed to be used in cases where the evidence shows a group assault. (*People v. Corona* (1989) 213 Cal.App.3d 589, 594.) However, there is currently a split in the Court of Appeal over whether a "group beating" instruction is proper and what form it should take. (Compare *People v. Banuleos* (2003) 106 Cal.App.4th 1332, 1136–1338 [instruction on group beating approved] with *People v. Modiri* (2003) 112 Cal.App.4th 123, 136–137 [reversed for erroneous instruction on group beating] REVIEW GRANTED AND DEPUBLISHED December 23, 2003, S120238.) The issue is currently pending before the Supreme Court. The trial court should review these decisions and any current law before giving the bracketed instruction on group beatings.

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.) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in Instruction 480, 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; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [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 Instruction 739, During Commission of Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25 Cal.4th 98, 109; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.)

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.

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Must Personally Inflict Injury ▸ *People v. Lee* (2003) 31 Cal.4th 613, 631; *People v. Cole* (1982) 31 Cal.3d 568, 571; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [Pen. Code, § 12022.8].

Group Beating Instruction ▸ *People v. Corona* (1989) 213 Cal.App.3d 589, 594; *People v. Banuleos* (2003) 106 Cal.App.4th 1332, 1136–1338 [instruction on group beating approved]; *People v. Modiri* (2003) 112 Cal.App.4th 123, 136–137 [reversed for erroneous instruction on group beating] REVIEW GRANTED AND DEPUBLISHED December 23, 2003, S120238.

Accomplice Defined ▸ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91.

"In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.

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

RELATED ISSUES

Coma Need Not Be Permanent

In *People v. Tokash* (2000) 79 Cal.App.4th 1373, 1378, 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 Instruction 230, Great Bodily Injury.

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STAFF NOTES

Penal Code, § 12022.7:

> (b) Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony which causes the victim to become comatose due to brain injury or to suffer paralysis of a permanent nature, shall be punished by an additional and consecutive term of imprisonment in the state prison for five years. As used in this subdivision, "paralysis" means a major or complete loss of motor function resulting from injury to the nervous system or to a muscular mechanism.

See Notes to Instruction 230.

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232. Great Bodily Injury: Age of Victim

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 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 [for each crime], the People must prove that:

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

[AND]

4. **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

5. **_____** *<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, but are not required to, conclude that the defendant personally inflicted great bodily injury on _____** *<insert name of injured person>* **if the People have proved that:**

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

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

AND

9. 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.]

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

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

AND

8. 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 (this/each) allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

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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.)

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 [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. (*People v. Corona* (1989) 213 Cal.App.3d 589, 594.) However, there is currently a split in the Court of Appeal over whether a "group beating" instruction is proper and what form it should take. (Compare *People v. Banuleos* (2003) 106 Cal.App.4th 1332, 1136–1338 [instruction on group beating approved] with *People v. Modiri* (2003) 112 Cal.App.4th 123, 136–137 [reversed for erroneous instruction on group beating] REVIEW GRANTED AND DEPUBLISHED December 23, 2003, S120238.) The issue is currently pending before the Supreme Court. The trial court should review these decisions and any current law before giving the bracketed instruction on group beatings.

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.) Additional paragraphs providing further explanation of the definition of "accomplice" are contained in Instruction 480, 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.)

The jury must determine whether an injury constitutes "great bodily injury." (*People v. Escobar* (1992) 3 Cal.4th 740, 750; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [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 Instruction 739, During Commission of Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25 Cal.4th 98, 109; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.)

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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.

Must Personally Inflict Injury ▸ *People v. Lee* (2003) 31 Cal.4th 613, 631; *People v. Cole* (1982) 31 Cal.3d 568, 571; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [Pen. Code, § 12022.8].

Sex Offenses—Injury Must Be More Than Incidental to Offense ▸ *People v. Escobar* (1992) 3 Cal.4th 740, 746.

Group Beating Instruction ▸ *People v. Corona* (1989) 213 Cal.App.3d 589, 594; *People v. Banuleos* (2003) 106 Cal.App.4th 1332, 1136–1338 [instruction on group beating approved]; *People v. Modiri* (2003) 112 Cal.App.4th 123, 136–137 [reversed for erroneous instruction on group beating] REVIEW GRANTED AND DEPUBLISHED December 23, 2003, S120238.

Accomplice Defined ▸ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91.

"In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.

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

RELATED ISSUES

See the Related Issues section of Instruction 230, Great Bodily Injury.

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STAFF NOTES

Penal Code, § 12022.7:

> (c) Any person who personally inflicts great bodily injury on a person who is 70 years of age or older, other than an accomplice, in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for five years.
>
> (d) Any person who personally inflicts great bodily injury on a child under the age of five years in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for four, five, or six years.

See Notes to Instruction 230.

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233. Great Bodily Injury: Domestic Violence

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 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.]**

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

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

[The term *cohabitants* means two unrelated adults 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, but are not required to, conclude that the defendant personally inflicted great bodily injury on _____** *<insert name of injured person>* **if the People have proved that:**

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

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

AND

12. 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.]

<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 (this/each) allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

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.)

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 [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. (*People v. Corona* (1989) 213 Cal.App.3d 589, 594.) However, there is currently a split in the Court of Appeal over whether a "group beating" instruction is proper and what form it should take. (Compare *People v. Banuleos* (2003) 106 Cal.App.4th 1332, 1136–1338 [instruction on group beating approved] with *People v. Modiri* (2003) 112 Cal.App.4th 123, 136–137 [reversed for erroneous instruction on group beating] REVIEW GRANTED AND DEPUBLISHED December 23, 2003, S120238.) The issue is currently pending before the Supreme Court.

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The trial court should review these decisions and any current law before giving the bracketed instruction on group beatings.

The jury must determine whether an injury constitutes "great bodily injury." (*People v. Escobar* (1992) 3 Cal.4th 740, 750; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [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 Instruction 739, During Commission of Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25 Cal.4th 98, 109; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.)

If there is an issue of whether the alleged victim was an accomplice, the court may insert the appropriate language from Instruction 230, Great Bodily Injury.

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.
Must Personally Inflict Injury ▸ *People v. Lee* (2003) 31 Cal.4th 613, 631; *People v. Cole* (1982) 31 Cal.3d 568, 571; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [Pen. Code, § 12022.8].
General Intent Only Required ▸ *People v. Carter* (1998) 60 Cal.App.4th 752, 755–756.
Sex Offenses—Injury Must Be More Than Incidental to Offense ▸ *People v. Escobar* (1992) 3 Cal.4th 740, 746.
Group Beating Instruction ▸ *People v. Corona* (1989) 213 Cal.App.3d 589, 594; *People v. Banuleos* (2003) 106 Cal.App.4th 1332, 1136–1338 [instruction on group beating approved]; *People v. Modiri* (2003) 112 Cal.App.4th 123, 136–137 [reversed for erroneous instruction on group beating] REVIEW GRANTED AND DEPUBLISHED December 23, 2003, S120238.
"In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.

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

RELATED ISSUES

Person Who Suffers Injury Need Not Be "Victim" of Domestic Abuse

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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.) 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 Instruction 230, Great Bodily Injury.

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STAFF NOTES

Penal Code, § 12022.7:

> (e) Any person who personally inflicts great bodily injury under circumstances involving domestic violence in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years. As used in this subdivision, "domestic violence" has the meaning provided in subdivision (b) of Section 13700.

Penal Code, § 13700, in relevant part:

> (a) "Abuse" means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.
>
> (b) "Domestic violence" means abuse committed against an adult or a fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. For purposes of this subdivision, "cohabitant" means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) whether the parties hold themselves out as husband and wife, (5) the continuity of the relationship, and (6) the length of the relationship.

Emancipated Minor Defined

An act of domestic violence may be committed against a “fully emancipated minor.” (See Pen. Code, § 13700(b).) The Emancipation of Minors Law (Fam. Code, § 7000 et seq.) governs the emancipation of minors. Section 7002 sets forth the conditions under which a minor becomes emancipated, as follows:

> A person under the age of 18 years is an emancipated minor if any of the following conditions is satisfied:
> (a) The person has entered into a valid marriage, whether or not the marriage has been dissolved.
> (b) The person is on active duty with the armed forces of the United States.
> (c) The person has received a declaration of emancipation pursuant to Section 7122.

General Intent Only Required

> Relying on the definition of abuse found in section 13700, subdivision (a), Carter argues section 12022.7, subdivision (d) requires the defendant to specifically intend to inflict GBI. But section 12022.7 subdivision (d) refers only to the general definition of domestic violence in section 13700, subdivision (b). It does not incorporate section 13700, subdivision (a). This indicates the reference to domestic violence in subdivision (d) was

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> designed to describe the context in which the subdivision applies, not the intent requirement needed under that provision.
>
> The history of section 12022.7 supports this interpretation. Unlike subdivision (d), subdivisions (a) (infliction of GBI on person other than accomplice) and (c) (infliction of GBI on person 70 years of age or older) originally required the defendant to intend to inflict GBI. (Stats. 1993, ch. 608, § 2.) Because the Legislature did not include a similar specific intent requirement in subdivision (d), we may presume no such requirement was intended. [Citations.]
>
> Furthermore, subdivisions (a) and (c) of section 12022.7 have since been amended to repeal the element of specific intent to inflict GBI. (Stats. 1995, ch. 341, § 1.) There would be no logical reason for the Legislature to relax the intent requirement for the situations covered in subdivisions (a) and (c) while requiring a more stringent mens rea requirement for cases involving domestic violence. We therefore interpret section 12022.7, subdivision (d) as requiring only the general intent to inflict GBI. Accordingly, the trial court's instruction was correct.

(*People v. Carter* (1998) 60 Cal.App.4th 752, 755–756.)

See Notes to Instruction 230.

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240. Sex Offenses: Sentencing Factors—Aggravated Kidnapping

If you find the defendant guilty of the crime[s] charged in Count[s] __ *<insert counts charging sex offense[s] from Pen. Code, § 667.61(c)>*, **you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant kidnapped _____** *<insert name of alleged victim>*, **increasing the risk of harm to (him/her). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

To prove this allegation [for each crime], the People must prove that:

1. **The defendant took, held, [stole, arrested,] or detained _____** *<insert name of alleged victim>* **by the use of force or by instilling reasonable fear;**

2. **Using that force or fear, the defendant moved _____** *<insert name of alleged victim>* **[or made (him/her) move] a substantial distance;**

3. **The movement of _____** *<insert name of alleged victim>* **substantially increased the risk of harm to (him/her) beyond that necessarily present in the _____** *<insert sex offense[s] from Pen. Code, § 667.61(c)>*;

[AND]

4. **_____** *<insert name of alleged victim>* **did not consent to the movement(./;)**

[AND

5. **The defendant did not actually and reasonably believe that _____** *<insert name of alleged victim>* **consented to the movement.]**

Substantial distance **means more than a slight or trivial distance. The movement must be more than merely incidental to the commission of _____** *<insert sex offense[s] from Pen. Code, § 667.61(c)>*. **In deciding whether the distance was substantial and whether the movement substantially**

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increased the risk of harm, you must consider all the circumstances relating to the movement.

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

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

The victim's consent to go with the defendant may be a defense. (See *People v. Greenberger* (1997) 58 Cal.App.4th 298, 375; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [reasonable, good faith belief that victim consented to movement is a defense to kidnapping].) For paragraphs instructing on actual consent or a reasonable, good faith belief in consent, see Instruction 950, Kidnapping.

AUTHORITY

One-Strike Sex Offense Statute—Kidnapping Factor ▸ Pen. Code, § 667.61(d)(2).
Factors Must Be Pleaded and Proved ▸ Pen. Code, § 667.61(i); *People v. Mancebo* (2002) 27 Cal.4th 735, 743.
Sentencing Factor Does Not Require Specific Intent to Commit Sex Offense ▸ *People v. Jones* (1997) 58 Cal.App.4th 693, 717.
Sentencing Factor Requires Greater Movement Than That Incidental to Offense ▸ *People v. Diaz* (2000) 78 Cal.App.4th 243, 246; *see also People v. Aguilar* (July 22, 2004, B163793) __ Cal.App.4th __, __ [discussing meaning of "incidental"].
Elements of Kidnapping ▸ Pen. Code, § 207(a).
Asportation Requirement ▸ *People v. Martinez* (1999) 20 Cal.4th 225, 235–237 [adopting modified two-pronged asportation test from *People v. Rayford* (1994) 9 Cal.4th 1, 12–14, and *People v. Daniels* (1969) 71 Cal.2d 1119, 1139].
Consent to Physical Movement ▸ See *People v. Davis* (1995) 10 Cal.4th 463, 516–518.
Force or Fear Requirement ▸ *People v. Moya* (1992) 4 Cal.App.4th 912, 916–917; *People v. Stephenson* (1974) 10 Cal.3d 652, 660; see *People v. Davis* (1995) 10 Cal.4th 463, 517, fn. 13, 518 [kidnapping requires use of force or fear; consent not vitiated by fraud, deceit, or dissimulation].
Good Faith Belief in Consent ▸ Pen. Code, § 26, subd. 3 [mistake of fact]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–155; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28; *People v. Patrick* (1981) 126 Cal.App.3d 952, 968.

