702ADP. Death Penalty: Factors to Consider—Identified as Aggravating or Mitigating

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

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

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

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

The only factors you may consider as aggravating circumstances are:

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

(b) Other violent criminal activity the defendant engaged in besides the crime[s] that resulted in conviction[s] in this case. *Violent criminal activity* involves the unlawful use or attempted use of force or violence or the [direct or indirect] threat to use force or violence. [The other violent criminal activity alleged in this case will be described in these instructions.]

(c) Any other felony that the defendant has been convicted of besides the crime[s] in this case.

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

You may not consider as an aggravating factor anything other than the aggravating factors I have just listed. You must not take into account any other facts or circumstances as a basis for imposing the death penalty.

[Even if a fact is both a "special circumstance" and also a "circumstance of the crime," you may consider that fact only once in your weighing process. Do not consider that fact as greater evidence of aggravation simply because it is both a "special circumstance" and a "circumstance of the crime."]

Factors that you may consider as mitigating circumstances include:

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

(b) The absence of any violent criminal activity by the defendant besides the crime[s] that (he/she) was convicted of in this case.

(c) The absence of any felony convictions of the defendant besides the crime[s] in this case.

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

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

(f) Whether the defendant reasonably believed that circumstances morally justified or extenuated (his/her) conduct.

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

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

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

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

(k) Any other circumstance that lessens the gravity of the crime[s] even though the circumstance is not a legal excuse. You must consider anything the defendant has offered as a basis for a sentence less than death, including but not limited to any mitigating or sympathetic circumstances of the crime[s] and of the defendant's character, background, history, or mental or physical condition. In reaching your decision, you may consider sympathy or compassion for the defendant or anything you consider to be a mitigating factor, whether or not I have specifically mentioned it here.

As you see, there are two factors that may be either aggravating or mitigating: the circumstances of the crime[s] that the defendant was convicted of in this case and the defendant's age at the time of the crime[s]. It is for you to decide whether these factors are aggravating or mitigating in this case.

The mitigating factors listed here are just examples of some of the factors you may take into account in deciding not to impose a death sentence. Consider any fact or circumstance supported by the evidence that you believe to be mitigating in deciding the question of penalty. Although a number of possible mitigating factors have been listed, you must not consider the absence of any such factor as an aggravating circumstance.

[You may not let sympathy for the defendant's family influence your decision.] [However, you may consider evidence about the impact the defendant's execution would have on (his/her) family if that evidence demonstrates some positive quality of the defendant's background or character.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury on the factors to consider in reaching a decision on the appropriate sentence. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604–605; *People v. Benson* (1990) 52 Cal.3d 754, 799.)

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

When the court will be instructing the jury on prior violent criminal activity in aggravation, give the bracketed sentence that begins with "The other violent criminal activity alleged in this case." (See *People v. Robertson* (1982) 33 Cal.3d 21, 55; *People v. Yeoman* (2003) 31 Cal.4th 93, 151.) The court also has a **sua sponte** duty to give Instruction 703DP, Death Penalty: Evidence of Other Violent Crimes in addition to this instruction.

When the court will be instructing the jury on prior felony convictions, the court also has a **sua sponte** duty to give Instruction 704DP, Death Penalty: Conviction for Other Felony Crimes in addition to this instruction.

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

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

AUTHORITY

Death Penalty Statute ▸ Pen. Code, § 190.3.
Jury Must Be Instructed to Consider Any Mitigating Evidence and Sympathy ▸ *Lockett v. Ohio* (1978) 438 U.S. 586, 604–605; *People v. Benson* (1990) 52 Cal.3d 754, 799; *People v. Easley* (1983) 34 Cal.3d 858, 876.
Should Instruct on All Factors ▸ *People v. Marshall* (1990) 50 Cal.3d 907, 932, cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110.
Must Instruct to Consider Only "Applicable Factors" ▸ *Williams v. Calderon* (1998) 48 F.Supp.2d 979, 1023; *People v. Marshall* (1990) 50 Cal.3d 907, 932, cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110.

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Mitigating Factor Must Be Supported by Evidence ▸ *Delo v. Lashley* (1993) 507 U.S. 272, 275, 277.

Aggravating and Mitigating Defined ▸ *People v. Dyer* (1988) 45 Cal.3d 26, 77–78; *People v. Adcox* (1988) 47 Cal.3d 207, 269–270.

On Request Must Instruct to Consider Only Statutory Aggravating Factors ▸ *People v. Hillhouse* (2002) 27 Cal.4th 469, 509, cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, fn. 14.

Mitigating Factors Are Examples ▸ *People v. Melton* (1988) 44 Cal.3d 713, 760; *Belmontes v. Woodford* (2003) 335 F.3d 1024, 1060 [reprinted as amended at *Belmontes v. Woodford* (2003) 350 F.3d 861, 876].

Must Instruct to Not Double-Count ▸ *People v. Melton* (1988) 44 Cal.3d 713, 768.

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

COMMENTARY

Aggravating and Mitigating Factors—Need Not Specify

The court is not required to identify for the jury which factors may be aggravating and which may be mitigating. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509, cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114.) "The aggravating or mitigating nature of the factors is self-evident within the context of each case." *(Ibid.)* However, the court is required on request to instruct the jury to consider only the aggravating factors listed. (*People v. Hillhouse, supra,* 27 Cal.4th at p. 509; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, fn. 14.) In *People v. Hillhouse, supra,* 27 Cal.4th at p. 508, fn. 6, the Supreme Court stated, "we suggest that, on request, the court merely tell the jury it may not consider in aggravation anything other than the aggravating statutory factors."

Although the court is not required to specify which factors are the aggravating factors, it is not error for the court to do so. (See *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1269.) The committee has drafted the instruction to identify the aggravating and mitigating factors to avoid juror confusion on this issue. If the court chooses not to identify the aggravating factors, give Instruction 702BDP, Death Penalty: Factors to Consider—Not Identified as Aggravating or Mitigating instead of this instruction.

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RELATED ISSUES

Factors That Are Only Mitigating—(d), (e), (f), (g), (h), and (k)
"[F]actors (d), (e), (f), (h), and (k) can only mitigate. While the prosecutor could properly point to the absence of mitigating evidence in these categories, he could not argue that such deficiency was itself aggravating." (*People v. Whitt* (1990) 51 Cal.3d 620, 654.) "Factors (f) and (g) . . . are mitigating factors . . . ." (*People v. Visciotti* (1992) 2 Cal.4th 1, 74; see also *People v. Melton* (1988) 44 Cal.3d 713, 770.) "[F]actors (d) . . ., (e), (f) . . ., (g) . . ., (h) . . ., and (j) . . . can only mitigate, and the absence of any of these factors may not be considered aggravating." (*People v. Morrison* (Dec. 10, 2004, S023835) __ Cal.4th __, __; see also *People v. Proctor* (1992) 4 Cal.4th 499, 553.)

Age May Be Aggravating or Mitigating Factor
The "age" factor, factor (i), may be used by either the prosecution or the defense:

> In *People v. Lucky* (1988) 45 Cal.3d 259, we explained that mere chronological age is not in and of itself an aggravating or mitigating factor. "In our view, the word 'age' in statutory sentencing factor (i) is used as a metonym for any age-related matter suggested by the evidence or by common experience of morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue such age-related inference in every case." (*Id*. at p. 302.)

(*People v. Nicolaus* (1991) 54 Cal.3d 551, 587.) However, the prosecution may only argue "age" as it relates to "this defendant's individual character or background, or to the circumstances of this particular offense." (*Id.* at p. 588 [improper to argue death penalty appropriate because defendant will not live much longer naturally].)

Aggravating Factors—Proof Beyond a Reasonable Doubt
The aggravating factors of other criminal activity and felony convictions must be proved beyond a reasonable doubt. (*People v. Smith* (2003) 30 Cal.4th 581, 638.) The other aggravating factors do not have to be proved beyond a reasonable doubt. *(Ibid.)*

Mitigating Factors—Pinpoint Instructions
If the court instructs the jury that it may consider any relevant mitigating evidence, the court need not give pinpoint instructions highlighting exactly what the defense argues is mitigating evidence in the case. (*People v. Yeoman* (2003) 31 Cal.4th 93, 152–154; *People v. Brown* (2003) 31 Cal.4th 518, 569.)

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Lingering Doubt
Although the defense may argue lingering doubt, the court is not required to instruct the jury specifically to consider this as a mitigating factor. (*People v. Brown* (2003) 31 Cal.4th 518, 567.)

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STAFF NOTES

Note: Underlined portions of quotes represent language that has been incorporated into the instruction (all of the statutory factors, (a)-(k) have also been incorporated though not underlined).

Pen. Code, § 190.3:

> If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and <u>the defendant's character, background, history, mental condition and physical condition.</u>
>
> However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.
>
> However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.
>
> Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be

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presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant was reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

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(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in a state prison for a term of life without the possibility of parole.

Definitions of "Aggravating" and "Mitigating"

The court has held that it is not error if the court fails to define the terms "aggravating" and "mitigating." (*People v. Ochoa* (1998) 19 Cal.4th 353, 458.) However, the court approved of the definitions for these terms given in *People v. Dyer* (1988) 45 Cal.3d 26, 77-78, and *People v. Adcox* (1988) 47 Cal.3d 207, 269-270.

In *People v. Dyer* (1988) 45 Cal.3d 26, 77-78, the court stated:

During discussions on what jury instructions would be given, the prosecutor objected to a proposed defense instruction defining "mitigating" evidence because "it only talks about mitigating circumstances. [. . .] The court and the prosecutor agreed, over defense counsel's objection, that Black's Law Dictionary would provide a suitable definition for aggravating circumstances.

Accordingly, the court instructed the jury as follows: "para. You are instructed that an aggravating circumstance is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the offense itself. para. You are

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> instructed that a mitigating circumstance is any fact, condition or event which, as such, does not constitute a justification or excuse for the offense in question, but which may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. para. It will be your duty . . . to determine which of the two penalties . . . shall be imposed on the defendant. After having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed." [Italics removed.]
>
> The foregoing definitions of aggravation and mitigation provided a helpful framework within which the jury could consider the specific circumstances in aggravation and mitigation set forth in section 190.3. We find no error in the presentation of both definitions to the jury, and we find no prejudice in light of the instruction limiting the jury's consideration to "the applicable factors of [aggravation]."

(*Ibid*.)

Similarly, in *People v. Adcox* (1988) 47 Cal.3d 207, 269-270, the court stated:

> Shortly after commencing their deliberations, the jury requested the court to define "aggravating" and "mitigating." In discussing the matter with the court, both the prosecutor and defense counsel stated they knew of no pertinent cases specifically defining those terms. The court, with both counsel and defendant personally in agreement, ultimately responded by giving the jury the definitions of "aggravation" and "mitigation" found in Corpus Juris Secundum, as follows: "Aggravation. Any circumstance attending the commission of a crime . . . which increases its guilt or enormity or adds to its injurious consequences, . . . but which is above and beyond the essential constituents of the crime or tort itself" (3 C.J.S., at p. 507); "Mitigating circumstances. Such circumstances as do not amount to a justification or excuse of the offense or act in question but may properly be considered in mitigation, or reduction, of the punishment. . . ." (14 C.J.S., at p. 1123.)
>
> We recently found no prejudice from the reading of nearly identical definitions in *People* v. *Dyer*, *supra*, 45 Cal.3d at pages 77-78. Indeed, we concluded that such definitions "provided a helpful framework within which the jury could consider the specific

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> circumstances in aggravation and mitigation set forth in section 190.3." (*Ibid*.) As in *Dyer*, here the jury was also instructed that, "you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed." (Former CALJIC No. 8.84.2.) Accordingly, we find no error or prejudice in the presentation of both definitions to the jury.

(*People v. Adcox* (1988) 47 Cal.3d 207, 269-270.)

CALJIC was subsequently revised to incorporate these definitions. In *People v. Benson* (1990) 52 Cal.3d 754, 800, the court approved of the following CALJIC definitions:

> Mitigating circumstances are any circumstances that do not constitute a justification or excuse of the offenses in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.
>
> Aggravating circumstances are any circumstances are any circumstances [*sic*] attending the commission of the offenses in question which increase their guilt or enormity or adds [*sic*] to their injurious consequences, but which are above and beyond the essential elements of the offenses themselves. [. . .]

More recently, the court approved of these definitions, given in CALJIC:

> n20 CALJIC No. 8.88 provides: "An aggravating factor is any fact, condition or event attending the commission of a crime which increases [its] guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. [P] A mitigating circumstance is any fact, condition or event which as such does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty."

(*People v. Brown* (2003) 31 Cal.4th 518, 565; see also *People v. Smith* (2003) 30 Cal.4th 581, 636.)

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In as least two published cases in which these definitions were given, juries asked for a definition of the term "extenuating circumstance." (*People v. Smith* (2003) 30 Cal.4th 581, 636; *People v. Lucero* (2000) 23 Cal.4th 692, 723.)

The Oxford English Dictionary defines a "mitigating circumstance" as: "a fact or situation which reduces culpability for an offence and permits greater leniency in judgment or punishment; = *extenuating circumstances*." (The Oxford English Dictionary Online (Draft entry 2002) http://dictionary.oed.com/entrance.dtl.) The OED defines "extenuating" as, "[t]hat extenuates in senses of the [verb]. Now chiefly in phrase *extenuating circumstances*: circumstances that tend to diminish culpability." (The Oxford English Dictionary Online (2nd Ed. 1998) http://dictionary.oed.com/entrance.dtl.)

Should Instruct on All Factors in Every Case

> It is, of course, the better practice for a court to instruct on all the statutory penalty factors, directing the jury to be guided by those that are applicable on the record.
>
> Such an instruction "ensures that the jury is aware of the complete range of factors that the state considers relevant to the penalty determination. With that knowledge the jury is better able to place the individual defendant's conduct in perspective, and thus its exercise of discretion to select the appropriate penalty is further channeled and directed as required by the Eighth Amendment." [Citation.]
>
> Such an instruction also avoids the risk that a factor that is indeed applicable on a given record may nevertheless be erroneously omitted. [Citation.] This risk is grave insofar as the defendant's interests are concerned: "deletion of any potentially mitigating factors from the statutory list could substantially prejudice the defendant." [Citations.]
>
> Nevertheless, it is not the law that the court is obligated to instruct on all the statutory penalty factors sua sponte.

(*People v. Marshall* (1990) 50 Cal.3d 907, 932.)

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Jury Must be Instructed to Consider "Applicable Factors"

> Petitioner contends that his constitutional rights were violated by the trial court's failure to delete the irrelevant factors from the California death penalty statute, Cal. Penal Code § 190.3.
>
> The jury in petitioner's case was instructed that it was to consider the listed factors "if applicable." (CT 559.) The words "if applicable" told the jury that not all of the factors would be relevant and that they should not consider the factors that did not apply.

(*Williams v. Calderon* (1998) 48 F.supp.2d 979, 1023.)

As noted above, the court in *People v. Marshall* (1990) 50 Cal.3d 907, 932, directed, "the better practice for a court [is] to instruct on all the statutory penalty factors, directing the jury to be guided by those that are applicable on the record."

Limitations on Aggravating Evidence—Not Required to Identify Factors as Mitigating or Aggravating

The court is not required to identify for the jury which factors may be aggravating and which may be mitigating. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) "The aggravating or mitigating nature of the factors is self-evident within the context of each case." (*Ibid.*)

However, the court has also recognized that the Due Process Clause of the United States Constitution limits what the jury may consider as an "aggravating factor":

> [I]t is settled that the due process clause of the Fourteenth Amendment prohibits the states from "attach[ing] the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, . . . or to conduct that actually should militate in favor of a lesser penalty . . . ." (*Zant* v. *Stephens* (1983) 462 U.S. 862, 885.) Evidently, it also bars use of decision-making processes that may be understood to incorporate such "mislabeling" and thereby threaten arbitrary and capricious results.

(*People v. Benson* (1990) 52 Cal.3d 754, 800.)

Defendants have attacked the CALJIC jury instructions for failing to identify which of the listed factors is aggravating and which mitigating because of the risk that jurors will impermissibly use some of the listed mitigating factors in aggravation:

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> Defendant contends that the court erred by instructing the jury as it did on aggravating circumstances and mitigating circumstances. His attack is directed against the court's failure to identify which circumstances were "aggravating" and which "mitigating," and its failure to state that the absence of mitigation did not amount to the presence of aggravation. He claims that in this regard the charge was inconsistent with the federal constitutional principles stated above.

(*Ibid.* [footnote omitted].) The court in *People v. Benson*, *supra*, rejected this claim. The court concluded that the definitions of mitigation and aggravation, along with the description of the weighing process, contained in the current CALJIC No. 8.88, sufficiently explained to the jurors the meaning of the terms and the role of the jurors in the process. (*Id.* at p. 802.) In concluding that these instructions met constitutional requirements, the court stated:

> Further, a reasonable juror could not have "attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, . . . or to conduct that actually should militate in favor of a lesser penalty . . . ." (*Zant* v. *Stephens*, *supra*, 462 U.S. at p. 885.)
>
> Defendant's claim to the contrary notwithstanding, a reasonable juror would readily have identified which circumstances were "aggravating" and which "mitigating." Again, this conclusion is virtually compelled by the plain language used in the definitions of "aggravating circumstances" and "mitigating circumstances," and in the description of the "weighing" process. Certainly, such a juror could not have inferred -- contrary to governing law (see *People* v. *Davenport* (1985) 41 Cal.3d 247, 288-289 (plur. opn.)) -- that extreme mental or emotional disturbance and diminished capacity were circumstances in aggravation. Defendant argues in substance that a reasonable juror might have understood these circumstances as indicia of future dangerousness and hence as grounds for the ultimate sanction. We are not persuaded. It is pellucid in the very words of the instructions that both circumstances looked to the past, not the future, and supported life, not death.
>
> Again notwithstanding defendant's claim, a reasonable juror could not have believed -- contrary to governing law (see *People* v. *Davenport*, *supra*, 41 Cal.3d at pp. 288-289 (plur. opn.)) -- that the absence of mitigation amounted to the presence of aggravation. The

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> instructions made plain that aggravation required the *existence* of "circumstances attending the commission of the offenses in question which increase their guilt or enormity or adds [*sic*] to their injurious consequences, but which are above and beyond the essential elements of the offenses themselves" -- and not merely the *nonexistence* of "circumstances . . . which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability."

(*Id.* at pp. 801-802 [italics in original].)

Limitations on Aggravating Evidence—Error to Instruct Any Factor May Aggravate

Although the court is not required to identify the aggravating and mitigating factors for the jury, it is error for the court to instruct the jury that any factor may be considered in aggravation:

> [T]he trial court instructed the jury that, in determining the penalty, it must consider and be guided by 11 factors, if applicable. The trial court added: "The factors which I have just listed for you may be considered by you, if applicable, as either aggravating factors or mitigating factors. [P] If you find any of these factors to be aggravating, and to have been established by the evidence, you may consider them in determining the penalty you will impose in this case."
>
> Defendant contends this instruction was erroneous. He is correct. A majority of the 11 statutory factors can only be mitigating.

(*People v. Wader* (1993) 5 Cal.4th 610, 657 [citations omitted.].)

Limitations on Aggravating Evidence—Must Instruct on Request that Jury is Limited to Statutory Aggravating Factors

Although not required to identify the factors as either aggravating or mitigating, the trial court must, on request, instruct the jury that it may only consider the statutory aggravating factors (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275 fn.14.) The court has made two proclamations on how this advisement should be worded. In *People v. Gordon, supra,* 50 Cal.3d at p. 1275 fn. 14, the court stated:

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> [O]n request a court must give an instruction stating that the jury may consider only penalty factors (a) through (j), and evidence relevant thereto, in determining aggravation. [Citation.]

This instruction was given in *People v. Hillhouse, supra,* 27 Cal.4th at p. 508. The trial court instructed as follows:

> The factors A through J which I have just listed are the only factors that can be considered by you as aggravating factors, and you cannot take into account any other facts or circumstances as a basis for imposing the penalty of death on the defendant. [P] If you find any of those factors to be aggravating and to have been established by the evidence, you may consider them in deciding the penalty you will impose in this case. [P] Although a number of possible mitigating factors have been listed, you cannot consider the absence of any such factors in this case as an aggravating factor. Aggravating factors are limited to those which have been listed for you in these instructions.

(*Ibid.*)

However, in *People v. Hillhouse, supra,* 27 Cal.4th at p. 508, the court found fault with its own instruction. The court agreed with the defendant that the instruction was potentially misleading because it presented the possible ambiguity that the jury might consider as aggravating factors which legally could only be mitigating factors, specifically factors (d), (f) and (g). (*Ibid.*). The court stated,

> To avoid any possible ambiguity in the future, we suggest that, on request, the court merely tell the jury it may not consider in aggravation anything other than the aggravating statutory factors.

(*Ibid.* at fn. 6.)

In *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1269, the court affirmed the giving of an instruction that, "*only* factors (a), (b) and (c) of section 190.3 could be considered in aggravation . . . " (italics in original).

Staff has drafted the instruction along the lines of *People v. Musselwhite, supra,* specifically identify the statutory aggravating factors for the jury. Instructing the jurors that they may only consider "the statutory aggravating factors," without explaining what these are, will invite confusion.

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Individualized Decision--Jury Must Consider Any Mitigating Evidence

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. [. . .] Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. [. . .]
>
> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

(*Lockett v. Ohio* 91978) 438 U.S. 586, 604-605 [footnotes omitted, emphasis in original].)

> The Eighth Amendment requires that a capital jury consider all relevant mitigating evidence offered by the defendant and afford it such weight as it deems appropriate. [Citation.] The sentencer may determine the weight to be given relevant mitigating evidence. But it may not give it no weight by excluding such evidence from its consideration. [Citations and quotation marks omitted.] [. . . .]
>
> To pass constitutional muster, the trial judge's instructions must convey to the jury that factor (k) compels it to consider all relevant mitigating evidence proffered by the defendant as a basis for a sentence less than death. [I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. [Citation and quotation marks omitted.] Rather, the trial judge's instructions must convey that the sentencer may not be precluded from

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> considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. [Citation and quotation marks omitted.]

(*Belmontes v. Woodford* (2003) 335 F.3d 1024, 1061 [reprinted as amended at *Belmontes v. Woodford*, 2003 U.S. App. LEXIS 23657 (9th Cir. Cal., Nov. 20, 2003)—awaiting final pagination].)

Jury Must be Instructed to Consider Sympathy or Other Mitigating Factors

> [United States Supreme Court cases] make it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any "sympathy factor" raised by the evidence before it.

(*People v. Robertson* (1982) 33 Cal.3d 21, 58.)

> The instructions in this case did not make clear to the jury its option to reject death if the evidence aroused sympathy or compassion. The instructions were inconsistent and ambiguous in advising both that the jury must not be swayed by pity or influenced by sympathy for the defendant, and that it should consider circumstances which "in fairness and mercy, must be considered in extenuating or reducing the degree of moral culpability." Because they also failed to tell the jury that any aspect of the defendant's character or background could be considered mitigating and could be a basis for rejecting death even though it did not necessarily lessen culpability, the instructions were constitutionally inadequate.

(*People v. Lanphear* (1984) 36 Cal.3d 163, 165.)

> [T]he jury instructions -- taken as a whole -- must clearly inform the jury that they are to consider any relevant mitigating evidence about a defendant's background and character, or about the circumstances of the crime.

(*California v. Brown* (1987) 479 U.S. 538, 545.)

Expanded Factor (k) Instruction

Factor (k) provides for the jury to consider, “Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the

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crime." (Pen. Code § 190.3(k).) In *People v. Easley* (1983) 34 Cal.3d 858, 876, the court concluded that instruction solely in the statutory language quoted was insufficient to inform the jurors that they may consider any mitigating evidence offered by the defendant:

> CALJIC No. 8.84.1 -- while listing a variety of aggravating and mitigating factors -- does not explicitly inform the jury that it may consider *any* mitigating factor proffered by the defendant. [. . .]
>
> n.10 In order to avoid potential misunderstanding in the future, trial courts -- in instructing on the factor embodied in section 190.3, subdivision (k) -- should inform the jury that <u>it may consider as a mitigating factor "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" and any other "aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death."</u> (*Lockett, supra*, 438 U.S. at p. 604 [57 L.Ed.2d at p. 990].)

(*Ibid.;* see also *People v. Miranda* (1987) 44 Cal.3d 57, 102.)

The language of *Easley, supra,* as well as language from several of the cases quoted above has been incorporated into the CALJIC instruction on factor (k). The resulting instruction has become known as the "expanded factor k" instruction.

Appropriate to Instruct Jury to Consider Sympathy for Defendant or "Any Mitigating Factor"

> [T]he jury was given this instruction: "You may take sympathy for the defendant into consideration in determining whether or not to extend mercy to the defendant." [. . .]
>
> Another instruction that defendant requested told the jury, as relevant here: "<u>Mitigating factors are unlimited. Anything mitigating should be considered. Mitigating factors provided in the instructions are merely examples of some of the factors you may take into account in deciding whether or not to impose a death penalty</u>."

(*People v. Ochoa* (1998) 19 Cal.4th 353, 454; similar instruction given in *People v. Melton* (1988) 44 Cal.3d 713, 760.)

In *Belmontes v. Woodford* (2003) 335 F.3d 1024, 1060 [reprinted as amended at *Belmontes v. Woodford*, 2003 U.S. App. LEXIS 23657 (9th Cir. Cal., Nov. 20,

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2003)—awaiting final pagination], the trial court gave these special instructions, requested by the defense:

> [T]he mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.
>
> [. . .] [Y]ou should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances . . . as reasons for not imposing the death sentence.

Even with these instructions, the Ninth Circuit Court of Appeals concluded that the jury instructions, taken as a whole, failed to inform the jurors that they could consider any mitigating factors. The trial court instructed the jury with the "unadorned factor (k)" instruction, failed to inform the jurors that they could consider whether the defendant would adapt to prison life, and specifically told the jurors they could not consider whether the defendant would receive counseling in prison and. (*Id.* at pp. 1062-1065.) In reversing the penalty phase, the Ninth Circuit noted,

> The trial judge started out on the right track by instructing the jury that it should view the statutory factors "merely as examples of some of the factors" that it could consider. However, any clarity gained at the outset of the instruction was immediately undone by a superceding qualifying directive. The judge added, "You should pay careful attention to each of these factors," an instruction that a reasonable juror would almost certainly have understood to refer to the statutory factors, and particularly to the unconstitutionally limiting unadorned factor (k). The trial judge then continued, "Any one of them [i.e., the factors] standing alone may support a decision that death is not the appropriate punishment in this case," implying that only a statutory factor can support a sentence less than death. A juror who followed these instructions would likely think that he could not consider nonstatutory mitigating evidence--evidence not going to culpability--such as testimony tending to show that Belmontes would lead a constructive life if confined permanently within a structured environment.

(*Id.* at p. 1065.)

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Factors (b) and (c) Apply to Other Crimes Only

> Defendant contends the trial court erred in failing sua sponte to modify CALJIC No. 8.84.1 to make clear that section 190.3, subdivisions (b) and (c) applied only to "other crimes." We agree that subdivisions (b) and (c) pertain only to criminal activity other than the crimes for which the defendant was convicted in the present proceeding. It would therefore be improper for the jury to consider the underlying crimes as separate and distinct aggravating circumstances under either subdivision. [. . .]
>
> fn. 28 [. . .] [T]he trial court in the future should expressly instruct that <u>subdivisions (b) and (c) refer to crimes other than those underlying the guilt determination</u>.

(*People v. Miranda* (1987) 44 Cal.3d 57, 105-106 [footnote omitted].)

"Extreme" Mental or Emotional Distress

> In accordance with section 190.3, factor (d) (CALJIC No. 8.84.1), the jury was instructed to consider "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." Defendant asserts that this instruction, by referring to an "extreme" mental or emotional condition, misled the jury into believing that any "lesser disturbance would not suffice and could not be considered." We cannot agree.
>
> Pursuant to CALJIC No. 8.84.1, the jury was given an "expanded" factor (k) instruction [. . . .]
>
> In *People* v. *Ghent* (1987) 43 Cal.3d 739, we concluded that this "catchall" expanded factor (k) provision is sufficient to permit the penalty jury to take into account a mental condition of the defendant which, though perhaps not deemed "extreme," nonetheless mitigates the seriousness of the offense.

(*People v. Nicolaus* (1991) 54 Cal.3d 551, 586-587 [quotation marks and citations omitted]; see also *People v. Cox* (2003) 30 Cal.4th 916, 966.)

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Age Can be Either Mitigating or Aggravating

> In *People* v. *Lucky* (1988) 45 Cal.3d 259 [247 Cal.Rptr. 1, 753 P.2d 1052], we explained that mere chronological age is not in and of itself an aggravating or mitigating factor. "In our view, the word 'age' in statutory sentencing factor (i) is used as a metonym for any age-related matter suggested by the evidence or by common experience of morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue such age-related inference in every case." (*Id*. at p. 302.)

(*People v. Nicolaus* (1991) 54 Cal.3d 551, 587.) Thus, the prosecutor may argue that the defendant was mature enough to fully understand the nature of his actions. (*Ibid.*) However, the prosecution may not argue "age-related" matters that do not reflect on the defendant's character:

> [T]he prosecutor also argued to the jury, "You can consider Mr. Nicolaus' age also in terms of the fact that the death penalty for Mr. Nicolaus will not deprive him of a long or potentially productive life as it would a young man." This was clearly improper argument. It did not purport to refer to any age-related matter that might have impacted defendant's character. Instead, it implied that the life of an individual more advanced in years might somehow be worth less than that of a younger individual. Although such a concept may have valid application in the determination of certain compensatory tort damages, it has no proper place in a death penalty case. [. . .] The comment in question bore no relation to this defendant's individual character or background, or to the circumstances of this particular offense.

(*Id.* at pp. 587-588.)

Factor (j)—Undecided if Aggravating as Well as Mitigating

> We have indicated or implied in numerous prior decisions that factor (j) may be considered only as a mitigating factor, and that where the defendant is not an accomplice whose participation in the offense is relatively minor, the factor is simply inapplicable and should not be considered as aggravating [citing 13 cases.] Nonetheless, in *People v. Howard, supra,* 1 Cal.4th 1132, 1195, we approved the trial

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> court's treatment of evidence of that defendant's sole participation as aggravating under factor (j). We need not decide the issue raised by the apparent conflict among these decisions, because any error in the present case would not have been prejudicial.

(*People v. Proctor* (1992) 4 Cal.4th 499, 553.)

Need Not Instruct on Mercy

If an "expanded factor k instruction" is given, the court need not explicitly instruct the jury that it may reject the death penalty simply on the basis of mercy. (*People v. Nicolaus* (1991) 54 Cal.3d 551, 588; *People v. Brown* (2003) 31 Cal.4th 518, 570.)

Not Appropriate to Instruct to Consider Sympathy for Defendant's Family

> [W]hat is ultimately relevant is a defendant's background and character--not the distress of his or her family. A defendant may offer evidence that he or she is loved by family members or others, and that these individuals want him or her to live. But this evidence is relevant because it constitutes indirect evidence of the defendant's character. The jury must decide whether the defendant deserves to die, not whether the defendant's family deserves to suffer the pain of having a family member executed. [. . .]
>
> In summary, we hold that sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation, but that family members may offer testimony of the impact of an execution on them if by so doing they illuminate some positive quality of the defendant's background or character. Nothing contrary to these principles occurred at trial.

(*People v. Ochoa* (1998) 19 Cal.4th 353, 456.)

Lingering Doubt

"[A]lthough it is proper for the jury to consider lingering doubt, there is no requirement that the court specifically instruct the jury that it may do so." (*People v. Brown* (2003) 31 Cal.4th 518, 567.)

Double Counting of Circumstances of Crime

In *People v. Harris* (1984) 36 Cal.3d 36, 64, the court ruled that the jury was improperly permitted to consider both robbery-murder and burglary-murder special circumstances arising out of the same course of conduct. The court held

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that this impermissibly allowed the jury to “double-count” the circumstances of the crime. (*Ibid.*) This decision was overruled in *People v. Melton* (1988) 44 Cal.3d 713, 767:

> In our view, it is constitutionally legitimate for the state to determine that a death-eligible murderer is more culpable, and thus more deserving of death, if he not only robbed the victim but committed an additional and separate felonious act, burglary, in order to facilitate the robbery and murder. Robbery involves an assaultive invasion of personal integrity; burglary a separate invasion of the sanctity of the home. Society may deem the violation of each of these distinct interests separately relevant to the seriousness of a capital crime.

The court observed, however, that the defendant was entitled to a limiting instruction on request:

> Of course the robbery and the burglary may not each be weighed in the penalty determination *more than once* for exactly the same purpose. The literal language of subdivision (a) presents a theoretical problem in this respect, since it tells the penalty jury to consider the "circumstances" of the capital crime *and* any attendant statutory "special circumstances." Since the latter are a subset of the former, a jury given no clarifying instructions might conceivably double-count any "circumstances" which were also "special circumstances." On defendant's request, the trial court should admonish the jury not to do so.

(*Id.* at p. 768.)

Must be Evidence of Mitigation

> [W]e never have suggested that the Constitution requires a state trial court to instruct the jury on mitigating circumstances in the absence of any supporting evidence.
>
> On the contrary, we have said that to comply with due process state courts need give jury instructions in capital cases only if the evidence so warrants. [. . .]
>
> Nothing in the Constitution obligates state courts to give mitigating circumstance instructions when no evidence is offered to support

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> them. Because the jury heard no evidence concerning Lashley's prior criminal history, the trial judge did not err in refusing to give the requested instruction.

(*Delo v. Lashley* (1993) 507 U.S. 272, 275, 277.)

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702BDP. Death Penalty: Factors to Consider—Not Identified as Aggravating or Mitigating

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

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

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

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

The factors are:

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

(b) Whether or not the defendant has engaged in violent criminal activity besides the crime[s] that resulted in conviction[s] in this case. *Violent criminal activity* involves the unlawful use or attempted use of force or violence or the [direct or indirect] threat to use force or violence. [The other violent criminal activity alleged in this case will be described in these instructions.]

(c) Whether or not the defendant has been convicted of any felonies besides the crime[s] in this case.

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

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

(f) Whether the defendant reasonably believed that circumstances morally justified or extenuated (his/her) conduct.

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

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

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

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

(k) Any other circumstance that lessens the gravity of the crime[s] even though the circumstance is not a legal excuse. You must consider anything the defendant has offered as a basis for a sentence less than death, including but not limited to any mitigating or sympathetic circumstances of the crime and of the defendant's character, background, history, or mental or physical condition. In reaching your decision, you may consider sympathy or compassion for the defendant or anything you consider to be a mitigating factor, whether or not I have specifically mentioned it here.

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

[Even if a fact is both a "special circumstance" and also a "circumstance of the crime," you may consider that fact only once in your weighing process. Do not consider that fact as greater evidence of aggravation simply because it is both a "special circumstance" and a "circumstance of the crime."]

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The mitigating factors listed here are just examples of some of the factors you may take into account in deciding not to impose a death sentence. Consider any fact or circumstance supported by the evidence that you believe to be mitigating in deciding the question of penalty. Although a number of possible mitigating factors have been listed, you must not consider the absence of any such factor as an aggravating circumstance.

[You may not let sympathy for the defendant's family influence your decision.] [However, you may consider evidence about the impact the defendant's execution would have on (his/her) family if that evidence demonstrates some positive quality of the defendant's background or character.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct the jury on the factors to consider in reaching a decision on the appropriate sentence. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604–605; *People v. Benson* (1990) 52 Cal.3d 754, 799.)

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

When the court will be instructing the jury on prior violent criminal activity in aggravation, give the bracketed sentence that begins with "The other violent criminal activity alleged in this case." (See *People v. Robertson* (1982) 33 Cal.3d 21, 55; *People v. Yeoman* (2003) 31 Cal.4th 93, 151.) The court also has a **sua sponte** duty to give Instruction 703DP, Death Penalty: Evidence of Other Violent Crimes in addition to this instruction.

When the court will be instructing the jury on prior felony convictions, the court also has a **sua sponte** duty to give Instruction 704DP, Death Penalty: Conviction for Other Felony Crimes in addition to this instruction.

On request, the court must instruct the jury not to double-count any "circumstances of the crime" that are also "special circumstances." (*People v.*

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Melton, supra, 44 Cal.3d at p. 768.) When requested, give the bracketed paragraph that begins with "Even if a fact is both a 'special circumstance' and also a 'circumstance of the crime'."

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

AUTHORITY

Death Penalty Statute ‣ Pen. Code, § 190.3.

Jury Must Be Instructed to Consider Any Mitigating Evidence and Sympathy ‣ *Lockett v. Ohio* (1978) 438 U.S. 586, 604–605; *People v. Benson* (1990) 52 Cal.3d 754, 799; *People v. Easley* (1983) 34 Cal.3d 858, 876.

Should Instruct on All Factors ‣ *People v. Marshall* (1990) 50 Cal.3d 907, 932, cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110.