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Intent Requirement ▸ *People v. Thornton* (1974) 11 Cal.3d 738, 765; *People v. Davis* (1995) 10 Cal.4th 463, 519; *People v. Moya* (1992) 4 Cal.App.4th 912, 916.

Substantial Distance Requirement ▸ *People v. Derek Daniels* (1993) 18 Cal.App.4th 1046, 1053; *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [since movement must be more than slight or trivial, it must be substantial in character].

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 386–389.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

RELATED ISSUES

One-Strike Sex Offense Statute—Meaning of Single Occasion
Penal Code section 667.61(g) provides that the sentence provided for by this statute "shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion." The term "single occasion" as used here does not have the same meaning as the term "separate occasion" in Penal Code section 667.6. (*People v. Jones* (2001) 25 Cal.4th 98, 107.) "[F]or the purposes of Penal Code section 667.61, subdivision (g), sex offenses occurred on a 'single occasion' if they were committed in close temporal and spatial proximity." *(Ibid.)*

See also the Related Issues section of Instruction 950, Kidnapping.

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STAFF NOTES

Penal Code, § 667.61:

(a) A person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 25 years except as provided in subdivision (j).

(b) Except as provided in subdivision (a), a person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years except as provided in subdivision (j).

(c) This section shall apply to any of the following offenses:

(1) A violation of paragraph (2) of subdivision (a) of Section 261.

(2) A violation of paragraph (1) of subdivision (a) of Section 262.

(3) A violation of Section 264.1.

(4) A violation of subdivision (b) of Section 288.

(5) A violation of subdivision (a) of Section 289.

(6) Sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(7) A violation of subdivision (a) of Section 288, unless the defendant qualifies for probation under subdivision (c) of Section 1203.066.

(d) The following circumstances shall apply to the offenses specified in subdivision (c):

(1) The defendant has been previously convicted of an offense specified in subdivision (c), including an offense committed in another jurisdiction that includes all of the elements of an offense specified in subdivision (c).

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(2) The defendant kidnapped the victim of the present offense and the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense in subdivision (c).

(3) The defendant inflicted aggravated mayhem or torture on the victim or another person in the commission of the present offense in violation of Section 205 or 206.

(4) The defendant committed the present offense during the commission of a burglary, as defined in subdivision (a) of Section 460, with intent to commit an offense specified in subdivision (c).

(e) The following circumstances shall apply to the offenses specified in subdivision (c):

(1) Except as provided in paragraph (2) of subdivision (d), the defendant kidnapped the victim of the present offense in violation of Section 207, 209, or 209.5.

(2) Except as provided in paragraph (4) of subdivision (d), the defendant committed the present offense during the commission of a burglary, as defined in subdivision (a) of Section 460, or during the commission of a burglary of a building, including any commercial establishment, which was then closed to the public, in violation of Section 459.

(3) The defendant personally inflicted great bodily injury on the victim or another person in the commission of the present offense in violation of Section 12022.53, 12022.7, or 12022.8.

(4) The defendant personally used a dangerous or deadly weapon or firearm in the commission of the present offense in violation of Section 12022, 12022.3, 12022.5, or 12022.53.

(5) The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim.

(6) The defendant engaged in the tying or binding of the victim or another person in the commission of the present offense.

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(7) The defendant administered a controlled substance to the victim by force, violence, or fear in the commission of the present offense in violation of Section 12022.75.

(f) If only the minimum number of circumstances specified in subdivision (d) or (e) which are required for the punishment provided in subdivision (a) or (b) to apply have been pled and proved, that circumstance or those circumstances shall be used as the basis for imposing the term provided in subdivision (a) or (b) rather than being used to impose the punishment authorized under any other law, unless another law provides for a greater penalty. However, if any additional circumstance or circumstances specified in subdivision (d) or (e) have been pled and proved, the minimum number of circumstances shall be used as the basis for imposing the term provided in subdivision (a), and any other additional circumstance or circumstances shall be used to impose any punishment or enhancement authorized under any other law. Notwithstanding any other law, the court shall not strike any of the circumstances specified in subdivision (d) or (e).

(g) The term specified in subdivision (a) or (b) shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. If there are multiple victims during a single occasion, the term specified in subdivision (a) or (b) shall be imposed on the defendant once for each separate victim. Terms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable.

(h) Probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person who is subject to punishment under this section for any offense specified in paragraphs (1) to (6), inclusive, of subdivision (c).

(i) For the penalties provided in this section to apply, the existence of any fact required under subdivision (d) or (e) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact.

(j) Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall apply to reduce the minimum term of 25 years in the state prison imposed pursuant to subdivision (a) or 15 years in the state prison imposed pursuant to subdivision (b). However, in no case shall the minimum term of 25 or 15 years be reduced by more than 15 percent for

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> credits granted pursuant to Section 2933, 4019, or any other law providing for conduct credit reduction. In no case shall any person who is punished under this section be released on parole prior to serving at least 85 percent of the minimum term of 25 or 15 years in the state prison.

Factors Must be Pled and Proved

> The plain wording of subdivisions (f) and (i) of section 667.61 together controls here. Subdivision (i) requires that "[f]or the penalties provided in this section to apply, the existence of any fact required under subdivision (d) or (e) *shall be alleged in the accusatory pleading* and either admitted by the defendant in open court or found to be true by the trier of fact." (Italics added.) Neither the original nor the amended information ever alleged a multiple victim circumstance under subdivision (e)(5). Substitution of that unpleaded circumstance for the first time at sentencing as a basis for imposing the indeterminate terms violated the explicit pleading provisions of the One Strike law.

(*People v. Mancebo* (2002) 27 Cal.4th 735, 743 [italics in original].)

Single Occasion

> [G]iven the harshness of the punishment dictated by Penal Code section 667.61, subdivision (g)--of life imprisonment--and the lack of definitive legislative direction, the rule of lenity also points to the conclusion that the Legislature intended to impose no more than one such sentence per victim per episode of sexually assaultive behavior. [Citation.] In this matter, for example, the rule we adopt should result in a *single* life sentence, rather than *three* consecutive life sentences, for a sequence of sexual assaults by defendant against one victim that occurred during an uninterrupted time frame and in a single location.
>
> Accordingly, we conclude that, for the purposes of Penal Code section 667.61, subdivision (g), sex offenses occurred on a "single occasion" if they were committed in close temporal and spatial proximity.

(*People v. Jones* (2001) 25 Cal.4th 98, 107.)

Specific Intent to Commit Sex Offense Not Required

> Nothing in this definition explicitly requires that the defendant kidnap the victim for the purpose of committing the sexual offense. It would appear the

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circumstance would apply if the defendant commits the sexual offense, then, as an afterthought, kidnaps the victim; or if the defendant kidnaps the victim for another purpose, e.g., to commit robbery, then, as an afterthought, commits the sexual offense (as defendant claims the evidence here shows).

Defendant infers a specific intent requirement from the requirement that the movement must substantially increase the risk of harm to the victim beyond the risk inherent in the sexual offense. As we discussed in part V.C.2.iv, *ante*, this "risk of harm" requirement is drawn from cases dealing with kidnapping for the purpose of robbery (Pen. Code, § 209, subd. (b)). . . .

Kidnapping for robbery also requires that the defendant commit the kidnapping with the specific intent to rob. (*People v. Tribble* (1971) 4 Cal. 3d 826, 830-832.) This requirement is derived from the statutory definition of the offense as "kidnap[ping] or carr[ying] away . . . to commit robbery." (Pen. Code, § 209, subd. (b).) "A person could not kidnap and carry away his victim to commit robbery if the intent to rob was not formed until after the kidnaping had occurred." (*People v. Tribble*, *supra*, 4 Cal. 3d at p. 831.)

The specific intent requirement is entirely separate from the "risk of harm" requirement, and exists for different reasons. The Legislature deliberately imported the "risk of harm" requirement into the one strike aggravated kidnapping circumstance. We see no reason to drag the specific intent requirement along with it. We conclude there could be sufficient evidence to support the aggravated kidnapping circumstance even if there was no evidence that defendant kidnapped the victim with the preexisting specific intent to commit the sexual offense.

(*People v. Jones* (1997) 58 Cal.App.4th 693, 717.)

Requires More Movement Than Incidental to Offense

The plain wording of this enhancement requires two elements: (1) a simple kidnapping (§ 207, subd. (a) n2); and (2) a substantial increase in the risk of harm to the victim.

A threshold question raised by the People is whether the issue of incidental movement has any relevance. The statute does not expressly require more than incidental movement, and it would be inappropriate for this court to add a requirement not intended by the Legislature. [Citation.] However, the Legislature is presumed to understand and intend to

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> incorporate judicial interpretations of statutory language that predate new legislation. It has long been the law in California that even a simple kidnapping requires movement more than incidental to the commission of an "associated crime." [Citations.] Consequently, we hold that kidnapping within the meaning of section 667.61, subdivision (d)(2) requires movement of the victim that is more than incidental to the underlying sex offense.

(*People v. Diaz* (2000) 78 Cal.App.4th 243, 246 [footnote ommited].)

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241. Sex Offenses: Sentencing Factors—Aggravated Mayhem

If you find the defendant guilty of the crime[s] charged in Count[s] __ *<insert counts charging sex offense[s] from Pen. Code, § 667.61(c)>*, **you must then decide whether[, for each crime,] the People have proved the additional allegation that, while committing that crime, the defendant also committed aggravated mayhem. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

To prove this allegation [for each crime], the People must prove that:

1. **During the commission of the crime, the defendant unlawfully and maliciously (disabled or disfigured someone permanently/ [or] deprived someone else of a limb, organ, or other part of (his/her) body);**

2. **When the defendant acted, (he/she) intended to (permanently disable or disfigure the other person/ [or] deprive the other person of a limb, organ, or other part of (his/her) body);**

AND

3. **Under the circumstances, the defendant's act showed extreme indifference to the physical or psychological well-being of the other person.**

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

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

[The People do not have to prove that the defendant intended to kill.]

<If there is an issue in the case over whether the mayhem was committed "during the commission of" the offense, see Bench Notes.>

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

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BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

The bracketed sentence about the permanency of "disfiguring injury" may be given on request if there is evidence that the injury may be repaired by medical procedures. (*People v. Hill* (1994) 23 Cal.App.4th 1566, 1574–1575 [not error to instruct that an injury may be permanent even though cosmetic repair may be medically feasible].)

The final bracketed sentence may be given on the prosecution's request when there is no evidence or conflicting evidence that the defendant intended to kill someone. (See Pen. Code, § 205.)

If the case involves an issue of whether the defendant committed the mayhem "during the commission of" the offense, the court may give Instruction 739, During Commission of Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25 Cal.4th 98, 109; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.)

AUTHORITY

One-Strike Sex Offense Statute—Aggravated Mayhem Factor ▸ Pen. Code, § 667.61(d)(3).
Factors Must Be Pleaded and Proved ▸ Pen. Code, § 667.61(i); *People v. Mancebo* (2002) 27 Cal.4th 735, 743.
Elements of Aggravated Mayhem ▸ Pen. Code, § 205.
Permanent Disability ▸ See, e.g., *People v. Thomas* (1979) 96 Cal.App.3d 507, 512 [serious ankle injury lasting over six months].
Permanent Disfigurement ▸ See *People v. Hill* (1994) 23 Cal.App.4th 1566, 1571; see also *People v. Newble* (1981) 120 Cal.App.3d 444, 451 [head is member of body for purposes of disfigurement].
Specific Intent to Cause Maiming Injury ▸ *People v. Ferrell* (1990) 218 Cal.App.3d 828, 833; *People v. Lee* (1990) 220 Cal.App.3d 320, 324–325.
"In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 386–389.