Must Instruct to Consider Only "Applicable Factors" ‣ *Williams v. Calderon* (1998) 48 F.Supp.2d 979, 1023; *People v. Marshall* (1990) 50 Cal.3d 907, 932, cert. den. sub nom. *Marshall v. California* (1991) 498 U.S. 1110.

Mitigating Factor Must Be Supported by Evidence ‣ *Delo v. Lashley* (1993) 507 U.S. 272, 275, 277.

Aggravating and Mitigating Defined ‣ *People v. Dyer* (1988) 45 Cal.3d 26, 77–78; *People v. Adcox* (1988) 47 Cal.3d 207, 269–270.

On Request Must Instruct to Consider Only Statutory Aggravating Factors ‣ *People v. Hillhouse* (2002) 27 Cal.4th 469, 509, cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, fn. 14.

Mitigating Factors Are Examples ‣ *People v. Melton* (1988) 44 Cal.3d 713, 760; *Belmontes v. Woodford* (2003) 335 F.3d 1024, 1060 [reprinted as amended at *Belmontes v. Woodford* (2003) 350 F.3d 861, 876].

Must Instruct to Not Double-Count ‣ *People v. Melton* (1988) 44 Cal.3d 713, 768.

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

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COMMENTARY

Aggravating and Mitigating Factors—Need Not Specify
The court is not required to identify for the jury which factors may be aggravating and which may be mitigating. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509, cert. den. sub nom. *Hillhouse v. California* (2003) 537 U.S. 1114.) "The aggravating or mitigating nature of the factors is self-evident within the context of each case." *(Ibid.)* However, the court is required on request to instruct the jury to consider only the aggravating factors listed. (*People v. Hillhouse, supra,* 27 Cal.4th at p. 509; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, fn. 14.) In *People v. Hillhouse, supra,* 27 Cal.4th at p. 508, fn. 6, the Supreme Court stated, "we suggest that, on request, the court merely tell the jury it may not consider in aggravation anything other than the aggravating statutory factors." The committee has rephrased this for clarity and included in the text of this instruction, "You may not consider as an aggravating factor anything other than the aggravating factors contained in this list."

Although the court is not required to specify which factors are the aggravating factors, it is not error for the court to do so. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1269.) In *People v. Musselwhite, supra,* 17 Cal.4th at p. 1269, decided prior to *Hillhouse*, the Supreme Court held that the trial court properly instructed the jury that "*only* factors (a), (b) and (c) of section 190.3 could be considered in aggravation . . . " (italics in original).

If the defendant requests an instruction identifying which factors may be aggravating factors, then, instead of this instruction, the court may give Instruction 702ADP, Death Penalty: Factors to Consider—Identified as Aggravating or Mitigating. Alternatively, the court may give this instruction and insert after factor (k) the appropriate portion of the following:

> In this case, the only factor[s] that may be [an] aggravating factor[s] (is/are):
>
> Factor (a), the circumstances of the crime[s] that the defendant was convicted of in this case and any special circumstances that were found true(;/.)
>
> [AND]
>
> [Factor (b), other violent criminal activity the defendant allegedly committed, as described in Instruction ___(;/.)]

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[AND]

[Factor (c), the other (felony/ felonies) the defendant has allegedly been convicted of, as described in Instruction ___(;/.)]

[AND

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

RELATED ISSUES

See the Related Issues section to Instruction 702ADP, Death Penalty: Factors to Consider—Identified as Aggravating or Mitigating.

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STAFF NOTES

Note: Underlined portions of quotes represent language that has been incorporated into the instruction (all of the statutory factors, (a)-(k) have also been incorporated though not underlined).

Pen. Code, § 190.3:

> If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and <u>the defendant's character, background, history, mental condition and physical condition.</u>
>
> However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.
>
> However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.
>
> Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be

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presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant was reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

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(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in a state prison for a term of life without the possibility of parole.

Definitions of "Aggravating" and "Mitigating"

The court has held that it is not error if the court fails to define the terms "aggravating" and "mitigating." (*People v. Ochoa* (1998) 19 Cal.4th 353, 458.) However, the court approved of the definitions for these terms given in *People v. Dyer* (1988) 45 Cal.3d 26, 77-78, and *People v. Adcox* (1988) 47 Cal.3d 207, 269-270.

In *People v. Dyer* (1988) 45 Cal.3d 26, 77-78, the court stated:

During discussions on what jury instructions would be given, the prosecutor objected to a proposed defense instruction defining "mitigating" evidence because "it only talks about mitigating circumstances. [. . .] The court and the prosecutor agreed, over defense counsel's objection, that Black's Law Dictionary would provide a suitable definition for aggravating circumstances.

Accordingly, the court instructed the jury as follows: "para. You are instructed that an aggravating circumstance is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the offense itself. para. You are

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> instructed that a mitigating circumstance is any fact, condition or event which, as such, does not constitute a justification or excuse for the offense in question, but which may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. para. It will be your duty . . . to determine which of the two penalties . . . shall be imposed on the defendant. After having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed." [Italics removed.]
>
> The foregoing definitions of aggravation and mitigation provided a helpful framework within which the jury could consider the specific circumstances in aggravation and mitigation set forth in section 190.3. We find no error in the presentation of both definitions to the jury, and we find no prejudice in light of the instruction limiting the jury's consideration to "the applicable factors of [aggravation]."

(*Ibid*.)

Similarly, in *People v. Adcox* (1988) 47 Cal.3d 207, 269-270, the court stated:

> Shortly after commencing their deliberations, the jury requested the court to define "aggravating" and "mitigating." In discussing the matter with the court, both the prosecutor and defense counsel stated they knew of no pertinent cases specifically defining those terms. The court, with both counsel and defendant personally in agreement, ultimately responded by giving the jury the definitions of "aggravation" and "mitigation" found in Corpus Juris Secundum, as follows: "Aggravation. Any circumstance attending the commission of a crime . . . which increases its guilt or enormity or adds to its injurious consequences, . . . but which is above and beyond the essential constituents of the crime or tort itself" (3 C.J.S., at p. 507); "Mitigating circumstances. Such circumstances as do not amount to a justification or excuse of the offense or act in question but may properly be considered in mitigation, or reduction, of the punishment. . . ." (14 C.J.S., at p. 1123.)
>
> We recently found no prejudice from the reading of nearly identical definitions in *People* v. *Dyer*, *supra*, 45 Cal.3d at pages 77-78. Indeed, we concluded that such definitions "provided a helpful framework within which the jury could consider the specific

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> circumstances in aggravation and mitigation set forth in section 190.3." (*Ibid*.) As in *Dyer*, here the jury was also instructed that, "you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed." (Former CALJIC No. 8.84.2.) Accordingly, we find no error or prejudice in the presentation of both definitions to the jury.

(*People v. Adcox* (1988) 47 Cal.3d 207, 269-270.)

CALJIC was subsequently revised to incorporate these definitions. In *People v. Benson* (1990) 52 Cal.3d 754, 800, the court approved of the following CALJIC definitions:

> Mitigating circumstances are any circumstances that do not constitute a justification or excuse of the offenses in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.
>
> Aggravating circumstances are any circumstances are any circumstances [*sic*] attending the commission of the offenses in question which increase their guilt or enormity or adds [*sic*] to their injurious consequences, but which are above and beyond the essential elements of the offenses themselves. [. . .]

More recently, the court approved of these definitions, given in CALJIC:

> n20 CALJIC No. 8.88 provides: "An aggravating factor is any fact, condition or event attending the commission of a crime which increases [its] guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. [P] A mitigating circumstance is any fact, condition or event which as such does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty."

(*People v. Brown* (2003) 31 Cal.4th 518, 565; see also *People v. Smith* (2003) 30 Cal.4th 581, 636.)

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In as least two published cases in which these definitions were given, juries asked for a definition of the term "extenuating circumstance." (*People v. Smith* (2003) 30 Cal.4th 581, 636; *People v. Lucero* (2000) 23 Cal.4th 692, 723.)

The Oxford English Dictionary defines a "mitigating circumstance" as: "a fact or situation which reduces culpability for an offence and permits greater leniency in judgment or punishment; = *extenuating circumstances*." (The Oxford English Dictionary Online (Draft entry 2002) http://dictionary.oed.com/entrance.dtl.) The OED defines "extenuating" as, "[t]hat extenuates in senses of the [verb]. Now chiefly in phrase *extenuating circumstances*: circumstances that tend to diminish culpability." (The Oxford English Dictionary Online (2nd Ed. 1998) http://dictionary.oed.com/entrance.dtl.)

Should Instruct on All Factors in Every Case

> It is, of course, the better practice for a court to instruct on all the statutory penalty factors, directing the jury to be guided by those that are applicable on the record.
>
> Such an instruction "ensures that the jury is aware of the complete range of factors that the state considers relevant to the penalty determination. With that knowledge the jury is better able to place the individual defendant's conduct in perspective, and thus its exercise of discretion to select the appropriate penalty is further channeled and directed as required by the Eighth Amendment." [Citation.]
>
> Such an instruction also avoids the risk that a factor that is indeed applicable on a given record may nevertheless be erroneously omitted. [Citation.] This risk is grave insofar as the defendant's interests are concerned: "deletion of any potentially mitigating factors from the statutory list could substantially prejudice the defendant." [Citations.]
>
> Nevertheless, it is not the law that the court is obligated to instruct on all the statutory penalty factors sua sponte.

(*People v. Marshall* (1990) 50 Cal.3d 907, 932.)

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Jury Must be Instructed to Consider "Applicable Factors"

> Petitioner contends that his constitutional rights were violated by the trial court's failure to delete the irrelevant factors from the California death penalty statute, Cal. Penal Code § 190.3.
>
> The jury in petitioner's case was instructed that it was to consider the listed factors "if applicable." (CT 559.) The words "if applicable" told the jury that not all of the factors would be relevant and that they should not consider the factors that did not apply.

(*Williams v. Calderon* (1998) 48 F.supp.2d 979, 1023.)

As noted above, the court in *People v. Marshall* (1990) 50 Cal.3d 907, 932, directed, "the better practice for a court [is] to instruct on all the statutory penalty factors, directing the jury to be guided by those that are applicable on the record."

Limitations on Aggravating Evidence—Not Required to Identify Factors as Mitigating or Aggravating

The court is not required to identify for the jury which factors may be aggravating and which may be mitigating. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) "The aggravating or mitigating nature of the factors is self-evident within the context of each case." (*Ibid.*)

However, the court has also recognized that the Due Process Clause of the United States Constitution limits what the jury may consider as an "aggravating factor":

> [I]t is settled that the due process clause of the Fourteenth Amendment prohibits the states from "attach[ing] the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, . . . or to conduct that actually should militate in favor of a lesser penalty . . . ." (*Zant* v. *Stephens* (1983) 462 U.S. 862, 885.) Evidently, it also bars use of decision-making processes that may be understood to incorporate such "mislabeling" and thereby threaten arbitrary and capricious results.

(*People v. Benson* (1990) 52 Cal.3d 754, 800.)

Defendants have attacked the CALJIC jury instructions for failing to identify which of the listed factors is aggravating and which mitigating because of the risk that jurors will impermissibly use some of the listed mitigating factors in aggravation:

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> Defendant contends that the court erred by instructing the jury as it did on aggravating circumstances and mitigating circumstances. His attack is directed against the court's failure to identify which circumstances were "aggravating" and which "mitigating," and its failure to state that the absence of mitigation did not amount to the presence of aggravation. He claims that in this regard the charge was inconsistent with the federal constitutional principles stated above.

(*Ibid.* [footnote omitted].) The court in *People v. Benson*, *supra*, rejected this claim. The court concluded that the definitions of mitigation and aggravation, along with the description of the weighing process, contained in the current CALJIC No. 8.88, sufficiently explained to the jurors the meaning of the terms and the role of the jurors in the process. (*Id.* at p. 802.) In concluding that these instructions met constitutional requirements, the court stated:

> Further, a reasonable juror could not have "attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, . . . or to conduct that actually should militate in favor of a lesser penalty . . . ." (*Zant* v. *Stephens*, *supra*, 462 U.S. at p. 885.)
>
> Defendant's claim to the contrary notwithstanding, a reasonable juror would readily have identified which circumstances were "aggravating" and which "mitigating." Again, this conclusion is virtually compelled by the plain language used in the definitions of "aggravating circumstances" and "mitigating circumstances," and in the description of the "weighing" process. Certainly, such a juror could not have inferred -- contrary to governing law (see *People* v. *Davenport* (1985) 41 Cal.3d 247, 288-289 (plur. opn.)) -- that extreme mental or emotional disturbance and diminished capacity were circumstances in aggravation. Defendant argues in substance that a reasonable juror might have understood these circumstances as indicia of future dangerousness and hence as grounds for the ultimate sanction. We are not persuaded. It is pellucid in the very words of the instructions that both circumstances looked to the past, not the future, and supported life, not death.
>
> Again notwithstanding defendant's claim, a reasonable juror could not have believed -- contrary to governing law (see *People* v. *Davenport*, *supra*, 41 Cal.3d at pp. 288-289 (plur. opn.)) -- that the absence of mitigation amounted to the presence of aggravation. The

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> instructions made plain that aggravation required the *existence* of "circumstances attending the commission of the offenses in question which increase their guilt or enormity or adds [*sic*] to their injurious consequences, but which are above and beyond the essential elements of the offenses themselves" -- and not merely the *nonexistence* of "circumstances . . . which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability."

(*Id.* at pp. 801-802 [italics in original].)

Limitations on Aggravating Evidence—Error to Instruct Any Factor May Aggravate

Although the court is not required to identify the aggravating and mitigating factors for the jury, it is error for the court to instruct the jury that any factor may be considered in aggravation:

> [T]he trial court instructed the jury that, in determining the penalty, it must consider and be guided by 11 factors, if applicable. The trial court added: "The factors which I have just listed for you may be considered by you, if applicable, as either aggravating factors or mitigating factors. [P] If you find any of these factors to be aggravating, and to have been established by the evidence, you may consider them in determining the penalty you will impose in this case."
>
> Defendant contends this instruction was erroneous. He is correct. A majority of the 11 statutory factors can only be mitigating.

(*People v. Wader* (1993) 5 Cal.4th 610, 657 [citations omitted.].)

Limitations on Aggravating Evidence—Must Instruct on Request that Jury is Limited to Statutory Aggravating Factors

Although not required to identify the factors as either aggravating or mitigating, the trial court must, on request, instruct the jury that it may only consider the statutory aggravating factors (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275 fn.14.) The court has made two proclamations on how this advisement should be worded. In *People v. Gordon, supra,* 50 Cal.3d at p. 1275 fn. 14, the court stated:

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> [O]n request a court must give an instruction stating that the jury may consider only penalty factors (a) through (j), and evidence relevant thereto, in determining aggravation. [Citation.]

This instruction was given in *People v. Hillhouse, supra,* 27 Cal.4th at p. 508. The trial court instructed as follows:

> The factors A through J which I have just listed are the only factors that can be considered by you as aggravating factors, and you cannot take into account any other facts or circumstances as a basis for imposing the penalty of death on the defendant. [P] If you find any of those factors to be aggravating and to have been established by the evidence, you may consider them in deciding the penalty you will impose in this case. [P] Although a number of possible mitigating factors have been listed, you cannot consider the absence of any such factors in this case as an aggravating factor. Aggravating factors are limited to those which have been listed for you in these instructions.

(*Ibid.*)

However, in *People v. Hillhouse, supra,* 27 Cal.4th at p. 508, the court found fault with its own instruction. The court agreed with the defendant that the instruction was potentially misleading because it presented the possible ambiguity that the jury might consider as aggravating factors which legally could only be mitigating factors, specifically factors (d), (f) and (g). (*Ibid.*). The court stated,

> To avoid any possible ambiguity in the future, we suggest that, on request, the court merely tell the jury it may not consider in aggravation anything other than the aggravating statutory factors.

(*Ibid.* at fn. 6.)

In *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1269, the court affirmed the giving of an instruction that, "*only* factors (a), (b) and (c) of section 190.3 could be considered in aggravation . . . " (italics in original).

Staff has drafted the instruction along the lines of *People v. Musselwhite, supra,* specifically identify the statutory aggravating factors for the jury. Instructing the jurors that they may only consider "the statutory aggravating factors," without explaining what these are, will invite confusion.

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Individualized Decision--Jury Must Consider Any Mitigating Evidence

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. [. . .] Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. [. . .]
>
> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

(*Lockett v. Ohio* 91978) 438 U.S. 586, 604-605 [footnotes omitted, emphasis in original].)

> The Eighth Amendment requires that a capital jury consider all relevant mitigating evidence offered by the defendant and afford it such weight as it deems appropriate. [Citation.] The sentencer may determine the weight to be given relevant mitigating evidence. But it may not give it no weight by excluding such evidence from its consideration. [Citations and quotation marks omitted.] [. . . .]
>
> To pass constitutional muster, the trial judge's instructions must convey to the jury that factor (k) compels it to consider all relevant mitigating evidence proffered by the defendant as a basis for a sentence less than death. [I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. [Citation and quotation marks omitted.] Rather, the trial judge's instructions must convey that the sentencer may not be precluded from

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> considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. [Citation and quotation marks omitted.]

(*Belmontes v. Woodford* (2003) 335 F.3d 1024, 1061 [reprinted as amended at *Belmontes v. Woodford*, 2003 U.S. App. LEXIS 23657 (9th Cir. Cal., Nov. 20, 2003)—awaiting final pagination].)

Jury Must be Instructed to Consider Sympathy or Other Mitigating Factors

> [United States Supreme Court cases] make it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any "sympathy factor" raised by the evidence before it.

(*People v. Robertson* (1982) 33 Cal.3d 21, 58.)

> The instructions in this case did not make clear to the jury its option to reject death if the evidence aroused sympathy or compassion. The instructions were inconsistent and ambiguous in advising both that the jury must not be swayed by pity or influenced by sympathy for the defendant, and that it should consider circumstances which "in fairness and mercy, must be considered in extenuating or reducing the degree of moral culpability." Because they also failed to tell the jury that any aspect of the defendant's character or background could be considered mitigating and could be a basis for rejecting death even though it did not necessarily lessen culpability, the instructions were constitutionally inadequate.

(*People v. Lanphear* (1984) 36 Cal.3d 163, 165.)

> [T]he jury instructions -- taken as a whole -- must clearly inform the jury that they are to consider any relevant mitigating evidence about a defendant's background and character, or about the circumstances of the crime.

(*California v. Brown* (1987) 479 U.S. 538, 545.)

Expanded Factor (k) Instruction

Factor (k) provides for the jury to consider, “Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the

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crime." (Pen. Code § 190.3(k).) In *People v. Easley* (1983) 34 Cal.3d 858, 876, the court concluded that instruction solely in the statutory language quoted was insufficient to inform the jurors that they may consider any mitigating evidence offered by the defendant:

> CALJIC No. 8.84.1 -- while listing a variety of aggravating and mitigating factors -- does not explicitly inform the jury that it may consider *any* mitigating factor proffered by the defendant. [. . .]
>
> n.10 In order to avoid potential misunderstanding in the future, trial courts -- in instructing on the factor embodied in section 190.3, subdivision (k) -- should inform the jury that <u>it may consider as a mitigating factor "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" and any other "aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death."</u> (*Lockett, supra*, 438 U.S. at p. 604 [57 L.Ed.2d at p. 990].)

(*Ibid.;* see also *People v. Miranda* (1987) 44 Cal.3d 57, 102.)

The language of *Easley, supra,* as well as language from several of the cases quoted above has been incorporated into the CALJIC instruction on factor (k). The resulting instruction has become known as the "expanded factor k" instruction.

Appropriate to Instruct Jury to Consider Sympathy for Defendant or "Any Mitigating Factor"

> [T]he jury was given this instruction: "You may take sympathy for the defendant into consideration in determining whether or not to extend mercy to the defendant." [. . .]
>
> Another instruction that defendant requested told the jury, as relevant here: "<u>Mitigating factors are unlimited. Anything mitigating should be considered. Mitigating factors provided in the instructions are merely examples of some of the factors you may take into account in deciding whether or not to impose a death penalty</u>."

(*People v. Ochoa* (1998) 19 Cal.4th 353, 454; similar instruction given in *People v. Melton* (1988) 44 Cal.3d 713, 760.)

In *Belmontes v. Woodford* (2003) 335 F.3d 1024, 1060 [reprinted as amended at *Belmontes v. Woodford*, 2003 U.S. App. LEXIS 23657 (9th Cir. Cal., Nov. 20,

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2003)—awaiting final pagination], the trial court gave these special instructions, requested by the defense:

> [T]he mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.
>
> [. . .] [Y]ou should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances . . . as reasons for not imposing the death sentence.

Even with these instructions, the Ninth Circuit Court of Appeals concluded that the jury instructions, taken as a whole, failed to inform the jurors that they could consider any mitigating factors. The trial court instructed the jury with the "unadorned factor (k)" instruction, failed to inform the jurors that they could consider whether the defendant would adapt to prison life, and specifically told the jurors they could not consider whether the defendant would receive counseling in prison and. (*Id.* at pp. 1062-1065.) In reversing the penalty phase, the Ninth Circuit noted,

> The trial judge started out on the right track by instructing the jury that it should view the statutory factors "merely as examples of some of the factors" that it could consider. However, any clarity gained at the outset of the instruction was immediately undone by a superceding qualifying directive. The judge added, "You should pay careful attention to each of these factors," an instruction that a reasonable juror would almost certainly have understood to refer to the statutory factors, and particularly to the unconstitutionally limiting unadorned factor (k). The trial judge then continued, "Any one of them [i.e., the factors] standing alone may support a decision that death is not the appropriate punishment in this case," implying that only a statutory factor can support a sentence less than death. A juror who followed these instructions would likely think that he could not consider nonstatutory mitigating evidence--evidence not going to culpability--such as testimony tending to show that Belmontes would lead a constructive life if confined permanently within a structured environment.

(*Id.* at p. 1065.)

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Factors (b) and (c) Apply to Other Crimes Only

> Defendant contends the trial court erred in failing sua sponte to modify CALJIC No. 8.84.1 to make clear that section 190.3, subdivisions (b) and (c) applied only to "other crimes." We agree that subdivisions (b) and (c) pertain only to criminal activity other than the crimes for which the defendant was convicted in the present proceeding. It would therefore be improper for the jury to consider the underlying crimes as separate and distinct aggravating circumstances under either subdivision. [. . .]
>
> fn. 28 [. . .] [T]he trial court in the future should expressly instruct that <u>subdivisions (b) and (c) refer to crimes other than those underlying the guilt determination</u>.

(*People v. Miranda* (1987) 44 Cal.3d 57, 105-106 [footnote omitted].)

"Extreme" Mental or Emotional Distress

> In accordance with section 190.3, factor (d) (CALJIC No. 8.84.1), the jury was instructed to consider "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." Defendant asserts that this instruction, by referring to an "extreme" mental or emotional condition, misled the jury into believing that any "lesser disturbance would not suffice and could not be considered." We cannot agree.
>
> Pursuant to CALJIC No. 8.84.1, the jury was given an "expanded" factor (k) instruction [. . . .]
>
> In *People* v. *Ghent* (1987) 43 Cal.3d 739, we concluded that this "catchall" expanded factor (k) provision is sufficient to permit the penalty jury to take into account a mental condition of the defendant which, though perhaps not deemed "extreme," nonetheless mitigates the seriousness of the offense.

(*People v. Nicolaus* (1991) 54 Cal.3d 551, 586-587 [quotation marks and citations omitted]; see also *People v. Cox* (2003) 30 Cal.4th 916, 966.)

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Age Can be Either Mitigating or Aggravating

> In *People* v. *Lucky* (1988) 45 Cal.3d 259 [247 Cal.Rptr. 1, 753 P.2d 1052], we explained that mere chronological age is not in and of itself an aggravating or mitigating factor. "In our view, the word 'age' in statutory sentencing factor (i) is used as a metonym for any age-related matter suggested by the evidence or by common experience of morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue such age-related inference in every case." (*Id*. at p. 302.)

(*People v. Nicolaus* (1991) 54 Cal.3d 551, 587.) Thus, the prosecutor may argue that the defendant was mature enough to fully understand the nature of his actions. (*Ibid.*) However, the prosecution may not argue "age-related" matters that do not reflect on the defendant's character:

> [T]he prosecutor also argued to the jury, "You can consider Mr. Nicolaus' age also in terms of the fact that the death penalty for Mr. Nicolaus will not deprive him of a long or potentially productive life as it would a young man." This was clearly improper argument. It did not purport to refer to any age-related matter that might have impacted defendant's character. Instead, it implied that the life of an individual more advanced in years might somehow be worth less than that of a younger individual. Although such a concept may have valid application in the determination of certain compensatory tort damages, it has no proper place in a death penalty case. [. . .] The comment in question bore no relation to this defendant's individual character or background, or to the circumstances of this particular offense.

(*Id.* at pp. 587-588.)

Factor (j)—Undecided if Aggravating as Well as Mitigating

> We have indicated or implied in numerous prior decisions that factor (j) may be considered only as a mitigating factor, and that where the defendant is not an accomplice whose participation in the offense is relatively minor, the factor is simply inapplicable and should not be considered as aggravating [citing 13 cases.] Nonetheless, in *People v. Howard, supra,* 1 Cal.4th 1132, 1195, we approved the trial

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> court's treatment of evidence of that defendant's sole participation as aggravating under factor (j). We need not decide the issue raised by the apparent conflict among these decisions, because any error in the present case would not have been prejudicial.

(*People v. Proctor* (1992) 4 Cal.4th 499, 553.)

Need Not Instruct on Mercy

If an "expanded factor k instruction" is given, the court need not explicitly instruct the jury that it may reject the death penalty simply on the basis of mercy. (*People v. Nicolaus* (1991) 54 Cal.3d 551, 588; *People v. Brown* (2003) 31 Cal.4th 518, 570.)

Not Appropriate to Instruct to Consider Sympathy for Defendant's Family

> [W]hat is ultimately relevant is a defendant's background and character--not the distress of his or her family. A defendant may offer evidence that he or she is loved by family members or others, and that these individuals want him or her to live. But this evidence is relevant because it constitutes indirect evidence of the defendant's character. The jury must decide whether the defendant deserves to die, not whether the defendant's family deserves to suffer the pain of having a family member executed. [. . .]
>
> In summary, we hold that sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation, but that family members may offer testimony of the impact of an execution on them if by so doing they illuminate some positive quality of the defendant's background or character. Nothing contrary to these principles occurred at trial.

(*People v. Ochoa* (1998) 19 Cal.4th 353, 456.)

Lingering Doubt

"[A]lthough it is proper for the jury to consider lingering doubt, there is no requirement that the court specifically instruct the jury that it may do so." (*People v. Brown* (2003) 31 Cal.4th 518, 567.)

Double Counting of Circumstances of Crime

In *People v. Harris* (1984) 36 Cal.3d 36, 64, the court ruled that the jury was improperly permitted to consider both robbery-murder and burglary-murder special circumstances arising out of the same course of conduct. The court held

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that this impermissibly allowed the jury to “double-count” the circumstances of the crime. (*Ibid.*) This decision was overruled in *People v. Melton* (1988) 44 Cal.3d 713, 767:

> In our view, it is constitutionally legitimate for the state to determine that a death-eligible murderer is more culpable, and thus more deserving of death, if he not only robbed the victim but committed an additional and separate felonious act, burglary, in order to facilitate the robbery and murder. Robbery involves an assaultive invasion of personal integrity; burglary a separate invasion of the sanctity of the home. Society may deem the violation of each of these distinct interests separately relevant to the seriousness of a capital crime.

The court observed, however, that the defendant was entitled to a limiting instruction on request:

> Of course the robbery and the burglary may not each be weighed in the penalty determination *more than once* for exactly the same purpose. The literal language of subdivision (a) presents a theoretical problem in this respect, since it tells the penalty jury to consider the "circumstances" of the capital crime *and* any attendant statutory "special circumstances." Since the latter are a subset of the former, a jury given no clarifying instructions might conceivably double-count any "circumstances" which were also "special circumstances." On defendant's request, the trial court should admonish the jury not to do so.

(*Id.* at p. 768.)

Must be Evidence of Mitigation

> [W]e never have suggested that the Constitution requires a state trial court to instruct the jury on mitigating circumstances in the absence of any supporting evidence.
>
> On the contrary, we have said that to comply with due process state courts need give jury instructions in capital cases only if the evidence so warrants. [. . .]
>
> Nothing in the Constitution obligates state courts to give mitigating circumstance instructions when no evidence is offered to support

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> them. Because the jury heard no evidence concerning Lashley's prior criminal history, the trial judge did not err in refusing to give the requested instruction.

(*Delo v. Lashley* (1993) 507 U.S. 272, 275, 277.)

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705DP. Death Penalty: Weighing Process

You have sole responsibility to decide which penalty (the/each) defendant will receive.

You must consider the arguments of counsel and all the evidence presented [during (both/all) phases of the trial] [except for the items of evidence I specifically instructed you not to consider].

In reaching your decision, you must consider, take into account, and be guided by the aggravating and mitigating circumstances. Each of you is free to assign whatever moral or sympathetic value you find appropriate to each individual factor and to all of them together. Do not simply count the number of aggravating and mitigating factors and decide based on the higher number alone. Consider the relative or combined weight of the factors and evaluate them in terms of their relative convincing force on the question of punishment.

Each of you must decide for yourself whether aggravating or mitigating factors exist. You do not all need to agree whether such factors exist. If any juror individually concludes that a factor exists, that juror may give the factor whatever weight he or she believes is appropriate.

Determine which penalty is appropriate and justified by considering all the evidence and the totality of any aggravating and mitigating circumstances. Even without mitigating circumstances, you may decide that the aggravating circumstances, if any, are not substantial enough to warrant death. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.

[In making your decision about penalty, you must assume that the penalty you impose, death or life without the possibility of parole, will be carried out.]

To return a verdict of either death or life without the possibility of parole, all 12 of you must agree on that verdict.

[You must separately consider which sentence to impose on each defendant. If you cannot agree on the sentence[s] for one [or more] defendant[s] but you do

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agree on the sentence[s] for the other defendant[s], then you must return a verdict for (the/each) defendant on whose sentence you do agree.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct the jury on the weighing process in a capital case. (*People v. Brown* (1985) 40 Cal.3d 512, 544; *People v. Benson* (1990) 52 Cal.3d 754, 799.)

Following this instruction, the court **must give** Instruction 140, Predeliberation Instructions, explaining how to proceed in deliberations.

On request, give the bracketed sentence that begins with "In making your decision about penalty." (*People v. Kipp* (1988) 18 Cal.4th 359, 378–379.)

AUTHORITY

Death Penalty Statute ▸ Pen. Code, § 190.3.
Error to Instruct "Shall Impose Death" ▸ *People v. Brown* (1985) 40 Cal.3d 512, 544.
Must Instruct on Weighing Process ▸ *People v. Brown* (1985) 40 Cal.3d 512, 544; *People v. Benson* (1990) 52 Cal.3d 754, 799; *People v. Duncan* (1991) 53 Cal.3d 955, 977–979.
Aggravating Factors "So Substantial in Comparison to" Mitigating ▸ *People v. Duncan* (1991) 53 Cal.3d 955, 977–979.
Error to Instruct on Commutation ▸ *People v. Ramos* (1982) 37 Cal.3d 136, 159.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 466–467, 493–494, 496–497.

RELATED ISSUES

No Presumption of Life and No Reasonable Doubt Standard
The court is not required to instruct the jury that there is a presumption in favor of a life sentence; that the aggravating factors (other than prior crimes) must be found beyond a reasonable doubt; or that the jury must find beyond a reasonable doubt that the aggravating factors substantially outweigh the mitigating factors. (*People v. Benson* (1990) 52 Cal.3d 754, 800; *People v. Miranda* (1987) 44 Cal.3d 57, 107; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777–779.)

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Unanimity on Factors Not Required
The court is not required to instruct the jury that they must unanimously agree on any aggravating circumstance. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 777–779.)

Commutation Power
It is error for the court to instruct on the Governor's commutation power unless specifically requested by the defense. (*People v. Ramos* (1982) 37 Cal.3d 136, 159.) If the jury inquires about commutation, the court may inform the jury that the Governor has the power to commute either sentence, but the jury may not consider this in reaching its decision. (*Id*. at 159, fn. 12; see 3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 496 [collecting cases in which court required to respond to inquiries from jury regarding commutation].) The court must not state or imply to the jury that the ultimate authority for selecting the sentence to be imposed lies elsewhere. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328–329.)

Deadlock—No Duty to Inform Jury Not Required to Return Verdict
"[W]here, as here, there is no jury deadlock, a court is not required to instruct the jury that it has the choice not to deliver any verdict." (*People v. Miranda* (1987) 44 Cal.3d 57, 105.)

Deadlock—Questions From the Jury About What Will Happen
If the jury inquires about what will happen in the event of a deadlock, the court should refuse to answer. (*People v. Bell* (1989) 49 Cal.3d 502, 553.)

No Duty to Instruct Not to Consider Deterrence or Costs
"Questions of deterrence or cost in carrying out a capital sentence are for the Legislature, not for the jury considering a particular case." (*People v. Benson* (1990) 52 Cal.3d 754, 807 [citation and internal quotation marks omitted].) Where "[t]he issue of deterrence or cost [is] not raised at trial, either expressly or by implication," the court need not instruct the jury to disregard these matters. *(Ibid.)*

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STAFF NOTES

Note: Underlined portions of quotes represent language that has been incorporated into the instruction.

Pen. Code, §190.3, in relevant part:

> After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in a state prison for a term of life without the possibility of parole.

"Shall Impose Death"—Error; Must Instruct on "Weighing"

As noted above, the statute states that the jury "*shall* impose a sentence of death" if aggravation outweighs mitigation. (Pen. Code, § 190.3.) Literal application of this provision would be unconstitutional. (See *People v. Brown* (1985) 40 Cal.3d 512, 544.) Thus, in *People v. Brown, supra,* the court interpreted the statute as never mandating the imposition of a death sentence but, rather, as requiring a "weighing process" in which the jury is always free to chose a sentence of life without parole. The court stated,

> In this context, the word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor "k" as we have interpreted it.

(*Id.* at p. 541.)

The court then disapproved of any instruction using the phrase "shall impose a sentence of death":

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> We acknowledge that the language of the statute, and in particular the words "shall impose a sentence of death," leave room for some confusion as to the jury's role. Indeed, such confusion is occasionally reflected in records before this court. For that reason, trial courts in future death penalty trials -- in addition to the instruction called for by *Easley, supra*, 34 Cal.3d at page 878, footnote 10 -- should instruct the jury as to the scope of its discretion and responsibility in accordance with the principles set forth in this opinion.

(*Ibid.* at fn. 17; see also *People v. Miranda* (1987) 44 Cal.3d 57, 102.)[1]

Following *People v. Brown, supra*, the CALJIC instruction was revised to reflect the holdings in the case. The court approved of the revised language in *People v. Duncan* (1991) 53 Cal.3d 955, 977-979:

> The instruction read as follows: "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on defendant. [para.] After having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [para.] The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death each of you must be persuaded that the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. [para.] You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree." [. . .]

[1] The instruction called for in footnote 10 of *Easley* is incorporated in Task Force Instruction 702DP: Factors to Consider.

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> In *People* v. *Brown*, *supra*, 40 Cal.3d 512, we noted that instruction in the terms of the statute had the potential to confuse jurors and thus suggested the adoption of an instruction like the one given here. (*Id*. at p. 545, fn. 19.) The instruction given informed the jurors that to return a verdict of death they must be persuaded that the "aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." We do not think that there is a reasonable likelihood that any of the jurors would have concluded that, even if the mitigating factors outweighed those in aggravation, the "so substantial in comparison with" language nevertheless might demand imposition of the higher punishment. (See *Boyde* v. *California* (1990) 494 U.S. 370.) The instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating. There was no need to additionally advise the jury of the converse (i.e., that if mitigating circumstances outweighed aggravating, then life without parole was the appropriate penalty). [. . .]
>
> [O]ur statute and instruction give the jury broad discretion to decide the appropriate penalty by weighing all the relevant evidence. The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death.

(*Ibid*.)

In subsequent cases, the court explicitly approved of the portion of the CALJIC instruction that, "weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale . . . . (CALJIC No. 8.88.)." (*People v. Smith* (2003) 30 Cal.4th 581, 638; (*People v. Benson* (1990) 52 Cal.3d 754, 800.) The court has also approved of the language from the CALJIC instruction stating, "You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." (*People v. Ochoa* (1998) 19 Cal.4th 353, 454; *People v. Benson* (1990) 52 Cal.3d 754, 800.)

No Sua Sponte Duty to Instruct on Meaning of Life Without Parole

> In this case, the term "confinement in the state prison for life without possibility of parole" was used in the common and nontechnical sense that

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> the plain meaning of the words convey. Accordingly, the court was not required to give an instruction as to its meaning sua sponte.