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

RELATED ISSUES

See the Related Issues sections of Instruction 240, Sex Offenses: Sentencing Factors—Aggravated Kidnapping, and Instruction 916, Aggravated Mayhem.

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STAFF NOTES

Penal Code, § 667.61, in relevant part:

> (d). . . (3) The defendant inflicted aggravated mayhem or torture on the victim or another person in the commission of the present offense in violation of Section 205 or 206.

See Notes to Instruction 240, Sex Offenses: Sentencing Factors—Aggravated Kidnapping and Instruction 916, Aggravated Mayhem.

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242. Sex Offenses: Sentencing Factors—Torture

If you find the defendant guilty of the crime[s] charged in Count[s] __ *<insert counts charging sex offense[s] from Pen. Code, § 667.61(c)>*, **you must then decide whether[, for each crime,] the People have proved the additional allegation that, while committing that crime, the defendant also committed torture. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

To prove this allegation [for each crime], the People must prove that:

4. **During the commission of the crime, the defendant inflicted great bodily injury on someone else;**

AND

5. **When inflicting the injury, the defendant intended to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, or persuasion or for any sadistic purpose.**

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

[It is not required that a victim actually suffer pain.]

[Someone acts for the purpose of *extortion* if he or she intends to (1) obtain a person's property with the person's consent and (2) obtain the person's consent through the use of force or fear.]

[Someone acts for the purpose of *extortion* if he or she (1) intends to get a public official to do an official act and (2) uses force or fear to make the official do the act.] [An *official act* is an act that an officer does in his or her official capacity using the authority of his or her public office.]

[Someone acts with a *sadistic purpose* if he or she intends to inflict pain on someone else in order to experience pleasure himself or herself.]

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

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

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

Unlike murder by torture, the crime of torture under Penal Code section 206 does not require that the intent to cause pain be premeditated or that any cruel or extreme pain be prolonged. (*People v. Pre* (2004) 114 Cal.App.4th 413, 419–420; *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1204–1205; *People v. Vital* (1996) 45 Cal.App.4th 441, 444.) Torture as defined in section 206 focuses on the mental state of the perpetrator and not the actual pain inflicted. (*People v. Hale* (1999) 75 Cal.App.4th 94, 108.) Give the bracketed sentence stating that "It is not required that a victim actually suffer pain" on request if there is no proof that the victim actually suffered pain.

"Extortion" need not be defined for purposes of torture. (*People v. Barrera* (1993) 14 Cal.App.4th 1555, 1564; but see *People v. Hill* (1983) 141 Cal.App.3d 661, 668 [term should be defined for kidnapping under Pen. Code, § 209].) Nevertheless, either of the bracketed definitions of extortion, and the related definition of "official act," may be given on request if any of these issues are raised in the case. (See Pen. Code, § 518 [defining "extortion"]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [defining "official act"].) Extortion may also be committed by using "the color of official right" to make an official do an act. (Pen. Code, § 518; see *Evans v. United States* (1992) 504 U.S. 255, 258; *McCormick v. United States* (1990) 500 U.S. 257, 273 [both discussing common law definition of the term].) It appears that this type of extortion would rarely occur in the context of torture, so it is excluded from this instruction.

"Sadistic purpose" may be defined on request. (See *People v. Barrera, supra,* 14 Cal.App.4th at p. 1564; *People v. Raley* (1992) 2 Cal.4th 870, 899–901 [approving use of phrase in torture-murder and special circumstances torture-murder instructions].)

If the case involves an issue of whether the defendant inflicted the injury "during the commission of" the offense, the court may give Instruction 739, During Commission of Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25 Cal.4th 98, 109; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.)

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AUTHORITY

One-Strike Sex Offense Statute—Torture Factor ▸ Pen. Code, § 667.61(d)(3).
Factors Must Be Pleaded and Proved ▸ Pen. Code, § 667.61(i); *People v. Mancebo* (2002) 27 Cal.4th 735, 743.
Elements of Torture ▸ Pen. Code, § 206.
Extortion Defined ▸ Pen. Code, § 518.
Great Bodily Injury Defined ▸ Pen. Code, § 12022.7(f); see, e.g., *People v. Hale* (1999) 75 Cal.App.4th 94, 108 [broken and smashed teeth, split lip, and facial cut sufficient evidence of great bodily injury].
Cruel Pain Equivalent to Extreme or Severe Pain ▸ *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1202.
Intent ▸ *People v. Hale* (1999) 75 Cal.App.4th 94, 106–107; *People v. Jung* (1999) 71 Cal.App.4th 1036, 1042–1043; see *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1204–1206 [neither premeditation nor intent to inflict prolonged pain are elements of torture].
Sadistic Purpose Defined ▸ *People v. Raley* (1992) 2 Cal.4th 870, 899–901; *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1202–1204; see *People v. Healy* (1993) 14 Cal.App.4th 1137, 1142 [sexual element not required].
"In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 386–389.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

RELATED ISSUES

See the Related Issues sections of Instruction 240, Sex Offenses: Sentencing Factors—Aggravated Kidnapping, and Instruction 917, Torture.

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STAFF NOTES

Penal Code, § 667.61, in relevant part:

> (d). . . (3) The defendant inflicted aggravated mayhem or torture on the victim or another person in the commission of the present offense in violation of Section 205 or 206.

See Notes to Instruction 240, Sex Offenses: Sentencing Factors—Aggravated Kidnapping and Instruction 917, Torutre.

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243. Sex Offenses: Sentencing Factors—Burglary With Intent to Commit Sex Offense

If you find the defendant guilty of the crime[s] charged in Count[s] __ *<insert counts charging sex offense[s] from Pen. Code, § 667.61(c)>*, **you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant committed the crime during the commission of burglary, with the intent to commit _____** *<insert sex offense[s] from Pen. Code, § 667.61(c)>*. **[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

To prove this allegation [for each crime], the People must prove that:

1. **The defendant entered an inhabited (house [or a room within an inhabited house]/vessel/floating home/trailer coach/part of a building);**

2. **When the defendant entered the (house [or room within the house]/vessel/floating home/trailer coach/part of a building), (he/she) intended to commit _____** *<insert sex offense[s] from Pen. Code, § 667.61(c)>*;

AND

3. **After the defendant entered the (house [or room within the house]/vessel/floating home/trailer coach/part of a building), (he/she) committed _____** *<insert sex offense[s] from Pen. Code, § 667.61(c)>* **[before (he/she) escaped to a place of temporary safety].**

A (house [or a room within an inhabited house]/vessel/floating home/trailer coach/part of a building) is *inhabited* if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged entry.

[A *house* includes any (structure/garage/office/_____ *<insert description>*) **that is attached to the house and functionally connected with it.]**

[The defendant intended to commit rape if he intended to have sexual intercourse with a woman [who was not his wife], without her consent, by (using force, duress, menace, or fear of immediate and unlawful bodily injury to her or to another person/threatening to retaliate against her or against a

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third person with a reasonable possibility that the threat would be carried out/threatening to have her or a third person incarcerated, arrested, or deported).]

[To decide whether the defendant intended to commit _____ *<insert sex offense[s] other than rape from Pen. Code, § 667.61(c)>*, **please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

[A person has *reached a place of temporary safety* if he or she has successfully escaped from the scene of the crime and is no longer being pursued.]

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

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

If the defendant is charged with rape, give the bracketed sentence that begins with "The defendant intended to commit rape . . . ." If the defendant is charged with another offense, use the next bracketed paragraph, and give all necessary instructions on the Penal Code section 667.61(c) offenses alleged.

For a definition of "vessel," "floating home," or "trailer coach," see Instruction 1405, Burglary: Degrees.

AUTHORITY

One-Strike Sex Offense Statute—Burglary With Intent to Commit Sex Offense ▸ Pen. Code, § 667.61(d)(4).
Factors Must Be Pleaded and Proved ▸ Pen. Code, § 667.61(i); *People v. Mancebo* (2002) 27 Cal.4th 735, 743.
During the Commission of Burglary Defined for Sentencing Factor ▸ *People v. Alvarado* (2001) 87 Cal.App.4th 178, 191.
Elements of Burglary ▸ Pen. Code, § 459.
Determination of Degrees ▸ Pen. Code, § 460.
Inhabitation Defined ▸ Pen. Code, § 459.

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Room Within Inhabited House ▸ *People v. Sparks* (2002) 28 Cal.4th 71, 86–87.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 386–389.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

RELATED ISSUES

See the Related Issues sections of Instruction 240, Sex Offenses: Sentencing Factors—Aggravated Kidnapping, Instruction 1400, Burglary, and Instruction 1405, Burglary: Degrees.

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STAFF NOTES

Penal Code, § 667.61, in relevant part:

> (d). . . (4) The defendant committed the present offense during the commission of a burglary, as defined in subdivision (a) of Section 460, with intent to commit an offense specified in subdivision (c).

Penal Code, § 460(a):

> Every burglary of an inhabited dwelling house, vessel, as defined in the Harbors and Navigation Code, which is inhabited and designed for habitation, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, or trailer coach, as defined by the Vehicle Code, or the inhabited portion of any other building, is burglary of the first degree.

See Notes to Instruction 240, Sex Offenses: Sentencing Factors—Aggravated Kidnapping and Instruction 916, Aggravated Mayhem.

During the Commission of Burglary Defined

> [W]e find the continuous-transaction test, including the perpetrator's escape, to be the appropriate way to measure the duration of a burglary under section 667.61(e)(2). Clearly, this measure provides the broadest deterrent against the commission of sex crimes against burglary victims. Therefore, we hold that for the purpose of section 667.61(e)(2), "during the commission of a burglary" refers to that period of time between the burglar's initial entry with the requisite intent and the burglar's escape to a place of temporary safety.

(*People v. Alvarado* (2001) 87 Cal.App.4th 178, 191.) The court further held that an instruction on this definition was not necessary. (*Id.* at p. 193.)

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244. Sex Offenses: Sentencing Factors—Kidnapping

If you find the defendant guilty of the crime[s] charged in Count[s] __ *<insert counts charging sex offense[s] from Pen. Code, § 667.61(c)>*, **you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant kidnapped _____** *<insert name[s] of alleged victim[s]>*. **[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

To decide whether the defendant kidnapped _____ *<insert name[s] of alleged victim[s]>*, **please refer to the separate instructions that I (will give/have given) you on kidnapping. You must apply those instructions when you decide whether the People have proved this additional allegation.**

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

This sentencing factor applies if "the defendant kidnapped the victim of the present offense in violation of Section 207, 209, or 209.5." (Pen. Code, § 667.61(e)(1).) Give the appropriate instruction on kidnapping, depending on which Penal Code section the prosecution alleges, as follows:

Pen. Code, § 207: Instruction 950, Kidnapping
Instruction 951, Kidnapping: For Child Molestation
Instruction 952, Kidnapping: Person Incapable of Consent

Pen. Code, § 209: Instruction 955, Kidnapping: For Ransom, Reward, or Extortion
Instruction 956, Kidnapping: For Robbery, Rape, or Other Sex Offenses

Pen. Code, § 209.5: Instruction 957, Kidnapping: During Carjacking

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AUTHORITY

One-Strike Sex Offense Statute—Kidnapping Factor ▸ Pen. Code, § 667.61(e)(1).
Factors Must Be Pleaded and Proved ▸ Pen. Code, § 667.61(i); *People v. Mancebo* (2002) 27 Cal.4th 735, 743.
Sentencing Factor Does Not Require Specific Intent to Commit Sex Offense ▸ *People v. Jones* (1997) 58 Cal.App.4th 693, 717.
Sentencing Factor Requires More Movement Than Incidental to Offense ▸ *People v. Diaz* (2000) 78 Cal.App.4th 243, 246.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 386–389.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

RELATED ISSUES

See also the Related Issues sections of Instruction 240, Sex Offenses: Sentencing Factors—Aggravated Kidnapping and of the instructions on kidnapping, Instructions 950–957.

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STAFF NOTES

Penal Code, § 667.61, in relevant part:

> (e) . . . (1) Except as provided in paragraph (2) of subdivision (d), the defendant kidnapped the victim of the present offense in violation of Section 207, 209, or 209.5.

See Notes to Instruction 240.