(*People v. Ochoa* (1998) 19 Cal.4th 353, 457 [citations and quotations marks omitted].)

On Request, May Instruct that Death Sentence Will be Carried Out, But Not Required to so Instruct

> As we have explained in prior cases, because of the possibility of appellate reversal or gubernatorial commutation or pardon, it would be erroneous to instruct the jury that if it returns a death verdict, the sentence of death will inexorably be carried out. But the trial court may give such an instruction at the defendant's request. [Citations.].

(*People v. Cox* (2003) 30 Cal.4th 916, 967.) The court may also give an instruction that the jury should assume that the sentence of life without parole will be carried out but is not required to do so. (*Ibid.*; *People v. Smith* (2003) 30 Cal.4th 581, 635.)

May Not Imply to Jury Duty to Choose Sentence Lies Elsewhere

> It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.

(*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-329.)

Error to Instruct on Commutation Power
Penal Code section 190.3 states:

> The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

The court has held that this instruction, dubbed the “Briggs Instruction,” is error:

> Accordingly, we conclude that the Briggs Instruction violates the due process clause of the California Constitution both because it is misleading and because it invites the jury to consider speculative and

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> impermissible factors in reaching its decision. If this case reaches the penalty phase on remand, the instruction should not be given. n12

(*People v. Ramos* (1982) 37 Cal.3d 136, 159.) In a footnote, the court discussed whether the jury should ever be instructed on commutation:

> n12 While the Briggs Instruction clearly should not be given, there is a legitimate question whether in general a trial court should instruct the jury *sua sponte* that it should not consider the possibility of commutation in reaching its decision, or whether no instruction on the subject should be given at all.
>
> When the jury raises the commutation issue itself -- either during voir dire or in a question posed to the court during deliberations -- the matter obviously cannot be avoided and is probably best handled by a short statement indicating that the Governor's commutation power applies to both sentences but emphasizing that it would be a violation of the juror's duty to consider the possibility of such commutation in determining the appropriate sentence. (Cf. *People* v. *Morse, supra*, 60 Cal.2d 631, 648.)
>
> When the issue is not expressly raised by the jury, it is a close question whether it is preferable for the court to give such a cautionary instruction on the assumption that some jurors might otherwise be aware of the possibility of commutation and improperly consider it, or whether such an instruction is simply more likely to bring the matter to the jury's attention and, as a practical matter, be difficult to follow.
>
> A similar problem has arisen in the Fifth Amendment realm, with respect to an instruction that cautions the jury that it may not draw an adverse inference from the fact that a defendant has not testified at trial. In that context, California courts have held that while such an instruction must be given if requested by the defendant, a trial court has no duty to give the instruction *sua sponte* in light of the possibility that it would prove more prejudicial than beneficial. (See, e.g., *People* v. *Gardner* (1969) 71 Cal.2d 843, 852-854 [79 Cal.Rptr. 743, 457 P.2d 575].) A similar approach -- permitting the defendant to assess the relative cost and benefit of a cautionary instruction in a particular case -- appears appropriate with regard to the commutation issue.

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(*Ibid.;* see 3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punish, § 496 [collecting cases in which court required to respond to inquires from jury regarding commutation].)

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710DP. Death Penalty: Mental Retardation

I will now instruct you on the law that applies to this [phase of the] case.

[You must disregard all the instructions I gave you earlier. I will give you a set of instructions that apply only to this phase of the trial. Some of these instructions will be the same or similar to instructions you have heard before. However, you must follow only this new set of instructions in this phase of the trial.]

You must decide whether the defendant is mentally retarded.

In order to establish that (he/she) is mentally retarded, the defendant must prove by a preponderance of the evidence that:

1. **(His/Her) general intellectual functioning is significantly below average;**

2. **(He/She) has deficits in adaptive behavior;**

AND

3. **These conditions were observable before the defendant reached the age of 18 years.**

***Adaptive behavior* is the set of learned skills people need to function adequately in their everyday lives.**

***Proof by a preponderance of the evidence* is a different standard than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that (he/she) is mentally retarded. If the defendant has not met this burden, you must find that (he/she) has not proved that (he/she) is mentally retarded.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on general concepts of law. (*People v. Babbitt* (1988) 45 Cal.3d 660, 718.) In the context of penalty phase instructions,

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the Supreme Court has stated that the trial court must clarify for the jury which instructions apply to the penalty phase. (*People v. Babbitt, supra,* 45 Cal.3d at p. 718, fn. 26; *People v. Weaver* (2001) 26 Cal.4th 876, 982, cert. den. sub nom. *Weaver v. California* (2002) 535 U.S. 1058.) In order to avoid confusion, the Supreme Court has indicated that the preferable practice is for the court to provide the jury with a completely new set of instructions. (*People v. Weaver, supra,* 26 Cal.4th at p. 982.) The committee recommends this approach in the mental retardation phase as well.

When the defendant in a capital trial raises the issue of mental retardation, the jury must decide the question unless the defendant has waived a jury on the issue. (Pen. Code, § 1376(b)(1).) The hearing on mental retardation shall be conducted after the guilt phase and prior to the penalty phase. *(Ibid.)* If the defendant has entered a plea of not guilty by insanity, the hearing on mental retardation shall be conducted after the sanity phase. (Pen. Code, § 1376(e).) The defense bears the burden of proving mental retardation by a preponderance of the evidence. (Pen. Code, § 1376(b)(2).)

The court **must** also give any necessary instructions on witnesses and evidence, such as Instruction 120, Evidence; Instruction 130, Witnesses; and Instruction 450, Expert Witness. The court must conclude with Instruction 140, Predeliberation Instructions.

AUTHORITY

Hearing on Mental Retardation in Death Penalty Case ▸ Pen. Code, § 1376.
Execution of Mentally Retarded Unconstitutional ▸ *Atkins v. Virginia* (2002) 536 U.S. 304, 319–321.
Mental Retardation Defined ▸ Pen. Code, § 1376(a); American Association on Mental Retardation, http://www.aamr.org/Policies/faq_mental_retardation.shtml (accessed August 24, 2004).
Should Give Jury New Set of Instructions (Penalty Phase) ▸ *People v. Weaver* (2001) 26 Cal.4th 876, 982, cert. den. sub nom. *Weaver v. California* (2002) 535 U.S. 1058.

RELATED ISSUES

Scope of Expert Testing
When the defendant places at issue the question of whether he or she is mentally retarded, the defendant must submit to examination by a prosecution expert. (*Centeno v. Superior Court* (2004) 117 Cal.App.4th 30, 40.) "However, those

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examinations are permissible only to the extent they are reasonably related to the determination of the existence of the mental condition raised. . . . [On] a defense objection to specific proposed prosecution tests, the trial court must make a threshold determination that the tests bear some reasonable relation to measuring mental retardation, including factors that might confound or explain the testing, such as malingering. . . . The trial court must prohibit any tests it concludes are not reasonably related to determining mental retardation." (*Id.* at p. 45.)

Measure of "General Intellectual Functioning"
In *People v. Superior Court (Vidal)* (Dec. 8, 2004, F045226) __ Cal.App.4th __, __, the court held that "where . . . IQ scores are available, general intellectual functioning is primarily determined by the defendant's FSIQ score." The "FSIQ score" is the "full scale intelligence quotient" on the Wechsler Intelligence Scale. (*Id.* at p. __.) The FSIQ score is based on the defendant's performance on a series of subtests which are divide into two categories, performance (PIQ) and verbal (VIQ). *(Ibid.)* The Court of Appeal held that the trial court, in concluding that the defendant was mentally retarded, had given undue weigh to the defendant's VIQ scores (his performance on the verbal subtests alone) without giving sufficient consideration to the defendant's FSIQ scores (which combined the defendant's performance on the verbal and the performance subtests). (*Id.* at p. __.) The Court of Appeal remanded the case for the trial court to reconsider its ruling based on the Court of Appeal's determination that the defendant's FSIQ scores were determinative of the defendant's "general intellectual functioning." *(Ibid.)* This decision is not final.

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STAFF NOTES

Pen. Code, § 1376:

(a) As used in this section, "mentally retarded" means the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18.

(b)(1) In any case in which the prosecution seeks the death penalty, the defendant may, at a reasonable time prior to the commencement of trial, apply for an order directing that a mental retardation hearing be conducted. Upon the submission of a declaration by a qualified expert stating his or her opinion that the defendant is mentally retarded, the court shall order a hearing to determine whether the defendant is mentally retarded. At the request of the defendant, the court shall conduct the hearing without a jury prior to the commencement of the trial. The defendant's request for a court hearing prior to trial shall constitute a waiver of a jury hearing on the issue of mental retardation. If the defendant does not request a court hearing, the court shall order a jury hearing to determine if the defendant is mentally retarded. The jury hearing on mental retardation shall occur at the conclusion of the phase of the trial in which the jury has found the defendant guilty with a finding that one or more of the special circumstances enumerated in Section 190.2 are true. Except as provided in paragraph (3), the same jury shall make a finding that the defendant is mentally retarded, or that the defendant is not mentally retarded.

(2) For the purposes of the procedures set forth in this section, the court or jury shall decide only the question of the defendant's mental retardation. The defendant shall present evidence in support of the claim that he or she is mentally retarded. The prosecution shall present its case regarding the issue of whether the defendant is mentally retarded. Each party may offer rebuttal evidence. The court, for good cause in furtherance of justice, may permit either party to reopen its case to present evidence in support of or opposition to the claim of retardation. Nothing in this section shall prohibit the court from making orders reasonably necessary to ensure the production of evidence sufficient to determine whether or not the defendant is mentally retarded, including, but not limited to, the appointment of, and examination of the defendant by, qualified

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experts. No statement made by the defendant during an examination ordered by the court shall be admissible in the trial on the defendant's guilt.

(3) At the close of evidence, the prosecution shall make its final argument, and the defendant shall conclude with his or her final argument. The burden of proof shall be on the defense to prove by a preponderance of the evidence that the defendant is mentally retarded. The jury shall return a verdict that either the defendant is mentally retarded or the defendant is not mentally retarded. The verdict of the jury shall be unanimous. In any case in which the jury has been unable to reach a unanimous verdict that the defendant is mentally retarded, and does not reach a unanimous verdict that the defendant is not mentally retarded, the court shall dismiss the jury and order a new jury impaneled to try the issue of mental retardation. The issue of guilt shall not be tried by the new jury. . . .

(d) In the event the hearing is conducted before the jury after the defendant is found guilty with a finding that one or more of the special circumstances enumerated in Section 190.2 are true, the following shall apply:

(1) If the jury finds that the defendant is mentally retarded, the court shall preclude the death penalty and shall sentence the defendant to confinement in the state prison for life without the possibility of parole.

(2) If the jury finds that the defendant is not mentally retarded, the trial shall proceed as in any other case in which a sentence of death is sought by the prosecution.

(e) In any case in which the defendant has not requested a court hearing as provided in subdivision (b), and has entered a plea of not guilty by reason of insanity under Sections 190.4 and 1026, the hearing on mental retardation shall occur at the conclusion of the sanity trial if the defendant is found sane.

Further Definitions of Mentally Retarded

Because the statutory definition of mentally retarded is extremely technical, Staff have examined several sources to provide further explanation of the term. Those source materials are attached.

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The most significant source is the American Association of Mental Retardation (AAMR.) We have attached the seven page printout from the AAMR website explaining their definition in length. The core definition states:

> Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills.
>
> This disability originates before age 18.
>
> Five Assumptions Essential to the Application of the Definition
>
> 1. Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture.
>
> 2. Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors.
>
> 3. Within an individual, limitations often coexist with strengths.
>
> 4. An important purpose of describing limitations is to develop a profile of needed supports.
>
> 5. With appropriate personalized supports over a sustained period, the life functioning of the person with mental retardation generally will improve.

(http://aamr.org/Policies/faq_mental_retardation.shtml, accessed on August 24, 2004.)

Many of the other sources rely on the AAMR definition. For example, *Atkins v. Virginia* (2002) 536 U.S. 304, 309, fn. 3, states:

> The American Association of Mental Retardation (AAMR) defines mental retardation as follows: "*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety,

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> functional academics, leisure, and work. Mental retardation manifests before age 18." Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992).
>
> The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id*., at 42-43.

(*Atkins v. Virginia* (2002) 536 U.S. 304, 309, fn. 3.)

Note, however, that the AAMR definition has changed from that cited in *Atkins*. The definition contained on the website reflects the 10th edition of Mental Retardation: Definition, Classification, and Systems of Supports, rather than the 9th edition quoted in the text.

We have not identified specific “adaptive behaviors” in which there must be a demonstrated deficiency. The AAMR definition of mental retardation quoted in *Atkins* referred to “limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.” However, the current definition provides three “categories” of adaptive behaviors for consideration, “conceptual, social, or practical,” with multiple examples for each category. (See attachment from AAMR website, p. 3.) Moreover, the current definition does not require a specific finding of deficiency in a set number of skills. As noted above, the most current definition emphasizes that “[l]imitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture,” and [v]alid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors.” Thus, we have not identified specific “adaptive behaviors” in which a deficiency must be shown.

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Introduction to Felony-Murder Series

The Supreme Court recently reiterated that the analysis to be used in determining whether a defendant is liable for a death under the felony-murder rule depends in part on whether the defendant personally caused the death. (*People v. Cavitt* (2004) 33 Cal.4th 187, 193; see also *People v. Billa* (2003) 31 Cal.4th 1064, 1072; see also *People v. Dominguez* (Dec. 16, 2004, H022727) __ Cal.App.4th __, __ [applying *Cavitt*].) Based on the reasoning of *Cavitt*, the committee has provided three separate instructions for both first and second degree felony murder. These instructions present the following options:

A. Defendant Allegedly Committed Fatal Act
B. Coparticipant Allegedly Committed Fatal Act
C. Other Acts Allegedly Caused Death

For a simple case in which the defendant allegedly personally caused the death by committing a direct act of force or violence against the victim, the court may use an option A instruction. This option contains the least amount of bracketed material and requires the least amount of modification by the court.

In a case where the prosecution alleges that the defendant is a "nonkiller cofelon" liable under the felony-murder rule for a death caused by another participant in the felony, then the court must use an option B instruction. This option allows the court (1) to instruct that the defendant may have committed the underlying felony or may have aided and abetted or conspired to commit an underlying felony that actually was committed by a coparticipant; and (2) to instruct on the additional logical nexus required to show that a nonkiller is liable for a death caused by a cofelon. (*People v. Cavitt, supra,* 33 Cal.4th at p. 193.)

If the evidence indicates that either the defendant or a coparticipant may have committed the fatal act, the court should give both option A and option B instructions.

In addition, the committee has provided option C instructions to account for the unusual factual situations where a victim dies during the course of a felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants. (See *People v. Billa, supra,* 31 Cal.4th at p. 1072.) Each option C instruction states that "[t]he commission [or attempted commission of] the _____ <*insert felony or felonies*> caused the death of another person." These instructions also include paragraphs on causation as well as elements requiring a temporal and logical nexus between the felony and the death. Option C is the most complicated of the three options provided. Thus, although option C is broad enough to cover most

felony-murder scenarios, the committee recommends using an option A or B instruction whenever appropriate to avoid providing the jury with unnecessarily complicated instructions.

730A. Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act

The defendant is charged [in Count __] with murder, under a theory of felony murder.

To prove that the defendant is guilty of first degree murder under this theory, the People must prove that:

1. **The defendant committed [or attempted to commit] _____** *<insert felony or felonies from Pen. Code, § 189>***;**

2. **The defendant intended to commit _____** *<insert felony or felonies from Pen. Code, § 189>***;**

3. **The defendant did an act that caused the death of another person;**

AND

4. **The act causing the death and the _____** *<insert felony or felonies from Pen. Code, § 189>* **[or attempted _____** *<insert felony or felonies from Pen. Code, § 189>***] were part of one continuous transaction.**

A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether the defendant committed [or attempted to commit] _____ *<insert felony or felonies from Pen. Code, § 189>***, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. You must apply (that/those) instruction[s] when you decide whether the People have proved first degree murder under a theory of felony murder.** *<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ALL UNDERLYING FELONIES ARE GIVEN.>*

[The defendant must have intended to commit the (felony/ [or] felonies) of _____ *<insert felony or felonies from Pen. Code, § 189>* **before or at the time of the act causing the death.]**

[It is not required that the person die immediately, as long as the act causing the death and the (felony/ [or] felonies) are part of one continuous transaction.]

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[It is not required that the person killed be the (victim/intended victim) of the (felony/ [or] felonies).]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of any underlying felonies. (*People v. Cain* (1995) 10 Cal.4th 1, 36.) Give all appropriate instructions on all underlying felonies with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense.

If causation is an issue, the court has a **sua sponte** duty to give Instruction 165, Causation.

The felonies that support a charge of first degree felony murder are arson, rape, carjacking, robbery, burglary, kidnapping, mayhem, train wrecking, sodomy, lewd or lascivious acts on a child, oral copulation, and sexual penetration. (See Pen. Code, § 189.)

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

Give the bracketed sentence that begins with "It is not required that the person die immediately" on request if relevant based on the evidence.

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [innocent bystander]; *People v. Salas* (1972) 7 Cal.3d 812, 823 [police officer].) Give the bracketed sentence that begins with "It is not required that the person killed be" on request.

The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt*

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(2004) 33 Cal.4th 187, 204.) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give Instruction 738, Felony Murder: One Continuous Transaction—Defined.

If the prosecutor is proceeding under both malice and felony-murder theories, also give Instruction 737, Murder: Alternative Theories. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [error to instruct on malice when felony murder only theory].)

Related Instructions—Other Causes of Death
This instruction should be used only when the prosecution alleges that the defendant committed the act causing the death.

If the prosecution alleges that another coparticipant in the felony committed the fatal act, give Instruction 730B, Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act. If the evidence indicates that either the defendant or a coparticipant may have committed the fatal act, give both instructions. (*People v. Dominguez* (Dec. 16, 2004, H022727) __ Cal.App.4th __, __.)

When the alleged victim dies during the course of the felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants, give Instruction 730C, Felony Murder: First Degree—Other Acts Allegedly Caused Death. (*People v. Billa* (2003) 31 Cal.4th 1064, 1072; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [a simultaneous or coincidental death is not a killing].)

If the evidence indicates that someone other than the defendant or a coparticipant committed the fatal act, then the crime is not felony murder. (*People v. Washington* (1965) 62 Cal.2d 777, 782–783; *People v. Caldwell* (1984) 36 Cal.3d 210, 216; see also *People v. Gardner* (1995) 37 Cal.App.4th 473, 477.) Liability may be imposed, however, under the provocative act doctrine. (*Pizano v. Superior Court of Tulare County* (1978) 21 Cal.3d 128, 134; see Instruction 740, Homicide: Provocative Act by Defendant.)

AUTHORITY

Felony Murder: First Degree ▸ Pen. Code, § 189; *People v. Cavitt* (2004) 33 Cal.4th 187, 197.

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Specific Intent to Commit Felony Required ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 197.
Continuous Transaction Requirement ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209; *People v. Hernandez* (1988) 47 Cal.3d 315, 348.
Infliction of Fatal Injury ▸ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 134–147.

LESSER INCLUDED OFFENSES

Second Degree Murder ▸ Pen. Code, § 187.
Voluntary Manslaughter ▸ Pen. Code, § 192(a).
Involuntary Manslaughter ▸ Pen. Code, § 192(b).
Attempted Murder ▸ Pen. Code, §§ 663, 189.

RELATED ISSUES

Does Not Apply Where Felony Committed Only to Facilitate Murder
If a felony, such as robbery, is committed merely to facilitate an intentional murder, then the felony-murder rule does not apply. (*People v. Green* (1980) 27 Cal.3d 1, 61 [robbery committed to facilitate murder did not satisfy felony-murder special circumstance].) If the defense requests a special instruction on this point, see Instruction 731SC, Special Circumstances: Murder in Commission of Felony, Pen. Code, § 190.2(a)(17).

No Duty to Instruct on Lesser Included Offenses of Uncharged Predicate Felony
"Although a trial court on its own initiative must instruct the jury on lesser included offenses of *charged* offenses, this duty does not extend to *uncharged* offenses relevant only as predicate offenses under the felony-murder doctrine." (*People v. Silva* (2001) 25 Cal.4th 345, 371 [original italics]; see *People v. Cash* (2002) 28 Cal.4th 703, 736–737 [no duty to instruct on theft as lesser included offense of uncharged predicate offense of robbery].)

Auto Burglary
Auto burglary may form the basis for a first degree felony-murder conviction. (*People v. Fuller* (1978) 86 Cal.App.3d 618, 622–623, 628 [noting the problems of applying the felony-murder rule to a nondangerous daytime auto burglary].)

Drive-By Shooting
The drive-by shooting clause in Penal Code section 189 is not an enumerated felony for purposes of the felony-murder rule. (*People v. Chavez* (2004) 118

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Cal.App.4th 379, 386–387.) A finding of a specific intent to kill is required in order to find first degree murder under this clause. *(Ibid.)*

Duress
"[D]uress can, in effect, provide a defense to murder on a felony-murder theory by negating the underlying felony." (*People v. Anderson* (2002) 28 Cal.4th 767, 784 [dictum]; see also Instruction 610, Duress or Threats.)

Imperfect Self-Defense
Imperfect self-defense is not a defense to felony murder because malice aforethought, which imperfect self-defense negates, is not an element of felony murder. (*People v. Tabios* (1998) 67 Cal.App.4th 1, 6–9.)

Merger: Ireland *Rule*
In *People v. Ireland* the court held that assault could not form the basis of a charge for second degree felony murder because the assaultive conduct "merges" with the homicide. (*People v. Ireland* (1969) 70 Cal.2d 522, 539–540 [merger based on assault with a deadly weapon].) Although merger is typically an issue in second degree felony murder, in *People v. Garrison* (1989) 47 Cal.3d 746, 778, the court held that first degree felony murder cannot be based on a burglary where the intent on entry is to commit an assault. (See also *People v. Baker* (1999) 74 Cal.App.4th 243, 251 [conspiracy to commit assault may not be basis for first degree felony murder]; for further discussion, see the Related Issues section of Instruction 731A, Felony Murder: Second Degree—Defendant Allegedly Committed Fatal Act.)

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730B. Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act

<Give the following introductory sentence when not giving Instruction 730A.>
[The defendant is charged [in Count __] with murder, under a theory of felony murder.]

The defendant may [also] be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the *perpetrator*.

To prove that the defendant is guilty of first degree murder under this theory, the People must prove that:

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit) _____** *<insert felony or felonies from Pen. Code, § 189>***;**

2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit) _____** *<insert felony or felonies from Pen. Code, § 189>***;**

3. **The perpetrator committed [or attempted to commit] _____** *<insert felony or felonies from Pen. Code, § 189>***;**

4. **The perpetrator did an act that caused the death of another person;**

[AND]

5. **The act causing the death and the _____** *<insert felony or felonies from Pen. Code, § 189>* **[or attempted _____** *<insert felony or felonies from Pen. Code, § 189>***] were part of one continuous transaction(;/.)**

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

6. **There was a logical connection between the act causing the death and the _____** *<insert felony or felonies from Pen. Code, § 189>*

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[or attempted _____ *<insert felony or felonies from Pen. Code, § 189>***]. The connection between the fatal act and the _____** *<insert felony or felonies from Pen. Code, § 189>* **[or attempted _____** *<insert felony or felonies from Pen. Code, § 189>***] must involve more than just their occurrence at the same time and place.]**

A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether the (the defendant/ [and] the perpetrator) committed [or attempted to commit] _____ *<insert felony or felonies from Pen. Code, § 189>***, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. [To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I (will give/have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit a crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply (that/those) instruction[s] when you decide whether the People have proved first degree murder under a theory of felony murder.**
<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ALL UNDERLYING FELONIES, AIDING AND ABETTING, AND CONSPIRACY ARE GIVEN.>

[The defendant must have (intended to commit[,]/ [or] aid and abet[,]/ [or] been a member of a conspiracy to commit) the (felony/ [or] felonies) of _____ *<insert felony or felonies from Pen. Code, § 189>* **before or at the time of the act causing the death.]**

[It is not required that the person die immediately, as long as the act causing the death and the (felony/ [or] felonies) are part of one continuous transaction.]

[It is not required that the person killed be the (victim/intended victim) of the (felony/ [or] felonies).]

[It is not required that the defendant be present when the act causing the death occurs.]

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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 also has a **sua sponte** duty to instruct on the elements of any underlying felonies. (*People v. Cain* (1995) 10 Cal.4th 1, 36.)

If causation is an issue, the court has a **sua sponte** duty to give Instruction 165, Causation.

If the prosecution's theory is that the defendant, as well as the perpetrator, committed or attempted to commit the underlying felony or felonies, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select both "the defendant and the perpetrator." Give all appropriate instructions on any underlying felonies with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the defendant and the perpetrator each committed [the crime] if . . . ."

If the prosecution's theory is that the defendant aided and abetted or conspired to commit the felony, select one or both of these options in element 1 and the corresponding intent requirements in element 2. In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on any underlying felonies and on aiding and abetting and/or conspiracy with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the perpetrator committed," rather than "the defendant," in the instructions on the underlying felony.

Bracketed element 6 is based on *People v. Cavitt* (2004) 33 Cal.4th 187, 193. In *Cavitt*, the Supreme Court clarified the liability of a nonkiller under the felony-murder rule when a cofelon commits a killing. The court held that "the felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act causing the death. The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction." (*Ibid.* [italics in original].) The majority concluded that the court has no sua sponte

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duty to instruct on the necessary causal connection. (*Id.* at pp. 203–204.) In concurring opinions, Justice Werdegar, joined by Justice Kennard, and Justice Chin expressed the view that the jury should be instructed on the necessary causal relationship. (*Id.* at pp. 212–213; see also *People v. Dominguez* (Dec. 16, 2004, H022727) __ Cal.App.4th __, __.) Give bracketed element 6 if the evidence raises an issue over the causal connection between the felony and the killing. In addition, the court may give this bracketed element at its discretion in any case in which this instruction is given. If the prosecution alleges that the defendant did not commit the felony but aided and abetted or conspired to commit the felony, the committee recommends giving bracketed element 6. (See discussion of conspiracy liability in the Related Issues section below.)

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, or did not join the conspiracy or aid and abet the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127; *People v. Silva* (2001) 25 Cal.4th 345, 371.) Give the bracketed sentence that begins with "The defendant must have (intended to commit." For an instruction specially tailored to robbery-murder cases, see *People v. Turner* (1990) 50 Cal.3d 668, 691.

Give the bracketed sentence that begins with "It is not required that the person die immediately" on request if relevant based on the evidence.

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [innocent bystander]; *People v. Salas* (1972) 7 Cal.3d 812, 823 [police officer].) Give the bracketed sentence that begins with "It is not required that the person killed be" on request.

Give the last bracketed sentence, stating that the defendant need not be present, on request.

The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204.) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give Instruction 738, Felony Murder: One Continuous Transaction—Defined.

If the prosecutor is proceeding under both malice and felony-murder theories, give Instruction 737, Murder: Alternative Theories. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People*

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v. Cain (1995) 10 Cal.4th 1, 35–37 [error to instruct on malice when felony murder only theory].)

Related Instructions—Other Causes of Death
This instruction should be used only when the prosecution alleges that a coparticipant in the felony committed the act causing the death.

If the prosecution alleges that the defendant committed the fatal act, give Instruction 730A, Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act. If the evidence indicates that either the defendant or a coparticipant may have committed the fatal act, give both instructions. (*People v. Dominguez* (Dec. 16, 2004, H022727) __ Cal.App.4th __, __.)

When the alleged victim dies during the course of the felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants, give Instruction 730C, Felony Murder: First Degree—Other Acts Allegedly Caused Death. (*People v. Billa* (2003) 31 Cal.4th 1064, 1072; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [a simultaneous or coincidental death is not a killing].)

If the evidence indicates that someone other than the defendant or a coparticipant committed the fatal act, then the crime is not felony murder. (*People v. Washington* (1965) 62 Cal.2d 777, 782–783; *People v. Caldwell* (1984) 36 Cal.3d 210, 216; see also *People v. Gardner* (1995) 37 Cal.App.4th 473, 477.) Liability may be imposed, however, under the provocative act doctrine. (*Pizano v. Superior Court of Tulare County* (1978) 21 Cal.3d 128, 134; see Instruction 740, Homicide: Provocative Act by Defendant.)

Related Instructions
Instruction 500 et seq., Aiding and Abetting.
Instruction 550 et seq., Conspiracy.

AUTHORITY

Felony Murder: First Degree ▸ Pen. Code, § 189; *People v. Cavitt* (2004) 33 Cal.4th 187, 197.
Specific Intent to Commit Felony Required ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 197.
Continuous Transaction Requirement ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209; *People v. Hernandez* (1988) 47 Cal.3d 315, 348.

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Logical Connection Required for Liability of Nonkiller ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209.
Duty to Instruct on Cofelon Liability ▸ *People v. Dominguez* (Dec. 16, 2004, H022727) __ Cal.App.4th __, __.
Infliction of Fatal Injury ▸ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223.
Defendant Must Join Felonious Enterprise Before or During Killing of Victim ▸ *People v. Pulido* (1997) 15 Cal.4th 713, 726.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, §§ 80, 87; Crimes Against the Person, §§ 134–147, 156.

LESSER INCLUDED OFFENSES

Second Degree Murder ▸ Pen. Code, § 187.
Voluntary Manslaughter ▸ Pen. Code, § 192(a).
Involuntary Manslaughter ▸ Pen. Code, § 192(b).
Attempted Murder ▸ Pen. Code, §§ 663, 189.

RELATED ISSUES

Conspiracy Liability—Natural and Probable Consequences
In the context of nonhomicide crimes, a coconspirator is liable for any crime committed by a member of the conspiracy that was a natural and probable consequence of the conspiracy. (*People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 842–843.) This is analogous to the rule in aiding and abetting that the defendant may be held liable for any unintended crime that was the natural and probable consequence of the intended crime. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.) In the context of felony murder, the Supreme Court has explicitly held that the natural and probable consequences doctrine does not apply to a defendant charged with felony murder based on aiding and abetting the underlying felony. (*People v. Anderson* (1991) 233 Cal.App.3d 1646, 1658.) The court has not explicitly addressed whether the natural and probable consequences doctrine continues to limit liability for felony murder where the defendant's liability is based solely on being a member of a conspiracy.

In *People v. Pulido* (1997) 15 Cal.4th 713, 724, the court stated in dicta, "[f]or purposes of complicity in a cofelon's homicidal act, the conspirator and the abettor stand in the same position. [Citation; quotation marks omitted.] In stating the rule of felony-murder complicity we have not distinguished accomplices whose responsibility for the underlying felony was pursuant to prior agreement (conspirators) from those who intentionally assisted without such agreement (aiders and abettors). [Citations]." In the court's two most recent opinions on felony-murder complicity, the court refers to the liability of "cofelons" or

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"accomplices" without reference to whether liability is based on directly committing the offense, aiding and abetting the offense, or conspiring to commit the offense. (*People v. Cavitt* (2004) 33 Cal.4th 187, 197–205; *People v. Billa* (2003) 31 Cal.4th 1064, 1072.) On the other hand, in both of these cases, the defendants were present at the scene of the felony and directly committed the felonious acts. (*People v. Cavitt, supra,* 33 Cal.4th at p. 194; *People v. Billa, supra,* 31 Cal.4th at p. 1067.) Thus, the court has not had occasion recently to address a situation in which the defendant was convicted of felony murder based solely on a theory of coconspirator liability.

The requirement for a logical nexus between the felony and the act causing the death, articulated in *People v. Cavitt, supra,* 33 Cal.4th at p. 193, may be sufficient to hold a conspiring defendant liable for the resulting death under the felony-murder rule. However, *Cavitt* did not clearly answer this question. Nor has any case explicitly held that the natural and probable consequences doctrine does not apply in the context of felony murder based on conspiracy.

Thus, if the trial court is faced with a factual situation in which the defendant's liability is premised solely on being a member of a conspiracy in which another coparticipant killed an individual, the committee recommends that the court do the following: (1) give bracketed element 6 requiring a logical nexus between the felony and the act causing death; (2) request briefing and review the current law on conspiracy liability and felony murder; and (3) at the court's discretion, add as element 7, "The act causing the death was a natural and probable consequence of the plan to commit _____ *<insert felony or felonies from Pen. Code, § 189>*."

See the Related Issues section of Instruction 730A, Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act.

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730C. Felony Murder: First Degree—Other Acts Allegedly Caused Death

The defendant is charged [in Count __] with murder, under a theory of felony murder.

[The defendant may [also] be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the *perpetrator*.]

To prove that the defendant is guilty of first degree murder under this theory, the People must prove that:

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit) _____** *<insert felony or felonies from Pen. Code, § 189>***;**

2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit) _____** *<insert felony or felonies from Pen. Code, § 189>***;**

<Give element 3 if defendant did not personally commit or attempt felony.>
[3. The perpetrator committed [or attempted to commit] _____ *<insert felony or felonies from Pen. Code, § 189>***;]**

(3/4). The commission [or attempted commission of] the _____ *<insert felony or felonies from Pen. Code, § 189>* **caused the death of another person;**

(4/5). The act causing the death and the _____ *<insert felony or felonies from Pen. Code, § 189>* **[or attempted _____** *<insert felony or felonies from Pen. Code, § 189>***] were part of one continuous transaction;**

AND

(5/6). There was a logical connection between the act causing the death and the _____ *<insert felony or felonies from Pen. Code, § 189>***. The connection between the fatal act and the _____** *<insert felony or felonies from Pen. Code, § 189>* **must involve more than just their occurrence at the same time and place.**

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A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether the (the defendant/ [and] the perpetrator) committed [or attempted to commit] _____ *<insert felony or felonies from Pen. Code, § 189>***, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. [To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I (will give/have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit a crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply (that/those) instruction[s] when you decide whether the People have proved first degree murder under a theory of felony murder.**
<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ALL UNDERLYING FELONIES, AIDING AND ABETTING, AND CONSPIRACY ARE GIVEN.>

[The defendant must have (intended to commit[,]/ [or] aid and abet[,]/ [or] been a member of a conspiracy to commit) the (felony/ [or] felonies) of _____ *<insert felony or felonies from Pen. Code, § 189>* **before or at the time of the act causing the death.]**

[It is not required that the person die immediately, as long as the act causing the death and the (felony/ [or] felonies) are part of one continuous transaction.]

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

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

[It is not required that the person killed be the (victim/intended victim) of the (felony/ [or] felonies).]

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[It is not required that the defendant be present when the act causing the death occurs.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of any underlying felonies. (*People v. Cain* (1995) 10 Cal.4th 1, 36.)

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.) Because causation is likely to be an issue in any case where this instruction is given, the committee has included the paragraph that begins with "An act causes death if." 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 of death." (*People v. Sanchez* (2001) 26 Cal.4th 834, 845–849; *People v. Autry* (1995) 37 Cal.App.4th 351, 363.)

If the prosecution's theory is that the defendant committed or attempted to commit the underlying felony, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select "the defendant" in the first sentence. Give all appropriate instructions on any underlying felonies with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense.

If the prosecution's theory is that the defendant aided and abetted or conspired to commit the felony, select one of these options in element 1 and the corresponding intent requirement in element 2. Give bracketed element 3. Give the bracketed sentence at the beginning of the instruction that begins with "The defendant may [also] be guilty of murder." In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on any underlying felonies and on aiding and abetting and/or conspiracy with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the perpetrator committed," rather than "the defendant," in the instructions on the underlying felony.

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If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, or did not join the conspiracy or aid and abet the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127; *People v. Silva* (2001) 25 Cal.4th 345, 371.) Give the bracketed sentence that begins with "The defendant must have (intended to commit." For an instruction specially tailored to robbery-murder cases, see *People v. Turner* (1990) 50 Cal.3d 668, 691.

Give the bracketed sentence that begins with "It is not required that the person die immediately" on request if relevant based on the evidence.

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [innocent bystander]; *People v. Salas* (1972) 7 Cal.3d 812, 823 [police officer].) Give the bracketed sentence that begins with "It is not required that the person killed be" on request.

Give the last bracketed sentence, stating that the defendant need not be present, on request.

The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204.) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give Instruction 738, Felony Murder: One Continuous Transaction—Defined.

If the prosecutor is proceeding under both malice and felony-murder theories, give Instruction 737, Murder: Alternative Theories. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [error to instruct on malice when felony murder only theory].)

Related Instructions—Other Causes of Death
This instruction should be used only when the alleged victim dies during the course of the felony as a result of a heart attack, fire, or a similar cause rather than as a result of some act of force or violence committed against the victim by one of the participants in the felony. (*People v. Billa* (2003) 31 Cal.4th 1064, 1072 [arson causing death of accomplice]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [heart attack caused by robbery]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [same]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [a simultaneous or coincidental death is not a killing].)

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See the Bench Notes to Instruction 730A, Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act for a discussion of other instructions to use if the evidence indicates a person committed an act of force or violence causing the death.

AUTHORITY

Felony Murder: First Degree ▸ Pen. Code, § 189; *People v. Cavitt* (2004) 33 Cal.4th 187, 197.
Specific Intent to Commit Felony Required ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 197.
Continuous Transaction Requirement ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209; *People v. Hernandez* (1988) 47 Cal.3d 315, 348.
Logical Connection Required for Liability of Nonkiller ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209.
Infliction of Fatal Injury ▸ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223.
Defendant Must Join Felonious Enterprise Before or During Killing of Victim ▸ *People v. Pulido* (1997) 15 Cal.4th 713, 726.
Death Caused by Felony but Not by Act of Force or Violence Against Victim ▸ *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [arson causing death of accomplice]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [heart attack caused by robbery]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [same]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [a simultaneous or coincidental death is not a killing].

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 134–147.

LESSER INCLUDED OFFENSES

Second Degree Murder ▸ Pen. Code, § 187.
Voluntary Manslaughter ▸ Pen. Code, § 192(a).
Involuntary Manslaughter ▸ Pen. Code, § 192(b).
Attempted Murder ▸ Pen. Code, §§ 663, 189.

RELATED ISSUES

Accidental Death of Accomplice During Commission of Arson
In *People v. Ferlin* (1928) 203 Cal. 587, 596–597, the Supreme Court held that an aider and abettor is not liable for the accidental death of an accomplice to arson when (1) the defendant was neither present nor actively participating in the arson

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when it was committed; (2) the accomplice acted alone in actually perpetrating the arson; and (3) the accomplice killed only himself or herself and not another person. More recently, the court stated,

> We conclude that felony-murder liability for any death in the course of arson attaches to all accomplices in the felony at least where, as here, one or more surviving accomplices were present at the scene and active participants in the crime. We need not decide here whether *Ferlin* was correct on its facts.

(*People v. Billa* (2003) 31 Cal.4th 1064, 1072.)

See the Related Issues section to Instruction 730A, Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act and Instruction 730B, Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act.

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731A. Felony Murder: Second Degree—Defendant Allegedly Committed Fatal Act

The defendant is charged [in Count __] with murder, under a theory of felony murder.

To prove that the defendant is guilty of second degree murder under this theory, the People must prove that:

1. **The defendant committed [or attempted to commit] _____** *<insert inherently dangerous felony or felonies>***;**

2. **The defendant intended to commit _____** *<insert inherently dangerous felony or felonies>***;**

3. **The defendant did an act that caused the death of another person;**

AND

4. **The act causing the death and the _____** *<insert inherently dangerous felony or felonies>* **[or attempted _____** *<insert inherently dangerous felony or felonies>***] were part of one continuous transaction.**

A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether the defendant committed [or attempted to commit] _____ *<insert inherently dangerous felony or felonies>***, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. You must apply (that/those) instruction[s] when you decide whether the People have proved second degree murder under a theory of felony murder.** *<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ALL UNDERLYING FELONIES ARE GIVEN.>*

[The defendant must have intended to commit the (felony/ [or] felonies) of _____ *<insert inherently dangerous felony or felonies>* **before or at the time of the act causing the death.]**

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[It is not required that the person die immediately, as long as the act causing the death and the (felony/ [or] felonies) are part of one continuous transaction.]

[It is not required that the person killed be the (victim/intended victim) of the (felony/ [or] felonies).]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of any underlying felonies. (*People v. Cain* (1995) 10 Cal.4th 1, 36.) Give all appropriate instructions on all underlying felonies with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense.

If causation is an issue, the court has a **sua sponte** duty to give Instruction 165, Causation.

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127; *People v. Silva* (2001) 25 Cal.4th 345, 371.) Give the bracketed sentence that begins with "The defendant must have intended to commit the felony."

Give the bracketed sentence that begins with "It is not required that the person die immediately" on request if relevant based on the evidence.

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [innocent bystander]; *People v. Salas* (1972) 7 Cal.3d 812, 823 [police officer].) Give the bracketed sentence that begins with "It is not required that the person killed be" on request.

The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204.) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give Instruction 738, Felony Murder: One Continuous Transaction—Defined.

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If the prosecutor is proceeding under both malice and felony-murder theories, give Instruction 737, Murder: Alternative Theories. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [error to instruct on malice when felony murder only theory].)

Related Instructions—Other Causes of Death
This instruction should be used only when the prosecution alleges that the defendant committed the act causing the death.

If the prosecution alleges that another coparticipant in the felony committed the fatal act, give Instruction 731B, Felony Murder: Second Degree—Coparticipant Allegedly Committed Fatal Act. If the evidence indicates that either the defendant or a coparticipant may have committed the fatal act, give both instructions. (*People v. Dominguez* (Dec. 16, 2004, H022727) __ Cal.App.4th __, __.)

When the alleged victim dies during the course of the felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants, give Instruction 731C, Felony Murder: Second Degree—Other Acts Allegedly Caused Death. (*People v. Billa* (2003) 31 Cal.4th 1064, 1072; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [a simultaneous or coincidental death is not a killing].)

If the evidence indicates that someone other than the defendant or a coparticipant committed the fatal act, then the crime is not felony murder. (*People v. Washington* (1965) 62 Cal.2d 777, 782–783; *People v. Caldwell* (1984) 36 Cal.3d 210, 216; see also *People v. Gardner* (1995) 37 Cal.App.4th 473, 477.) Liability may be imposed, however, under the provocative act doctrine. (*Pizano v. Superior Court of Tulare County* (1978) 21 Cal.3d 128, 134; see Instruction 740, Homicide: Provocative Act by Defendant.)

AUTHORITY

Inherently Dangerous Felonies ▸ *People v. Satchell* (1971) 6 Cal.3d 28, 33–41 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484]; *People v. Henderson* (1977) 19 Cal.3d 86, 93 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484]; *People v. Patterson* (1989) 49 Cal.3d 615, 622–625.

Specific Intent to Commit Felony Required ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 197.

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Continuous Transaction Requirement ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209; *People v. Hernandez* (1988) 47 Cal.3d 315, 348.
Infliction of Fatal Injury ▸ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 134–147.

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Merger: Ireland *Rule*
Assault or assault with a deadly weapon cannot form the basis for a charge of second degree felony murder because the assaultive conduct "merges" with the homicide. (*People v. Ireland* (1969) 70 Cal.2d 522, 539–540 [merger based on assault with a deadly weapon]; see also *People v. Garrison* (1989) 47 Cal.3d 746, 778 [first degree felony murder cannot be based on burglary where intent on entry is to commit assault].) The Supreme Court has emphasized that the purpose of the merger doctrine is to ensure that the judicially developed second degree felony-murder rule does not "subvert legislative intent" by elevating most felony assaults to murder without any inquiry into malice aforethought. (*People v. Ireland, supra*, 70 Cal.2d at pp. 539–540; see *People v. Robertson* (2004) 34 Cal.4th 156, 170.) In *People v. Robertson, supra*, 34 Cal.4th at p. 171, the Supreme Court discussed what standard the trial court should use to determine if the merger doctrine applies,

> In [*People v. Mattison* (1971) 4 Cal.3d 177, 185,] we concluded that use of the second degree felony-murder rule was appropriate when the purpose of the predicate felony was independent of or collateral to an intent to cause injury that would result in death. Although the collateral purpose rationale may have its drawbacks in some situations [*People v. Hansen* (1994) 9 Cal.4th 300, 315], we believe it provides the most appropriate framework to determine whether, under the facts of the present case, the trial court properly instructed the jury.

Previously, in *People v. Hansen, supra*, 9 Cal.4th at p. 315, the court stated,

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> We decline . . . to adopt as the critical test determinative of merger in all cases the following language that appears in *Taylor* . . . "that the rationale for the merger doctrine does not encompass a felony committed with a collateral and independent felonious design." . . . Rather than rely upon a somewhat artificial test that may lead to an anomalous result, we focus upon the principles and rationale underlying the foregoing language in *Taylor*, namely, that with respect to certain inherently dangerous felonies, their use as the predicate felony supporting application of the felony-murder rule will not elevate all felonious assaults to murder or otherwise subvert the legislative intent.

When determining whether the merger doctrine applies, the court should consider both of these standards.

Second Degree Felony Murder: Inherently Dangerous Felonies
The second degree felony-murder doctrine is triggered when a homicide occurs during the commission of a felony that is inherently dangerous to human life. (*People v. Satchell* (1971) 6 Cal.3d 28, 33–41 and *People v. Henderson* (1977) 19 Cal.3d 86, 93 [both overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484].) In *People v. Burroughs* (1984) 35 Cal.3d 824, 833, the court described an inherently dangerous felony as one that cannot be committed without creating a substantial risk that someone will be killed. However, in *People v. Patterson* (1989) 49 Cal.3d 615, 618, 626–627, the court defined an inherently dangerous felony as "an offense carrying a high probability that death will result." (See *People v. Coleman* (1992) 5 Cal.App.4th 646, 649–650 [court explicitly adopts *Patterson* definition of inherently dangerous felony].)

Whether a felony is inherently dangerous is a legal question for the court to determine. (See *People v. Schaefer* (2004) 118 Cal.App.4th 893, 900–902 [rule not changed by *Apprendi*].) In making this determination, the court should assess "the elements of the felony in the abstract, not the particular facts of the case," and consider the statutory definition of the felony in its entirety. (*People v. Satchell, supra,* 6 Cal.3d at p. 36; *People v. Henderson, supra,* 19 Cal.3d at pp. 93–94.) If the statute at issue prohibits a diverse range of conduct, the court must analyze whether the entire statute or only the part relating to the specific conduct at issue is applicable. (See *People v. Patterson, supra,* 49 Cal.3d at pp. 622–625 [analyzing Health & Saf. Code, § 11352, which prohibits range of drug-related behavior, and holding that only conduct at issue should be considered when determining dangerousness].)

The following felonies have been found inherently dangerous for purposes of second degree felony murder:

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Attempted Escape From Prison by Force or Violence ▸ Pen. Code, § 4530; *People v. Lynn* (1971) 16 Cal.App.3d 259, 272; *People v. Snyder* (1989) 208 Cal.App.3d 1141, 1143–1146.

Furnishing Poisonous Substance ▸ Pen. Code, § 347; *People v. Mattison* (1971) 4 Cal.3d 177, 182–184.

Kidnapping for Ransom, Extortion, or Reward ▸ Pen. Code, § 209(a); *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1227–1228.

Manufacturing Methamphetamine ▸ Health & Saf. Code, § 11379.6(a); *People v. James* (1998) 62 Cal.App.4th 244, 270–271.

Reckless Possession of Bomb ▸ Pen. Code, § 12303.2; *People v. Morse* (1992) 2 Cal.App.4th 620, 646, 655.

Shooting Firearm in Grossly Negligent Manner ▸ Pen. Code, § 246.3; *People v. Clem* (2000) 78 Cal.App.4th 346, 351; *People v. Robertson* (2004) 34 Cal.4th 156, 173 [merger doctrine does not apply].

Shooting at Inhabited Dwelling ▸ Pen. Code, § 246; *People v. Tabios* (1998) 67 Cal.App.4th 1, 9–10.

Shooting at Occupied Vehicle ▸ Pen. Code, § 246; *People v. Tabios* (1998) 67 Cal.App.4th 1, 10–11.

Shooting From Vehicle at Inhabited Dwelling ▸ *People v. Hansen* (1994) 9 Cal.4th 300, 311.

The following felonies have been found to be *not* inherently dangerous for purposes of second degree felony murder:

Conspiracy to Possess Methedrine ▸ *People v. Williams* (1965) 63 Cal.2d 452, 458.

Extortion ▸ Pen. Code, §§ 518, 519; *People v. Smith* (1998) 62 Cal.App.4th 1233, 1237–1238.

False Imprisonment ▸ Pen. Code, § 236; *People v. Henderson* (1977) 19 Cal.3d 86, 92–96 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484].

Felon in Possession of Firearm ▸ Pen. Code, § 12021; *People v. Satchell* (1971) 6 Cal.3d 28, 39–41 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484].

Felonious Practice of Medicine Without License ▸ *People v. Burroughs* (1984) 35 Cal.3d 824, 830–833.

Felony Child Abuse ▸ Pen. Code, § 273a; *People v. Lee* (1991) 234 Cal.App.3d 1214, 1228.

Felony Escape From Prison Without Force or Violence ▸ Pen. Code, § 4530(b); *People v. Lopez* (1971) 6 Cal.3d 45, 51–52.

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Felony Evasion of Peace Officer Causing Injury or Death ▸ Veh. Code, § 2800.3; *People v. Sanchez* (2001) 86 Cal.App.4th 970, 979–980.

Furnishing PCP ▸ Health & Saf. Code, § 11379.5; *People v. Taylor* (1992) 6 Cal.App.4th 1084, 1100–1101.

Grand Theft Under False Pretenses ▸ *People v. Phillips* (1966) 64 Cal.2d 574 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484].

Grand Theft From the Person ▸ Pen. Code, § 487.2; *People v. Morales* (1975) 49 Cal.App.3d 134, 142–143.

It is undecided whether evading a peace officer with reckless driving in violation of Vehicle Code section 2800.2 is an inherently dangerous felony supporting a felony-murder conviction. Two cases previously held that a violation of Vehicle Code section 2800.2 was an inherently dangerous felony. (*People v. Johnson* (1993) 15 Cal.App.4th 169, 174; *People v. Sewell* (2000) 80 Cal.App.4th 690, 697.) However, the issue is currently pending before the Supreme Court. (*People v. Howard* (2002) 99 Cal.App.4th 43, REVIEW GRANTED AND OPN. ORDERED DEPUBLISHED Sept. 11, 2002, S108353; see also *People v. Williams* (2004) 116 Cal.App.4th 1114, 1118, REVIEW GRANTED AND OPN. ORDERED DEPUBLISHED, June 11, 2004, S123910 [holding that Veh. Code, § 2800.2 does not support felony-murder conviction].)

See the Related Issues section of Instruction 730A, Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act.

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731B. Felony Murder: Second Degree—Coparticipant Allegedly Committed Fatal Act

<Give the following introductory sentence when not giving Instruction 731A.>
[The defendant is charged [in Count __] with murder, under a theory of felony murder.]

The defendant may [also] be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the *perpetrator*.

To prove that the defendant is guilty of second degree murder under this theory, the People must prove that:

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit) _____** *<insert inherently dangerous felony or felonies>***;**

2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit) _____** *<insert inherently dangerous felony or felonies>***;**

3. **The perpetrator committed [or attempted to commit] _____** *<insert inherently dangerous felony or felonies>***;**

4. **The perpetrator did an act that caused the death of another person;**

[AND]

5. **The act causing the death and the _____** *<insert inherently dangerous felony or felonies>* **[or attempted _____** *<insert inherently dangerous felony or felonies>***] were part of one continuous transaction(;/.)**

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

6. **There was a logical connection between the act causing the death and the _____** *<insert inherently dangerous felony or felonies>***.**

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The connection between the fatal act and the _____ *<insert inherently dangerous felony or felonies>* **must involve more than just their occurrence at the same time and place.]**

A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether the (the defendant/ [and] the perpetrator) committed [or attempted to commit] _____ *<insert inherently dangerous felony or felonies>***, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. [To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I (will give/have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit a crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply (that/those) instruction[s] when you decide whether the People have proved second degree murder under a theory of felony murder.**
<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ALL UNDERLYING FELONIES, AIDING AND ABETTING, AND CONSPIRACY ARE GIVEN.>

[The defendant must have (intended to commit[,]/ [or] aid and abet[,]/ [or] been a member of a conspiracy to commit) the (felony/ [or] felonies) of _____ *<insert inherently dangerous felony or felonies>* **before or at the time of the act causing the death.]**

[It is not required that the person die immediately, as long as the act causing the death and the (felony/ [or] felonies) are part of one continuous transaction.]

[It is not required that the person killed be the (victim/intended victim) of the underlying (felony/ [or] felonies).]

[It is not required that the defendant be present when the act causing the death occurs.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of any underlying felonies. (*People v. Cain* (1995) 10 Cal.4th 1, 36.)

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If causation is an issue, the court has a **sua sponte** duty to give Instruction 165, Causation.

If the prosecution's theory is that the defendant, as well as the perpetrator, committed or attempted to commit the underlying felony or felonies, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select both "the defendant and the perpetrator." Give all appropriate instructions on any underlying felonies with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the defendant and the perpetrator each committed [the crime] if . . . ."

If the prosecution's theory is that the defendant aided and abetted or conspired to commit the felony, select one or both of these options in element 1 and the corresponding intent requirements in element 2. In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on any underlying felonies and on aiding and abetting and/or conspiracy with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the perpetrator committed," rather than "the defendant," in the instructions on the underlying felony.

Bracketed element 6 is based on *People v. Cavitt* (2004) 33 Cal.4th 187, 193. In *Cavitt*, the Supreme Court clarified the liability of a nonkiller under the felony-murder rule when a cofelon commits a killing. The court held that "the felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act causing the death. The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction." (*Ibid.* [italics in original].) The majority concluded that the court has no sua sponte duty to instruct on the necessary causal connection. (*Id.* at pp. 203–204.) In concurring opinions, Justice Werdegar, joined by Justice Kennard, and Justice Chin expressed the view that the jury should be instructed on the necessary causal relationship. (*Id.* at pp. 212–213; see also *People v. Dominguez* (Dec. 16, 2004, H022727) __ Cal.App.4th __, __.) The court should give the bracketed element 6 if the evidence raises an issue over the causal connection between the felony and

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the killing. In addition, the court may give this bracketed element at its discretion in any case in which this instruction is given. If the prosecution alleges that the defendant did not commit the felony but aided and abetted or conspired to commit the felony, the committee recommends giving bracketed element 6. (See discussion of conspiracy liability in the Related Issues section of Instruction 730B, Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act.)

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, or did not join the conspiracy or aid and abet the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127; *People v. Silva* (2001) 25 Cal.4th 345, 371.) Give the bracketed sentence that begins with "The defendant must have (intended to commit felony." For an instruction specially tailored to robbery-murder cases, see *People v. Turner* (1990) 50 Cal.3d 668, 691.

Give the bracketed sentence that begins with "It is not required that the person die immediately" on request if relevant based on the evidence.

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [innocent bystander]; *People v. Salas* (1972) 7 Cal.3d 812, 823 [police officer].) Give the bracketed sentence that begins with "It is not required that the person killed be" on request.

Give the last bracketed sentence, stating that the defendant need not be present, on request.

The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204.) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give Instruction 738, Felony Murder: One Continuous Transaction—Defined.

If the prosecutor is proceeding under both malice and felony-murder theories, give Instruction 737, Murder: Alternative Theories. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [error to instruct on malice when felony murder only theory].)

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Related Instructions—Other Causes of Death
This instruction should be used only when the prosecution alleges that a coparticipant in the felony committed the act causing the death.

If the prosecution alleges that the defendant committed the fatal act, give Instruction 731A, Felony Murder: Second Degree—Defendant Allegedly Committed Fatal Act. If the evidence indicates that either the defendant or a coparticipant may have committed the fatal act, give both instructions. (*People v. Dominguez* (Dec. 16, 2004, H022727) __ Cal.App.4th __, __.)

When the alleged victim dies during the course of the felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants, give Instruction 731C, Felony Murder: Second Degree—Other Acts Allegedly Caused Death. (*People v. Billa* (2003) 31 Cal.4th 1064, 1072; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [a simultaneous or coincidental death is not a killing].)

If the evidence indicates that someone other than the defendant or a coparticipant committed the fatal act, then the crime is not felony murder. (*People v. Washington* (1965) 62 Cal.2d 777, 782–783; *People v. Caldwell* (1984) 36 Cal.3d 210, 216; see also *People v. Gardner* (1995) 37 Cal.App.4th 473, 477.) Liability may be imposed, however, under the provocative act doctrine. (*Pizano v. Superior Court of Tulare County* (1978) 21 Cal.3d 128, 134; see Instruction 740, Homicide: Provocative Act by Defendant.)

Related Instructions
Instruction 500 et seq., Aiding and Abetting.
Instruction 550 et seq., Conspiracy.

AUTHORITY

Inherently Dangerous Felonies ▸ *People v. Satchell* (1971) 6 Cal.3d 28, 33–41 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484]; *People v. Henderson* (1977) 19 Cal.3d 86, 93 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484]; *People v. Patterson* (1989) 49 Cal.3d 615, 622–625.

Specific Intent to Commit Felony Required ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 197.

Continuous Transaction Requirement ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209; *People v. Hernandez* (1988) 47 Cal.3d 315, 348.

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Logical Connection Required for Liability of Nonkiller ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209.
Duty to Instruct on Cofelon Liability ▸ *People v. Dominguez* (Dec. 16, 2004, H022727) __ Cal.App.4th __, __.
Infliction of Fatal Injury ▸ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223.
Defendant Must Join Felonious Enterprise Before or During Killing of Victim ▸ *People v. Pulido* (1997) 15 Cal.4th 713, 726.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, §§ 80, 87; Crimes Against the Person, §§ 134–147, 156.

LESSER INCLUDED OFFENSES

Second Degree Murder ▸ Pen. Code, § 187.
Voluntary Manslaughter ▸ Pen. Code, § 192(a).
Involuntary Manslaughter ▸ Pen. Code, § 192(b).
Attempted Murder ▸ Pen. Code, §§ 663, 189.

RELATED ISSUES

See the Related Issues section of Instruction 730B, Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act and Instruction 731A, Felony Murder: Second Degree—Defendant Allegedly Committed Fatal Act.

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731C. Felony Murder: Second Degree—Other Acts Allegedly Caused Death

The defendant is charged [in Count __] with murder, under a theory of felony murder.

[The defendant may [also] be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the *perpetrator*.]

To prove that the defendant is guilty of second degree murder under this theory, the People must prove that:

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit) _____** *<insert inherently dangerous felony or felonies>***;**

2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit) _____** *<insert inherently dangerous felony or felonies>***;**

<Give element 3 if defendant did not personally commit or attempt felony.>
[3. The perpetrator committed [or attempted to commit] _____ *<insert inherently dangerous felony or felonies>***;]**

(3/4). The commission [or attempted commission of] the _____ *<insert inherently dangerous felony or felonies>* **caused the death of another person;**

(4/5). The act causing the death and the _____ *<insert inherently dangerous felony or felonies>* **[or attempted _____** *<insert inherently dangerous felony or felonies>***] were part of one continuous transaction;]**

AND

(5/6). There was a logical connection between the act causing the death and the _____ *<insert inherently dangerous felony or felonies>***. The connection between the fatal act and the _____** *<insert inherently dangerous felony or felonies>* **must involve more than just their occurrence at the same time and place.**

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A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether the (the defendant/ [and] the perpetrator) committed [or attempted to commit] _____ *<insert inherently dangerous felony or felonies>***, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. [To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I (will give/have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit a crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply (that/those) instruction[s] when you decide whether the People have proved second degree murder under a theory of felony murder.**
<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ALL UNDERLYING FELONIES, AIDING AND ABETTING, AND CONSPIRACY ARE GIVEN.>

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

[It is not required that the person die immediately, as long as the act causing the death and the (felony/ [or] felonies) are part of one continuous transaction.]

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

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

[It is not required that the person killed be the (victim/intended victim) of the (felony/ [or] felonies.]

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[It is not required that the defendant be present when the act causing the death occurs.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of the underlying felony. (*People v. Cain* (1995) 10 Cal.4th 1, 36.)

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.) Because causation is likely to be an issue in any case where this instruction is given, the committee has included the paragraph that begins with "An act causes death if." 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 of death." (*People v. Sanchez* (2001) 26 Cal.4th 834, 845–849; *People v. Autry* (1995) 37 Cal.App.4th 351, 363.)

If the prosecution's theory is that the defendant committed or attempted to commit the underlying felony, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select "the defendant" in the first sentence. Give all appropriate instructions on any underlying felonies with this instruction. The court may need to modify the first sentence of an instruction on the underlying felony if the defendant is not separately charged with that offense.

If the prosecution's theory is that the defendant aided and abetted or conspired to commit the felony, select one of these options in element 1 and the corresponding intent requirement in element 2. Give bracketed element 3. Give the bracketed sentence at the beginning of the instruction that begins with "The defendant may [also] be guilty of murder." In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on any underlying felonies and on aiding and abetting and/or conspiracy with this instruction. The court may need to modify the first sentence of an instruction on the underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the perpetrator committed," rather than "the defendant," in the instructions on the underlying felony.

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If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, or did not join the conspiracy or aid and abet the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127; *People v. Silva* (2001) 25 Cal.4th 345, 371.) Give the bracketed sentence that begins with "The defendant must have (intended to commit."

Give the bracketed sentence that begins with "It is not required that the person die immediately" on request if relevant based on the evidence.

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [innocent bystander]; *People v. Salas* (1972) 7 Cal.3d 812, 823 [police officer].) Give the bracketed sentence that begins with "It is not required that the person killed be" on request.

Give the last bracketed sentence, stating that the defendant need not be present, on request.

The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204.) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give Instruction 738, Felony Murder: One Continuous Transaction—Defined.

If the prosecutor is proceeding under both malice and felony-murder theories, give Instruction 737, Murder: Alternative Theories. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [error to instruct on malice when felony murder only theory].)

Related Instructions—Other Causes of Death
This instruction should be used only when the alleged victim dies during the course of the felony as a result of a heart attack, fire, or a similar cause rather than as a result of some act of force or violence committed against the victim by one of the participants in the felony. (*People v. Billa* (2003) 31 Cal.4th 1064, 1072 [arson causing death of accomplice]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [heart attack caused by robbery]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [same]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [a simultaneous or coincidental death is not a killing].)

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See the Bench Notes to Instruction 731B, Felony Murder: Second Degree—Defendant Allegedly Committed Fatal Act for a discussion of other instructions to use if the evidence indicates a person committed an act of force or violence causing the death.

AUTHORITY

Inherently Dangerous Felonies ▸ *People v. Satchell* (1971) 6 Cal.3d 28, 33–41 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484]; *People v. Henderson* (1977) 19 Cal.3d 86, 93 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484]; *People v. Patterson* (1989) 49 Cal.3d 615, 622–625.
Specific Intent to Commit Felony Required ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 197.
Continuous Transaction Requirement ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209; *People v. Hernandez* (1988) 47 Cal.3d 315, 348.
Logical Connection Required for Liability of Nonkiller ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209.
Infliction of Fatal Injury ▸ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223.
Defendant Must Join Felonious Enterprise Before or During Killing of Victim ▸ *People v. Pulido* (1997) 15 Cal.4th 713, 726.
Death Caused by Felony but Not by Act of Force or Violence Against Victim ▸ *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [arson causing death of accomplice]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [heart attack caused by robbery]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [same]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [a simultaneous or coincidental death is not a killing].

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 134–147.

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Accidental Death of Accomplice During Commission of Arson
In *People v. Ferlin* (1928) 203 Cal. 587, 596–597, the Supreme Court held that an aider and abettor is not liable for the accidental death of an accomplice to arson

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when (1) the defendant was neither present nor actively participating in the arson when it was committed; (2) the accomplice acted alone in actually perpetrating the arson; and (3) the accomplice killed only himself or herself and not another person. More recently, the court stated,

> We conclude that felony-murder liability for any death in the course of arson attaches to all accomplices in the felony at least where, as here, one or more surviving accomplices were present at the scene and active participants in the crime. We need not decide here whether *Ferlin* was correct on its facts.

(*People v. Billa* (2003) 31 Cal.4th 1064, 1072.)

See the Related Issues section of Instruction 730A, Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act; Instruction 730B, Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act; and 731A, Felony Murder: Second Degree—Defendant Allegedly Committed Fatal Act.

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737. Murder: Alternative Theories

The defendant has been prosecuted for murder under two theories: (1) malice aforethought, and (2) felony murder.

Each theory of murder has different requirements, and I will instruct you on both.

You may not find the defendant guilty of murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory.

BENCH NOTES

Instructional Duty

This instruction is designed to be given when murder is charged on theories of malice and felony murder to help the jury distinguish between the two theories. This instruction should be given after the court has given any applicable instructions on defenses to homicide and **before** Instruction 720, Murder With Malice Aforethought.

If there is evidence of multiple acts from which the jury might conclude that the defendant killed the decedent, the court may be required to give Instruction 160, Unanimity. (See *People v. Dellinger* (1984) 163 Cal.App.3d 284, 300–302 [error not to instruct on unanimity where evidence that the victim was killed either by blunt force or by injection of cocaine].) Review the Bench Notes for Instruction 160 discussing when a unanimity instruction is required.

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738. Felony Murder: One Continuous Transaction—Defined

In order for the People to prove that the defendant is guilty of murder under a theory of felony murder [and that the special circumstance of murder committed while engaged in the commission of _____ <*insert felony*> is true], the People must prove that the _____ <*insert felony*> [or attempted _____ <*insert felony*>] and the act causing the death were part of one continuous transaction. The continuous transaction may occur over a period of time and in more than one location.

In deciding whether the act causing the death and the felony were part of *one continuous transaction*, you may consider the following factors:

1. **Whether the felony and the fatal act occurred at the same place;**

2. **The time period, if any, between the felony and the fatal act;**

3. **Whether the fatal act was committed for the purpose of aiding the commission of the felony or escape after the felony;**

4. **Whether the fatal act occurred after the felony but while [one or more of] the perpetrator[s] continued to exercise control over the person who was the target of the felony;**

5. **Whether the fatal act occurred while the perpetrator[s] (was/were) fleeing from the scene of the felony or otherwise trying to prevent the discovery or reporting of the crime;**

6. **Whether the felony was the direct cause of the death;**

AND

7. **Whether the death was a natural and probable consequence of the felony.**

It is not required that the People prove any one of these factors or any particular combination of these factors. The factors are given to assist you in deciding whether the fatal act and the felony were part of one continuous transaction.

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BENCH NOTES

Instructional Duty
In *People v. Cavitt* (2004) 33 Cal.4th 187, 204, the court stated that "there is no sua sponte duty to clarify the principles of the requisite relationship between the felony and the homicide without regard to whether the evidence supports such an instruction." If the evidence raises an issue of whether the felony and the homicide were part of one continuous transaction, give this instruction.

The court **must** also give the appropriate felony-murder instructions explaining the elements of the underlying offense.

AUTHORITY

Continuous Transaction ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209; *People v. Hart* (1999) 20 Cal.4th 546, 608–609; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1016; *People v. Hernandez* (1988) 47 Cal.3d 315, 346; *People v. Stamp* (1969) 2 Cal.App.3d 203, 210; *People v. Whitehorn* (1963) 60 Cal.2d 256, 264.

Continuous Control of Victim ▸ *People v. Thompson* (1990) 50 Cal.3d 134, 171–172 [lewd acts]; *People v. Carter* (1993) 19 Cal.App.4th 1236, 1251–1252 [robbery].

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 139–142.

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STAFF NOTES

Felony and Fatal Act Must be Part of "One Continuous Transaction" But No Requirement that the Killing was Committed "During" the Felony; "One Continuous Transaction" Distinguished from "Escape Rule"

> Our case law has consistently rejected a strict construction of the temporal relationship between felony and killing as to both first degree murder and the felony-murder special circumstance. [Citation.] Instead, we have said that a killing is committed in the perpetration of an enumerated felony if the killing and the felony are parts of one continuous transaction. [Citation.] . . .
>
> The homicide is committed in the perpetration of the felony if the killing and felony are parts of one continuous transaction . . . with the proviso that felony-murder liability attaches only to those engaged in the felonious scheme before or during the killing. [Citation.] . . .
>
> [Court notes that the jury in co-defendant Williams' case was instructed on both the meaning of "one continuous transaction" and the "duration" of the felony (e.g., that the felony continues until the defendant reaches a temporary place of safety).]
>
> [W]e are presented with two related, but distinct, doctrines: the continuous-transaction doctrine and the escape rule. The "escape rule" defines the duration of the underlying felony, in the context of certain ancillary consequences of the felony [citation], by deeming the felony to continue until the felon has reached a place of temporary safety. (E.g., *People v. Bodely* (1995) 32 Cal.App.4th 311, 313.) The continuous-transaction doctrine, on the other hand, defines the duration of *felony-murder* liability, which may extend beyond the termination of the felony itself, provided that the felony and the act resulting in death constitute one continuous transaction. (*Ibid*. ["the duration of felony-murder liability is not determined by considering whether the felony itself has been completed"]; *People v. Castro* (1994) 27 Cal.App.4th 578, 585 ["it is settled that a murder is deemed to occur in the commission of rape even after the rape is completed so long as the rape and murder are part of a continuous transaction"]; *People v. Taylor* (1980) 112 Cal. App. 3d 348, 358.) It thus would have been sufficient to have instructed the Williams jury

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> on the continuous-transaction doctrine alone, as the Cavitt jury was instructed. [Citation.]

(*People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [some quotation marks omitted, emphasis in original].)

Instruction Given in *Cavitt*

> Cavitt's jury was further instructed as follows: "When a killing occurs after the elements of the felony have been committed, the felony-murder rule applies if the killing and the felony were part of 'one continuous transaction.' Some factors that you may consider in determining whether the killing and the felony were part of, 'one continuous transaction' might include, but are not limited to, the following considerations:
>
> "(1) whether or not any aider and abettor exercised continuous control over the victim. [P] (2) whether or not the killing occurs in pursuance of a felony. [P] (3) the distance between the location of the perpetration of the felony and the location of the killing. [P] (4) the time lapse between the perpetration of the felony and the killing. [P] (5) whether the killing is a direct causal result of the felony. [P] (6) whether the killing occurs while the perpetrators are attempting to protect themselves against discovery of the felony or reporting of the crime. [P] (7) whether the killing is a natural and probable consequence of the felony.
>
> "No one of these factors, or any combination of factors is to be considered by you to be determinative of the phrase 'one continuous transaction.' There is no requirement that the defendant be present at the scene of the killing so long as the defendant's participation in the felony sets in motion a chain of events which resulted in the killing."

(*People v. Cavitt* (2004) 33 Cal.4th 187, 206, fn. 7.)

As noted above, the court found this instruction “sufficient” but made no other comment.

Continuous Transaction—Earlier Cases

> There is no requirement that the killing occur, "while committing" or "while engaged in" the felony, or that the killing be "a part of" the

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> felony, other than that the few acts be a part of one continuous transaction. Thus the homicide need not have been committed "to perpetrate" the felony. There need be no technical inquiry as to whether there has been a completion or abandonment of or desistance from the robbery before the homicide itself was completed.

(*People v. Stamp* (1969) 2 Cal.App.3d 203, 210 [citations omitted].)

> There is no requirement of a strict 'causal' or 'temporal' relationship between the 'felony' and the 'murder.' All that is demanded is that the two 'are parts of one continuous transaction.' There is, however, a requirement of proof beyond a reasonable doubt of the underlying felony.

(*People v. Hart* (1999) 20 Cal.4th 546, 608-609.)

Continuous Control of Victim

> In *People v. Fields* (1983) 35 Cal.3d 329, 367-68, the defendant robbed the victim, then drove her some distance from his home to kill her. We found a felony murder, noting that the crimes were linked not only by defendant's motive -- which, as here, may have included preventing the victim from identifying him to the police -- but also by his "continued control over the victim." (*Id*. at p. 368.) Even if, in the present case, one or more lewd acts occurred at defendant's apartment, perhaps another (the sodomy) elsewhere and the killing some hours later in Palos Verdes, defendant's control over the victim was continuous and links the crimes.

(*People v. Thompson* (1990) 50 Cal.3d 134171-172.)

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731SC. Special Circumstances: Murder in Commission of Felony, Pen. Code, § 190.2(a)(17)

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

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

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

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

<Give element 3 if defendant did not personally commit or attempt felony.>
[3. The perpetrator committed [or attempted to commit] _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***;]**

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

[AND]

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

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

(5/6). There was a logical connection between the act causing the death and the _____ *<insert felony or felonies from Pen. Code, §*

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

To decide whether the (the defendant/ [and] the perpetrator) committed [or attempted to commit] _____ *<insert felony or felonies from Pen. Code, § 190.2(a)(17)>***, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. [To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I (will give/have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit a crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply (that/those) instruction[s] when you decide whether the People have proved this special circumstance.**
<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ALL UNDERLYING FELONIES, AIDING AND ABETTING, AND CONSPIRACY ARE GIVEN.>

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

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

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689.) The court also has a **sua sponte** duty to instruct on the elements of any felonies alleged. (*People v. Cain* (1995) 10 Cal.4th 1, 36.)

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If the evidence raises the potential for accomplice liability, the court has a **sua sponte** duty to instruct on that issue. Give Instruction 703SC, Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17). If the homicide occurred prior to June 5, 1990, give Instruction 701SC, Special Circumstances: Intent Requirement for Accomplice Before June 6, 1990.

If causation is an issue, the court has a **sua sponte** duty to give Instruction 165, Causation.

If the prosecution's theory is that the defendant committed or attempted to commit the underlying felony, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select "the defendant" in the first sentence. Give all appropriate instructions on any underlying felonies.