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245. Sex Offenses: Sentencing Factors—Burglary

If you find the defendant guilty of the crime[s] charged in Count[s] __ *<insert counts charging sex offense[s] from Pen. Code, § 667.61(c)>*, **you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant committed the crime during the commission of a burglary. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

To prove this allegation [for each crime], the People must prove that:

4. **The defendant entered (a building/an inhabited (house [or a room within an inhabited house]/vessel/floating home/trailer coach/part of a building));**

5. **When the defendant entered the (building/house [or a room within the house]/vessel/floating home/trailer coach/part of a building), (he/she) intended to commit (theft/_____** *<insert other felony alleged>***);**

[AND]

6. **After the defendant entered the (building/house [or a room within the house]/vessel/floating home/trailer coach/part of a building), (he/she) committed _____** *<insert sex offense[s] from Pen. Code, § 667.61(c)>* **[before (he/she) escaped to a place of temporary safety](./;)**

<Give element 4 only if prosecution alleges defendant entered a building that does not meet definition of inhabited dwelling.>
[AND

7. **When the defendant committed _____** *<insert sex offense[s] from Pen. Code, § 667.61(c)>*, **the building was closed to the public.]**

A (house [or a room within an inhabited house]/vessel/floating home/trailer coach/part of a building) is *inhabited* if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged entry.

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[A *house* includes any (structure/garage/office/_____ *<insert description>*) **that is attached to the house and functionally connected with it.]**

<Alternative A—theft>
[The defendant intended to commit theft [by larceny] if (he/she) intended to take property owned by someone else, without the owner's consent, to deprive the owner of it permanently [or to remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property], to move the property, even a small distance, and to keep it for any period of time, however brief.]

<Alternative B—rape by force, fear, or threats>
[The defendant intended to commit rape if he intended to have sexual intercourse with a woman [who was not his wife], without her consent, by (using force, duress, menace, or fear of immediate and unlawful bodily injury to her or to another person/threatening to retaliate against her or against a third person with a reasonable possibility that the threat would be carried out/threatening to have her or a third person incarcerated, arrested, or deported).]

<Alternative C—other felony>
[To decide whether the defendant intended to commit _____ *<insert other felony alleged>*, **please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]**

[A person has *reached a place of temporary safety* if (he/she) has successfully escaped from the scene of the crime and is no longer being pursued.]

[The burglary was committed if the defendant entered with the intent to commit (theft/_____ *<insert other felony alleged>*). **The defendant does not need to have actually committed that crime as long as (he/she) entered with the intent to do so. [The People do not have to prove that the defendant actually committed _____** *<insert other felony alleged>*.]]

[The People allege that the defendant intended to commit either _____ *<insert felony alleged>* **or _____** *<insert second felony alleged>*. **You may not find this allegation true unless you all agree that (he/she) intended to commit one of those crimes at the time of the entry. You do not need to all agree on which one of those crimes (he/she) intended.]**

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

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

If the prosecution alleges that the defendant entered a "building" that does not meet the definition of inhabited dwelling, give element 4.

Give alternative A, B, or C depending on the prosecution's theory about which felony the defendant intended to commit at the time of entry. To have the requisite intent for theft, the defendant must either intend to deprive the owner permanently or 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.) When giving this portion of the instruction, select the appropriate language in alternative A—theft.

If the prosecution alleges multiple underlying felonies, give the bracketed paragraph that begins with "The People allege that the defendant intended to commit either . . . ." (*People v. Failla* (1966) 64 Cal.2d 560, 569; *People v. Griffin* (2001) 90 Cal.App.4th 741, 750.)

For a definition of "vessel," "floating home," or "trailer coach," see Instruction 1405, Burglary: Degrees.

AUTHORITY

One-Strike Sex Offense Statute—Burglary ▸ Pen. Code, § 667.61(e)(2).
Factors Must Be Pleaded and Proved ▸ Pen. Code, § 667.61(i); *People v. Mancebo* (2002) 27 Cal.4th 735, 743.
During the Commission of Burglary Defined for Sentencing Factor ▸ *People v. Alvarado* (2001) 87 Cal.App.4th 178, 191.
Elements of Burglary ▸ Pen. Code, § 459.
Determination of Degrees ▸ Pen. Code, § 460.
Inhabitation Defined ▸ Pen. Code, § 459.
Room Within Inhabited House ▸ *People v. Sparks* (2002) 28 Cal.4th 71, 86–87.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 386–389.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

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RELATED ISSUES

"Closed to the Public"

"[T]he commission of a specified sex offense during a burglary is within the statute if the business is closed when the sex offense is committed." (*People v. Palmore* (2000) 79 Cal.App.4th 1290, 1295–1296.)

See the Related Issues sections of Instruction 240, Sex Offenses: Sentencing Factors—Aggravated Kidnapping, Instruction 1400, Burglary, and Instruction 1405, Burglary: Degrees.

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STAFF NOTES

Penal Code, § 667.61, in relevant part:

> (e). . . (2) Except as provided in paragraph (4) of subdivision (d), the defendant committed the present offense during the commission of a burglary, as defined in subdivision (a) of Section 460, or during the commission of a burglary of a building, including any commercial establishment, which was then closed to the public, in violation of Section 459.

Penal Code, § 460(a):

> Every burglary of an inhabited dwelling house, vessel, as defined in the Harbors and Navigation Code, which is inhabited and designed for habitation, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, or trailer coach, as defined by the Vehicle Code, or the inhabited portion of any other building, is burglary of the first degree.

See Notes to Instruction 240, Sex Offenses: Sentencing Factors—Aggravated Kidnapping and Instruction 916, Aggravated Mayhem.

During the Commission of Burglary Defined

> [W]e find the continuous-transaction test, including the perpetrator's escape, to be the appropriate way to measure the duration of a burglary under section 667.61(e)(2). Clearly, this measure provides the broadest deterrent against the commission of sex crimes against burglary victims. Therefore, we hold that for the purpose of section 667.61(e)(2), "during the commission of a burglary" refers to that period of time between the burglar's initial entry with the requisite intent and the burglar's escape to a place of temporary safety.

(*People v. Alvarado* (2001) 87 Cal.App.4th 178, 191.) The court further held that an instruction on this definition was not necessary. (*Id.* at p. 193.)

Closed to Public

> Palmore contends that the phrase "which was then closed to the public" modifies the commission of the burglary and refers to the time of entry.

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> We disagree. The use of the term "during" in the clause "the defendant committed [the sex offense] *during* the commission of a burglary . . . of a . . . commercial establishment, which was then closed to the public" (§ 667.61, subd. (e)(2), italics added) indicates that the Legislature was using "burglary" in its colloquial rather than its strict legal sense. Burglary, for purposes of this special sentencing circumstance in the one strike statute, means the entire course of illegal entry, commission of a felony and escape rather than the technical meaning of entry at a discrete time with intent to commit a felony. That being so, the commission of a specified sex offense during a burglary is within the statute if the business is closed when the sex offense is committed.

(*People v. Palmore* (2000) 79 Cal.App.4th 1290, 1295–1296 [footnote omitted].)

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246. Sex Offenses: Sentencing Factors—Multiple Victims

If you find the defendant guilty of two or more sex offenses, as charged in Counts __ <*insert counts charging sex offense[s] from Pen. Code, § 667.61(c)*>, you must then decide whether the People have proved the additional allegation that those crimes were committed against more than one victim.

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

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

This sentencing factor must be pleaded, proved, and found true by the trier of fact. (*People v. Mancebo* (2002) 27 Cal.4th 735, 743.) The court may not impose a sentence using this factor unless the jury has specifically made a finding that the factor has been proved, even if the defendant is convicted in the proceeding of qualifying offenses against more than one person. *(Ibid.)*

AUTHORITY

One-Strike Sex Offense Statute—Multiple Victims Factor ▸ Pen. Code, § 667.61(e)(5).
Factors Must Be Pleaded and Proved ▸ Pen. Code, § 667.61(i); *People v. Mancebo* (2002) 27 Cal.4th 735, 743.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 386–389.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

RELATED ISSUES

"Present Case or Cases"
This sentencing factor applies when the "offenses are prosecuted 'in the present case or cases.' " (*People v. Stewart* (2004) 119 Cal.App.4th 163, 171.) There is no requirement that the offenses be committed on the same date or in the course of the same transaction, so long as the offenses are tried together. (*Id.* at p. 172.)

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See also the Related Issues section of Instruction 240, Sex Offenses: Sentencing Factors—Aggravated Kidnapping.

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STAFF NOTES

Penal Code, § 667.61, in relevant part:

> (e) . . . (5) The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim.

See Notes to Instruction 240.

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247. Sex Offenses: Sentencing Factors—Tying or Binding

If you find the defendant guilty of the crime[s] charged in Count[s] __ *<insert counts charging sex offense[s] from Pen. Code, § 667.61(c)>*, **you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant tied or bound _____** *<insert name[s] of alleged victim[s]>* **during the commission of (that/those) crime[s]. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

<If there is an issue in the case as to whether the tying or binding occurred "during the commission of" the offense, see Bench Notes.>

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

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

If there is an issue in the case as to whether the defendant acted "during the commission of" the offense, the court may give Instruction 739, During Commission of Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25 Cal.4th 98, 109; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.)

AUTHORITY

One-Strike Sex Offense Statute—Tying or Binding Factor ▸ Pen. Code, § 667.61(e)(6).
Factors Must Be Pleaded and Proved ▸ Pen. Code, § 667.61(i); *People v. Mancebo* (2002) 27 Cal.4th 735, 743.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 386–389.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

RELATED ISSUES

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Binding Includes Placing Tape Over Victim's Eyes
In *People v. Campbell* (2000) 82 Cal.App.4th 71, 77–79, the court held that "binding" included placing tape over the victim's eyes to prevent her from seeing.

See also the Related Issues section of Instruction 240, Sex Offenses: Sentencing Factors—Aggravated Kidnapping.

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STAFF NOTES

Penal Code, § 667.61, in relevant part:

> (e) . . . (6) The defendant engaged in the tying or binding of the victim or another person in the commission of the present offense.

See Notes to Instruction 240.

Binding Includes Placing Tape Over Victim's Eyes

> Turning to the words of the statute, we consider first tying. The verb "tie" is defined as "to bind, fasten, make fast (one thing to another, or two or more things together) with a cord, rope, band, or the like . . . to confine (a person or animal) by fastening to something," while "bind" is defined in its two principal senses as "To tie fast" and "To tie about, bandage, gird, encircle." The noun "tie" itself derives from Old Norse "taug," or rope. (Oxford English Dict. (compact ed. 1971) p. 3319.) n6
>
> Clearly, while the words "tying" and "binding" may sometimes be used as synonyms, "courts must avoid a construction that would render related provisions nugatory. [Citation.]" [Citation.] . . .
>
> "[W]hen the objectives of the [statute] are considered and the words of the provision are read in context" [citation] the common theme of the entire subdivision is to provide an increased punishment for those sexual assaults carried out under circumstances such as to render the victim of the offense particularly vulnerable. n7
>
> While the increased vulnerability of a victim whose hands or feet (or both) are tied is immediately clear, we cannot in any logical manner distinguish such an enhanced vulnerability from that inherent in being bound so as to be unable to see. In both instances the victim's ability to flee her attacker, to resist the assault, or to summon help is severely impaired, and in the case of blindfolding, there is added vulnerability flowing from the psychological stresses associated with sensory deprivation. n8
>
> Further, while Campbell argues that his intention was to prevent his identification rather than to render his victim more vulnerable, the statute does not refer at all to the attacker's objective in performing prohibited acts, and any such particular intention cannot be controlling. [Citation.] Thus, while it may be true that Campbell's goals included not

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> being identified by K.M., the means which Campbell chose to effectuate this goal increased his victim's vulnerability, and came well within the scope of the prohibition on tying or binding of the victim.

(*People v. Campbell* (2000) 82 Cal.App.4th 71, 77–79 [footnotes omitted].)

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248. Sex Offenses: Sentencing Factors—Administered Controlled Substance

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If you find the defendant guilty of the crime[s] charged in Count[s] __ *<insert counts charging sex offense[s] from Pen. Code, § 667.61(c)>***, you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant administered a controlled substance to _____** *<insert name[s] of alleged victim[s]>* **during the commission of (that/those) crime[s]. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

To prove this allegation [for each crime], the People must prove that:

1. **In the commission of _____** *<insert sex offense[s] from Pen. Code, § 667.61(c)>***, the defendant administered _____** *<insert controlled substance from Health & Saf. Code, §§ 11054–11058>* **to _____** *<insert name[s] of alleged victim[s]>***;**

2. **The defendant administered the _____** *<insert controlled substance from Health & Saf. Code, §§ 11054–11058>* **against that person's will by means of force, violence, or fear of immediate and unlawful bodily injury to that person [or someone else];**

AND

3. **The defendant did so for the purpose of committing _____** *<insert felony alleged>***.**

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.