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

Bracketed element 6 is based on *People v. Cavitt* (2004) 33 Cal.4th 187, 193. In *Cavitt*, the Supreme Court clarified the liability of a nonkiller under the felony-murder rule when a cofelon commits a killing. The court held that "the felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act causing the death. The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction." (*Ibid.* [italics in original].) The majority concluded that the court has no sua sponte duty to instruct on the necessary causal connection. (*Id.* at pp. 203–204.) In concurring opinions, Justice Werdegar, joined by Justice Kennard, and Justice Chin expressed the view that the jury should be instructed on the necessary causal relationship. (*Id.* at pp. 212–213.) The court should give bracketed element 6 if the evidence raises an issue over the causal connection between the felony and the killing. In addition, the court may give this bracketed element at its discretion in any case in which this instruction is given. If the prosecution alleges that the

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defendant did not commit the felony but aided and abetted or conspired to commit the felony, the committee recommends giving bracketed element 6. (See discussion of conspiracy liability in the Related Issues section of Instruction 730B, Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act.)

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

In addition, the court must give the final bracketed paragraph stating that the felony must be independent of the murder if the evidence supports a reasonable inference that the felony was committed merely to facilitate the murder. (*People v. Green* (1980) 27 Cal.3d 1, 61; *People v. Clark* (1990) 50 Cal.3d 583, 609; *People v. Kimble* (1988) 44 Cal.3d 480, 501; *People v. Navarette* (2003) 30 Cal.4th 458, 505.)

The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204.) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give Instruction 738, Felony Murder: One Continuous Transaction—Defined.

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

If the alleged homicide occurred between 1983 and 1987 (the window of time between *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 135 and *People v. Anderson* (1987) 43 Cal.3d 1104, 1147), then the prosecution must also prove intent to kill on the part of the actual killer. (*People v. Bolden* (2002) 29 Cal.4th 515, 560; *People v. Mendoza* (2000) 24 Cal.4th 130, 182.) The court should then modify this instruction to specify intent to kill as an element.

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AUTHORITY

Special Circumstance ▸ Pen. Code, § 190.2(a)(17).
Specific Intent to Commit Felony Required ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 197; *People v. Valdez* (2004) 32 Cal.4th 73, 105.
Continuous Transaction Requirement ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209; *People v. Marlow* (2004) 33 Cal.4th 1, 88 [applying rule to special circumstance]; *People v. Hernandez* (1988) 47 Cal.3d 315, 348; *People v. Fields* (1983) 35 Cal.3d 329, 364–368; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1025–1026.
Logical Connection Required for Liability of Nonkiller ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209.
Provocative Act Murder ▸ *People v. Briscoe* (2001) 92 Cal.App.4th 568, 596 [citing *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1081].
Concurrent Intent ▸ *People v. Mendoza* (2000) 24 Cal.4th 130, 183; *People v. Clark* (1990) 50 Cal.3d 583, 608–609.
Felony Cannot Be Incidental to Murder ▸ *People v. Green* (1980) 27 Cal.3d 1, 61 [disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3]; *People v. Mendoza* (2000) 24 Cal.4th 130, 182.
Instruction on Felony as Incidental to Murder ▸ *People v. Kimble* (1988) 44 Cal.3d 480, 501; *People v. Clark* (1990) 50 Cal.3d 583, 609; *People v. Navarette* (2003) 30 Cal.4th 458, 505.
Proposition 115 Amendments to Special Circumstance ▸ *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298.

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

RELATED ISSUES

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

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Concurrent Intent to Kill and Commit Felony
"Concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance." (*People v. Mendoza* (2000) 24 Cal.4th 130, 183; *People v. Clark* (1990) 50 Cal.3d 583, 608–609.)

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

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STAFF NOTES

Pen. Code, § 190.2(a), in relevant part:

(17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies:

(A) Robbery in violation of Section 211 or 212.5.

(B) Kidnapping in violation of Section 207, 209, or 209.5.

(C) Rape in violation of Section 261.

(D) Sodomy in violation of Section 286.

(E) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years in violation of Section 288.

(F) Oral copulation in violation of Section 288a.

(G) Burglary in the first or second degree in violation of Section 460.

(H) Arson in violation of subdivision (b) of Section 451.

(I) Train wrecking in violation of Section 219.

(J) Mayhem in violation of Section 203.

(K) Rape by instrument in violation of Section 289.

(L) Carjacking, as defined in Section 215.

(M) To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder.

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Pen. Code, § 190.41:

> Notwithstanding Section 190.4 or any other provision of law, the corpus delicti of a felony-based special circumstance enumerated in paragraph (17) of subdivision (a) of Section 190.2 need not be proved independently of a defendant's extrajudicial statement.

Felony Cannot be Incidental to Murder

In *People v. Green* (1980) 27 Cal.3d 1, 61 (disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3), the court established the rule that the felony cannot be incidental to the commission of the murder. Interpreting the previous version of Penal Code section 190.2(a)(17), which used the phrase "during the commission of" in place of the words "while engaged in," the court stated:

> [A] valid conviction of a listed crime was a necessary condition to finding a corresponding special circumstance, but it was not a sufficient condition: the murder must also have been committed 'during the commission' of the underlying crime. [. . .]

(*People v. Green, supra,* 27 Cal.3d 1 at p. 59.) The court continued:

> [T]he Legislature [in enacting section 190.2] must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not. [. . .]
>
> The Legislature's goal is not achieved, however, when the defendant's intent is not to steal but to kill and the robbery is merely incidental to the murder--'a second thing to it,' as the jury foreman here said--because its sole object is to facilitate or conceal the primary crime.

(*Id.* at p. 61 [citations omitted].)

The court later summarized this rule as follows:

> [T]o prove a felony-murder special-circumstance allegation, the prosecution must show that the defendant had an independent purpose for the commission of the felony, that is, the commission of the felony was not merely incidental to an intended murder.

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(*People v. Mendoza* (2000) 24 Cal.4th 130, 182 [citations omitted].)

Instruction on Felony Incidental to Murder

When the evidence supports the inference that the felony was incidental to the murder or was committed solely for the purpose of committing murder, it is error not to instruct the jury on the *Green* principle. (*People v. Clark* (1990) 50 Cal.3d 583, 609.)

However, the court later held that the *Green* case did not create a new "element" of the special circumstance that must be instructed on in every case:

> [W]e reject the dissent's novel suggestion that *Green*'s clarification of the scope of felony-murder special circumstances has somehow become an 'element' of such special circumstances, on which the jury must be instructed in all cases regardless of whether the evidence supports such an instruction. Our cases have never treated *Green* in this fashion. [Citations.] Nor have we so treated other 'clarifying' holdings in analogous settings. [Citations.] These cases disclose that the mere act of 'clarifying' the scope of an element of a crime or a special circumstance does not create a new and separate element of that crime or special circumstance.

(*People v. Kimble* (1988) 44 Cal.3d 480, 501.)

The *Kimble* court concluded that the trial court did not have a sua sponte duty to instruct the jury that the felony could not be incidental to the murder because "there was abundant evidence that the rape and robberies were not 'incidental' to the murders." (*Id.* at p. 503.) The court held that, given the state of the evidence, the defense was required to request a clarifying instruction. (*Ibid.*)

The trial in *Kimble, supra,* predated the *Green* decision. The *Kimble* court also noted,

> CALJIC No. 8.81.17, paragraph 3, incorporates the *Green* holding. Presumably trial courts have given this instruction as a matter of course in post-*Green* trials. Nothing in our opinion today is intended to discourage such a practice.

(*Ibid.* at n.16.)

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The court reached a similar ruling in *People v. Navarette* (2003) 30 Cal.4th 458, 505, stating:

> The second paragraph of CALJIC No. 8.81.17 is appropriate where the evidence suggests the defendant may have intended to murder his victim without having an independent intent to commit the felony that forms the basis of the special circumstance allegation. In other words, if the felony is merely incidental to achieving the murder--the murder being the defendant's primary purpose--then the special circumstance is not present, but if the defendant has an 'independent felonious purpose' (such as burglary or robbery) and commits the murder to advance that independent purpose, the special circumstance is present. [Citations].
>
> Here, the record includes no significant evidence of any motive for the murders other than burglary and/or robbery [. . . .] [T]he record does not include any evidence (other than the brutality of the crimes) that defendant had an unconscious hatred for women, and defendant did nothing to develop this theory of the case at trial, making only a passing speculative reference to this theory at closing argument. Defendant's primary defense at trial was that he was too intoxicated to act with intent. Under the circumstances of the case as presented to the jury, the second paragraph of CALJIC No. 8.81.17 was not required.

The Court of Appeals recently applied these holdings in *People v. Harden* (2003) 2 Cal.Rptr.3d 105, 117:

> We conclude *Navarette*, together with *Kimble* and *Mendoza*, are binding precedent setting forth the principle that paragraph 2 of CALJIC No. 8.81.17 may be omitted by a trial court *if* the evidence does not support a reasonable inference (or, in other words, a rational jury would not conclude) that commission of the felony other than murder was merely incidental to the primary goal of murder.

The court noted, however, that the by failing to require this instruction, the Supreme Court left open potential constitutional difficulties by conflating felony murder with the felony-murder special circumstance:

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> We acknowledge the merit of Harden's contention that there must be a distinction between felony murder and the felony-murder special circumstance. However, we are bound to follow precedent established by the California Supreme Court. In *Green*, that court discussed *Furman* and *Gregg* and referred to the Legislature's apparent cognizance of the need for such a distinction. However, in *Green*'s progeny, the California Supreme Court has concluded paragraph 2 of CALJIC No. 8.81.17 is not required to be given if the evidence does not support a reasonable inference that the felony other than murder was merely incidental to the primary goal of murder. In deciding those cases, we presume the California Supreme Court was aware of the constitutional issue it previously discussed in *Green*, even though that issue was not expressly discussed in those subsequent cases. We therefore infer the California Supreme Court has implicitly concluded omission of paragraph 2 of CALJIC No. 8.81.17 does not violate the Eighth Amendment in cases in which the evidence does not support a reasonable inference that the other felony was merely incidental to the primary goal of murder. Accordingly, if the omission of paragraph 2 violates the Eighth Amendment, Harden must seek review of that issue by the California Supreme Court.

(*People v. Harden, supra,* 2 Cal.Rptr.3d at p. 119.)

"While Engaged in" Sufficiently Clear

> Defendant now contends that the court erred by failing to define the phrase "while engaged in" sua sponte. The court did not err. When, as here, a phrase "is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request."

(*People v. Rowland* (1992) 4 Cal.4th 238, 270-271 [citations omitted]; *People v. Guzman* (1988) 45 Cal.3d 915, 950.)

"During" Equivalent to "While Engaged in"

> [W]e perceive no substantial difference between the two statutory phrases, "during the commission of," and "while engaged in the commission of." The words "during" and "while," in this context, reasonably appear to mean the same thing.

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(*People v. Guzman* (1988) 45 Cal.3d 915, 950.)

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732ASC. Special Circumstances: Murder in Commission of Felony—Kidnapping With Intent to Kill, Pen. Code, § 190.2(a)(17)

The defendant is charged with the special circumstance of intentional murder while engaged in the commission of kidnapping.

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

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit) kidnapping;**

2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit) kidnapping;**

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

[3. The perpetrator committed [or attempted to commit] kidnapping;]

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

(4/5). The defendant intended that the other person be killed;

[AND]

(5/6). The act causing the death and the kidnapping [or attempted kidnapping] were part of one continuous transaction(;/.)

<Give element 7 if the court concludes it must instruct on causal relationship between kidnapping and death; see Bench Notes.>

[AND

(6/7). There was a logical connection between the act causing the death and the kidnapping [or attempted kidnapping]. The connection between the fatal act and the kidnapping [or attempted kidnapping] must involve more than just their occurrence at the same time and place.]

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To decide whether the (the defendant/ [and] the perpetrator) committed [or attempted to commit] kidnapping, please refer to the separate instructions that I (will give/have given) you on that crime. [To decide whether the defendant aided and abetted the crime, please refer to the separate instructions that I (will give/have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit the crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply (that/those) instruction[s] when you decide whether the People have proved this special circumstance.
<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON UNDERLYING KIDNAPPING, AIDING AND ABETTING, AND CONSPIRACY ARE GIVEN.>

[If all the listed elements are proved, you may find this special circumstance true even if the defendant intended solely to commit murder and the commission of kidnapping was merely part of or incidental to the commission of that murder.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689.) The court also has a **sua sponte** duty to instruct on the elements of the kidnapping alleged. (*People v. Cain* (1995) 10 Cal.4th 1, 36.)

Subparagraph (M) of Penal Code section 190.2(a)(17) eliminates the application of *People v. Green* (1980) 27 Cal.3d 1, 61, to intentional murders during the commission of kidnapping or arson of an inhabited structure. The statute may only be applied to alleged homicides after the effective date, March 8, 2000. This instruction may be given alone or with Instruction 731SC, Special Circumstances: Murder in Commission of Felony, Pen. Code, § 190.2(a)(17).

For the standard felony-murder special circumstance, it is not necessary for the actual killer to intend to kill. (Pen. Code, § 190.2(b).) However, an accomplice who is not the actual killer must either act with intent to kill or be a major participant and act with reckless indifference to human life. (Pen. Code, § 190.2(d).) Subparagraph (M) of Penal Code section 190.2(a)(17) does not specify whether the defendant must personally intend to kill or whether accomplice liability may be based on an actual killer who intended to kill even if the defendant

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did not. (See Pen. Code, § 190.2(a)(17)(M).) This instruction has been drafted to require that the defendant intend to kill, whether the defendant is an accomplice or the actual killer. If the evidence raises the potential for accomplice liability and the court concludes that the accomplice need not personally intend to kill, then the court must modify element 5 to state that the person who caused the death intended to kill. In such cases, the court also has a **sua sponte** duty give Instruction 703SC, Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17).

If causation is an issue, the court has a **sua sponte** duty to give Instruction 165, Causation.

If the prosecution's theory is that the defendant committed or attempted to commit kidnapping, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select "the defendant" in the first sentence. Give all appropriate instructions on kidnapping.

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

Bracketed element 7 is based on *People v. Cavitt* (2004) 33 Cal.4th 187, 193. In *Cavitt*, the Supreme Court clarified the liability of a nonkiller under the felony-murder rule when a cofelon commits a killing. The court held that "the felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act resulting in death. The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction." (*Ibid.* [italics in original].) The majority concluded that the court has no sua sponte duty to instruct on the necessary causal connection. (*Id.* at pp. 203–204.) In concurring opinions, Justice Werdegar, joined by Justice Kennard, and Justice Chin expressed the view that the jury should be instructed on the necessary causal relationship. (*Id.* at pp. 212–213.) The court should give bracketed element 7 if the evidence raises an issue over the causal connection between the felony and the killing. In addition, the court may give this bracketed element at its discretion in

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any case in which this instruction is given. If the prosecution alleges that the defendant did not commit the felony but aided and abetted or conspired to commit the felony, the committee recommends giving bracketed element 7. (See discussion of conspiracy liability in the Related Issues section of Instruction 730B, Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act.)

When giving this instruction with Instruction 731SC, give the final bracketed paragraph.

The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204.) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give Instruction 738, Felony Murder: One Continuous Transaction—Defined.

Related Instructions
Instruction 950, Kidnapping.
Instruction 951, Kidnapping: For Child Molestation.
Instruction 952, Kidnapping: Person Incapable of Consent.
Instruction 955, Kidnapping: For Ransom, Reward, or Extortion.
Instruction 956, Kidnapping: For Robbery, Rape, or Other Sex Offenses.
Instruction 957, Kidnapping During Carjacking.

AUTHORITY

Special Circumstance ▸ Pen. Code, § 190.2(a)(17)(B), (H) & (M).
Continuous Transaction Requirement ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209; *People v. Marlow* (2004) 33 Cal.4th 1, 88 [applying rule to special circumstance]; *People v. Hernandez* (1988) 47 Cal.3d 315, 348; *People v. Fields* (1983) 35 Cal.3d 329, 364–368; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1025–1026.
Logical Connection Required for Liability of Nonkiller ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Punishment, § 450.

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STAFF NOTES

Pen. Code, § 190.2(a), in relevant part:

> (17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies: [. . .]
>
> (B) Kidnapping in violation of Section 207, 209, or 209.5. [. . .]
>
> (H) Arson in violation of subdivision (b) of Section 451. [. . .]
>
> (M) To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder.

Felony Continues Until Reaches Temporary Place of Safety

As with felony murder, in determining whether the defendant was "engaged in" the felony at the time of the murder, the Supreme Court has held that the felony continues until the defendant reaches a temporary place of safety. (*People v. Fields* (1983) 35 Cal.3d 329, 364-368.) In *People v. Fields, supra*, the defendant forced the victim to write a check then kept the victim in his home while a codefendant cashed the check and returned with money. The court observed that, although the defendant has in his own home with the proceeds of the robbery,

> That residence, however, was not a place of safety so long as [the victim] was held prisoner. [Citation.] In an unguarded moment, she might escape, notify the police, and render the Fields residence quite unsafe for defendant. In order to complete a successful escape with the robbery proceeds, defendant either had to dispose of her, which he did, or flee to some other place which she could not identify for the police.

(*Id.* at pp. 367-368; see also *People v. Ainsworth* (1988) 45 Cal.3d 984, 1025-1026; *People v. Silva* (1988) 45 Cal.3d 604, 632 [kidnapping continued while victim detained].)

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Similarly, the court held in *People v. Guzman* (1988) 45 Cal.3d 915, 952, that the crime of rape continued "so long as the victim had not been disposed of or confined."

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732BSC. Special Circumstances: Murder in Commission of Felony—Arson With Intent to Kill, Pen. Code, § 190.2(a)(17)

The defendant is charged with the special circumstance of intentional murder while engaged in the commission of arson that burned an inhabited structure.

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

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit) arson that burned an inhabited structure;**

2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit) arson that burned an inhabited structure;**

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

[3. The perpetrator committed [or attempted to commit] arson that burned an inhabited structure;]

(3/4). The commission [or attempted commission] of the arson caused the death of another person;

(4/5). The defendant intended that the other person be killed;

(5/6). The act causing the death and the arson [or attempted arson] were part of one continuous transaction;

AND

(6/7). There was a logical connection between the act causing the death and the arson [or attempted arson]. The connection between the fatal act and the arson must involve more than just their occurrence at the same time and place.

To decide whether the (the defendant/ [and] the perpetrator) committed [or attempted to commit] arson that burned an inhabited structure, please refer to the separate instructions that I (will give/have given) you on that crime. [To decide whether the defendant aided and abetted the crime, please refer to the

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separate instructions that I (will give/have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit the crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply (that/those) instruction[s] when you decide whether the People have proved this special circumstance.
<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON UNDERLYING ARSON, AIDING AND ABETTING, AND CONSPIRACY ARE GIVEN.>

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

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

[If all the listed elements are proved, you may find this special circumstance true even if the defendant intended solely to commit murder and the commission of arson was merely part of or incidental to the commission of that murder.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689.) The court also has a **sua sponte** duty to instruct on the elements of the arson alleged. (*People v. Cain* (1995) 10 Cal.4th 1, 36.)

Subparagraph (M) of Penal Code section 190.2(a)(17) eliminates the application of *People v. Green* (1980) 27 Cal.3d 1, 61, to intentional murders during the commission of kidnapping or arson of an inhabited structure. The statute may only be applied to alleged homicides after the effective date, March 8, 2000. This instruction may be given alone or with Instruction 731SC, Special Circumstances: Murder in Commission of Felony, Pen. Code, § 190.2(a)(17).

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For the standard felony-murder special circumstance, it is not necessary for the actual killer to intend to kill. (Pen. Code, § 190.2(b).) However, an accomplice who is not the actual killer must either act with intent to kill or be a major participant and act with reckless indifference to human life. (Pen. Code, § 190.2(d).) Subparagraph (M) of Penal Code section 190.2(a)(17) does not specify whether the defendant must personally intend to kill or whether accomplice liability may be based on an actual killer who intended to kill even if the defendant did not. (See Pen. Code, § 190.2(a)(17)(M).) This instruction has been drafted to require that the defendant intend to kill, whether the defendant is an accomplice or the actual killer. If the evidence raises the potential for accomplice liability and the court concludes that the accomplice need not personally intend to kill, then the court must modify element 5 to state that the person who caused the death intended to kill. In such cases, the court also has a **sua sponte** duty give Instruction 703SC, Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17).

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.) Because causation is likely to be an issue in any case where this instruction is given, the committee has included the paragraph that begins with "An act causes death if." 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 of death." (*People v. Sanchez* (2001) 26 Cal.4th 834, 845–849; *People v. Autry* (1995) 37 Cal.App.4th 351, 363.)

If the prosecution's theory is that the defendant committed or attempted to commit arson, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select "the defendant" in the first sentence. Give all appropriate instructions on arson.

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

When giving this instruction with Instruction 731SC, give the final bracketed paragraph.

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The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204.) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give Instruction 738, Felony Murder: One Continuous Transaction—Defined.

Related Instructions
Instruction 1055, Arson: Inhabited Structure.

AUTHORITY

Special Circumstance ▸ Pen. Code, § 190.2(a)(17)(B), (H) & (M).
Continuous Transaction Requirement ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209; *People v. Hernandez* (1988) 47 Cal.3d 315, 348; *People v. Fields* (1983) 35 Cal.3d 329, 364–368; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1025–1026.
Logical Connection Required for Liability of Nonkiller ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Punishment, § 450.

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STAFF NOTES

Pen. Code, § 190.2(a), in relevant part:

> (17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies: [. . .]
>
> (B) Kidnapping in violation of Section 207, 209, or 209.5. [. . .]
>
> (H) Arson in violation of subdivision (b) of Section 451. [. . .]
>
> (M) To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder.

Felony Continues Until Reaches Temporary Place of Safety

As with felony murder, in determining whether the defendant was "engaged in" the felony at the time of the murder, the Supreme Court has held that the felony continues until the defendant reaches a temporary place of safety. (*People v. Fields* (1983) 35 Cal.3d 329, 364-368.) In *People v. Fields, supra*, the defendant forced the victim to write a check then kept the victim in his home while a codefendant cashed the check and returned with money. The court observed that, although the defendant has in his own home with the proceeds of the robbery,

> That residence, however, was not a place of safety so long as [the victim] was held prisoner. [Citation.] In an unguarded moment, she might escape, notify the police, and render the Fields residence quite unsafe for defendant. In order to complete a successful escape with the robbery proceeds, defendant either had to dispose of her, which he did, or flee to some other place which she could not identify for the police.

(*Id.* at pp. 367-368; see also *People v. Ainsworth* (1988) 45 Cal.3d 984, 1025-1026; *People v. Silva* (1988) 45 Cal.3d 604, 632 [kidnapping continued while victim detained].)

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Similarly, the court held in *People v. Guzman* (1988) 45 Cal.3d 915, 952, that the crime of rape continued "so long as the victim had not been disposed of or confined."

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115. Reasonable Doubt: Bifurcated Trial; Trial on Sexually Violent Predator Petition; and Penalty Phase of Capital Case

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The People are required to prove the allegation[s] [that _____ <*insert description of allegation[s], e.g., "that the defendant is a sexually violent predator"*>**] beyond a reasonable doubt.**

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

In deciding whether the People have proved (an/the) allegation beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received during this [phase of the] trial. Unless the evidence proves (an/the) allegation beyond a reasonable doubt, you must find that the allegation has not been proved [and disregard it completely].

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct on reasonable doubt in any proceeding in which that standard of proof applies.

This instruction is provided for the court to use **only** in bifurcated trials or special proceedings where the court is required to instruct on reasonable doubt but Instruction 110, Reasonable Doubt, would not be appropriate as written. **Do not** use this instruction in place of Instruction 110 in a trial on the substantive crimes charged.

This instruction should be used **only** in the following situations:

1. When the court has granted a bifurcated trial on a prior conviction or a sentencing factor (see Instructions 201, Prior Conviction: Bifurcated Trial and 281, Enhancement, Sentencing Factor, or Specific Factual Issue: Template—Bifurcated Trial);

2. When the court is conducting a trial on a petition to commit someone as a sexually violent predator or for an extension of commitment (see

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Instructions 683, Extension of Commitment and 684, Commitment as Sexually Violent Predator); or

3. In the penalty phase of a capital trial when the court is instructing on other violent criminal activity or prior felony convictions offered as aggravation (see Instructions 703DP, Death Penalty: Evidence of Other Violent Crimes and 704DP, Death Penalty: Conviction for Other Felony Crimes).

In the first sentence, the court, at its discretion, may insert a description of the allegations.

In the final paragraph, give the bracketed phrase "and disregard it completely" when using this instruction in the penalty phase of a capital trial.

AUTHORITY

Instructional Requirements ▸ Pen. Code, §§ 1096, 1096a; *People v. Freeman* (1994) 8 Cal.4th 450, 503–504.

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STAFF NOTES

Our "general" reasonable doubt instruction states:

> 1. The fact that a criminal charge has been filed against (the/a) defendant[s] is not evidence that the charge is true. You must not be biased against (the/a) defendant[s] just because (he/she/they) (has/have) been arrested, charged with a crime or brought to trial.
>
> 2. A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove each element of a crime [and special allegation] beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise].
>
> 3. Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.
>
> 4. In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves (the/a) defendant[s] guilty beyond a reasonable doubt, (he/she/they) (is/are) entitled to an acquittal and you must find (him/her/them) not guilty.

Currently, in several instructions for use in bifurcated trials and special proceedings, we tell the court to give an appropriately modified version of this instruction. Rather than make the court do this each time, we suggest providing this instruction. We have modified the original instruction as follows:

1. Eliminated the first paragraph.

2. Eliminated reference to the presumption of innocence.

3. Eliminated the sentence, "When I tell you the People must prove . . . ."

4. Modified the final paragraph to eliminate "acquittal" and finding of "not guilty."

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Presumption of Innocence Does Not Apply to Aggravation Evidence in Death Penalty Trial

> In *People* v. *Robertson* (1982) 33 Cal.3d 21, we held that . . . a defendant . . . during the penalty phase of a trial is entitled to an instruction to the effect that the jury may consider evidence of other crimes [in aggravation] only when the commission of such other crimes is proved beyond a reasonable doubt. [Citations.] . . .
>
> In conformity with the foregoing principle, the court instructed the jury: [with the definition of proof beyond a reasonable doubt]. . . . .
>
> The court, however, did *not* instruct the jury to the effect that defendant was presumed innocent of the offense until the contrary was proved or that the People bore the burden of proof on the issue.
>
> Defendant now contends that the court erred by failing to instruct the jury sua sponte on the presumption of innocence and the People's burden. . . .
>
> The point must be rejected. We are not persuaded that the 1978 death penalty law requires an instruction that the defendant is presumed innocent of unadjudicated offenses offered in aggravation or that the People bear the burden of proof on the issue: the "requirement" cannot be discerned either within the words of the statute or without. Nor are we persuaded that the United States Constitution requires the instruction in question. We have never held that the Constitution requires such an instruction -- neither, to our knowledge, has any other appellate court in a reported decision. And we decline to so hold now. . . .

(*People v. Benson* (1990) 52 Cal.3d 754, 809–810.)

> [T]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." [Citation.] The presumption operates at the guilt phase of a trial to remind the jury that the State has the burden of establishing every element of the offense beyond a reasonable doubt. [Citation.] But even at the guilt phase, the defendant is not entitled automatically to an instruction that he is presumed innocent of the charged offense. [Citation.] An instruction is constitutionally required only when, in light of the totality of the circumstances,

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> there is a "'genuine danger'" that the jury will convict based on something other than the State's lawful evidence, proved beyond a reasonable doubt. [Citation.]
>
> Once the defendant has been convicted fairly in the guilt phase of the trial, the presumption of innocence disappears. [Citation.] We have not considered previously whether a presumption that the defendant is innocent of other crimes attaches at the sentencing phase. But even assuming that such a presumption does attach, Lashley was not entitled to a "presumption of innocence" instruction. Under our precedents, the instruction would have been constitutionally required only if the circumstances created a genuine risk that the jury would conclude, from factors other than the State's evidence, that the defendant had committed other crimes.

(*Delo v. Lashley* (1993) 507 U.S. 272, 278–279.)

Presumption of Innocence Does Not Apply to Civil Commitments

> The term "presumption of innocence" alone indicates that it applies exclusively in the criminal context, where the jury makes a determination as to a defendant's guilt. "The presumption operates at the guilt phase of a trial to remind the jury that the State has the burden of establishing every element of the offense beyond a reasonable doubt. [Citation.]"
>
> Even if we view the presumption in a more general sense as a warning against the consideration of extraneous factors, we cannot conclude that the federal and state Constitutions require a presumption-of-innocence-like instruction outside the context of a criminal case. Particularly, we conclude that, based on the civil and nonpunitive nature of involuntary commitment proceedings, a mentally ill or disordered person would not be deprived of a fair trial without such an instruction.

(*People v. Beeson* (2002) 99 Cal.App.4th 1393, 1409 [footnote omitted].)

Presumption of Innocence and Prior Conviction—No Case On Point

Staff was unable to locate a case discussing whether the court must instruct on the presumption of innocence with regard to a bifurcated trial on a prior conviction. However, it appears that the federal constitution does not require such an instruction. (See *Delo v. Lashley* (1993) 507 U.S. 272, 278–279, quoted above,

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"Once the defendant has been convicted fairly in the guilt phase of the trial, the presumption of innocence disappears."]; see also *Apprendi* v. *New Jersey* (2000) 530 U.S. 466, 490 [no federal constitutional right to jury trial on fact of prior conviction].)

Presumption of Innocence and Sentencing Factor—No Case On Point
As stated in *Blakely* and *Aprendi*,

> Other 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.

(*Blakely v. Washington* (2004) __ U.S. __, __; *Apprendi* v. *New Jersey* (2000) 530 U.S. 466, 490.)

Neither *Blakely* nor *Aprendi* addressed whether the court must instruct on the presumption of innocence with regard to a sentencing factor.

In *Kentucky v. Wharton* (1979) 441 U.S. 786, 789, the Supreme Court held that the due process clause does not require that a presumption of innocence instruction be given in every case. Further, as stated above in *Delo v. Lashley* (1993) 507 U.S. 272, 278–279, the Supreme Court has expressed the view that the presumption of innocence applies only to the guilt phase of the trial. Thus, it does not appear that the federal constitution requires a presumption of innocence instruction on a sentencing factor.

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135. Additional Instructions on Witness Credibility—Other Conduct

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<Alternative A—felony conviction>
[If you find that a witness has been convicted of a felony, you may consider that fact [only] in evaluating the credibility of the witness's testimony. The fact of a conviction does not necessarily destroy or impair a witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable.]

<Alternative B—prior criminal conduct with or without conviction>
[If you find that a witness has committed a crime, you may consider that fact [only] in evaluating the credibility of the witness's testimony. The fact that a witness may have committed a crime does not necessarily destroy or impair a witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable.]

BENCH NOTES

Instructional Duty
There is no sua sponte duty to give this instruction; however, the instruction must be given on request. (*People v. Kendrick* (1989) 211 Cal.App.3d 1273, 1278; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [overruling *People v. Mayfield* (1972) 23 Cal.App.3d 236, which had found a sua sponte duty to give limiting instruction on felony conviction admitted for impeachment].)

If a felony conviction or other misconduct has been admitted only on the issue of credibility, give the bracketed word "only."

Do not give this instruction if a conviction also has been admitted to prove an element of a charged offense. (*People v. Dewberry* (1959) 51 Cal.2d 548, 553–554.)

It is unclear if this instruction is appropriate if the evidence also has been admitted for a purpose other than to prove an element of the offense (as discussed above). For example, the evidence may have been admitted under Evidence Code section 1108. In such cases, if the court does give this instruction, the court may omit the bracketed "only."

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AUTHORITY

Limiting Instruction Must Be Given on Request ▸ *People v. Kendrick* (1989) 211 Cal.App.3d 1273, 1278; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052.

Felony Conviction Admissible for Impeachment ▸ Evid. Code, § 788.

Standard for Admitting Felony Conviction ▸ *People v. Castro* (1985) 38 Cal.3d 301, 306–319; *People v. Beagle* (1972) 6 Cal.3d 441, 451–452.

Misdemeanor Conduct Admissible for Impeachment ▸ *People v. Wheeler* (1992) 4 Cal.4th 284, 295–296.

Record Must Demonstrate Court Conducted Evid. Code, § 352 Weighing ▸ *People v. Navarez* (1985) 169 Cal.App.3d 936, 950.

1 Witkin, Cal. Evidence (4th ed. 2000) Presentation, §§ 292–314.

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STAFF NOTES

Instruction Must Be Given on Request

> We reject the *Mayfield* holding that the trial court had a sua sponte duty to instruct the jury on the limited purpose for which a prior conviction could be used in light of the overwhelming authority to the contrary.
>
> We hold the trial court did not commit error in failing to give CALJIC No. 2.23 sua sponte. The instruction need be given only upon request. (Evid. Code, § 355.) Evidence Code section 355 is one of the "general provisions" of that code, which apply to evidence admissible under other provisions thereof. (See Evid. Code, div. 3.)

(*People v. Kendrick* (1989) 211 Cal.App.3d 1273, 1278.)

> In the instant case, the court instructed the jury in the language of what is now CALJIC (3d revised ed.) No. 2.23: "The fact that a witness had been convicted of a felony, if such be a fact, may be considered by you only for the purpose of determining the credibility of that witness. The fact of such a conviction does not necessarily destroy or impair the witness' credibility. It is one of the circumstances that you may take into consideration in weighing the testimony of such a witness." This instruction adequately protected defendant's rights.

(*People v. House* (1970) 12 Cal.App.3d 756, 764 [overruled in part by *People v. Beagle* (1972) 6 Cal.3d 441, 451].)

Instruction Should Not Be Given When Conviction Element of Offense

> Defendant contends that the court erred in refusing to give the following instruction:
>
> "The fact that a witness had been convicted of a felony, if such be a fact, may be considered by you for only one purpose, namely, in judging the credibility of that witness. The fact of such a conviction does not necessarily destroy or impair the witness's credibility, and it does not raise a presumption that the witness has testified falsely. It is simply one of the circumstances that you are to take into consideration in weighing the testimony of such a witness."

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> The jury was instructed that it was for them alone to judge the credibility of the witnesses and the weight to be given the evidence offered; that every person is presumed to speak the truth; and that a witness may be impeached by inconsistent statements, by contradictory evidence, or by evidence that he has been convicted of a felony. These instructions correctly stated the law. Moreover, under the circumstances of the present case, the requested instruction was incorrect. Defendant's convictions were not in the evidence "for only one purpose, namely, in judging the credibility of that witness." They were an essential element in the charged violation of the Deadly Weapons Act. (Pen. Code, § 12021.)

(*People v. Dewberry* (1959) 51 Cal.2d 548, 553–554.)

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295. During Commission of Felony: Defined—Escape Rule

The People must prove that _____ *<insert allegation, e.g., the defendant personally used a firearm>* **during the commission [or attempted commission] of _____** *<insert felony or felonies>***.**

<Give one or more bracketed paragraphs below depending on crime[s] alleged.>

<Robbery>
[The crime of robbery [or attempted robbery] continues until the perpetrator[s] (has/have) actually reached a temporary place of safety.

The perpetrator[s] (has/have) reached a temporary place of safety if:

- **(He/She/They) (has/have) successfully escaped from the scene; [and]**
- **(He/She/They) (is/are) no longer being chased(; [and]/.)**
- **[(He/She/They) (has/have) unchallenged possession of the property(; [and]/.)]**
- **[(He/She/They) (is/are) no longer in continuous physical control of the person who is the target of the robbery.]]**

<Burglary>
[The crime of burglary [or attempted burglary] continues until the perpetrator[s] (has/have) actually reached a temporary place of safety. The perpetrator[s] (has/have) reached a temporary place of safety if (he/she/they) (has/have) successfully escaped from the scene[,] [and] (is/are) no longer being chased[, and (has/have) unchallenged possession of the property].]

<Sexual Assault>
[The crime of _____ *<insert sexual assault alleged>* **[or attempted _____** *<insert sexual assault alleged>***] continues until the perpetrator[s] (has/have) actually reached a temporary place of safety. The perpetrator[s] (has/have) reached a temporary place of safety if (he/she/they) (has/have) successfully escaped from the scene[,] [and] (is/are) no longer being chased[,and (is/are) no longer in continuous physical control of the person who was the target of the crime].]**

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<Kidnapping>
[The crime of kidnapping [or attempted kidnapping] continues until the perpetrator[s] (has/have) actually reached a temporary place of safety. The perpetrator[s] (has/have) reached a temporary place of safety if (he/she/they) (has/have) successfully escaped from the scene, (is/are) no longer being chased, and (is/are) no longer in continuous physical control of the person kidnapped.]

<Other Felony>
[The crime of _____ *<insert felony alleged>* **[or attempted _____** *<insert felony alleged>***] continues until the perpetrator[s] (has/have) actually reached a temporary place of safety. The perpetrator[s] (has/have) reached a temporary place of safety if (he/she/they) (has/have) successfully escaped from the scene and (is/are) no longer being chased.]**

BENCH NOTES

Instructional Duty
Give this instruction whenever the evidence raises an issue over the duration of the felony and another instruction given to the jury has required some act "during the commission or attempted commission" of the felony. (See *People v. Cavitt* (2004) 33 Cal.4th 187, 208.)

In *People v. Cavitt* (2004) 33 Cal.4th 187, 208, the court explained the "escape rule" and distinguished this rule from the "continuous-transaction" doctrine:

> [W]e first recognize that we are presented with two related, but distinct, doctrines: the continuous-transaction doctrine and the escape rule. The "escape rule" defines the duration of the underlying felony, in the context of certain ancillary consequences of the felony [citation], by deeming the felony to continue until the felon has reached a place of temporary safety. [Citation.] The continuous-transaction doctrine, on the other hand, defines the duration of *felony-murder* liability, which may extend beyond the termination of the felony itself, provided that the felony and the act resulting in death constitute one continuous transaction. [Citations.] . . .

(Ibid. [italics in original].)

This instruction should **not** be given in a felony-murder case to explain the required temporal connection between the felony and the killing. Instead, the court should give Instruction 738, Felony Murder: One Continuous Transaction—

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Defined. This instruction should only be given if it is required to explain the duration of the felony for other ancillary purposes, such as use of a weapon.

Similarly, this instruction should **not** be given if the issue is when the defendant formed the intent to aid and abet a robbery or a burglary. For robbery, give Instruction 806, Robbery: Intent of Aider and Abettor. For burglary, give Instruction 1406, Burglary: Intent of Aider and Abettor.

AUTHORITY

Escape Rule ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 208–209.
Temporary Place of Safety ▸ *People v. Salas* (1972) 7 Cal.3d 812, 823; *People v. Johnson* (1992) 5 Cal.App.4th 552, 560.
Continuous Control of Victim ▸ *People v. Thompson* (1990) 50 Cal.3d 134, 171–172 [lewd acts]; *People v. Carter* (1993) 19 Cal.App.4th 1236, 1251–1252 [robbery].
Robbery ▸ *People v. Salas* (1972) 7 Cal.3d 812, 823; *People v. Cooper* (1991) 53 Cal.3d 158, 1170.
Burglary ▸ *People v. Bodely* (1995) 32 Cal.App.4th 311, 313–314.
Lewd Acts on Child ▸ *People v. Thompson* (1990) 50 Cal.3d 134, 171–172.
Sexual Assault ▸ *People v. Hart* (1999) 20 Cal.4th 546, 611; *People v. Hernandez* (1988) 47 Cal.3d 315, 348.
Kidnapping ▸ *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1299; *People v. Silva* (1988) 45 Cal.3d 604, 632.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 139–142.

RELATED ISSUES

Temporary Place of Safety Based on Objective Standard
Whether the defendant had reached a temporary place of safety is judged on an objective standard. The "issue to be resolved is whether a robber had actually reached a place of temporary safety, not whether the defendant thought that he or she had reached such a location." (*People v. Johnson* (1992) 5 Cal.App.4th 552, 560.)

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STAFF NOTES

Cavitt

As explained in the Bench Notes, *Cavitt* created a distinction between the “escape rule” and the “continuous transaction” doctrine. *Cavitt* for the first time indicated that the “escape rule” does not define the limits of felony-murder liability but only the duration of the felony for other “ancillary” purposes. This instruction has been modified accordingly.

Continuous Control of Victim

> In *People v. Fields* (1983) 35 Cal.3d 329, 367-68, the defendant robbed the victim, then drove her some distance from his home to kill her. We found a felony murder, noting that the crimes were linked not only by defendant's motive -- which, as here, may have included preventing the victim from identifying him to the police -- but also by his "continued control over the victim." (*Id*. at p. 368.) Even if, in the present case, one or more lewd acts occurred at defendant's apartment, perhaps another (the sodomy) elsewhere and the killing some hours later in Palos Verdes, defendant's control over the victim was continuous and links the crimes.

(*People v. Thompson* (1990) 50 Cal.3d 134171-172.)

In *People v. Carter* (1993) 19 Cal.App.4th 1236, 1251-52, the court approved of this instruction: "a perpetrator of a robbery has not reached a place of temporary safety if the continued control over the victim places the perpetrator's safety in jeopardy." In *People v. Carter, supra,* 19 Cal.App.4th at pp. 1241-43, defendants drove the victim to a secluded area before killing him and taking his wallet. The defendants were charged with robbery-felony murder, not kidnapping felony murder. Arguably, the facts might have supported the conclusion that the defendants did not abduct the victim but convinced him to accompany them to the secluded area as a “pick up.” (*Ibid.*)

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300A. Direct and Circumstantial Evidence: Defined

Facts may be proved by direct or circumstantial evidence or by a combination of both. *Direct evidence* can prove a fact by itself. For example, if a witness testifies he saw it raining outside before he came into the courthouse, that testimony is direct evidence that it was raining. *Circumstantial evidence* also may be called indirect evidence. Circumstantial evidence can prove a fact based on a reasonable conclusion drawn from one or more other facts. For example, if a witness testifies that he saw someone come inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence because it supports a conclusion that it was raining outside.

Both direct and circumstantial evidence are acceptable, and neither is necessarily more reliable than the other. You must decide whether a fact in issue has been proved based on all the evidence.

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction explaining direct and circumstantial evidence if the prosecution substantially relies on circumstantial evidence to establish any element of the case. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [duty exists where circumstantial evidence relied on to prove any element, including intent]; see *People v. Boyd* (1987) 43 Cal.3d 333, 351–352; *People v. Heishman* (1988) 45 Cal.3d 147, 167.) The court must give this instruction if the court will be giving either Instruction 300B, Circumstantial Evidence: Sufficiency of Evidence or Instruction 301, Circumstantial Evidence: Intent or Mental State.

The court, at its discretion, may give this instruction in any case in which circumstantial evidence has been presented.

AUTHORITY

Direct Evidence Defined ▸ Evid. Code, § 410.
Inference Defined ▸ Evid. Code, § 600(b).
Difference Between Direct and Circumstantial Evidence ▸ *People v. Lim Foon* (1915) 29 Cal.App. 270, 274 [no sua sponte duty to instruct, but court

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approves definition]; *People v. Goldstein* (1956) 139 Cal.App.2d 146, 152–153 [sua sponte duty to instruct].

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 3.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 652.
1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 117.

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300B. Circumstantial Evidence: Sufficiency of Evidence

Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on how to evaluate circumstantial evidence if the prosecution substantially relies on circumstantial evidence to establish any element of the case. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [duty exists where circumstantial evidence relied on to prove any element, including intent]; see *People v. Boyd* (1987) 43 Cal.3d 333, 351–352; *People v. Heishman* (1988) 45 Cal.3d 147, 167.)

There is no sua sponte duty to give this instruction when the circumstantial evidence is incidental to and corroborative of direct evidence. (*People v. Malbrough* (1961) 55 Cal.2d 249, 250–251; *People v. Watson* (1956) 46 Cal.2d 818, 831; *People v. Shea* (1995) 39 Cal.App.4th 1257, 1270–1271.) This is so even when the corroborative circumstantial evidence is essential to the prosecution's case, e.g., when corroboration of an accomplice's testimony is required under Penal Code section 1111. (*People v. Williams* (1984) 162 Cal.App.3d 869, 874.)

If intent is the only element proved by circumstantial evidence, do not give this instruction. Give Instruction 301, Circumstantial Evidence: Intent or Mental State. (*People v. Marshall* (1996) 13 Cal.4th 799, 849.)

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AUTHORITY

Direct Evidence Defined ▸ Evid. Code, § 410.
Inference Defined ▸ Evid. Code, § 600(b).
Between Two Reasonable Interpretations of Circumstantial Evidence, Accept the One That Points to Innocence ▸ *People v. Merkouris* (1956) 46 Cal.2d 540, 560–562 [error to refuse requested instruction on this point]; *People v. Johnson* (1958) 163 Cal.App.2d 58, 62 [sua sponte duty to instruct]; see *People v. Wade* (1995) 39 Cal.App.4th 1487, 1492.
Circumstantial Evidence Must Be Entirely Consistent With a Theory of Guilt and Inconsistent With Any Other Rational Conclusion ▸ *People v. Bender* (1945) 27 Cal.2d 164, 175 [sua sponte duty to instruct]; *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [same].
Difference Between Direct and Circumstantial Evidence ▸ *People v. Lim Foon* (1915) 29 Cal.App. 270, 274 [no sua sponte duty to instruct, but court approves definition]; *People v. Goldstein* (1956) 139 Cal.App.2d 146, 152–153 [sua sponte duty to instruct].
Each Fact in Chain of Circumstantial Evidence Must Be Proved ▸ *People v. Watson* (1956) 46 Cal.2d 818, 831 [error to refuse requested instruction on this point].
Sua Sponte Duty When Prosecutor's Case Rests Substantially on Circumstantial Evidence ▸ *People v. Boyd* (1987) 43 Cal.3d 333, 351–352.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 3.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 652.
1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 117.

RELATED ISSUES

Extrajudicial Admissions
Extrajudicial admissions are not the type of indirect evidence requiring instruction on circumstantial evidence. (*People v. Wiley* (1976) 18 Cal.3d 162, 174–175.)

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301. Circumstantial Evidence: Intent or Mental State

The People must prove not only that the defendant did the act[s] charged, but also that (he/she) acted with a particular intent or mental state. The instructions for each crime explain the intent or mental state required.

An intent or mental state may be proved by circumstantial evidence.

Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

Also, before you may rely on circumstantial evidence to conclude that the defendant had the required intent or mental state, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required intent or mental state. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required intent or mental state and another reasonable conclusion supports a finding that the defendant did not, you must conclude that the required intent or mental state was not proved by the circumstantial evidence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on how to evaluate circumstantial evidence if the prosecution substantially relies on circumstantial evidence to establish the element of a specific intent or a mental state. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49.)

Give this instruction when the defendant's intent or mental state is the only element of the offense that rests substantially or entirely on circumstantial evidence. If other elements of the offense also rest substantially or entirely on circumstantial evidence, do not give this instruction. Give Instruction 300B,

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Circumstantial Evidence: Sufficiency of Evidence. (See *People v. Marshall* (1996) 13 Cal.4th 799, 849; *People v. Hughes* (2002) 27 Cal.4th 287, 347.)

If the court is also instructing on a strict-liability offense, the court may wish to modify this instruction to clarify which charges it applies to.

AUTHORITY

Instructional Requirements ▸ *People v. Lizarraga* (1990) 219 Cal.App.3d 476, 481–482 [when both specific intent and mental state are elements].
Intent Manifested by Circumstances ▸ Pen. Code, § 21(a).
Accept Reasonable Interpretation of Circumstantial Evidence That Points Against Specific Intent ▸ *People v. Yokum* (1956) 145 Cal.App.2d 245, 253–254.
Circumstantial Evidence Must Be Entirely Consistent With Existence of Specific Intent ▸ *People v. Yokum* (1956) 145 Cal.App.2d 245, 253–254.
Reject Unreasonable Interpretations ▸ *People v. Hines* (1997) 15 Cal.4th 997, 1049–1050.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, §§ 3, 6.
5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 652.
1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 117.

RELATED ISSUES

General or Specific Intent Explained
A crime is a general-intent offense when the statutory definition of the crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence. A crime is a specific-intent offense when the statutory definition refers to the defendant's intent to do some further act or achieve some additional consequence. (*People v. McDaniel* (1979) 24 Cal.3d 661, 669; *People v. Hood* (1969) 1 Cal.3d 444, 456–457; *People v. Swanson* (1983) 142 Cal.App.3d 104, 109; see, e.g., *People v. Whitfield* (1994) 7 Cal.4th 437, 449–450 [second degree murder based on implied malice is a specific-intent crime].)

Only One Possible Inference
The fact that elements of a charged offense include mental elements that must necessarily be proved by inferences drawn from circumstantial evidence does not alone require an instruction on the effect to be given to such evidence. (*People v. Heishman* (1988) 45 Cal.3d 147, 167; *People v. Wiley* (1976) 18 Cal.3d 162, 174–

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176.) When the only inference to be drawn from circumstantial evidence points to the existence of a required specific intent or mental state, a circumstantial evidence instruction need not be given sua sponte, but should be given on request. (*People v. Gordon* (1982) 136 Cal.App.3d 519, 531; *People v. Morrisson* (1979) 92 Cal.App.3d 787, 793–794.)

Direct Evidence, Extrajudicial Admission, or No Substantial Reliance
This instruction should not be given if direct evidence of the mental elements exists (*People v. Wiley* (1976) 18 Cal.3d 162, 175), if the only circumstantial evidence is an extrajudicial admission (*People v. Gould* (1960) 54 Cal.2d 621, 629 [overruled on other grounds in *People v. Cuevas* (1995) 12 Cal.4th 252, 271–272]), or if the prosecution does not substantially rely on circumstantial evidence (*People v. DeLeon* (1982) 138 Cal.App.3d 602, 607–608).

See the Related Issues section of Instruction 300B, Circumstantial Evidence: Sufficiency of Evidence.

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STAFF COMMENTS

The mental state in instruction 301 refers to a special mental state, analogous to a specific intent, that is an element of the criminal offense, such as premeditation. (*People v. Wiley* (1976) 18 Cal.3d 162, 174–76; *People v. Swanson* (1983) 142 Cal.App.3d 104,110.)

If the defendant intends to do a proscribed act and no showing is required of an intent to do a further act or achieve a future consequence, general criminal intent is shown. (*People v. McDaniel* (1979) 24 Cal.3d 661, 669; *People v. Swanson* (1983) 142 Cal.App.3d 104, 110.) The fact that a criminal statute requires an act to be done knowingly does not mean that the act calls for specific intent. (*People v. Calban* (1976) 65 Cal.App.3d 578, 583–84.)

Circumstantial Evidence of Specific Intent
When a specific intent is an element of an offense, it presents a question of fact that must be proved like any other fact in the case. It is a question of fact even though it cannot be proved by direct evidence. The circumstances surrounding the act furnish the evidence from which the presence or absence of the specific intent may be inferred. (*People v. Maciel* (1925) 71 Cal.App. 213, 218–19.) A presumption of intent, however, is unconstitutional because it relieves the prosecution of its burden of proving every element of the offense charged. (*Francis v. Franklin* (1985) 471 U.S. 307, 316–17.)

Reasonable Doubt Burden
An instruction on circumstantial evidence does not undermine the constitutional requirement of proof beyond a reasonable doubt by telling the jury that if there is only one reasonable conclusion to be drawn from the circumstantial evidence, they must accept it. When read in context with other instructions, including the reasonable doubt instruction, it is clear that a jury is required only to reject unreasonable interpretations of the evidence and to accept a reasonable interpretation that is consistent with the evidence. (*People v. Crittenden* (1994) 9 Cal.4th 83, 144.)

Union of Act or Conduct and Specific Intent
Specific intent crimes require a union or joint operation of act or conduct and a certain specific intent in the perpetrator's mind. (See *People v. Williams* (1997) 16 Cal.4th 635, 675–76 [approving concurrence instruction for murder charges]; see, e.g., *People v. Dawson* (1997) 60 Cal.App.4th 534, 545–46 [approved use of instruction along with other aiding and abetting instructions].)

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Sources from Other Jurisdictions
Iowa Criminal Jury Instructions, no. 200.2
Michigan Criminal Jury Instructions, no. CJI2d 3.9
Pennsylvania Suggested Standard Criminal Jury Instructions, no. 7.02B

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421. Testimony of Person With Developmental, Cognitive, or Mental Disability

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In evaluating the testimony of a person with a (developmental disability[,]/ [or] [a] (cognitive[,]/ [or] mental[,]/ [or] communication) impairment), consider all of the factors surrounding that person's testimony, including his or her level of cognitive development.

Even though a person with a (developmental disability[,]/ [or] [a] (cognitive[,]/ [or] mental[,]/ [or] communication) impairment)[,] may perform differently as a witness because of his or her level of cognitive development, that does not mean he or she is any more or less credible than another witness.

You should not discount or distrust the testimony of a person with a (developmental disability[,]/ [or] [a] (cognitive[,]/ [or] mental [,]/ [or] communication) impairment)[,] solely because he or she has such a (disability/ [or] impairment).

BENCH NOTES

Instructional Duty

This instruction must be given on request in any case "in which a person with a developmental disability, or cognitive, mental, or communication impairment testifies as a witness . . . ." (Pen. Code, § 1127g.)

The court should consider whether this instruction is appropriate if the witness has a communication impairment that is not related to a deficiency in cognitive functioning.

AUTHORITY

Statutory Authority ▸ Pen. Code, § 1127g.

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STAFF NOTES

New Statute effective Jan 1, 2005—Pen. Code, § 1127g:

> In any criminal trial or proceeding in which a person with a developmental disability, or cognitive, mental, or communication impairment testifies as a witness, upon the request of a party, the court shall instruct the jury, as follows:
>
> In evaluating the testimony of a person with a developmental disability, or cognitive, mental, or communication impairment, you should consider all of the factors surrounding the person's testimony, including their level of cognitive development. Although, because of his or her level of cognitive development, a person with a developmental disability, or cognitive, mental, or communication impairment may perform differently as a witness, that does not mean that a person with a developmental disability, or cognitive, mental, or communication impairment is any more or less credible a witness than another witness. You should not discount or distrust the testimony of a person with a developmental disability, or cognitive, mental, or communication impairment solely because he or she is a person with a developmental disability, or cognitive, mental, or communication impairment.

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535. Compelling Another to Commit Crime

If the defendant forced another person to commit a crime by threatening, menacing, commanding, or coercing that person, then the defendant is guilty of the crime that the defendant forced the other person to commit.

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct on the theory of liability advanced by the prosecution. (See *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [sua sponte duty to instruct on aiding and abetting].)

AUTHORITY

Principals Defined ▸ Pen. Code, § 31.

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STAFF NOTES

Pen. Code, § 31, in relevant part:

> All persons . . . who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed.

Staff was unable to locate any cases discussing this portion of Penal Code section 31.

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542. Limited Purpose of Evidence of Gang Activity

You may consider evidence of gang activity only for the limited purpose of deciding whether:

- **[The defendant acted with the intent and knowledge that are required to prove the gang-related (crime/ [and] enhancement[s]) charged(;/.)]**

[OR]

- **[The defendant had a motive to commit the crimes charged(;/.)]**

[OR]

- **[The defendant actually believed in the need to defend (himself/herself)(;/.)]**

[OR]

- **[The defendant acted in the heat of passion(;/.)]**

[OR]

- **[_____** *<insert other reason court admitted gang evidence>*.**]**

[You may also consider this evidence when you evaluate the credibility or believability of [a] witness[es] and when you consider the facts and information relied on by an expert witness in reaching his or her opinion.]

You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that (he/she) has a disposition to commit crime.

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BENCH NOTES

Instructional Duty
On request, the court must give a limiting instruction when evidence of gang activity has been admitted. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052.) There is, however, no sua sponte duty to instruct the jury on this issue.

AUTHORITY

Instruction Must Be Given on Request ▸ *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052.

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STAFF NOTES

This instruction is modeled on a special instruction sent to us by Judge William Froeberg in Orange County. He states he has been using this special instruction for several years and that attorneys have begun requesting it in other courts.

His instruction has been modified to be more consistent with the task force drafting style.

In addition, as noted in the bench notes, the Supreme Court recently ruled that a special instruction on the limited admissibility of gang evidence must be given on request.

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712. Provocation: Effect on Degree of Murder

Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide.

If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.]

[Provocation does not apply to a prosecution under a theory of felony murder.]

BENCH NOTES

Instructional Duty
Provocation may reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [provocation raised reasonable doubt about premeditation or deliberation, "leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation"]; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1211–1212 [court adequately instructed on relevance of provocation to whether defendant acted with intent to torture for torture murder].) There is, however, no sua sponte duty to instruct the jury on this issue. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 31–33.) This is a pinpoint instruction, to be given on request.

This instruction may be given after Instruction 721, Murder: Degrees.

If the court will be instructing on voluntary manslaughter, give both bracketed portions on manslaughter.

If the court will be instructing on felony murder, give the bracketed sentence stating that provocation does not apply to felony murder.

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AUTHORITY

Provocation Reduces From First to Second Degree ▸ *People v. Thomas* (1945) 25 Cal.2d 880, 903; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1211–1212.

Pinpoint Instruction ▸ *People v. Middleton* (1997) 52 Cal.App.4th 19, 31–33.

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STAFF NOTES

Appellate Defenders, LAPD and Orange County Bar—all note that CALJIC contains an instruction similar to this (see 8.73). We have included a note in the related issues section of Inst. 721, but have not yet included an instruction on this anywhere.

In addition, in the recent opinion *People v. Cole* (Aug. 17, 2004) S027766, __ Cal.4th __, __ slip op. at p. 10116, the Supreme Court held that the trial court adequately instructed on the effect of provocation on torture murder because the court gave the CALJIC equivalent to this instruction. The court stated:

> Defendant similarly contends that the trial court erred in failing to instruct on the relationship of provocation to the mental state necessary for murder by torture, that is, the intent to inflict extreme pain. He claims that instructing the jury according to CALJIC No. 8.73 that it could consider "evidence of provocation for such bearing as it may have on the question of whether the murder was of the first or second degree" was insufficient.
>
> Defendant did not ask the trial court to clarify or amplify the instruction. Thus, he may not complain on appeal that the instruction was incomplete. [Citation.] In any event, the argument is without merit. . . .
>
> Defendant argues the trial court should have instructed on provocation *for purposes of voluntary manslaughter*. But provocation for such purposes has nothing to do with intent and everything to do with circumstances, specifically, whether the circumstances would have caused a reasonable person to act as defendant did. [Citation.] Thus, to instruct on provocation for purposes of voluntary manslaughter would have not assisted the jury in determining whether provocation prevented defendant from forming the intent necessary to commit murder by torture. The two concepts are distinct.
>
> The court did instruct the jury on provocation as relevant to this case. Specifically, the court instructed that, if "the killing was preceded and accompanied by a clear, deliberate intent . . ., which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and *not under a sudden heat of passion or other condition precluding the idea of*

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> *deliberation*," it was first degree murder. (Italics added; see CALJIC No. 8.20 (5th ed. 1988) [deliberate and premeditated murder].) As stated, the court also instructed that, if "the evidence shows the existence of provocation that played a part in inducing the unlawful killing of a human being, and you find that the killing was murder, you may consider the evidence of provocation for such bearing as it may have on the question of whether the murder was of the first or second degree." (See CALJIC No. 8.73 (5th ed. 1988) [evidence of premeditation may be considered in determining degree of murder].) Finally, the court instructed that, if the jury had a reasonable doubt as to whether the murder was of the first or second degree, the jury had to give the defendant the benefit of the doubt and return a verdict of second degree murder. (See CALJIC No. 8.71 (5th ed. 1988) [doubt whether first or second degree murder].) There is no reasonable likelihood that the jury would have understood these instructions to foreclose them from considering evidence of provocation, if any, in connection with murder by torture. [Citations.]

(*Ibid.* [footnote omitted, italics in original].)

Note that in *Cole* the court did not give any instructions on voluntary manslaughter or any other instructions defining provocation or heat of passion. (*Id.* at p. 10118.) The Supreme Court held that, as used here “provocation” and “heat of passion” had their ordinary meaning and the court did not have to provide any further explanation without a specific request. *(Ibid.)*

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1420. Owning or Operating a Chop Shop

The defendant is charged [in Count __] with owning or operating a chop shop.

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

1. **The defendant knew that (he/she) (owned/ [or] operated) a chop shop;**

AND

2. **The defendant intentionally (owned/ [or] operated) the chop shop.**

A *chop shop* is a building, lot, or other place where:

1. **A person alters, destroys, takes apart, reassembles, or stores a motor vehicle or motor vehicle part;**

2. **That person knows that the vehicle or part has been obtained by theft, fraud, or conspiracy to defraud;**

AND

3. **That person knows that the vehicle or part was obtained in order to either:**

   a. **Sell or dispose of the vehicle or part;**

OR

   b. **Alter, counterfeit, deface, destroy, disguise, falsify, forge, obliterate, or remove the identity, including an identification number, of the vehicle or part, in order to misrepresent its identity or prevent its identification.**

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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.

AUTHORITY

Elements ▸ Veh. Code, § 10801.
Chop Shop Defined ▸ Veh. Code, § 250.
Meaning of "Operate" ▸ *People v. Ramirez* (2000) 79 Cal.App.4th 408, 414–415.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 263.

LESSER INCLUDED OFFENSES

Receiving Stolen Property ▸ Pen. Code, § 496. There is a split in authority on this issue. *People v. Sanchez* (2004) 113 Cal.App.4th 271, 277–278 concluded that receiving stolen property is a lesser included offense, but a defendant may be convicted of both offenses when different property is involved in the two convictions. However, *People v. Strohman* (2000) 84 Cal.App.4th 1313, 1316, reached the opposite conclusion.

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STAFF COMMENTS

Vehicle Code, § 10801:

> Any person who knowingly and intentionally owns or operates a chop shop is guilty of a public offense and, upon conviction, shall be punished by imprisonment in the state prison for two, three, or four years, or by a fine of not more than fifty thousand dollars ($50,000), or by both the fine and imprisonment, or by up to one year in the county jail, or by a fine of not more than one thousand dollars ($1,000), or by both the fine and imprisonment.

Vehicle Code, § 250:

> A “chop shop” is any building, lot, or other premises where any person has been engaged in altering, destroying, disassembling, dismantling, reassembling, or storing any motor vehicle or motor vehicle part known to be illegally obtained by theft, fraud, or conspiracy to defraud, in order to do either of the following:
>
> (a) Alter, counterfeit, deface, destroy, disguise, falsify, forge, obliterate, or remove the identity, including the vehicle identification number, of a motor vehicle or motor vehicle part, in order to misrepresent the identity of the motor vehicle or motor vehicle part, or to prevent the identification of the motor vehicle or motor vehicle part.
>
> (b) Sell or dispose of the motor vehicle or motor vehicle part.

Operating a Chop Shop

In *People v. Ramirez* (2000) 79 Cal.App.4th 408, 415, the court explained the word “operates” has its common sense meaning as used in this statute:

> The parties concede that the definitions of the terms "own" or "operate" as they apply to this statute have not yet been interpreted by the courts. However, we may look to the interpretation of those terms as they have been applied in other contexts. In *People v. Sanchez* (1998) 62 Cal. App. 4th 460, 471, our colleagues in Division Two of this appellate district defined the word "operate" AS FOLLOWS: "The word 'operates' here [(§ 327, endless chain scheme)] has its ordinary meaning. Webster's Third New International Dictionary (1993) page 1581 defines 'operate' as 'to

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cause to function usu[ally] by direct personal effort: work (car) (*operating* a drill press) . . . to manage and put or keep in operation whether with personal effort or not (*operated* a grocery store).' Unlike the words 'contrives,' 'prepares,' 'sets up' or 'proposes,' which envision preparatory activity, the word 'operates' denotes ongoing conduct which advances the progress of an existing entity. This term stands apart from the others, which describe various stages of formulation of the scheme; one who 'operates' a scheme may carry it along after its inception. We reject appellants' claim that 'operate' applies only to the creators and designers of the scheme." (*Id.* at p. 471, original italics.) Defendant's citation to *Wells Fargo Bank v. Goldzband* (1997) 53 Cal. App. 4th 596, 605 is essentially in agreement, "The definitions of owner and operator [(Pub. Resources Code, § 3009, oil and gas wells)] . . . clearly envision someone who exercises some form of control over *or active involvement in* the drilling, maintaining or operation of the well." (Italics added.)

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1690. Driver and Driving Defined

[A *driver* is a person who drives or is in actual physical control of a vehicle.]

[A person *drives* a vehicle when he or she intentionally causes it to move by exercising actual physical control over it. The person must cause the vehicle to move, but the movement may be slight.]

BENCH NOTES

Instructional Duty
No case has held that the court has a sua sponte duty to define "driver" or "driving." This instruction is provided for the court to use, on request, at its discretion.

AUTHORITY

Driver Defined ▸ Veh. Code, § 305.
Driving Defined ▸ *Mercer v. Dept. of Motor Vehicles* (1991) 53 Cal.3d 753, 763–765.
Slight Movement Sufficient ▸ *Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1029; *Music v. Dept. of Motor Vehicles* (1990) 221 Cal.App.3d 841, 850.

RELATED ISSUES

Circumstantial Evidence
Driving may be established through circumstantial evidence. (*Mercer v. Dept. of Motor Vehicles* (1991) 53 Cal.3d 753, 768.) For example, in *People v. Wilson* (1985) 176 Cal.App.3d Supp. 1, 9, the court found sufficient evidence of driving where the vehicle was parked on the freeway, over a mile from the on-ramp, and the defendant, the sole occupant of the vehicle, was found in the driver's seat with the vehicle's engine running.

Engine Need Not Be On
In *People v. Hernandez* (1990) 219 Cal.App.3d 1177, 1184, the court held that the defendant was "driving" because he was "seated in the driver's seat steering or controlling the truck while it was still moving, even though the engine was no longer running." (See also *People v. Jordan* (1977) 75 Cal.App.3d Supp. 1, 9

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[defendant “driving” a moped when she moved it by pedaling, even though the engine was not on].)

Steering Vehicle
In *In re Queen T.* (1993) 14 Cal.App.4th 1143, 1145, the court held that the minor was “driving” when she steered the vehicle, even though someone else was sitting in the driver’s seat operating the accelerator and brake.

Relocating Vehicle in Accident
In *People v. Kelley* (1937) 27 Cal.App.2d Supp. 771, 773, the court held that the defendant was not “driving” when he got in the driver’s seat and steered a disabled vehicle, moving it four or five feet to a safe location following an accident. The court specifically stated that its holding was based on the unique facts of the case and that it was not attempting to “give a definition to the word ‘drive.’ ” (*Id.* at p. 775.)

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STAFF NOTES

Veh. Code, § 305:

A "driver" is a person who drives or is in actual physical control of a vehicle. The term "driver" does not include the tillerman or other person who, in an auxiliary capacity, assists the driver in the steering or operation of any articulated firefighting apparatus.

Driving

In everyday usage the phrase, "to drive a vehicle," is understood as requiring evidence of volitional movement of a vehicle. . . .

Section 305, defining the noun "driver" for purposes of construing the Vehicle Code, provides, "A 'driver' is a person who drives *or* is in actual physical control of a vehicle." . . .

The use of the disjunctive "or" in these statutes suggests the Legislature recognizes a distinction between one who "drives" a vehicle and one who "operates" or "is in actual physical control of" a vehicle, and that the Legislature knows how to broaden the scope of coverage when it wants to do so. . . .

"The distinction between these terms is material, for it is generally held that the word 'drive,' as used in statutes of this kind, usually denotes movement of the vehicle in some direction, whereas the word 'operate' has a broader meaning so as to include not only the motion of the vehicle, but also acts which engage the machinery of the vehicle that, alone or in sequence, will set in motion the motive power of the vehicle." [Citation.] . . .

fn8. "'[T]he term "driving" is encompassed within the term "operating"; but the reverse is not necessarily so. One may not drive a vehicle without operating it; but one may operate the engine or devices of a vehicle without driving it. Otherwise stated: while all driving is necessarily operation of a motor vehicle, not all operation is necessarily driving.'" . . .[End footnote.]

Based on (i) the "plain meaning" of the statutory term "drive," (ii) the use of that and related terms by our Legislature in related statutes, and (iii) the interpretation of the word "drive" and related

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> terms in numerous decisions by our sister states, we conclude section 23152 requires proof of volitional movement of a vehicle.

(*Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3d 753, 763–768 [footnotes omitted, italics in original; footnotes omitted].)

Only Slight Movement Required

> It is true that the driver in *Henslee* only moved the car slightly. But the movement need not be extensive; even a matter of a few inches will suffice to constitute driving.

(*Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1029 [discussing *Henslee v. Depart. of Motor Vehicles* (1985) 168 Cal.App.3d 445, 450-453]; see also *Music v. Depart. of Motor Vehicles* (1990) 221 Cal.App.3d 841, 850.)

Engine Need Not be On

> Hernandez was "driving" his truck when the engine stalled in a traffic lane of the freeway. He was seated in the driver's seat steering or controlling the truck while it was still moving, even though the engine was no longer running.

(*People v. Hernandez* (1990) 219 Cal.App.3d 1177, 1184.)

> [I]t has been consistently held that a person steering or controlling a vehicle may be prosecuted for drunk driving when the vehicle is in motion but the engine is off. [Citing cases from other states.]

(*People v. Jordan* (1977) 75 Cal.App.3d Supp. 1, 9.)

Steering Vehicle

In *In re Queen T.* (1993) 14 Cal.App.4th 1143, 1145, the court held that the minor was “driving” when she steered the vehicle, even though someone else was sitting in the driver’s seat operating the accelerator and brake.

Moving Vehicle in Accident

In *People v. Kelley* (1937) 27 Cal.App.2d Supp. 771, 773, the court held that the defendant was not “driving” when he got in the driver’s seat and steered a disabled vehicle, moving it four or five feet to a safe location. The court specifically stated that it’s holding was based on the unique facts of the case and the court was not attempting to “give a definition to the word ‘drive.’” (*Id.* at p. 775.)

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863. Sexual Battery: Misdemeanor

The defendant is charged [in Count __] with sexual battery.

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

1. **The defendant touched an intimate part of _____** *<insert name of complaining witness>***;**

2. **The touching was done against _____'s** *<insert name of complaining witness>* **will;**

AND

3. **The touching was done for the specific purpose of sexual arousal, sexual gratification, or sexual abuse.**

An *intimate part* is a female's breast or the anus, groin, sexual organ, or buttocks of anyone.

***Touching*, as used here, means making physical contact with another person. *Touching* includes contact made through the clothing.**

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

BENCH NOTES

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

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

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AUTHORITY

Elements ▸ Pen. Code, § 243.4(e)(1).
Touches Defined ▸ Pen. Code, § 243.4(e)(2).
Intimate Part Defined ▸ Pen. Code, § 243.4(g)(1).
Consent Defined ▸ Pen. Code, §§ 261.6, 261.7.
Specific-Intent Crime ▸ *People v. Chavez* (2000) 84 Cal.App.4th 25, 29.
Defendant Must Touch Intimate Part of Victim ▸ *People v. Elam* (2001) 91 Cal.App.4th 298, 309–310.
Defendant Need Not Touch Skin ▸ *People v. Dayan* (1995) 34 Cal.App.4th 707, 716.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 26.

COMMENTARY

In a case addressing the meaning of for the "purpose of . . . sexual abuse" in the context of Penal Code section 289, one court has stated that "when a penetration is accomplished for the purpose of causing pain, injury or discomfort, it becomes sexual abuse, even though the perpetrator may not necessarily achieve any sexual arousal or gratification whatsoever." (*People v. White* (1986) 179 Cal.App.3d 193, 205.) If the court concludes that this reasoning applies to the crime of sexual battery and a party requests a definition of "sexual abuse," the following language may be used:

> *Sexual abuse* means any touching of a person's intimate parts in order to cause pain, injury, or discomfort. The perpetrator does not need to achieve any sexual arousal or sexual gratification.

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STAFF NOTES

Pen. Code, § 243.4, in relevant part:

> (e)(1) Any person who touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of misdemeanor sexual battery, punishable by a fine not exceeding two thousand dollars ($ 2,000), or by imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment. However, if the defendant was an employer and the victim was an employee of the defendant, the misdemeanor sexual battery shall be punishable by a fine not exceeding three thousand dollars ($ 3,000), by imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment. . . .
>
> (2) As used in this subdivision, "touches" means physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim. . . .
>
> (g) As used in this section, the following terms have the following meanings:
>
> (1) "Intimate part" means the sexual organ, anus, groin, or buttocks of any person, and the breast of a female.

Source of Instruction

This instruction is modeled on the Task Force instruction on felony battery. The definition of touching has been changed, consistent with the statute, and a definition of “against the will” has been added.

Defendant Must Touch Intimate Part of Victim

> The prosecutor argued and the court accepted that it was sufficient for sexual battery that defendant forced [the victim’s] hand to touch [the defendant’s] penis. They were mistaken. As defined, the term "intimate part" does not include the victim's hand. Moreover, it is the *perpetrator* who must touch the victim's intimate part, not the other way around.

(*People v. Elam* (2001) 91 Cal.App.4th 298, 310.)

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864. Simple Battery: Against Spouse, Cohabitant, or Fellow Parent

The defendant is charged [in Count __] with battery against [his/her] ([former] spouse/[former] cohabitant/fiancé[e]/a person with whom the defendant currently has, or previously had, a (dating/ [or] engagement) relationship/the (mother/father) of (his/her) child).