<If there is an issue in the case as to whether the defendant acted "during the commission of" the offense, see Bench Notes.>

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

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BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

If there is an issue in the case as to whether the defendant acted "during the commission" of the offense, the court may give Instruction 739, During Commission of Felony: Defined—Escape Rule. (See *People v. Jones* (2001) 25 Cal.4th 98, 109; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [weapon used before elements of felony committed]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.)

AUTHORITY

One-Strike Sex Offense Statute—Administered Controlled Substance ▸ Pen. Code, § 667.61(e)(7).
Factors Must Be Pleaded and Proved ▸ Pen. Code, § 667.61(i); *People v. Mancebo* (2002) 27 Cal.4th 735, 743.
Elements of Enhancement ▸ Pen. Code, § 12022.75.
Administering ▸ Health & Saf. Code, § 11002.
"In Commission of" Felony ▸ *People v. Jones* (2001) 25 Cal.4th 98, 109–110; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 386–389.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

RELATED ISSUES

See also the Related Issues section of Instruction 240, Sex Offenses: Sentencing Factors—Aggravated Kidnapping.

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STAFF NOTES

Penal Code, § 667.61, in relevant part:

> (e) . . . (7) The defendant administered a controlled substance to the victim by force, violence, or fear in the commission of the present offense in violation of Section 12022.75.

Penal Code, § 12022.75, in relevant part:

> Any person who, for the purpose of committing a felony, administers by injection, inhalation, ingestion, or any other means, any controlled substance listed in Section 11054, 11055, 11056, 11057, or 11058 of the Health and Safety Code, against the victim's will by means of force, violence, or fear of immediate and unlawful bodily injury to the victim or another person, shall, in addition and consecutive to the penalty provided for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of three years.

Staff was unable to locate any cases on this statute.

See Notes to Instruction 240.

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260. Controlled Substance: Quantity

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 lesser offense[s]>***], you must then decide whether[, for each crime,] the People have proved the additional allegation that the crime involved [more than] a specified amount [or more] of the controlled substance. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

To prove this allegation [for each crime], the People must prove that:

> **[1.] The defendant _____** *<insert conduct alleged, e.g., sold or conspired to sell>* **[more than] _____** *<insert quantity alleged>* **by (weight/volume) [or more] of a substance containing _____** *<insert controlled substance>***(./;)**
>
> *<Give element 2 if enhancement alleged in conspiracy count.>*
> **[AND**
>
> **2. The defendant was substantially involved in the planning, direction, execution, or financing of the _____** *<insert conduct alleged, e.g., sale>* **of the _____** *<insert controlled substance>***.]**

[In deciding whether the required (weight/volume) has been proved, do not take into account plant or vegetable material.]

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction when the defendant is charged with an enhancement or a probation ineligibility clause based on the quantity of the controlled substance. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

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Give the bracketed phrases "more than" if the defendant is charged with an enhancement under Health and Safety Code section 11370.4. Give the bracketed phrases "or more" if the defendant is charged under Health and Safety Code section 11352.5 or Penal Code section 1203.07.

Give bracketed element 2 if an enhancement under Health and Safety Code section 11370.4 is alleged in a count of conspiracy. (Health & Saf. Code, § 11370.4(a); *People v. Salcedo* (1994) 30 Cal.App.4th 209, 217.) Do not give element 2 if the defendant is not charged with conspiracy but is being prosecuted for one or more substantive offenses on a theory of coconspirator liability. (*People v. Salcedo, supra,* 30 Cal.App.4th at p. 217.) If the defendant is charged with the enhancement on both conspiracy and substantive offenses, the court should give this instruction once for the conspiracy charge, with element 2, and once for all the substantive offenses, without element 2. If properly instructed, the jury need not make a special finding that the defendant was substantially involved. (*People v. Lobato* (2003) 109 Cal.App.4th 762, 766.)

AUTHORITY

Enhancements and Sentencing Factors ▸ Pen. Code, §§ 1203.07(a)(1), (2) & (4); Health & Saf. Code, §§ 11352.5, 11370.4.

Substance Containing Controlled Substance—Need Not Be Pure ▸ *People v. Pieters* (1991) 52 Cal.3d 894, 903.

Knowledge of Quantity or Specific Intent Not Required ▸ *People v. Meza* (1995) 38 Cal.App.4th 1741, 1748.

Conspiracy Instruction ▸ *People v. Duran* (2001) 94 Cal.App.4th 923, 941–942; *People v. Salcedo* (1994) 30 Cal.App.4th 209, 217; *People v. Lobato* (2003) 109 Cal.App.4th 762, 766.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 302, 511.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

RELATED ISSUES

Must Controlled Substance Actually Exist?

In *Valenzuela v. Superior Court* (1995) 33 Cal.App.4th 1445, 1447, the court held that, where a defendant is charged with offering to sell, an enhancement under Health and Safety Code section 11370.4 "must be based on the weight of a substance in existence, not on an amount merely offered or negotiated." Thus, the enhancement was not proper where the defendant negotiated to sell five kilograms of heroin but in fact only produced less than one kilogram, or where the defendant offered to sell four kilograms of cocaine but never possessed that substance. (*Valenzuela, supra,* 33 Cal.App.4th at p. 1455.) Similarly, *People v. Lopez* (1993)

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20 Cal.App.4th 897, 902–903, held that an enhancement under Health and Safety Code section 11379.8 was not proper where the defendant agreed to manufacture more than three pounds of methamphetamine but failed to produce any of the substance. On the other hand, in *People v. Howard* (1995) 33 Cal.App.4th 1407, 1414–1416, the court upheld an enhancement where the defendants agreed to purchase seven kilograms of cocaine and had the required money on hand, but the officers conducting the undercover operation only provided one kilogram of the substance. The court distinguished prior holdings, finding that where a defendant is charged with conspiracy to purchase a controlled substance in an undercover operation, it is not necessary for the officers to produce all of the drugs promised. (*Id.* at p. 1416.)

Sentencing Entrapment or Manipulation

Some jurisdictions have recognized a defense of "sentencing entrapment or manipulation," where undercover law enforcement officers persuade a defendant to sell or produce a greater quantity of the controlled substance for the purpose of later obtaining a higher mandatory sentence. (See *People v. Smith* (2003) 31 Cal.4th 1207, 1212.) The doctrine of "sentencing entrapment" does not apply in California. *(Ibid.)* In *Smith*, the court did not decide whether the doctrine of "sentence manipulation" does apply. *(Ibid.)* The court did find that if the doctrine of sentence manipulation applies in California, its application to a particular case would require "truly outrageous" conduct by law enforcement officers. *(Ibid.)*

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STAFF NOTES

Penal Code, § 1203.07, in relevant part:

(a) Notwithstanding Section 1203, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any of the following persons:

(1) Any person who is convicted of violating Section 11351 of the Health and Safety Code by possessing for sale 14.25 grams or more of a substance containing heroin.

(2) Any person who is convicted of violating Section 11352 of the Health and Safety Code by selling or offering to sell 14.25 grams or more of a substance containing heroin. . . .

(4) Any person who is convicted of violating Section 11378.5 of the Health and Safety Code by possessing for sale 14.25 grams or more of any salt or solution of phencyclidine or any of its analogs as specified in paragraph (21), (22), or (23) of subdivision (d) of Section 11054 or in paragraph (3) of subdivision (e) of Section 11055 of the Health and Safety Code, or any of the precursors of phencyclidine as specified in paragraph (2) of subdivision (f) of Section 11055 of the Health and Safety Code. . . .

(b) The existence of any fact which would make a person ineligible for probation under subdivision (a) shall be alleged in the information or indictment, and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

Health & Saf. Code, § 11352.5:

The court shall impose a fine not exceeding fifty thousand dollars ($ 50,000), in the absence of a finding that the defendant would be incapable of paying such a fine, in addition to any term of imprisonment provided by law for any of the following persons:

(1) Any person who is convicted of violating Section 11351 of the Health and Safety Code by possessing for sale 14.25 grams or more of a substance containing heroin.

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(2) Any person who is convicted of violating Section 11352 of the Health and Safety Code by selling or offering to sell 14.25 grams or more of a substance containing heroin.

(3) Any person convicted of violating Section 11351 of the Health and Safety Code by possessing heroin for sale or convicted of violating Section 11352 of the Health and Safety Code by selling or offering to sell heroin, and who has one or more prior convictions for violating Section 11351 or Section 11352 of the Health and Safety Code.

Health & Saf. Code, § 11370.4:

(a) Any person convicted of a violation of, or of a conspiracy to violate, Section 11351, 11351.5, or 11352 with respect to a substance containing heroin, cocaine base as specified in paragraph (1) of subdivision (f) of Section 11054, or cocaine as specified in paragraph (6) of subdivision (b) of Section 11055 shall receive an additional term as follows:

(1) Where the substance exceeds one kilogram by weight, the person shall receive an additional term of three years.

(2) Where the substance exceeds four kilograms by weight, the person shall receive an additional term of five years.

(3) Where the substance exceeds 10 kilograms by weight, the person shall receive an additional term of 10 years.

(4) Where the substance exceeds 20 kilograms by weight, the person shall receive an additional term of 15 years.

(5) Where the substance exceeds 40 kilograms by weight, the person shall receive an additional term of 20 years.

(6) Where the substance exceeds 80 kilograms by weight, the person shall receive an additional term of 25 years.

The conspiracy enhancements provided for in this subdivision shall not be imposed unless the trier of fact finds that the defendant conspirator was substantially involved in the planning, direction, execution, or financing of the underlying offense.

(b) Any person convicted of a violation of, or of conspiracy to violate,

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Section 11378, 11378.5, 11379, or 11379.5 with respect to a substance containing methamphetamine, amphetamine, phencyclidine (PCP) and its analogs shall receive an additional term as follows:

(1) Where the substance exceeds one kilogram by weight, or 30 liters by liquid volume, the person shall receive an additional term of three years.

(2) Where the substance exceeds four kilograms by weight, or 100 liters by liquid volume, the person shall receive an additional term of five years.

(3) Where the substance exceeds 10 kilograms by weight, or 200 liters by liquid volume, the person shall receive an additional term of 10 years.

(4) Where the substance exceeds 20 kilograms by weight, or 400 liters by liquid volume, the person shall receive an additional term of 15 years.

In computing the quantities involved in this subdivision, plant or vegetable material seized shall not be included.

The conspiracy enhancements provided for in this subdivision shall not be imposed unless the trier of fact finds that the defendant conspirator was substantially involved in the planning, direction, execution, or financing of the underlying offense.

(c) The additional terms provided in this section shall not be imposed unless the allegation that the weight of the substance containing heroin, cocaine base as specified in paragraph (1) of subdivision (f) of Section 11054, cocaine as specified in paragraph (6) of subdivision (b) of Section 11055, methamphetamine, amphetamine, or phencyclidine (PCP) and its analogs exceeds the amounts provided in this section is charged in the accusatory pleading and admitted or found to be true by the trier of fact.

(d) The additional terms provided in this section shall be in addition to any other punishment provided by law.

(e) Notwithstanding any other provision of law, the court may strike the additional punishment for the enhancements provided in this section if it determines that there are circumstances in mitigation of the additional punishment and states on the record its reasons for striking the additional punishment.

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Substance Containing Controlled Substance—Need Not be Pure

> Defendant, however, fails to examine the word 'substance' within its statutory context. Section 11370.4, subdivision (a), requires that a defendant be convicted with respect to 'a substance containing . . . cocaine.' The Court of Appeal observed that if it accepted defendant's interpretation, the words, 'substance containing' would either be rendered meaningless or produce an absurd result. We agree. Substituting defendant's definition, the requirement for imposing an enhancement under section 11370.4 would effectively read, 'with respect to pure cocaine containing cocaine.'
>
> The Court of Appeal found a more likely interpretation of 'substance containing . . . cocaine' to include ' "an identifiable chemical element, compound, or *mixture*--sometimes restricted to compounds and elements." ' (Quoting Webster's New Internat. Dict. (3d ed. 1981) p. 2279, italics added.) As the Court of Appeal noted, this definition comports with the express legislative objective: 'The Legislature enacted . . . section 11370.4 to discourage the transfer of large quantities of cocaine and other controlled substances. No authority suggests " 'the severity of these sanctions must be finely tuned to correspond to the amount of pure [narcotic] involved in any given transaction . . ..' " [Citation.] . . . The focus is on the *quantity*, not the *quality*, of the drug seized.'
>
> We conclude that the Court of Appeal correctly interpreted the language of section 11370.4 in holding that enhancements under that section are triggered by the weight of a mixture containing the drug and not merely by the weight of the pure drug itself”

(*People v. Pieters* (1991) 52 Cal.3d 894, 903 [italics in original, footnotes omitted].)