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

1. **The defendant willfully [and unlawfully] touched _____** *<insert name of complaining witness>* **in a harmful or offensive manner;**

[AND]

2. **_____** *<insert name of complaining witness>* **is (the/a) (defendant's [former] spouse/defendant's [former] cohabitant/defendant's fiancé[e]/person with whom the defendant currently has, or previously had, a (dating/ [or] engagement) relationship/(mother/father) of the defendant's child)(;/.)**

<Give element 3 when instructing on self-defense or defense of another.>
[AND

3. **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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[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 person may cohabit simultaneously with two or more people at different locations, during the same time frame, if he or she maintains substantial ongoing relationships with each person and lives with each person for significant periods.]

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

[A person is considered to be the (mother/father) of another person's child if the alleged male parent is presumed under the law to be the natural father. _____ *<insert name of presumed father>* **is presumed under law to be the natural father of _____** *<insert name of child>***.]**

BENCH NOTES

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3 and any appropriate defense instructions. (See Instructions 690–697.)

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

Give the third bracketed sentence that begins with "A person may cohabit simultaneously with two or more people" on request if there is evidence that the defendant cohabited with two or more people. (See *People v. Moore* (1996) 44 Cal.App.4th 1323, 1335.)

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Give on request the bracketed paragraph that begins with "A person is considered to be the (mother/father)" if an alleged parental relationship is based on the statutory presumption that the male parent is the natural father. (See Pen. Code, § 273.5(d); see also *People v. Vega* (1995) 33 Cal.App.4th 706, 711 [parentage can be established without resort to any presumption].)

AUTHORITY

Elements ▸ Pen. Code, § 243(e)(1).
Willfully 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].
Cohabitant Defined ▸ *People v. Holifield* (1988) 205 Cal.App.3d 993, 1000; *People v. Ballard* (1988) 203 Cal.App.3d 311, 318–319.
Dating Relationship Defined ▸ Pen. Code, § 243(f)(10).
Simultaneous Cohabitation ▸ *People v. Moore* (1996) 44 Cal.App.4th 1323, 1335.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 19.

LESSER INCLUDED OFFENSES

Assault ▸ Pen. Code, § 240.
Simple Battery ▸ Pen. Code, §§ 242, 243(a).

RELATED ISSUES

See the Related Issues section of Instruction 850, Simple Battery.

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STAFF NOTES

Pen. Code, § 243, in relevant part:

> (e) (1) When a battery is committed against a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant's child, former spouse, fiance, or fiancee, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship, the battery is punishable by a fine not exceeding two thousand dollars ($ 2,000), or by imprisonment in a county jail for a period of not more than one year, or by both that fine and imprisonment. . . .
>
> (f) (10) "Dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement independent of financial considerations.

Source of Instruction

This instruction is modeled on Task Force Instruction 850, Simple Battery, and Instruction 924, Inflicting Injury on Spouse, Cohabitant, or Fellow Parent Resulting in Traumatic Condition. The definition of “dating relationship” has been added per statute.

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865. Simple Battery on Military Personnel

The defendant is charged [in Count __] with battery against a member of the United States Armed Forces.

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

1. **The defendant willfully [and unlawfully] touched _____** *<insert name of complaining witness>* **in a harmful or offensive manner;**

2. **_____** *<insert name of complaining witness>* **was a member of the United States Armed Forces at the time of the touching;**

[AND]

3. **The defendant knew _____** *<insert name of complaining witness>* **was a member of the United States Armed Forces and touched _____** *<insert name of complaining witness>* **in a harmful or offensive manner because of _____** *<insert name of complaining witness>***'s service(;/.)**

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

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

A _____ *<insert description, e.g., "private in the United States Army">* **is a member of the United States Armed Forces.**

A person commits a battery *because of* someone's service in the armed forces if:

1. **He or she is biased against the person battered based on that person's military service;**

AND

2. **That bias caused him or her to commit the alleged battery.**

If the defendant had more than one reason to commit the alleged battery, the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the battery.

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 3 and any appropriate defense instructions. (See Instructions 690–697.)

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

The jury must determine whether the alleged victim is a member of the armed forces. (See *People v. Brown* (1988) 46 Cal.3d 432, 444–445.) The court may instruct the jury on the appropriate definition of "member of the armed forces." However, the court may not instruct the jury that the alleged victim was a member of the armed forces as a matter of law. *(Ibid.)*

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AUTHORITY

Elements ▸ Pen. Code, § 243.10.
Willfully 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].

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 19.

LESSER INCLUDED OFFENSES

Assault ▸ Pen. Code, § 240.
Simple Battery ▸ Pen. Code, §§ 242, 243(a).

RELATED ISSUES

See the Related Issues section of Instruction 850, Simple Battery.

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STAFF NOTES

Pen. Code, § 243.10. Battery against member of United States Armed Forces

(a) Any person who commits a battery against a member of the United States Armed Forces because of the victim's service in the United States Armed Forces shall be punished by a fine not exceeding two thousand dollars ($ 2,000), by imprisonment in a county jail for a period not exceeding one year, or by both that fine and imprisonment.

(b) "Because of" means that the bias motivation must be a cause in fact of the battery, whether or not other causes exist. When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the battery.

Source of Instruction

This instruction is modeled on Task Force Instruction 850, Simple Battery.

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871A. Assault on Firefighter or Peace Officer

The defendant is charged [in Count __] with assault on a (firefighter/peace officer/_____ <*insert description of other person from Pen. Code, § 241(b)*>).

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

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

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

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

4. **When the defendant acted, (he/she) had the present ability to apply force to a person;**

5. **When the defendant acted, the person assaulted was lawfully performing (his/her) duties as a (firefighter/peace officer/_____** <*insert description of other person from Pen. Code, § 241(b)*>**);**

[AND]

6. **When the defendant acted, (he/she) knew, or reasonably should have known, that the person assaulted was a (firefighter/peace officer/_____** <*insert description of other person from Pen. Code, § 241(b)*>**) who was performing (his/her) duties(;/.)**

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

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

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

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

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

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

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

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

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<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 1935 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 an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 7 and any appropriate defense instructions. (See Instructions 690–697.)

In order to be "engaged in the performance of his or her duties," a peace officer must be acting lawfully. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217.) "[D]isputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element." *(Ibid.)* The court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168.) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47.) On request, the court must also instruct that the People have the burden of proving the lawfulness of an arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145.) Give the appropriate portions of Instruction 1935, Lawful Performance.

The jury must determine whether the alleged victim 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 alleged victim was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)* If the alleged victim is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the alleged victim is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

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The court may give the bracketed sentence that begins with "The duties of a _____ <*insert title of peace officer specified in Pen. Code, § 830 et seq.*> include" on request. The court may insert a description of the officer's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1222.)

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.)

AUTHORITY

Elements ▸ Pen. Code, §§ 240, 241(b).
Firefighter Defined ▸ Pen. Code, § 245.1.
Peace Officer Defined ▸ Pen. Code, § 830 et seq.
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.
Mental State for Assault ▸ *People v. Williams* (2001) 26 Cal.4th 779, 790.
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].

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

LESSER INCLUDED OFFENSES

Simple Assault ▸ Pen. Code, § 240.

RELATED ISSUES

Resisting Arrest
"[A] person may not use force to resist any arrest, lawful or unlawful, except that he may use reasonable force to defend life and limb against excessive force . . . ." (*People v. Curtis* (1969) 70 Cal.2d 347, 357.) "[I]f the arrest is ultimately determined factually to be unlawful [but the officer did not use excessive force], the defendant can be validly convicted only of simple assault or battery," not assault or battery of a peace officer. (*Id.* at pp. 355–356.) See Instruction 1936, Lawful Performance: Resisting Unlawful Arrest With Force.

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STAFF NOTES

Pen. Code, § 241(b):

> When an assault is committed against the person of a peace officer, firefighter, emergency medical technician, mobile intensive care paramedic, lifeguard, process server, traffic officer, code enforcement officer, or animal control officer engaged in the performance of his or her duties, or a physician or nurse engaged in rendering emergency medical care outside a hospital, clinic, or other health care facility, and the person committing the offense knows or reasonably should know that the victim is a peace officer, firefighter, emergency medical technician, mobile intensive care paramedic, lifeguard, process server, traffic officer, code enforcement officer, or animal control officer engaged in the performance of his or her duties, or a physician or nurse engaged in rendering emergency medical care, the assault is punishable by a fine not exceeding two thousand dollars ($ 2,000), or by imprisonment in the county jail not exceeding one year, or by both the fine and imprisonment.

Source of Instruction
This instruction is based on Task Force Instructions 870, Simple Assault, 871, Assault on a Custodial Officer, and 876, Assault on Firefighter or Peace Officer With Deadly Weapon or Force Likely to Produce Great Bodily Injury.

Definition of Peace Officer
Staff recommends the changes to our definition of "peace officer" contained in the text. In the case of a police officer, the Supreme Court approved of a similar instruction in *People v. Brown* (1988) 46 Cal.3d 432, 444–445. In *Brown*, the court instructed: "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers." *(Ibid.)*

For those peace officers where some additional fact must be proved, we have provided the second bracketed alternative.

Below is a selection of the statutes that define various peace officers.

Pen. Code, 803.1, in relevant part:

> (a) Any sheriff, undersheriff, or deputy sheriff, employed in that capacity, of a county, any chief of police of a city or chief, director, or chief executive officer of a consolidated municipal public safety agency that performs police functions, **any police officer, employed**

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in that capacity and appointed by the chief of police or chief, director, or chief executive of a public safety agency, of a city, any chief of police, or police officer of a district, including police officers of the San Diego Unified Port District Harbor Police, authorized by statute to maintain a police department, any marshal or deputy marshal of a superior court or county , any port warden or port police officer of the Harbor Department of the City of Los Angeles, or any inspector or investigator employed in that capacity in the office of a district attorney, is a peace officer.

Pen. Code, 803.2:

The following persons are peace officers whose authority extends to any place in the state:

(a) Any member of the Department of the California Highway Patrol including those members designated under subdivision (a) of Section 2250.1 of the Vehicle Code, provided that the primary duty of the peace officer is the enforcement of any law relating to the use or operation of vehicles upon the highways, or laws pertaining to the provision of police services for the protection of state officers, state properties, and the occupants of state properties, or both, as set forth in the Vehicle Code and Government Code.

(b) A member of the University of California Police Department appointed pursuant to Section 92600 of the Education Code, provided that the primary duty of the peace officer shall be the enforcement of the law within the area specified in Section 92600 of the Education Code.

(c) A member of the California State University Police Departments appointed pursuant to Section 89560 of the Education Code, provided that the primary duty of the peace officer shall be the enforcement of the law within the area specified in Section 89560 of the Education Code.

(d)(1) Any member of the Law Enforcement and Investigations Unit of the Department of Corrections, provided that the primary duties of the peace officer shall be the investigation or apprehension of parolees, parole violators, or escapees from state institutions, the transportation of those persons, and the coordination of those activities with other criminal justice agencies.

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(2) Any member of the Office of Internal Affairs of the Department of Corrections, provided that the primary duties shall be criminal investigations of Department of Corrections personnel and the coordination of those activities with other criminal justice agencies. For purposes of this subdivision the member of the Office of Internal Affairs shall possess certification from the Commission on Peace Officer Standards and Training for investigators, or have completed training pursuant to Section 6126.1 of the Penal Code.

(e) Employees of the Department of Fish and Game designated by the director, provided that the primary duty of those peace officers shall be the enforcement of the law as set forth in Section 856 of the Fish and Game Code.

(f) Employees of the Department of Parks and Recreation designated by the director pursuant to Section 5008 of the Public Resources Code, provided that the primary duty of the peace officer shall be the enforcement of the law as set forth in Section 5008 of the Public Resources Code.

(g) The Director of Forestry and Fire Protection and employees or classes of employees of the Department of Forestry and Fire Protection designated by the director pursuant to Section 4156 of the Public Resources Code, provided that the primary duty of the peace officer shall be the enforcement of the law as that duty is set forth in Section 4156 of the Public Resources Code.

(h) Persons employed by the Department of Alcoholic Beverage Control for the enforcement of Division 9 (commencing with Section 23000) of the Business and Professions Code and designated by the Director of Alcoholic Beverage Control, provided that the primary duty of any of these peace officers shall be the enforcement of the laws relating to alcoholic beverages, as that duty is set forth in Section 25755 of the Business and Professions Code.

(i) Marshals and police appointed by the Board of Directors of the California Exposition and State Fair pursuant to Section 3332 of the Food and Agricultural Code, provided that the primary duty of the peace officers shall be the enforcement of the law as prescribed in that section.

(j) The Inspector General, pursuant to Section 6125, and the Chief Deputy Inspector General In Charge, the Senior Deputy Inspector

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General, the Deputy Inspector General, and those employees of the Inspector General as designated by the Inspector General, are peace officers, provided that the primary duty of these peace officers shall be conducting audits of investigatory practices and other audits, as well as conducting investigations, of the Department of Corrections, the Department of the Youth Authority, the Board of Prison Terms, the Youthful Offender Parole Board, or the Board of Corrections.

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871C. Assault on Military Personnel

The defendant is charged [in Count __] with assault on a member of the United States Armed Forces.

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

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

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

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

4. **When the defendant acted, (he/she) had the present ability to apply force to a person;**

5. **The person assaulted was a member of the United States Armed Forces at the time of the assault;**

[AND]

6. **The defendant knew the other person was a member of the United States Armed Forces and assaulted the other person because of that person's service(;/.)**

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

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

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.

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

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

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

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

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

A _____ *<insert description, e.g., "private in the United States Army">* **is a *member of the United States Armed Forces.***

A person commits an assault *because of someone's service in the Armed Forces* if:

1. **That person is biased against the assaulted person based on the assaulted person's military service;**

AND

2. **That bias caused the person to commit the alleged assault.**

If the defendant had more than one reason to commit the alleged assault, the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the assault.

[Voluntary intoxication is not a defense to assault.]

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BENCH NOTES

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on that defense. Give bracketed element 7 and any appropriate defense instructions. (See Instructions 690–697.)

The jury must determine whether the alleged victim is a member of the United States Armed Forces. (See *People v. Brown* (1988) 46 Cal.3d 432, 444–445.) The court may instruct the jury on the appropriate definition of member of the armed forces. However, the court may not instruct the jury that the alleged victim was a member of the armed forces as a matter of law. *(Ibid.)*

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.)

AUTHORITY

Elements ▸ Pen. Code, §§ 240, 241.8.
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.
Mental State for Assault ▸ *People v. Williams* (2001) 26 Cal.4th 779, 790.
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].

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

LESSER INCLUDED OFFENSES

Simple Assault ▸ Pen. Code, § 240.

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STAFF NOTES

Pen. Code, § 241.8:

> (a) Any person who commits an assault against a member of the United States Armed Forces because of the victim's service in the United States Armed Forces shall be punished by a fine not exceeding two thousand dollars ($ 2,000), by imprisonment in a county jail for a period not exceeding one year, or by both that fine and imprisonment.
>
> (b) "Because of" means that the bias motivation must be a cause in fact of the assault, whether or not other causes exist. When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the assault.

This statute became effective Jan. 1, 2004.

"Because Of"

The Supreme Court explained the phrase "because of" as used in hate crimes statutes in *In Re M.S.* (1995) 10 Cal.4th 698, 719–720:

> By employing the phrase "because of" in section 422.6 and 422.7, the Legislature has simply dictated the bias motivation must be a cause in fact of the offense, whether or not other causes also exist. [Citations.] When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the crime.

Justice Kennard defined "cause in fact" in her concurring opinion (*Id.* at pp. 731–732):

> When a person has acted to deprive another of civil rights, and the evidence reveals both bias and nonbias motives, the bias motives will be a "cause in fact" of the conduct if either (1) the conduct would not have occurred in the absence of the bias motives, or (2) the bias and nonbias motives are independent of each other and the bias motives would have been sufficient to produce the conduct even in the absence of all nonbias motives.

Source of Instruction

This instruction is based on Task Force Instructions 871A, Assault on Firefighter or Peace Officer and 730SC, Special Circumstances: Murder Because of Race, Religion, or Nationality, Pen. Code, § 190.2(a)(16).

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899A. Brandishing Firearm or Deadly Weapon: Misdemeanor

The defendant is charged [in Count __] with brandishing a (firearm/deadly weapon).

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

1. **The defendant drew or exhibited a (firearm/deadly weapon) in the immediate presence of someone else;**

[AND]

<Alternative 2A—displayed in rude, angry, or threatening manner>
[2. The defendant did so in a rude, angry, or threatening manner(;/.)]

<Alternative 2B—used in fight>
[2. The defendant [unlawfully] used the (firearm/deadly weapon) in a fight(;/.)]

<Give element 3 when instructing on self-defense or defense of another.>
[AND

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

[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 *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 *(firearm/deadly weapon)* is defined in another instruction to which you should refer.]

[It is not required that the firearm be loaded.]

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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 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 3 and any appropriate defense instructions. (See Instructions 690–697.)

If the prosecution alleges that the defendant displayed the weapon in a rude, angry, or threatening manner, give alternative 2A. If the prosecution alleges that the defendant used the weapon in a fight, give alternative 2B.

If the defendant is charged under Penal Code section 417(a)(2)(A), the court **must** also give Instruction 899B, Brandishing Firearm or Deadly Weapon: Misdemeanor—Public Place.

Give the bracketed definition of "firearm" or "deadly weapon" 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.

On request, give the bracketed sentence stating that the firearm need not be loaded.

AUTHORITY

Elements ▸ Pen. Code, § 417(a)(1) & (2).
Firearm Defined ▸ Pen. Code, § 12001(b); see *In re Jose A.* (1992) 5 Cal.App.4th 697, 702 [pellet gun not a "firearm" within meaning of Pen. Code, § 417(a)].
Deadly Weapon Defined ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029.
Victim's Awareness of Firearm Not a Required Element ▸ *People v. McKinzie* (1986) 179 Cal.App.3d 789, 794.
Weapon Need Not Be Pointed Directly at Victim ▸ *People v. Sanders* (1995) 11 Cal.4th 475, 542.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 5.

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STAFF NOTES

Pen. Code, § 417, in relevant part:

> (a)(1) Every person who, except in self-defense, in the presence of any other person, draws or exhibits any deadly weapon whatsoever, other than a firearm, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a deadly weapon other than a firearm in any fight or quarrel is guilty of a misdemeanor, punishable by imprisonment in a county jail for not less than 30 days.
>
> (2) Every person who, except in self-defense, in the presence of any other person, draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a firearm in any fight or quarrel is punishable as follows:
>
> (A) If the violation occurs in a public place and the firearm is a pistol, revolver, or other firearm capable of being concealed upon the person, by imprisonment in a county jail for not less than three months and not more than one year, by a fine not to exceed one thousand dollars ($ 1,000), or by both that fine and imprisonment.
>
> (B) In all cases other than that set forth in subparagraph (A), a misdemeanor, punishable by imprisonment in a county jail for not less than three months.

Source of Instruction

This instruction is modeled on Task Force Instruction 897, Brandishing Firearm in Presence of Peace Officer, with modifications to reflect the language of this statute.

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899B. Brandishing Firearm or Deadly Weapon: Misdemeanor—Public Place

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If you find the defendant guilty of brandishing a firearm, you must then decide whether the People have proved the additional allegation that the defendant brandished a firearm that was capable of being concealed on the person while in a public place.

To prove this allegation, the People must prove that:

1. **The defendant drew or exhibited a firearm that was capable of being concealed on the person;**

AND

2. **When the defendant did so, (he/she) was (in a public place in an incorporated city/ [or] on a public street).**

A firearm *capable of being concealed on the person* is a firearm that has a barrel less than 16 inches in length. [A firearm *capable of being concealed on the person* also includes any device that has a barrel 16 inches or more in length that is designed to be interchanged with a barrel less than 16 inches in length.]

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

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 under Penal Code section 417(a)(2)(A), the court has a **sua sponte** duty to instruct on this sentencing factor.

This instruction **must** be given with Instruction 899A, Brandishing Firearm or Deadly Weapon: Misdemeanor.

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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 this allegation.

Penal Code section 417(a)(2)(A) applies to a firearm that "is a pistol, revolver, or other firearm capable of being concealed upon the person." Penal Code section 12001(a)(1) provides a single definition for this class of weapons. Thus, the committee has chosen to use solely the all-inclusive phrase "firearm capable of being concealed on the person."

AUTHORITY

Elements ▸ Pen. Code, § 417(a)(2)(A).
Firearm Capable of Being Concealed Defined ▸ Pen. Code, § 12001(a)(1).
Public Place Defined ▸ *In re Zorn* (1963) 59 Cal.2d 650, 652; *People v. Belanger* (1966) 243 Cal.App.2d 654, 657; *People v. Perez* (1976) 64 Cal.App.3d 297, 300–301; but see *People v. White* (1991) 227 Cal.App.3d 886, 892–893 [fenced yard of defendant's home not a "public place"].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 5.

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STAFF NOTES

Penal Code, § 417, in relevant part:

> (a)(2)(A) If the violation occurs in a public place and the firearm is a pistol, revolver, or other firearm capable of being concealed upon the person, by imprisonment in a county jail for not less than three months and not more than one year, by a fine not to exceed one thousand dollars ($ 1,000), or by both that fine and imprisonment. . . .
>
> (f) As used in this section, "public place" means any of the following:
>
> (1) A public place in an incorporated city.
>
> (2) A public street in an incorporated city.
>
> (3) A public street in an unincorporated area.

Firearm Defined—Pen. Code, § 12001, in relevant part:

> (a)(1) As used in this title, the terms "pistol," "revolver," and "firearm capable of being concealed upon the person" shall apply to and include any device designed to be used as a weapon, from which is expelled a projectile by the force of any explosion, or other form of combustion, and that has a barrel less than 16 inches in length. These terms also include any device that has a barrel 16 inches or more in length which is designed to be interchanged with a barrel less than 16 inches in length.
>
> (2) As used in this title, the term "handgun" means any "pistol," "revolver," or "firearm capable of being concealed upon the person." [. . .]

Public Place

> “[P]ublic" has been defined as "'Common to all or many; general; open to common use,'" and "'Open to common, or general use, participation, enjoyment, etc.; as, a *public* place, tax, or meeting.'

(*In re Zorn* (1963) 59 Cal.2d 650, 652.)

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> We think it is obvious that public streets and highways are public places . . . . "A public place has been defined to be a place where the public has a right to go and to be, and includes public streets, roads, highways, and sidewalks . . . ." (28 C.J.S., § 14, p. 560.) "One definition of 'public' given by Webster is 'Open to common, or general use, participation, enjoyment, etc.; as, a *public* place, tax, or meeting. Specif.: *a* Open to the free and unrestricted use of the public; as, a *public* park or road. . . .'" . . . . . From Words & Phrases, First Series, vol. 6, p. 5809, the following statement is taken: 'A public place, as used in Acts 1875, § 11, providing for the punishment of any person found in a public place in a state of intoxication, is a place where all persons are entitled to be. A public street, highway, and sidewalk is a public place, within the meaning of the statute. [Citations.]'"

(*People v. Belanger* (1966) 243 Cal.App.2d 654, 657.)

> In the context of section 647, subdivision (f), California courts have defined a public place variously as "common to all or many; general; open to common use". . .; "a place where the public has a right to go and to be . . . . open to the free and unrestricted use of the public" . . . ; and a place where a "stranger . . . was able to walk through the outside area of [a] home to the front door without challenge." . . .
>
> New York's former public intoxication statute has been construed to define a public place as one where the public has a right to go, not necessarily a place solely for the use of the public, but a place which is merely accessible to the neighboring public. . . .
>
> The hallway in this case is the kind of public place contemplated in the California and New York cases. There were no locked gates or doors to keep the public from entering. Hallways and stairways of multiple dwellings are open to delivery men, service men, solicitors, visitors and other strangers, whether those hallways are interior or exterior to the buildings, and are therefore public places within the meaning of section 647, subdivision (f). In other words, a "public place" within the meaning of this subdivision is a location readily accessible to all those who wish to go there rather than a place which the general public frequents.

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(*People v. Perez* (1976) 64 Cal.App.3d 297, 300–301 [footnotes and citations omitted].)

> Whether a particular location is a "public place" depends upon the facts of the individual case. . . . Appellant herein was located in his own front yard surrounded by a three-and-a-half-foot-high fence with a gate which was unlocked at the time. The gate was not standing open. Deputy Moore opened it. Appellant released three dogs into the yard, which from all appearances acted as an effective if unintentional deterrent to the arresting officer. This fenced yard cannot be characterized as a "public place," i.e., "common to all or many; general; open to common use." . . . In contrast to *Olson*, the fence, gate and dogs all provided challenge to public access. Appellant may have been found intoxicated in a place exposed to public view but that, in and of itself, is not a violation of section 647, subdivision (f).

(*People v. White* (1991) 227 Cal.App.3d 886, 892–893 [footnote and citations omitted].)

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899C. Brandishing Imitation Firearm

The defendant is charged [in Count __] with brandishing an imitation firearm.

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

1. **The defendant drew or exhibited an imitation firearm in a threatening manner against another person;**

2. **The defendant's act caused someone to fear bodily harm to them self or someone else;**

[AND]

3. **That fear of harm was reasonable(;/.)**

<Give element 4 when instructing on self-defense or defense of another.>
[AND

4. **When the defendant drew or exhibited the imitation firearm, (he/she) was not acting (in self-defense/ [or] in defense of someone else).]**

An *imitation firearm* is a device[, or a toy gun, replica of a firearm, or BB device,] that is so substantially similar to a real firearm in color and overall appearance that a reasonable person would believe that it is a real firearm. [A *BB device* is an instrument that expels a projectile, such as a BB or other pellet, not exceeding 6 mm caliber, through the force of air pressure, gas pressure, or spring action, or any spot marker gun.]

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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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.)

AUTHORITY

Elements ▸ Pen. Code, § 417.4.
Imitation Firearm ▸ Pen. Code, § 12550.
BB Device Defined ▸ Pen. Code, § 12001.
Reasonable Person Must Be Placed in Fear ▸ *In re Michael D.* (2002) 100 Cal.App.4th 115, 124.
Person Placed in Fear May Be Bystander ▸ *In re Michael D.* (2002) 100 Cal.App.4th 115, 120–123.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 5.

RELATED ISSUES

Reasonable Person Who Fears Harm May Be Bystander
Penal Code section 417.4 requires not "only the presence of another person against whom the imitation firearm is displayed or exhibited, but also some person's knowledge of, and a reaction to, the perpetrator's action." (*In re Michael D.* (2002) 100 Cal.App.4th 115, 124.) Thus, someone must be placed in fear as a result of the defendant's conduct; however, this does not have to be the person against whom the object is exhibited. (*Id.* at pp. 120–123.) The term "reasonable person," as used in the statute "refers to anyone who witnesses the actions of the perpetrator, not just to the person against whom the device is drawn or exhibited." (*Id.* at p. 123.)

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STAFF NOTES

Pen. Code, § 417.4:

> Every person who, except in self-defense, draws or exhibits an imitation firearm, as defined in Section 12550, in a threatening manner against another in such a way as to cause a reasonable person apprehension or fear of bodily harm is guilty of a misdemeanor punishable by imprisonment in a county jail for a term of not less than 30 days.

Pen. Code, § 12550:

> As used in this article, the following definitions apply:
>
> (a) "BB device" is defined in subdivision (g) of Section 12001.
>
> (b) "Firearm" is defined in subdivision (b) of Section 12001.
>
> (c) "Imitation firearm" means any BB device, toy gun, replica of a firearm, or other device that is so substantially similar in coloration and overall appearance to an existing firearm as to lead a reasonable person to perceive that the device is a firearm.

Pen. Code, § 12001:

> (g) For purposes of Sections 12551 and 12552, the term "BB device" means any instrument that expels a projectile, such as a BB or a pellet, not exceeding 6mm caliber, through the force of air pressure, gas pressure, or spring action, or any spot marker gun.

Someone Must Experience Fear of Harm

> Subdivision (a)(2) of section 417 proscribes public brandishing, generally, of an actual firearm. . . . Section 417.4, on the other hand, does not simply proscribe public brandishing of an imitation firearm. It proscribes drawing or exhibiting an imitation firearm "against another," with the additional requirement that it cause a reasonable person to experience fear or apprehension of bodily harm. . . . In section 417.4, the Legislature required that a person not only know

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> about the perpetrator's actions but also that the person have a specific reaction. Section 417, subdivision (a)(2) makes presence of another person, even without that person's knowledge of the perpetrator's action, an element of the offense--thus, the language "in the presence of any other person." That language, however, does not properly describe the elements of section 417.4, which include not only the presence of another person against whom the imitation firearm is displayed or exhibited, but also some person's knowledge of, and a reaction to, the perpetrator's action.

(*In re Michael D.* (2002) 100 Cal.App.4th 115, 124.)

Person Who Fears Harm May Be Bystander

> The phrase "*draws or exhibits an imitation firearm in a threatening manner against another in such a way as to cause a reasonable person apprehension or fear of bodily harm*" can be interpreted two ways. As the minor asserts, under one interpretation, the statute could apply to those situations where the perpetrator draws or exhibits an imitation firearm against another person in a threatening manner and this display causes the person against whom the imitation firearm is drawn or exhibited to experience reasonable apprehension or fear of bodily harm. Alternatively, the phrase could apply to situations in which the perpetrator displays or exhibits an imitation firearm against another with the result that any reasonable person witnessing the event, even a reasonable bystander, experiences apprehension or fear of bodily harm. . . .
>
> The legislative record suggests former section 417.2 and current section 417.4 were never intended to be limited to situations in which the person against whom the device was drawn experienced apprehension or fear of bodily harm. . . .
>
> Therefore, the term "reasonable person" in the phrase "draws or exhibits an imitation firearm in a threatening manner against another in such a way as to cause a reasonable person apprehension or fear of bodily harm" refers to anyone who witnesses the actions of the perpetrator, not just to the person against whom the device is drawn or exhibited.

(*In re Michael D.* (2002) 100 Cal.App.4th 115, 120–123 [italics in original.)

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925. Child Abuse

The defendant is charged [in Count __] with child abuse.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. **He or she acts in a reckless way that creates a high risk of death or great bodily harm;**

AND

2. **A reasonable person would have known that acting in that way would create such a risk.**

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

BENCH NOTES

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

If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense of disciplining a child. (*People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1049.) Give bracketed element 3 and Instruction 630, Parental Right to Punish a Child.

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

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

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

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

AUTHORITY

Elements ▸ Pen. Code, § 273a(b); *People v. Cortes* (1999) 71 Cal.App.4th 62, 80; *People v. Smith* (1984) 35 Cal.3d 798, 806.

Child Defined ▸ See Fam. Code, § 6500; *People v. Thomas* (1976) 65 Cal.App.3d 854, 857–858 [in context of Pen. Code, § 273d].

Willfully Defined ▸ Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107; *People v. Vargas* (1988) 204 Cal.App.3d 1455, 1462, 1468–1469.

Criminal Negligence Required for Indirect Conduct ▸ *People v. Valdez* (2002) 27 Cal.4th 778, 788, 789; *People v. Peabody* (1975) 46 Cal.App.3d 43, 47, 48–49; see *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [criminal negligence for homicide]; *Walker v. Superior Court* (1988) 47 Cal.3d 112, 135.

General Criminal Intent Required for Direct Infliction of Pain or Suffering ▸ *People v. Sargent* (1999) 19 Cal.4th 1206, 1224; see *People v. Atkins* (1975) 53 Cal.App.3d 348, 361; *People v. Wright* (1976) 60 Cal.App.3d 6, 14.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 159–163.

COMMENTARY

See Commentary to Instruction 920, Child Abuse Likely to Produce Great Bodily Harm or Death.

RELATED ISSUES

See the Related Issues section of Instruction 920, Child Abuse Likely to Produce Great Bodily Harm or Death.

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STAFF NOTES

Pen. Code, § 273a(b):

> Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor.

Source of Instruction

This instruction is identical to Instruction 920, Child Abuse Likely to Produce Great Bodily Harm or Death, except that the "likely to cause GBI/death" element has been removed.

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926. Abuse of Elder or Dependent Adult

The defendant is charged [in Count __] with (elder/dependent adult) abuse.

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

<Alternative 1A—inflicted pain>

[1. The defendant willfully inflicted unjustifiable physical pain or mental suffering on _____ *<insert name or description of elder or dependent adult>***;]**

<Alternative 1B—caused or permitted to suffer pain>

[1. The defendant willfully caused or permitted _____ *<insert name or description of elder or dependent adult>* **to suffer unjustifiable physical pain or mental suffering;]**

<Alternative 1C—while having custody, caused or permitted to be injured>

[1. The defendant, while having care or custody of _____ *<insert name or description of elder or dependent adult>***, willfully caused or permitted that person or (his/her) health to be injured;]**

<Alternative 1D—while having custody, caused or permitted to be placed in danger>

[1. The defendant, while having care or custody of _____ *<insert name or description of elder or dependent adult>***, willfully caused or permitted that person to be placed in a situation where (his/her) person or health was endangered;]**

2. _____ *<insert name or description of elder or dependent adult>* **(is/was) (an elder/ [or] [a] dependent adult);**

[AND]

3. When the defendant acted, (he/she) knew or reasonably should have known that _____ *<insert name or description of elder or dependent adult>* **was (an elder/ [or] [a] dependent adult)(;/.)**

<Give element 4 when giving alternative 1B and it is alleged the defendant permitted the suffering.>

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[AND]

[4. The defendant had a legal duty to supervise and control the conduct of the person[s] who caused or inflicted unjustifiable physical pain or mental suffering on _____ *<insert name or description of elder or dependent adult>***, but failed to supervise or control that conduct(;/.)]**

<Give element 5 when giving alternative 1B, 1C, or 1D.>

[AND

(4/5). The defendant was criminally negligent when (he/she) caused or permitted _____ *<insert name or description of elder or dependent adult>* **to (suffer[,]/ [or] be injured[,]/ [or] be endangered).]**

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

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

[A *dependent adult* is someone who is between 18 and 64 years old and has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights.] [This definition includes an adult who has physical or developmental disabilities or whose physical or mental abilities have decreased because of age.] [A *dependent adult* is also someone between 18 and 64 years old who is an inpatient in a [psychiatric] health facility [or chemical dependency recovery hospital] that provides 24-hour inpatient care.]

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

[A person who does not have care or custody of (an elder/a dependent adult) may still have a *legal duty to supervise and control the conduct of a third person* who can inflict abuse on the (elder/dependent adult) if the person has a special relationship with the third person. A special relationship is created, for example, when (1) a person takes charge of a third person whom (he/she) knows or should know is likely to cause bodily harm to others if not controlled, and (2) the person has the ability to control the third person's conduct.]

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

1. **He or she acts in a reckless way that creates a high risk of death or great bodily harm;**

AND

2. **A reasonable person would have known that acting in that way would create such a risk.**

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

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

BENCH NOTES

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

Give alternative 1A if it is alleged that the defendant directly inflicted unjustifiable physical pain or mental suffering. Give alternative 1B if it is alleged that the defendant caused or permitted an elder or dependent adult to suffer. If it is alleged that the defendant had care or custody of an elder or dependent adult and that the defendant caused or permitted the elder's or dependent adult's person or health to be injured, give alternative 1C. Finally, give alternative 1D if it is alleged that the defendant had care or custody of an elder or dependent adult and that the defendant endangered the elder's or dependent adult's person or health. (See Pen. Code, § 368(c).)

Give bracketed element 4 if it is alleged under alternative 1B that the defendant *permitted* an elder or dependent adult to suffer unjustifiable pain or mental suffering. (See *People v. Heitzman* (1994) 9 Cal.4th 189, 212.) If element 4 is given, also give the bracketed paragraph defining who has a "legal duty to supervise and control the conduct of a third person."

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Give bracketed element 5 regarding criminal negligence, and the bracketed definition of "criminal negligence," if alternative 1B, 1C, or 1D is given alleging that the defendant committed any indirect act. (*People v. Manis* (1992) 10 Cal.App.4th 110, 114; *People v. Superior Court (Holvey)* (1988) 205 Cal.App.3d 51, 60; see *People v. Valdez* (2002) 27 Cal.4th 778, 788, 789; *People v. Peabody* (1975) 46 Cal.App.3d 43, 48–49 [latter two cases in context of parallel child abuse statute].)

Give the bracketed definition of "elder" or "dependent adult" depending on the status of the alleged victim. (See Pen. Code, § 368(g) & (h).)

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

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

AUTHORITY

Elements ▸ Pen. Code, § 368(c).

Willfully Defined ▸ Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107; *People v. Vargas* (1988) 204 Cal.App.3d 1455, 1462, 1468–1469.

Criminal Negligence Required for Indirect Conduct ▸ *People v. Manis* (1992) 10 Cal.App.4th 110, 114; *People v. Superior Court (Holvey)* (1988) 205 Cal.App.3d 51, 60; see *People v. Valdez* (2002) 27 Cal.4th 778, 788, 789; *People v. Peabody* (1975) 46 Cal.App.3d 43, 47, 48–49 [in context of parallel child abuse statute].