Conspiracy Instruction

> *Salcedo* concluded, "The statute does not require substantial involvement where a defendant is convicted not of conspiracy but of a substantive offense (enumerated in the statute) based on a theory of joint conspiracy liability." (*Id.* at p. 216.) "[T]he only conspiracy enhancement identified in the statute is one that applies to the substantive offense of conspiracy." (*Ibid.*)
>
> Thus, under *Salcedo*, the Legislature has added "conspiracy

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> enhancements" to the quantity enhancements originally proscribed by section 11379.8. The quantity enhancements apply to a conviction for violating section 11379.6, subdivision (a), whether or not the conviction is based on a conspiracy theory and whether or not the defendant was substantially involved in the conspiracy. The "conspiracy enhancements" apply only to convicted conspirators who were "substantially involved in the direction or supervision of, or in a significant portion of the financing of, the underlying offense." . . .
>
> [W]e agree with the reasoning and conclusion of *Salcedo*. The "conspiracy enhancements" apply only to conspiracy convictions, not to convictions of the underlying offenses on a conspiracy theory.

(*People v. Duran* (2001) 94 Cal.App.4th 923, 941–942 [italics in original, footnotes omitted].)

> [W]e conclude section 11370.4 requires a finding of substantial involvement in the underlying offense only where the defendant is convicted of conspiracy and the weight enhancement is appended to the conspiracy conviction. . . .
>
> [S]ince the weight enhancements in this case were not appended to a conspiracy conviction, the trial court should not have given the last paragraph of CALJIC No. 17.22.1, which required the jury to find substantial involvement "in the conspiracy and its objective." . . .
>
> [I]n this case, we need not determine whether, as defendants contend, CALJIC No. 17.22.1 improperly requires substantial involvement "in the conspiracy and its objective" rather than in an underlying substantive offense.

(*People v. Salcedo* (1994) 30 Cal.App.4th 209, 217–218.)

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261. Controlled Substance: Quantity—Manufacture of Controlled Substance

---

If you find the defendant guilty of the crime[s] charged in Count[s] __ *<insert counts charging manufacturing or processing of controlled substance>***, you must then decide whether[, for each crime,] the People have proved the additional allegation that the crime involved more than a specified amount of the controlled substance. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

To prove this allegation [for each crime], the People must prove that:

1. **A substance used in, to be used in, or produced during the (manufacturing/_____** *<insert description of alleged other process>***) process contained _____** *<insert controlled substance from Health & Saf. Code, §§ 11054–11058>***;**

[AND]

2. **The substance containing _____** *<insert controlled substance>* **was more than _____** *<insert quantity alleged>* **by (weight/volume)(./;)**

<Give element 3 if enhancement alleged in conspiracy count.>
[AND

3. **The defendant was substantially involved in the direction or supervision of, or in a significant portion of the financing of, the (manufacturing/_____** *<insert description of alleged other process>***) of _____** *<insert controlled substance>***.]**

[In deciding whether the required (weight/volume) has been proved, do not take into account plant or vegetable material.]

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

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BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction when the defendant is charged with an enhancement based on the quantity of the controlled substance. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

Give bracketed element 3 if the enhancement is alleged in a count of conspiracy to manufacture a controlled substance. (Health & Saf. Code, § 11379.8(e); *People v. Duran* (2001) 94 Cal.App.4th 923, 941.) Do not give element 3 if the defendant is not charged with conspiracy but is being prosecuted for one or more substantive offenses on a theory of coconspirator liability. (*People v. Duran, supra,* 94 Cal.App.4th at p. 942.) If the defendant is charged with the enhancement on both conspiracy and substantive offenses, the court should give this instruction once for the conspiracy charge, with element 3, and once for all the substantive offenses, without element 3. If properly instructed, the jury need not make a special finding that the defendant was substantially involved. (*People v. Lobato* (2003) 109 Cal.App.4th 762, 766.)

AUTHORITY

Enhancement ▸ Health & Saf. Code, § 11379.8.
Substance Containing Controlled Substance—Need Not Be Pure ▸ *People v. Burgio* (1993) 16 Cal.App.4th 769, 774.
Substance Containing Controlled Substance—Used or to Be Used in Process ▸ *People v. Hard* (2003) 112 Cal.App.4th 272, 275.
Knowledge of Quantity or Specific Intent Not Required ▸ *People v. Meza* (1995) 38 Cal.App.4th 1741, 1748.
Conspiracy Instruction ▸ *People v. Duran* (2001) 94 Cal.App.4th 923, 941–942; *People v. Salcedo* (1994) 30 Cal.App.4th 209, 217; *People v. Lobato* (2003) 109 Cal.App.4th 762, 766.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 302, 511.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

RELATED ISSUES

Combining Measurements
Health and Safety Code section 11379.8 provides two sets of measurements, one for "liquid by volume" and one for "solids by weight." "[S]o long as there is sufficient evidence, the trier of fact should be permitted to add the common measures of the seized substances in order to meet the statute's standards." (*People v. Good* (1990) 217 Cal.App.3d 1533, 1537.)

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See the Related Issues section of Instruction 260, Controlled Substance: Quantity.

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STAFF NOTES

Health & Saf. Code, § 11379.8:

(a) Any person convicted of a violation of subdivision (a) of Section 11379.6, or of a conspiracy to violate subdivision (a) of Section 11379.6, with respect to any substance containing a controlled substance which is specified in paragraph (21), (22), or (23) of subdivision (d) of Section 11054, or in paragraph (1) or (2) of subdivision (d) or in paragraph (3) of subdivision (e) or in paragraph (2) of subdivision (f) of Section 11055 shall receive an additional term as follows:

(1) Where the substance exceeds three gallons of liquid by volume or one pound of solid substances by weight, the person shall receive an additional term of three years.

(2) Where the substance exceeds 10 gallons of liquid by volume or three pounds of solid substance by weight, the person shall receive an additional term of five years.

(3) Where the substance exceeds 25 gallons of liquid by volume or 10 pounds of solid substance by weight, the person shall receive an additional term of 10 years.

(4) Where the substance exceeds 105 gallons of liquid by volume or 44 pounds of solid substance by weight, the person shall receive an additional term of 15 years.

In computing the quantities involved in this subdivision, plant or vegetable material seized shall not be included.

(b) The additional terms provided in this section shall not be imposed unless the allegation that the controlled substance exceeds the amounts provided in this section is charged in the accusatory pleading and admitted or found to be true by the trier of fact.

(c) The additional terms provided in this section shall be in addition to any other punishment provided by law.

(d) Notwithstanding any other provision of law, the court may strike the additional punishment for the enhancements provided in this section if it determines that there are circumstances in mitigation of the additional

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punishment and states on the record its reasons for striking the additional punishment.

(e) The conspiracy enhancements provided for in this section shall not be imposed unless the trier of fact finds that the defendant conspirator was substantially involved in the direction or supervision of, or in a significant portion of the financing of, the underlying offense.

Manufacture—Substance Containing Meth

Over defendant's objection the court modified the 1996 version of CALJIC No. 17.21, n2 the standard instruction defining the volume enhancement imposed by Health and Safety Code n3 section 11379.8, subdivision (a)(1). The key portion of the court's modified instruction read as follows: "It is alleged under count one in the first special allegation that the substance containing methamphetamine exceeded three gallons of liquid by volume within the meaning of [section] 11379.8, subdivision (a)(1). [P] In order for you to find this special allegation to be true, the following elements must be proved: [P] One, the person was convicted of manufacturing methamphetamine; two, one of the substances used in, to be used in or produced during the manufacturing process contained methamphetamine; and three, that substance containing methamphetamine exceeded three gallons of liquid by volume." The jury later found this volume enhancement true. This instruction permits a true finding even if the substance containing methamphetamine, the solvent in this case, had not yet been used in the manufacturing process. Defendant contends that this instruction exceeds the intended scope of section 11379.8, and that it was error to provide it. . . .

In pertinent part, section 11379.8, subdivision (a) provides: "Any person convicted of a violation of subdivision (a) of Section 11379.6 ... *with respect to* any substance containing a [statutorily specified] controlled substance ... shall receive an additional term as follows: (1) Where the substance exceeds three gallons of liquid by volume or one pound of solid substances by weight, the person shall receive an additional term of three years." (Italics added.) Defendant would have us construe the italicized phrase narrowly so that one convicted of manufacturing methamphetamine would be liable for the enhanced penalty only if the substance containing methamphetamine was manufactured in that process. This imposes too limited a meaning for the phrase "with respect to" used by the drafters. Under the term "respect," Webster's defines "with respect to" as "with reference to: in relation to." (Webster's 10th Collegiate Dict. (2000) pp.

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> 994-995.) While the phrase certainly applies to those who manufacture a substance of sufficient volume, it is broad enough to also cover persons who used or will use such a substance in the course of producing the final product. . . .
>
> Consequently, section 11379.6 contemplates that a conviction may result even though production is interrupted before all of the substances gathered by a manufacturer and necessary to produce a final product have been utilized. We believe that section 11379.8 should be interpreted in a similar fashion.

(*People v. Hard* (2003) 112 Cal.App.4th 272, 278–280 [italics in original, footnote omitted].)

Substance Containing Controlled Substance—Need Not be Pure

> We conclude under case authority and a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the Legislature, that the word "substance" as used in its statutory context (§ 11379.8, subd. (a)(3)), is not "limited" by language in subdivision (b), and was not intended by the Legislature to mean a pure controlled substance as defined in sections 11054 and 11055 (methamphetamine), but a "substance containing a controlled substance."

(*People v. Burgio* (1993) 16 Cal.App.4th 769, 774.)

Conspiracy Instruction

> The jury in this case was instructed: "It is alleged in Counts 1 and 2 that at the time of the commission of the crime of which each defendant is accused, he conspired to manufacture or manufactured a substance containing methamphetamine which exceeded twenty five (25) gallons of liquid volume. [P] If you find a defendant guilty of the crime charged in Count 1 or 2, you must determine whether this allegation is true. [P] If you find a defendant guilty of the crime of conspiracy to commit the manufacture of the methamphetamine involving a substance containing methamphetamine which exceeds twenty five (25) gallons of liquid by volume, an essential element of this allegation is that the defendant was *substantially involved in the planning, direction, execution or financing of the conspiracy* and its objective." n4 (CALJIC No. 17.21, italics added.)
>
> We observe that the given instruction does not track the wording of

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> section 11379.8, subdivision (e). It allowed for imposition of the weight enhancement if defendant was involved in the "planning" or "execution" of the conspiracy. These words do not appear in the subdivision, which refers only to "the direction or supervision of, or in a significant portion of the financing of" the underlying offense. We find the words "planning" and "execution" in different statutes describing different drug crimes. (§§ 11370.2, subd. (e), n5 11370.4, subds. (a), (b). n6) . . .
>
> We presume a different legislative intent, not an oversight, from the fact that words used in sections 11370.2 and 11370.4 are missing from section 11379.8. Thus, the "conspiracy enhancements" described in subdivision (e) of section 11379.8 do not apply to a defendant unless he or she "was substantially involved in the direction or supervision of, or in a significant portion of the financing of, the underlying offense." Evidence of planning or execution alone is not enough. If the Legislature meant to include the words "planning" and "execution" in section 11379.8, the Legislature can correct this drafting error. (*People v. Garcia, supra*, 21 Cal. 4th 1, 15.) . . .
>
> *Salcedo* concluded, "The statute does not require substantial involvement where a defendant is convicted not of conspiracy but of a substantive offense (enumerated in the statute) based on a theory of joint conspiracy liability." (*Id.* at p. 216.) "[T]he only conspiracy enhancement identified in the statute is one that applies to the substantive offense of conspiracy." (*Ibid.*)
>
> Thus, under *Salcedo*, the Legislature has added "conspiracy enhancements" to the quantity enhancements originally proscribed by section 11379.8. The quantity enhancements apply to a conviction for violating section 11379.6, subdivision (a), whether or not the conviction is based on a conspiracy theory and whether or not the defendant was substantially involved in the conspiracy. The "conspiracy enhancements" apply only to convicted conspirators who were "substantially involved in the direction or supervision of, or in a significant portion of the financing of, the underlying offense." . . .
>
> we agree with the reasoning and conclusion of *Salcedo*. The "conspiracy enhancements" apply only to conspiracy convictions, not to convictions of the underlying offenses on a conspiracy theory.

(*People v. Duran* (2001) 94 Cal.App.4th 923, 941–942 [italics in original, footnotes omitted].)

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> [W]e conclude section 11370.4 requires a finding of substantial involvement in the underlying offense only where the defendant is convicted of conspiracy and the weight enhancement is appended to the conspiracy conviction. . . .
>
> [S]ince the weight enhancements in this case were not appended to a conspiracy conviction, the trial court should not have given the last paragraph of CALJIC No. 17.22.1, which required the jury to find substantial involvement "in the conspiracy and its objective." . . .
>
> [I]n this case, we need not determine whether, as defendants contend, CALJIC No. 17.22.1 improperly requires substantial involvement "in the conspiracy and its objective" rather than in an underlying substantive offense.

(*People v. Salcedo* (1994) 30 Cal.App.4th 209, 217–218.)

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270. Amount of Loss

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

To prove this allegation, the People must prove that:

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

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

AND

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

[If you find the defendant guilty of more than one crime, you may add together the loss from each crime to determine whether the total loss from all the crimes was more than $_____ *<insert amount alleged>* **if the People prove that:**

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

AND

ii. Each crime arose from a common scheme or plan.]

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

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

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.)

AUTHORITY

Enhancement ▸ Pen. Code, § 12022.6.
Value Is Fair Market Value ▸ *People v. Swanson* (1983) 142 Cal.App.3d 104, 107–109.
Defendant Need Not Intend to Permanently Deprive Owner of Property ▸ *People v. Kellett* (1982) 134 Cal.App.3d 949, 958–959.
Victim Need Not Suffer Actual Loss ▸ *People v. Bates* (1980) 113 Cal.App.3d 481, 483–484; *People v. Ramirez* (1980) 109 Cal.App.3d 529, 539–540.
Defendant Need Not Know or Reasonably Believe Value of Item Exceeded Amount Specified ▸ *People v. DeLeon* (1982) 138 Cal.App.3d 602, 606–607.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 292.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

COMMENTARY

Penal Code section 12022.6 applies to "any person [who] takes, damages, or destroys any property . . . ." The statute does not explicitly include vicarious liability but also does not use the term "personally" to limit the scope of liability. In *People v. Fulton* (1984) 155 Cal.App.3d 91, 102, the Fourth Appellate District of the Court of Appeal interpreted this language to mean that the statute did not require that the defendant personally take, damage, or destroy the property, but provided for vicarious liability. In reaching this conclusion, the court relied on the reasoning of *People v. Le* (1984) 154 Cal.App.3d 1, which held that an enhancement for being armed with a firearm under Penal Code section 12022.3(b) allowed for vicarious liability despite the fact that the statute does not explicitly include vicarious liability. The *Fulton* court also disagreed with the holding of *People v. Reed* (1982) 135 Cal.App.3d 149, which held that Penal Code section 12022.3(b) did not include vicarious liability. However, the *Fulton* decision failed to

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consider the Supreme Court opinion in *People v. Walker* (1976) 18 Cal.3d 232, 241–242, which held that an enhancement does not provide for vicarious liability unless the underlying statute contains an explicit statement that vicarious liability is included within the statute's scope. Moreover, the Supreme Court has endorsed the *Reed* opinion and criticized the *Le* opinion, noting that *Le* also failed to consider the holding of *Walker*. (*People v. Piper* (1986) 42 Cal.3d 471, 477, fn. 5.) Similarly, the Fifth Appellate District of the Court of Appeal has observed that "the weight of authority has endorsed the analysis in *Reed*" and rejected the holding of *Le*. (*People v. Rener* (1994) 24 Cal.App.4th 258, 267 [holding that Pen. Code, §12022.3(a) & (b) does not include vicarious liability].) Thus, although no case has explicitly overruled *Fulton*, the holding of that case appears to be contrary to the weight of authority.

RELATED ISSUES

"Take"

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

"Loss"

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

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STAFF NOTES

Penal Code, § 12022.6:

(a) When any person takes, damages, or destroys any property in the commission or attempted commission of a felony, with the intent to cause that taking, damage, or destruction, the court shall impose an additional term as follows:

(1) If the loss exceeds fifty thousand dollars ($ 50,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of one year.

(2) If the loss exceeds one hundred fifty thousand dollars ($ 150,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of two years.

(3) If the loss exceeds one million dollars ($ 1,000,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of three years.

(4) If the loss exceeds two million five hundred thousand dollars ($ 2,500,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of four years.

(b) In any accusatory pleading involving multiple charges of taking, damage, or destruction, the additional terms provided in this section may be imposed if the aggregate losses to the victims from all felonies exceed the amounts specified in this section and arise from a common scheme or plan. All pleadings under this section shall remain subject to the rules of joinder and severance stated in Section 954.

(c) The additional terms provided in this section shall not be imposed unless the facts of the taking, damage, or destruction in excess of the amounts provided in this section are charged in the accusatory pleading and admitted or found to be true by the trier of fact.

(d) This section applies to, but is not limited to, property taken, damaged,

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or destroyed in violation of Section 502 or subdivision (b) of Section 502.7. This section shall also apply to applicable prosecutions for a violation of Section 350, 653h, 653s, or 653w.

(e) For the purposes of this section, the term "loss" has the following meanings:

(1) When counterfeit items of computer software are manufactured or possessed for sale, the "loss" from the counterfeiting of those items shall be equivalent to the retail price or fair market value of the true items that are counterfeited.

(2) When counterfeited but unassembled components of computer software packages are recovered, including, but not limited to, counterfeited computer diskettes, instruction manuals, or licensing envelopes, the "loss" from the counterfeiting of those components of computer software packages shall be equivalent to the retail price or fair market value of the number of completed computer software packages that could have been made from those components.

(f) It is the intent of the Legislature that the provisions of this section be reviewed within 10 years to consider the effects of inflation on the additional terms imposed. For that reason, this section shall remain in effect only until January 1, 2008, and as of that date is repealed unless a later enacted statute, which is enacted before January 1, 2008, deletes or extends that date.

“Take” Does Not Mean “With intent to Permanently Deprive”

In enacting section 12022.6, the Legislature did not intend that a taking was to be a necessary element of the underlying crime in order to impose the enhancement. (See Cassou & Taugher, *Determinate Sentencing in California: The New Numbers Game* (1978) 9 Pacific L.J. 5, 45.) Thus, appellant errs in placing primary reliance on the fact that culpability for vehicle theft requires only the intent to temporarily take a vehicle. The Legislature was not concerned with the crime committed by a defendant so long as property valued in excess of $ 25,000 was taken.

Moreover, the clear language of the statute is contrary to appellant's interpretation. Section 12022.6 provides that the enhancement may be given to "[any] person who takes . . . property . . . with the intent to cause such taking . . . ." The statute does not on its face require the intent to

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> permanently deprive the owner of property, but rather that the property be intentionally rather than accidentally taken. The dictionary definition of "take" is "to get into one's hands or into one's possession . . . ." (Webster's Third New Internat. Dict. (1961) p. 2329.) The length of time for which the property may be retained has nothing to do with the initial intent to take the property.

(*People v. Kellett* (1982) 134 Cal.App.3d 949, 958–959.)

Victim Need Not Suffer "Actual" Loss

> In both *People* v. *Bates* (1980) 113 Cal.App.3d 481, and *People* v. *Ramirez*, [1980], 109 Cal.App.3d 529, it was contended that a section 12022.6 enhancement cannot be imposed unless it is shown that the victim has actually suffered a loss. n3 In both cases, it was held to be irrelevant whether the victims suffered a loss so long as the defendants initially intended to take the property. (113 Cal.App.3d at pp. 483-484, 109 Cal. App.3d at pp. 539-540.)
>
> n3 In *Bates*, appellant was arrested shortly after stealing gold nuggets and the gold was recovered. In *Ramirez*, appellants were convicted of grand theft from a bank based on bogus wire transfers of funds, and contended it was not shown the bank had failed to recover its stolen funds.
>
> *People* v. *Bates*, *supra*, 113 Cal.App.3d 481, although not directly in point, contains language which is contrary to appellant's position. Having found that the Legislature intended to impose additional punishment commensurate with the seriousness of the offense committed, the court concluded that: "[the] word 'loss,' as used in section 12022.6 in the context of the *taking* of property, therefore includes any dispossession which constitutes theft of the victim's property." (*Id*., at p. 484.) This principle readily applies to the instant case.

(*People v. Kellett* (1982) 134 Cal.App.3d 949, 959–960.)

Defendant Ned Not Know or Reasonably Believe Value of Item Exceeded Amount

In *People v. DeLeon* (1982) 138 Cal.App.3d 602, 606–607, the defendant stole a car and found inside a brief case containing valuable coins. The court held that the enhancement

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applied based on the value of the coins even thought the defendant did not know or reasonably believe that the coins were in the car.

Is Vicarious Liability Permitted?

In *People v. Fulton* (1984) 155 Cal.App.3d 91, 102, the court held that Penal Code section 12022.6 did not require that the defendant personally take, damage or destroy the property but provided for vicarious liability. The court stated:

> Fulton relies on *People* v. *Reed* (1982) 135 Cal.App.3d 149, which held a somewhat similarly structured enhancement for being armed during the course of certain sex offenses did not impose vicarious liability on an accomplice who was not personally armed. There are two problems with this position. First, we disagreed with *Reed* in *People* v. *Le* (1984) 154 Cal.App.3d 1.
>
> Second, as the Attorney General convincingly argues, the application of the *Reed* holding to the great taking enhancement would lead to absurd results. The criminal who masterminds the offense would be subject to less severe punishment than the minions who actually carry out the crime at his direction. The Legislature cannot have intended that anomaly, and it is obviously aware of means to restrict the scope of liability to defendants who personally commit an act forbidden by an enhancement. (See Pen. Code, §§ 12022, subd. (b), 12022.5 and 12022.7.) We conclude *all* persons who participate in an offense which results in a great taking, with the requisite knowledge and intent, are subject to the terms of the enhancement, regardless of the specific amount personally taken.

However, the Supreme Court subsequently endorsed the *Reed* opinion and criticized the *Le* opinion which failed to consider the Supreme Court opinion in *Walker*:

> In *People* v. *Walker* (1976) 18 Cal.3d 232, we considered whether the provisions of former section 12022.5 -- which authorized an additional five-year sentence for "any person who uses a firearm in the commission of [specified offenses]" -- should be interpreted to apply only to those defendants who personally used a firearm. In analyzing the issue, we explained: "Generally, if a statute is intended to impose a derivative liability on some person other than the actor, there must be some legislative direction that it is to be applied to persons who do not themselves commit the proscribed act. . . . [The] rules which make an accused derivatively liable for a crime which he does not personally commit, do not at the same time impose a derivatively increased punishment by reason of the manner in which a confederate commits the

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> crime." (18 Cal.3d at pp. 241-242.) Because former section 12022.5 contained no explicit suggestion that derivative liability was intended, we concluded in *Walker* that the statute should be interpreted to apply only to defendants who personally used a firearm. [Citation.]. . .
>
> n5 Justice Puglia, writing for the Court of Appeal in *People* v. *Reed* (1982) 135 Cal.App.3d 149 [185 Cal.Rptr. 169], reached a similar conclusion in construing the comparable language of an analogous sentencing statute, section 12022.3. Section 12022.3 provides that "[for] each violation of [various sex offenses], and in addition to the sentence provided, any person shall receive an enhancement (a) of three years *if such person uses a firearm or any other deadly weapon* in the commission of such violation or (b) of two years *if such person is armed with a firearm or any other deadly weapon*." (Italics added.) In analyzing whether section 12022.3, subdivision (b) applies only to persons who are "personally" armed with a firearm or deadly weapon, Justice Puglia observed that the provision is not as clear as other related enhancement provisions, and, applying the principles of *Walker*, concluded that the provision should be construed to apply only to defendants who are personally armed. (135 Cal.App.3d at pp. 152-153.) Although a different panel of the Court of Appeal reached a contrary conclusion in applying section 12022.3, subdivision (b) in *People* v. *Le* (1984) 154 Cal.App.3d 1, 11-12, the *Le* court took no note of our *Walker* decision.

(*People v. Piper* (1986) 42 Cal.3d 471, 476–477 [italic sin original].)

The Court of Appeal in the Fifth Appellate District has also observed:

> It thus appears that the weight of authority has endorsed the analysis in *Reed*. The Supreme Court and the First, Second, and Fifth Appellate Districts have all adopted or approvingly cited that analysis while *Le* has been accepted only in the Fourth District. *Le* simply fails to address the Supreme Court's analysis in *Walker* which is the lodestar by which we must be guided.

(*People v. Rener* (1994) 24 Cal.App.4th 258, 267.)

The Fourth District opinion in *Fulton* similarly fails to account for *Walker*. Thus, the holding of the case appears to be contrary to the weight of authority.

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271. Aggravated White Collar Crime

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ *<insert lesser offense[s]>***], you must then decide whether the People have proved the additional allegation that the defendant engaged in a pattern of related felony conduct that involved that taking of more than $_____** *<insert amount alleged>***.**

To prove this allegation, the People must prove that:

5. **The defendant committed two or more related felonies, specifically _____** *<insert name[s] of alleged felonies and description[s] if necessary>***;**

6. **Fraud or embezzlement was a material element of each felony committed by the defendant;**

7. **The related felonies involved a pattern of related felony conduct;**

AND

8. **The pattern of related felony conduct involved the taking of more than $_____** *<insert amount alleged>***.**

A *pattern of related felony conduct* means engaging in at least two felonies that have the same or similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics, and that are not isolated events.

***Related felonies* are felonies committed against two or more separate victims, or against the same victim on two or more separate occasions.**

[Fraud is a material element of _____ *<insert name of alleged felony>***.]**

[Embezzlement is a material element of _____ *<insert name of alleged felony>***.]**

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

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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.)

If the court has not otherwise instructed the jury on all the elements of the underlying felonies, the court must also give the appropriate instructions on those elements.

It is unclear if the court may instruct the jury that the fraud or embezzlement is a material element of the felonies. The bracketed sentences are provided for the court to use at its discretion.

AUTHORITY

Enhancement ▸ Pen. Code, § 186.11(a)(1).

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 293.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

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STAFF NOTES

Penal Code, § 186.11, in relevant part:

(a)(1) Any person who commits two or more related felonies, a material element of which is fraud or embezzlement, which involve a pattern of related felony conduct, and the pattern of related felony conduct involves the taking of more than one hundred thousand dollars ($ 100,000), shall be punished, upon conviction of two or more felonies in a single criminal proceeding, in addition and consecutive to the punishment prescribed for the felony offenses of which he or she has been convicted, by an additional term of imprisonment in the state prison as specified in paragraph (2) or (3). This enhancement shall be known as the aggravated white collar crime enhancement. The aggravated white collar crime enhancement shall only be imposed once in a single criminal proceeding. For purposes of this section, "pattern of related felony conduct" means engaging in at least two felonies that have the same or similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics, and that are not isolated events. For purposes of this section, "two or more related felonies" means felonies committed against two or more separate victims, or against the same victim on two or more separate occasions.

(2) If the pattern of related felony conduct involves the taking of more than five hundred thousand dollars ($ 500,000), the additional term of punishment shall be two, three, or five years in the state prison.

(3) If the pattern of related felony conduct involves the taking of more than one hundred thousand dollars ($ 100,000), but not more than five hundred thousand dollars ($ 500,000), the additional term of punishment shall be the term specified in paragraph (1) or (2) of subdivision (a) of Section 12022.6.

(b)(1) The additional prison term and penalties provided for in subdivisions (a), (c), and (d) shall not be imposed unless the facts set forth in subdivision (a) are charged in the accusatory pleading and admitted or found to be true by the trier of fact.

(2) The additional prison term provided in paragraph (2) of subdivision (a) shall be in addition to any other punishment provided by law, including Section 12022.6, and shall not be limited by any other provision of law.

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Limited Case Law

This statute was enacted in 1996. The only case discussing the application of the sentencing enhancement is *People v. Williams* (2004) 118 Cal.App.4th 735, 749, which held that application of the enhancement in that case did not violate ex post facto.

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272. Characteristics of Victim

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant committed that crime against a person who was (65 years of age or older/under the age of 14 years/blind/deaf/developmentally disabled/paraplegic/ [or] quadriplegic). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation [for each crime], the People must prove that:

1. **At the time of the crime, _____** *<insert name[s] of alleged victim[s]>* **(was/were) (65 years of age or older/under the age of 14 years/blind/deaf/developmentally disabled/ paraplegic/ [or] quadriplegic);**

AND

2. **At that time, the defendant knew or reasonably should have known that _____** *<insert name[s] of alleged victim[s]>* **(was/were) (65 years of age or older/under the age of 14 years/blind/deaf/developmentally disabled/ paraplegic/ [or] quadriplegic).**

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

[*Developmentally disabled* means a severe, chronic disability of a person that:

1. **Is attributable to a mental or physical impairment or a combination of mental and physical impairments;**

2. **Is likely to continue indefinitely;**

AND

3. **Results in substantial functional limitation in three or more of the following abilities:**

   a. To care for one's self;

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b. To understand and express language;

c. To learn;

d. To be independently mobile;

e. To engage in self-direction;

f. To live independently;

OR

g. To be economically self-sufficient.]

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

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.)

If the defendant is charged with a prior conviction under Penal Code section 667.9(b) or 667.10, the court must also give Instruction 200, Prior Conviction, unless the defendant has stipulated to the prior or the court has granted a bifurcated trial on the prior conviction.

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

Give the bracketed definition of developmental disability if that enhancement is charged.

AUTHORITY

Enhancements ▸ Pen. Code, §§ 667.9(a) & (b), 667.10(a).

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Developmental Disability Defined ▸ Pen. Code, § 667.9(d).
Reasonably Should Have Known Not Unconstitutionally Vague ▸ *People v. Smith* (1993) 13 Cal.App.4th 1182, 1188–1190.
Prior Conviction Not Required for Enhancement Under Penal Code Section 667.9(a) ▸ *People v. Huricks* (1995) 32 Cal.App.4th 1201, 1213.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 306, 352.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 644.

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STAFF NOTES

Penal Code, § 667.9:

(a) Any person who commits one or more of the crimes specified in subdivision (c) against a person who is 65 years of age or older, or against a person who is blind, deaf, developmentally disabled, a paraplegic, or a quadriplegic, or against a person who is under the age of 14 years, and that disability or condition is known or reasonably should be known to the person committing the crime, shall receive a one-year enhancement for each violation .

(b) Any person who commits a violation of subdivision (a) and who has a prior conviction for any of the offenses specified in subdivision (c), shall receive a two-year enhancement for each violation in addition to the sentence provided under Section 667.

(c) Subdivisions (a) and (b) apply to the following crimes:

(1) Mayhem, in violation of Section 203 or 205.

(2) Kidnapping, in violation of Section 207, 209, or 209.5.

(3) Robbery, in violation of Section 211.

(4) Carjacking, in violation of Section 215.

(5) Rape, in violation of paragraph (2) or (6) of subdivision (a) of Section 261.

(6) Spousal rape, in violation of paragraph (1) or (4) of subdivision (a) of Section 262.

(7) Rape, spousal rape, or sexual penetration in concert, in violation of Section 264.1.

(8) Sodomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 286.

(9) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 288a.

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(10) Sexual penetration, in violation of subdivision (a) of Section 289.

(11) Burglary of the first degree, as defined in Section 460, in violation of Section 459.

(d) As used in this section, "developmentally disabled" means a severe, chronic disability of a person, which is all of the following:

(1) Attributable to a mental or physical impairment or a combination of mental and physical impairments.

(2) Likely to continue indefinitely.

(3) Results in substantial functional limitation in three or more of the following areas of life activity:

(A) Self-care.

(B) Receptive and expressive language.

(C) Learning.

(D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

(G) Economic self-sufficiency.

Pen. Code, § 667.10:

(a) Any person who has a prior conviction of the offense set forth in Section 289 and who commits that crime against a person who is 65 years of age or older, or against a person who is blind, deaf, developmentally disabled, as defined in subdivision (d) of Section 667.9, a paraplegic, or a quadriplegic, or against a person who is under the age of 14 years, and that disability or condition is known or reasonably should be known to the person committing the crime, shall receive a two-year enhancement for each violation in addition to the sentence provided under Section 289.

(b) The existence of any fact which would bring a person under

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subdivision (a) shall be alleged in the information or indictment and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

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280. Enhancement, Sentencing Factor, or Specific Factual Issue: Template

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If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ *<insert lesser offense[s]>***], **you must then decide whether[, for each crime,] the People have proved the additional allegation that _____** *<insert description of enhancement, sentencing factor, or factual issue>*. **[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

To prove this allegation [for each crime], the People must prove that:

<INSERT ELEMENTS REQUIRED.>

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

BENCH NOTES

Instructional Duty

This template is provided for the court to use for any enhancements, sentencing factors, or factual issues to be submitted to the jury that are not covered in previous instructions. (*Blakely v. Washington* (March 23, 2004, No. 02-1632) __ U.S. __.)

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281. Enhancement, Sentencing Factor, or Specific Factual Issue: Template—Bifurcated Trial

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The People have alleged that _____ *<insert description of enhancement, sentencing factor, or factual issue>***.**

To prove this allegation, the People must prove that:

<INSERT ELEMENTS REQUIRED.>

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

BENCH NOTES

Instructional Duty

This template is provided for the court to use for any enhancements, sentencing factors, or factual issues to be submitted to the jury that are not covered in previous instructions when the court grants a bifurcated trial on that issue. (*Blakely v. Washington* (March 23, 2004, No. 02-1632) __ U.S. __.)

The court **must also give** Instruction 115, Reasonable Doubt: Bifurcated Trail.

When inserting the description in the first sentence, the court should specify which crimes the enhancement or sentencing factor pertains to if it applies to one or more specific counts. For example, “the victim of the robbery in Count 1 was particularly vulnerable.”

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290. Duty of Jury: Verdict Form for Enhancement, Sentencing Factor, or Prior Conviction

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You have been given (a/__ <*insert number*>) verdict form[s] for the additional allegation[s]. If you reach a verdict on (the/any) additional allegation, complete the verdict form for that allegation.

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction when instructing on any enhancements, sentencing factors, prior convictions, or other special findings.

Do not give this instruction for special circumstances. Give Instruction 700SC, Special Circumstances: Introduction.

AUTHORITY

Statutory Authority ▸ Pen. Code, §§ 1158, 1158a.

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

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STAFF NOTES

Pen. Code, § 1158:

Whenever the fact of a previous conviction of another offense is charged in an accusatory pleading, and the defendant is found guilty of the offense with which he is charged, the jury, or the judge if a jury trial is waived, must unless the answer of the defendant admits such previous conviction, find whether or not he has suffered such previous conviction. The verdict or finding upon the charge of previous conviction may be: "We (or I) find the charge of previous conviction true" or "We (or I) find the charge of previous conviction not true," according as the jury or the judge find that the defendant has or has not suffered such conviction. If more than one previous conviction is charged a separate finding must be made as to each.

Pen. Code, § 1158a:

(a) Whenever the fact that a defendant was armed with a weapon either at the time of his commission of the offense or at the time of his arrest, or both, is charged in accordance with section 969c of this code, in any count of the indictment or information to which the defendant has entered a plea of not guilty, the jury, if they find a verdict of guilty of the offense with which the defendant is charged, or of any offense included therein, must also find whether or not the defendant was armed as charged in the count to which the plea of not guilty was entered. The verdict of the jury upon a charge of being armed may be: "We find the charge of being armed contained in the . . . . . count true," or "We find the charge of being armed contained in the . . . . . count not true," as they find that the defendant was or was not armed as charged in any particular count of the indictment or information. A separate verdict upon the charge of being armed must be returned for each count which alleges that the defendant was armed.

(b) Whenever the fact that a defendant used a firearm is charged in accordance with section 969d in any count of the indictment or information to which the defendant has entered a plea of not guilty, the jury if they find a verdict of guilty of the offense with which the defendant is charged must also find whether or not the defendant used a firearm as charged in the count to which the plea of not guilty was entered. A verdict of the jury upon a charge of using a firearm may be: "We find the charge of using a firearm contained in the . . . . . count true," or "We find

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> the charge of using a firearm contained in the . . . . . count not true," as they find that the defendant used or did not use a firearm as charged in any particular count of the indictment or information. A separate verdict upon the charge of using a firearm shall be returned for each count which alleges that defendant used a firearm.

CALJIC includes this instruction in the instruction on each enhancement.

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