Duty to Control Conduct of Person Inflicting Abuse ▸ *People v. Heitzman* (1994) 9 Cal.4th 189, 212.

General Criminal Intent Required for Direct Infliction of Pain or Suffering ▸ See *People v. Sargent* (1999) 19 Cal.4th 1206, 1224 [in context of parallel child abuse statute].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 168–170.

COMMENTARY

See Commentary to Instruction 923, Abuse of Elder or Dependent Adult Likely to Produce Great Bodily Harm or Death.

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RELATED ISSUES

See the Related Issues section of Instruction 923, Abuse of Elder or Dependent Adult Likely to Produce Great Bodily Harm or Death.

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STAFF NOTES

Pen. Code, § 368(c), as amended effective 1/1/05:

> Any person who knows or reasonably should know that a person is an elder or dependent adult and who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health may be endangered, is guilty of a misdemeanor. A second or subsequent violation of this subdivision is punishable by a fine not to exceed two thousand dollars ($ 2,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.

Source of Instruction

This instruction is identical to Instruction 923, Abuse of Elder or Dependent Adult Likely to Produce Great Bodily Harm or Death, except that the "likely to cause GBI/death" element has been removed and the knowledge element has been updated based on the recent amendments to the statute. Previously, the knowledge element was misplaced in the statute, creating an ambiguity as to when it applied. The amendments clarify that the defendant must know or reasonably should know that the victim is an elder or dependant adult in all cases where this crime is charged.

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972. Misdemeanor False Imprisonment

The defendant is charged [in Count __] with false imprisonment.

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

1. **The defendant intentionally [and unlawfully] (restrained[,]/ [or] detained[,]/ [or] confined) a person;**

AND

2. **The defendant's act made that person stay or go somewhere against that person's will.**

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

[False imprisonment does not require that the person restrained or detained be confined in jail or prison.]

BENCH NOTES

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

Give the bracketed words "and unlawfully" in element 1 on request if there is evidence that the defendant acted lawfully. The court will need to further define for the jury when a restraint, detention, or confinement is legal.

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

Give the final paragraph on request to inform jurors that false "imprisonment" is not limited to confinement in jail or prison. (*People v. Agnew* (1940) 16 Cal.2d 655, 659; *People v. Haney* (1977) 75 Cal.App.3d 308, 313.)

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AUTHORITY

Elements ‣ Pen. Code, §§ 236, 237(a); *People v. Agnew* (1940) 16 Cal.2d 655, 659–660.

General-Intent Crime ‣ *People v. Fernandez* (1994) 26 Cal.App.4th 710, 717–718; *People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1399–1400; *People v. Swanson* (1983) 142 Cal.App.3d 104, 109.

Confinement in Jail or Prison Not Required ‣ *People v. Agnew* (1940) 16 Cal.2d 655, 659; *People v. Haney* (1977) 75 Cal.App.3d 308, 313.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 77.

RELATED ISSUES

General-Intent Crime

False imprisonment is a general-intent crime. (*People v. Fernandez* (1994) 26 Cal.App.4th 710, 716–718; *People v. Olivencia* (1988) 204 Cal.App.3d 1391; *People v. Swanson* (1983) 142 Cal.App.3d 104, 109.) Thus, the court is not required to instruct on the joint union of act and specific intent (*People v. Fernandez, supra,* 26 Cal.App.4th at p. 716), on the use of circumstantial evidence to prove specific intent (*People v. Swanson, supra,* 142 Cal.App.3d at pp. 109–110), or that the jury should consider mental illness in deciding whether the defendant acted with specific intent (*People v. Olivencia, supra,* 204 Cal.App.3d at p. 1399).

Parent Confining Child

A parent who confines his or her child with the intent to endanger the health and safety of the child or for an unlawful purpose can be prosecuted for false imprisonment. (*People v. Checketts* (1999) 71 Cal.App.4th 1190, 1195 [unlawful purpose of avoiding prosecution]; see also *People v. Rios* (1986) 177 Cal.App.3d 445, 451.) If there is sufficient evidence that the parent's restraint or confinement was a reasonable exercise of parental authority, the court has a **sua sponte** duty to instruct on that defense. (*People v. Checketts, supra,* 71 Cal.App.4th at p. 1196.)

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STAFF NOTES

Pen. Code, § 236:

> False imprisonment is the unlawful violation of the personal liberty of another.

Pen. Code, § 237(a):

> False imprisonment is punishable by a fine not exceeding one thousand dollars ($ 1,000), or by imprisonment in the county jail for not more than one year, or by both that fine and imprisonment. If the false imprisonment be effected by violence, menace, fraud, or deceit, it shall be punishable by imprisonment in the state prison.

Source of Instruction
This instruction is modeled on Instruction 970, Felony False Imprisonment. The "use of violence or menace" has been deleted. Otherwise the instruction is identical except for the proposed changes discussed below.

Change "Knowingly" to "Intentionally"
The Supreme Court originally explained the elements of false imprisonment in *People v. Agnew* (1940) 16 Cal.2d 655, 659–660, as follows:

> In order to constitute a case of false imprisonment, it is essential that there be some restraint of the person; but it is not necessary that there be confinement in a jail or prison. Any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his liberty or is compelled to remain where he does not wish to remain, or to go where he does not wish to go, is an imprisonment. The wrong may be committed by acts or by words, or both, and by merely operating upon the will of the individual or by personal violence, or both. . . . **If an act is done with the intention** of causing the confinement of the person actually confined or of another and such act is a substantial factor in bringing about a confinement, it is immaterial whether the act directly or indirectly causes the confinement.

(See also *People v. Bamba* (1997) 58 Cal.App.4th 1113, 1121 [collecting cases that held that false imprisonment requires "some intended confinement or restrain"].)

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The courts have held that the following instruction is a correct statement of the law:

> CALJIC No. 9.60 states in pertinent part: "Every person who by violence or menace violates the liberty of another person by **intentionally** and unlawfully restraining, confining or detaining such other person and compelling such person to stay or go somewhere without [his] [her] consent, is guilty of the crime of false imprisonment by violence or menace in violation of Penal Code Section [236]. [P] Violence means the exercise of physical force used to restrain over and above the force reasonably necessary to effect such restraint. [P] Menace means a threat of harm express or implied by word or act. [P] [False imprisonment does not require that there be confinement in a jail or prison.] [P] In order to prove such crime, each of the following elements must be proved: [P] 1. A person **intentionally** and unlawfully, violated the liberty of another person by restraining, confining or detaining that person, compelling [him] to stay or go somewhere without [his] consent; and [P] 2. Such act was done by violence or menace."

(*People v. Fernandez* (1994) 26 Cal.App.4th 710, 716, fn. 4; see also *People v. Babich* (1993) 14 Cal.App.4th 801, 806–807.)

Task Force Instruction 970 states that the defendant must act “knowingly” rather than “intentionally.” This choice appears to have been made because cases have held that the crime of false imprisonment is a general intent crime. (*People v. Fernandez, supra,* 26 Cal.App.4th at pp. 716–718; *People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1399–1400; *People v. Swanson* (1983) 142 Cal.App.3d 104, 109.)

It appears, however, that in each of these cases the jury was actually instructed in standard CALJIC instruction quoted above, stating that the defendant must have acted “intentionally.” (Cf. *People v. Fernandez, supra,* 26 Cal.App.4th at p. 716.) The cases held that the trial court was not required to give *other* instructions stating that this was a specific intent crime. (*People v. Fernandez, supra,* 26 Cal.App.4th at p. 716 [no duty to instruct on joint union of act and specific intent]; *People v. Swanson, supra,* 142 Cal.App.3d at pp. 109–110 [no duty to instruct on circumstantial evidence to prove specific intent]; *People v. Olivencia, supra,* 204 Cal.App.3d at p. 1399 [no duty to instruct jury to consider mental illness in deciding whether the defendant acted with specific intent].) None of these cases

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held that it is correct to instruct that the defendant acted "knowingly" rather than "intentionally."

In both *People v. Fernandez, supra,* 26 Cal.App.4th at p. 718, and *People v. Swanson, supra,* 142 Cal.App.3d at p. 110, the court stated,

> "[I]ntentionally" is often used synonymously with "knowingly," i.e., that the person doing the act is conscious of what he or she is doing, and its probable consequences. Thus, if the defendant intends to do the proscribed act and no showing is required of an intent to do a further act or achieve a future consequence, the defendant has shown general criminal intent.

(*People v. Fernandez, supra,* 26 Cal.App.4th at p. 718 [citing *People v. Swanson, supra,* 142 Cal.App.3d at p. 110].) This passage merely clarifies that the use of the word "intentionally" here does not make this a specific intent crime. Indeed, the Task Force Instruction on joint union of act and general intent states that the defendant must do the prohibited act "intentionally." The language from *Fernandez* and *Swanson* does not support changing "intentionally" to "knowingly" in the instructions.

The Task Force has attempted to eliminate use of the word "knowingly" from all instructions because it is confusing. Where the statute requires knowledge on the part of the defendant, the instruction states what exactly the defendant must know. Here, there is no real "knowledge" required. Rather, what is required is an intentional act. Thus, we suggest changing "knowingly" to "intentionally" to be consistent both with prior instructions held to be correct statements of the law and with current Task Force instructions.

Add Definition of "Against Will"

Instruction 970 provides no definition of "against that person's will." We suggest providing a definition in brackets for the court to use on request.

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1032. Hate Crime: Misdemeanor Interference With Civil Rights by Force

The defendant is charged [in Count __] with interfering with another person's civil rights by the use of force.

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

1. **The defendant used force to willfully interfere with[, or injure, intimidate, or oppress,] another person's free exercise or enjoyment of the right [or privilege] to _____** *<describe the right allegedly infringed, e.g., "be free from violence or bodily harm">*, **established by the law or Constitution of California or the United States;**

2. **The defendant did so in whole or in part because of the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);**

AND

3. **The defendant intended to interfere with the other person's legally protected right [or privilege].**

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

The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the other person if:

1. **The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);**

AND

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2. The bias motivation caused the defendant to commit the alleged act[s].

If you find that the defendant had more than one reason to commit the alleged act[s], the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the conduct.

[The term *disability* is explained in Instruction 1035, to which you should refer.]

[*Gender*, as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]

[*Nationality* includes citizenship, country of origin, and national origin.]

[*Race or ethnicity* includes ancestry, color, and ethnic background.]

[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]

[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]

[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ [or] identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ [or] group[,]/ [or] family[,]/ [or] community center[,]/ [or] educational facility[,]/ [or] office[,]/ [or[meeting hall[,]/ [or] place of worship[,]/ [or] private institution[,]/ [or] public agency[,]/ [or] library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. This statute was substantially revised, effective January 1, 2005.

If the prosecution is based on the defendant's speech alone, do not give this instruction. (Pen. Code, § 422.6(c); *In re M.S.* (1995) 10 Cal.4th 698, 711–716.)

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Give Instruction 1033, Hate Crime: Misdemeanor Interference With Civil Rights by Threat.

In element 1, insert a description of the specific right or rights allegedly infringed, for example, the right to be free from violence or the threat of violence or the right to be protected from bodily harm. (See Civil Code, §§ 43, 51.7; *People v. Lashley* (1991) 1 Cal.App.4th 938, 950–951; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278.)

Give all relevant bracketed definitions. If the term "disability" is used, give Instruction 1035, Hate Crime: Disability Defined.

AUTHORITY

Elements ▸ Pen. Code, § 422.6(a).
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.
Hate Crime Defined ▸ Pen. Code, § 422.55.
"In Whole or in Part Because of" Defined ▸ Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741.
Disability Defined ▸ Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(*l*).
Gender Defined ▸ Pen. Code, §§ 422.56(c), 422.57.
Nationality Defined ▸ Pen. Code, § 422.56(e).
Race or Ethnicity Defined ▸ Pen. Code, § 422.56(f).
Religion Defined ▸ Pen. Code, § 422.56(g).
Sexual Orientation Defined ▸ Pen. Code, § 422.56(h).
Association With Defined ▸ Pen. Code, § 422.56(a).
Specific Intent to Deprive Individual of Protected Right Required ▸ *In re M.S.* (1995) 10 Cal.4th 698, 713; *People v. Lashley* (1991) 1 Cal.App.4th 938, 947–949.
Not Limited to "Significant Constitutional Rights" ▸ *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278.
Statute Constitutional ▸ *In re M.S.* (1995) 10 Cal.4th 698, 715–717, 724.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 410, 411.

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RELATED ISSUES

Defendant Need Not Know He or She Is Violating the Law
" '[S]pecific intent' under the statute does not require an actual awareness on the part of the defendant that he is violating another's constitutional rights. It is enough that he engages in activity that interferes with rights clearly and specifically protected by the laws of the United States." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 948.) "It is sufficient if the right is clearly defined and that the defendant intended to invade interests protected by constitutional or statutory authority." (*Id.* at p. 949.)

Penal Code Section 654
In *In re M.S.* (1995) 10 Cal.4th 698, 727, the court rejected the argument that Penal Code section 654 does not apply to convictions under Penal Code section 422.6. In 2004, the Legislature amended the statute to add subdivision (d), which specifically states that Penal Code section 654 applies to convictions under Penal Code section 422.6.

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STAFF NOTES

Pen. Code, § 422.6, as amended by SB 1234, effective 1/1/05:

(a) No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States in whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55.

(b) No person, whether or not acting under color of law, shall knowingly deface, damage, or destroy the real or personal property of any other person for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege secured to the other person by the Constitution or laws of this state or by the Constitution or laws of the United States, in whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55.

(c) Any person convicted of violating subdivision (a) or (b) shall be punished by imprisonment in a county jail not to exceed one year, or by a fine not to exceed five thousand dollars ($ 5,000), or by both that imprisonment and fine, and the court shall order the defendant to perform a minimum of community service, not to exceed 400 hours, to be performed over a period not to exceed 350 days, during a time other than his or her hours of employment or school attendance. However, no person shall be convicted of violating subdivision (a) based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat.

(d) Conduct that violates this and any other provision of law, including, but not limited to, an offense described in Article 4.5 (commencing with Section 11410) of Chapter 3 of Title 1 of Part 4, may be charged under all applicable provisions. However, an act or omission punishable in different ways by this section and other

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provisions of law shall not be punished under more than one provision, and the penalty to be imposed shall be determined as set forth in Section 654.

Penal Code, § 422.55, new statute added effective 1/1/05:

For purposes of this title, and for purposes of all other state law unless an explicit provision of law or the context clearly requires a different meaning, the following shall apply:

(a) "Hate crime" means a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim:
(1) Disability.
(2) Gender.
(3) Nationality.
(4) Race or ethnicity.
(5) Religion.
(6) Sexual orientation.
(7) Association with a person or group with one or more of these actual or perceived characteristics.
(b) "Hate crime" includes, but is not limited to, a violation of Section 422.6.

Penal Code, § 422.56, new statute added effective 1/1/05:

For purposes of this title, the following definitions shall apply:

(a) "Association with a person or group with these actual or perceived characteristics" includes advocacy for, identification with, or being on the ground owned or rented by, or adjacent to, any of the following: a community center, educational facility, family, individual, office, meeting hall, place of worship, private institution, public agency, library, or other entity, group, or person that has, or is identified with people who have, one or more of those characteristics listed in the definition of "hate crime" under paragraphs 1 to 6, inclusive, of subdivision (a) of Section 422.55.

(b) "Disability" includes mental disability and physical disability as defined in Section 12926 of the Government Code.

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(c) "Gender" means sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

(d) "In whole or in part because of" means that the bias motivation must be a cause in fact of the offense, whether or not other causes also exist. When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the particular result. There is no requirement that the bias be a main factor, or that the crime would not have been committed but for the actual or perceived characteristic. This subdivision does not constitute a change in, but is declaratory of, existing law under In re M.S.(1995) 10 Cal. 4th 698 and People v. Superior Court (Aishman) (1995) 10 Cal. 4th 735.

(e) "Nationality" includes citizenship, country of origin, and national origin.

(f) "Race or ethnicity" includes ancestry, color, and ethnic background.

(g) "Religion" includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.
(h) "Sexual orientation" means heterosexuality, homosexuality, or bisexuality.

(i) "Victim" includes, but is not limited to, a community center, educational facility, entity, family, group, individual, office, meeting hall, person, place of worship, private institution, public agency, library, or other victim or intended victim of the offense.

Penal Code, § 422.57, new statute added effective 1/1/05:

For purposes this code, unless an explicit provision of law or the context clearly requires a different meaning, "gender" has the same meaning as in Section 422.56.

“Because Of”
Penal Code section 422.56(d) defines “in whole or in part because of.” The statute states, in part:

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> There is no requirement that the bias be a main factor, **or that the crime would not have been committed but for the actual or perceived characteristic.** This subdivision does not constitute a change in, but is declaratory of, existing law under In re M.S.(1995) 10 Cal. 4th 698 and People v. Superior Court (Aishman) (1995) 10 Cal. 4th 735.

Previously, the committee had interpreted *In re M.S.* (1995) 10 Cal.4th 698, 719–720 and *People v. Superior Court of San Diego County (Aishman)* (1995) 10 Cal. 4th 735, 741 as requiring that the bias be a "but-for-cause" of the offense. The relevant language from *In re M.S.* is quoted at length below.

> One can articulate, then, the parameters of the expressed bias sections 422.6 and 422.7 target. On one hand, the Legislature has not sought to punish offenses committed by a person who entertains in some degree racial, religious or other bias, but whose bias is not what motivated the offense; in that situation, it cannot be said the offense was committed *because of* the bias. On the other hand, nothing in the text of the statute suggests the Legislature intended to limit punishment to offenses committed exclusively or even mainly because of the prohibited bias. A number of causes may operate concurrently to produce a given result, none necessarily predominating over the others. By employing the phrase "because of" in section 422.6 and 422.7, the Legislature has simply dictated **the bias motivation must be a cause in fact of the offense, whether or not other causes also exist.** [Citations.] **When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the crime.** [Citations.] These principles accord with traditional rules of causation in criminal cases [citations] . . . .

Justice Kennard discussed the meaning of "cause in fact" in her concurring opinion:

> [T]he majority arrives at the following conclusions about the meaning of the term "because of" in Penal Code sections 422.6 and 422.7: (1) bias or hatred toward one or more of the enumerated groups need not be the predominant or exclusive motive for the defendant's conduct; (2) a bias motivation must be a "cause in fact" of the defendant's conduct; and (3) if the defendant also had other independent nonbias motives for the conduct, the bias motive must have been a "substantial factor" in producing the defendant's behavior. (Maj. opn., *ante*, at pp. 716, 718-720.)

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> In adopting these conclusions, the majority follows the generally accepted analytical path of using the language of causation developed primarily in tort law to define the role that a bias motivation must play before conduct may be sanctioned as discriminatory. The terms "cause in fact" and "substantial factor" have established meanings in tort law. By using those terms here, the majority has adopted those tort law meanings. . . .
>
> In tort law, a person's conduct is a "cause in fact" of another's injury if the injury would not have occurred in the absence of that conduct. **This is generally referred to as the "but for" test of causation.** As this court has recognized, the "but for" test works well in most situations, **but it should not be used "when two 'causes concur to bring about an event and either one of them operating alone could have been sufficient to cause the result** [citation].' " [Citations.] The most common illustration of concurrent causation is two fires of independent origin that join before destroying property. Under the "but for" test of causation, neither fire would be a "cause in fact" of the property's destruction (because either would have caused the loss in the other's absence), and thus persons responsible for the fires would escape legal responsibility. **To avoid this improper result, the definition of "cause in fact" must be expanded to include a second and alternative test, in addition to the "but for" test.** Thus, conduct is deemed to be a "cause in fact" of another's injury if either (1) the injury would not have occurred "but for" the conduct, or (2) the conduct would have been sufficient to produce the injury in the absence of other independent forces operating concurrently. . . .
>
> When a person has acted to deprive another of civil rights, and the evidence reveals both bias and nonbias motives, **the bias motives will be a “cause in fact” of the conduct if either (1) the conduct would not have occurred in the absence of the bias motives, or (2) the bias and nonbias motives are independent of each other and the bias motives would have been sufficient to produce the conduct even in the absence of all nonbias motives.**

(*Id.* at pp. 731–732 [footnotes and italics omitted].)

The paragraph on causation by multiple factors has been revised to reflect this second possibility.

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Specific Intent to Deprive Individual of Protected Rights Required

> In *People v. Lashley* (1991) 1 Cal. App. 4th 938, 949 (*Lashley*), the Court of Appeal held that, to violate the statute, one must specifically intend, by means of threats of violence to another person, to invade interests protected by constitutional or statutory authority. . . . We find the *Lashley* court's reasoning persuasive and, accordingly, conclude sections 422.6 and 422.7 require proof of a specific intent to interfere with a person's right protected under state or federal law.

(*In re M.S.* (1995) 10 Cal.4th 698, 713 [footnote omitted].)

Not Limited to "Significant Constitutional Rights"

> [The defendant] opines that section 422.7 applies only to crimes committed for the specific purpose of interfering with "significant constitutional rights such as the right to vote, freedom of speech, assembly, and religion, and the right to a trial by jury." We are unpersuaded.
>
> In 1976, the Legislature enacted Civil Code section 51.7, which at that time provided: "All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, or position in a labor dispute." (Stats. 1976, ch. 1293, § 2, p. 5778.) In 1987, the Legislature passed the Tom Bane Civil Rights Act, which not only enacted section 422.7 but also amended Civil Code section 51.7. (See Stats. 1987, ch. 1277, § 2 and 4, pp. 4544, 4546-4547.) Thus, in addition to the general presumption that the Legislature has existing law in mind at the time it enacts a new statute [citation] the specific history of section 422.7 indicates the Legislature was explicitly aware of the right provided in Civil Code section 51.7 when it proscribed violent conduct committed for the purpose of intimidating or interfering with a person's free exercise and enjoyment "of *any* right secured to him or her by the Constitution or laws of this state ...." (§ 422.7, italics added.) . . .

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> Both its plain meaning and legislative history reveal that section 422.7 was expressly intended to protect, among other things, the right to be free from "any" violence or threat of violence committed because of one's membership in a protected group. [Citation.] We disagree with defendant's suggestion that this view renders the specific intent requirement "meaningless." By implicitly incorporating Civil Code section 51.7, section 422.7 reaches *all* violent conduct committed against others because of their protected status. Doing so is hardly meaningless; rather it is the primary purpose of the statute. Although by incorporating section 51.7, the Legislature made it relatively easy to prove intent, doing so represents a decision well within the Legislature's power to make. Defendant does not suggest that this decision is constitutionally suspect.

(*People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278 [italics in original].)

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1033. Hate Crime: Misdemeanor Interference With Civil Rights by Threat

The defendant is charged [in Count __] with interfering with another person's civil rights by threatening violence.

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

1. **The defendant threatened physical violence against a specific person [or a specific group of people];**

2. **The threat would have caused a reasonable person to be afraid because the defendant appeared able to carry out the threat;**

3. **The defendant used the threat to willfully interfere with[, or injure, intimidate, oppress, or threaten,] another person's free exercise or enjoyment of the right [or privilege] to _____** *<describe the right allegedly infringed, e.g., "be free from violence or bodily harm">*, **established by the law or Constitution of California or the United States;**

4. **The defendant did so in whole or in part because of the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);**

AND

5. **The defendant intended to interfere with the other person's legally protected right [or privilege].**

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

The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the other person if:

1. **The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual**

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orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);

AND

2. The bias motivation caused the defendant to commit the alleged act[s].

If you find that the defendant had more than one reason to commit the alleged act[s], the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the conduct.

[The term *disability* is explained in Instruction 1035, to which you should refer.]

[*Gender*, as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]

[*Nationality* includes citizenship, country of origin, and national origin.]

[*Race or ethnicity* includes ancestry, color, and ethnic background.]

[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]

[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]

[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ [or] identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ [or] group[,]/ [or] family[,]/ [or] community center[,]/ [or] educational facility[,]/ [or] office[,]/ [or] meeting hall[,]/ [or] place of worship[,]/ [or[private institution[,]/ [or] public agency[,]/ [or] library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]

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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. This statute was substantially revised, effective January 1, 2005.

Give this instruction if the prosecution is based on the defendant's speech alone. (Pen. Code, § 422.6(c); *In re M.S.* (1995) 10 Cal.4th 698, 711–716.)

In element 3, insert a description of the specific right or rights allegedly infringed, for example, the right to be free from violence or the threat of violence or the right to be protected from bodily harm. (See Civil Code, §§ 43, 51.7; *People v. Lashley* (1991) 1 Cal.App.4th 938, 950–951; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278.)

Give all relevant bracketed definitions. If the term "disability" is used, give Instruction 1035, Hate Crime: Disability Defined.

AUTHORITY

Elements ▸ Pen. Code, § 422.6(a) & (c).
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.
Hate Crime Defined ▸ Pen. Code, § 422.55.
"In Whole or in Part Because of" Defined ▸ Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741.
Disability Defined ▸ Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(*l*).
Gender Defined ▸ Pen. Code, §§ 422.56(c), 422.57.
Nationality Defined ▸ Pen. Code, § 422.56(e).
Race or Ethnicity Defined ▸ Pen. Code, § 422.56(f).
Religion Defined ▸ Pen. Code, § 422.56(g).
Sexual Orientation Defined ▸ Pen. Code, § 422.56(h).
Association With Defined ▸ Pen. Code, § 422.56(a).
Specific Intent to Deprive Individual of Protected Right Required ▸ *In re M.S.* (1995) 10 Cal.4th 698, 713; *People v. Lashley* (1991) 1 Cal.App.4th 938, 947–949.
Requirements for Threat of Violence ▸ Pen. Code, § 422.6(c); *In re M.S.* (1995) 10 Cal.4th 698, 711–716.
Not Limited to "Significant Constitutional Rights" ▸ *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278.
Statute Constitutional ▸ *In re M.S.* (1995) 10 Cal.4th 698, 715–717, 724.

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2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 410, 411.

RELATED ISSUES

See the Related Issues section of Instruction 1032, Hate Crime: Misdemeanor Interference With Civil Rights by Force.

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STAFF NOTES

Pen. Code, § 422.6:

> (c) . . . However, no person shall be convicted of violating subdivision (a) based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat.

Threat Must be to Specific Person or Group of People

> The Court of Appeal interpreted "group of persons" in section 422.6, subdivision (c) (see fn. 1, *ante*) to mean a specific group of individuals, not abstract groups or protected classes, as the minors contended. Its interpretation is sound. Reading the statute as a whole, we are persuaded the Legislature meant to proscribe "true threats" as traditionally understood, not what might be termed "group libel."

(*In re M.S.* (1995) 10 Cal.4th 698, 711.)

Threatened Harm Need Not be Imminent But Defendant Must Have Apparent Ability to Carry Out

> The minors also contend, as they unsuccessfully did before the Court of Appeal, that section 422.6 is overbroad because it fails to require that a punishable threat be unconditional and imminent. They suggest the requirement in subdivision (c) of section 422.6, that the offender have the "apparent ability to carry out the threat," fails to satisfy the requirement of imminence. The minors err, however, in assuming the First Amendment always requires the threatened harm be imminent for the threat to be constitutionally punishable. It does not. . . .
>
> As long as the threat reasonably appears to be a serious expression of intention to inflict bodily harm [citation] and its circumstances are such that there is a reasonable tendency to produce in the victim a fear the threat will be carried out [citation] the fact the threat may be contingent on some future event (e.g., "If you don't move out of the neighborhood by Sunday, I'll kill you") does not cloak it in constitutional protection. [Citations.] Section 422.6, therefore, is not unconstitutional for lacking a requirement of immediacy or

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> imminence.
>
> Under section 422.6, for a conviction based on speech alone, the prosecution must prove the speech itself threatened violence and the defendant had the "apparent ability" to carry out the threat. (§ 422.6, subd. (c).) As noted above, the Court of Appeal construed the latter phrase to encompass "a requirement that the victim reasonably fear for his or her safety," concluding this construction eliminated doubt as to the statute's constitutionality. The Court of Appeal's formulation would apparently require that the victim *actually*, as well as reasonably, entertain such fear. The Attorney General argues the Court of Appeal erred in imposing a requirement of subjective experience of fear. We agree that whether section 422.6 is violated in a given case should not depend on the robustness or susceptibility of the victim. **We therefore construe the phrase "apparent ability" objectively, as implying the threat must be one that would reasonably tend to induce fear in the victim.** [citation] . . .
>
> **Both "apparent ability to carry out a threat" and "having a reasonable tendency to induce fear in a victim" are essentially two aspects of the same idea.** A person who, in making a threat of violence, displays the apparent ability to carry out the threat ordinarily will also reasonably tend to induce fear of such violence in the victim. We conclude section 422.6 is not overbroad as we have construed it.

(*In re M.S.* (1995) 10 Cal.4th 698, 711–716 [italics in original].)

See Notes to Instruction 1032.

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1034. Hate Crime: Misdemeanor Interference With Civil Rights by Damaging Property

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The defendant is charged [in Count __] with interfering with another person's civil rights by damaging property.

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

1. **The defendant (defaced[,]/ [or] damaged[,]/ [or] destroyed) (real/ [or] personal) property (owned[,]/ [or] used[,]/ [or] possessed[,]/ [or] occupied) by another person;**

2. **The defendant knew that (he/she) was (defacing[,]/ [or] damaging[,]/ [or] destroying) property that was (owned[,]/ [or] used[,]/ [or] possessed[,]/ [or] occupied) by that person;**

3. **The defendant did so for the purpose of interfering with [or intimidating] that person's free exercise or enjoyment of the right [or privilege] to _____** *<describe the right allegedly infringed, e.g. "be free from violence or bodily harm">*, **established by the law or Constitution of California or the United States;**

4. **The defendant did so in whole or in part because of the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);**

AND

5. **The defendant intended to interfere with the other person's legally protected right [or privilege].**

The defendant acted *in whole or in part because of* the actual or perceived characteristic[s] of the other person if:

1. **The defendant was biased against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual**

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orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);

AND

2. The bias motivation caused the defendant to commit the alleged act[s].

If you find that the defendant had more than one reason to commit the alleged act[s], the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the conduct.

[The term *disability* is explained in Instruction 1035, to which you should refer.]

[*Gender*, as used here, means sex and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.]

[*Nationality* includes citizenship, country of origin, and national origin.]

[*Race or ethnicity* includes ancestry, color, and ethnic background.]

[*Religion*, as used here, includes all aspects of religious belief, observance, and practice and includes agnosticism and atheism.]

[*Sexual orientation* means heterosexuality, homosexuality, or bisexuality.]

[*Association with a person or group having (this/one or more of these) actual or perceived characteristic[s]* includes (advocacy for[,]/ [or] identification with[,]/ [or] being on the ground owned or rented by[, or adjacent to,]) a (person[,]/ [or] group[,]/ [or] family[,]/ [or] community center[,]/ [or] educational facility[,]/ [or] office[,]/ [or] meeting hall[,]/ [or] place of worship[,]/ [or] private institution[,]/ [or] public agency[,]/ [or] library[,]/ [or] other entity) that has, or is identified with people who have, (that/one or more of those) characteristic[s].]

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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. This statute was substantially revised, effective January 1, 2005.

In element 3, insert a description of the specific right or rights allegedly infringed, for example, the right to be free from violence or the threat of violence or the right to be protected from bodily harm. (See Civil Code, §§ 43, 51.7; *People v. Lashley* (1991) 1 Cal.App.4th 938, 950–951; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278.)

Give all relevant bracketed definitions. If the term "disability" is used, give Instruction 1035, Hate Crime: Disability Defined.

AUTHORITY

Elements ▸ Pen. Code, § 422.6(b).
Hate Crime Defined ▸ Pen. Code, § 422.55.
"In Whole or in Part Because of" Defined ▸ Pen. Code, § 422.56(d); *In re M.S.* (1995) 10 Cal.4th 698, 719–720; *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741.
Disability Defined ▸ Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(*l*).
Gender Defined ▸ Pen. Code, §§ 422.56(c), 422.57.
Nationality Defined ▸ Pen. Code, § 422.56(e).
Race or Ethnicity Defined ▸ Pen. Code, § 422.56(f).
Religion Defined ▸ Pen. Code, § 422.56(g).
Sexual Orientation Defined ▸ Pen. Code, § 422.56(h).
Association With Defined ▸ Pen. Code, § 422.56(a).
Specific Intent to Deprive Individual of Protected Right Required ▸ *In re M.S.* (1995) 10 Cal.4th 698, 713; *People v. Lashley* (1991) 1 Cal.App.4th 938, 947–949.
Not Limited to "Significant Constitutional Rights" ▸ *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1277–1278.
Statute Constitutional ▸ *In re M.S.* (1995) 10 Cal.4th 698, 715–717, 724.
Victim Need Not Own Property ▸ *In re Michael M.* (2001) 86 Cal.App.4th 718, 724–726.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 410, 411.

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RELATED ISSUES

Target of Intimidation Need Not Own Property
"[T]he phrase 'property of any other person' in section 422.6, subdivision (b) does not require that the victim own the property. As long as the property is regularly and openly used, possessed, or occupied by the victim so that it is readily identifiable with him or her, it falls within the statutory scope." (*In re Michael M.* (2001) 86 Cal.App.4th 718, 724–726 [classroom was the "property of" the students whose class met there].)

See the Related Issues section of Instruction 1032, Hate Crime: Misdemeanor Interference With Civil Rights by Force.

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STAFF NOTES

Pen. Code, § 422.6:

> (b) No person, whether or not acting under color of law, shall knowingly deface, damage, or destroy the real or personal property of any other person for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege secured to the other person by the Constitution or laws of this state or by the Constitution or laws of the United States, in whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55.

Victim Need Not Own the Property

> Appellant seems to argue that section 422.6, subdivision (b) applies only to property owned by the victim. We disagree.
>
> Applying the foregoing principles, we look first to the words used in the statute, i.e., "No person . . . shall knowingly deface, damage, or destroy the real or personal *property of any other person* for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege secured *to the other person* . . . ." n12 Clearly, this language requires some connection between the property which is defaced, damaged, or destroyed and the person who is targeted because of race, color, religion, etc. It does not, however, expressly require any particular ownership interest in the property.
>
> The preposition "of" has several accepted meanings, including "belonging to," "having," and "possessing." Those terms, when used in reference to property, may imply ownership, but they may also imply possession or occupation.
>
> In common usage we often refer to particular property as "John's office" or "Barbara's classroom" or "Terry's parking space" even though the person has no ownership interest in it. The wording used by the Legislature in section 422.6, subdivision (b) does not preclude its application to such situations. . . .
>
> Nothing in the language of section 422.6, subdivision (b) or in the legislative history of the Bane Act suggests the Legislature intended

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> for the application of that provision to turn on questions of property ownership. Instead, the principal thrust of the statute is toward preventing the intimidation of a victim, or the interference with the victim's civil rights, when the intimidation or interference is based on the victim's actual or perceived protected characteristic. . . .
>
> We conclude that the phrase "property of any other person" in section 422.6, subdivision (b) does not require that the victim own the property. As long as the property is regularly and openly used, possessed, or occupied by the victim so that it is readily identifiable with him or her, it falls within the statutory scope.

(*In re Michael M.* (2001) 86 Cal.App.4th 718, 724–726.)

See Notes to Instruction 1032.

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1035. Hate Crime: Disability Defined

The term *disability* includes a (mental/ [or] physical) disability.

<Alternative A—mental disability>
[A person has a *mental disability* if he or she has a mental or psychological condition that limits a major life activity. The term *mental disability* includes (mental retardation[,]/ [and] organic brain syndrome[,]/[and] emotional or mental illness[,]/ [and] specific learning disabilities).]

<Alternative B—physical disability>
[A person has a *physical disability* if he or she has (a physiological (disease[,]/ [or] disorder[,]/ [or] condition)[;]/ [or] a cosmetic disfigurement[;]/ [or] an anatomical loss) that:

1. **Affects one or more of the following body systems: (neurological[(,/;)]/ immunological[(,/;)]/ musculoskeletal[(,/;)]/ sensory, primarily the special sense organs[(,/;)]/ respiratory, including speech organs[(,/;)]/ cardiovascular[(,/;)]/ reproductive[(,/;)]/ digestive[(,/;)]/ genitourinary[(,/;)]/ hemic and lymphatic[(,/;)]/ skin[(,/;)]/ [or] endocrine);**

AND

2. **Limits a major life activity.]**

***Major life activities* include physical, mental, and social activities, including but not limited to working.**

A (disease[,]/ [or] disorder[,]/ [or] condition) *limits* a major life activity if it makes the achievement of the major life activity difficult.

[In deciding whether a (disease[,]/ [or] disorder[,]/ [or] condition) *limits* a major life activity, do not consider whether the limitation can be overcome with medications, assistive devices, reasonable accommodations, or other mitigating measures. [However, if a mitigating measure itself limits a major life activity, you may consider this as evidence that the (disease[,]/ [or] disorder[,]/ [or] condition) limits a major life activity.]]

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[A person [also] has a *disability* if he or she has a (mental or psychological condition/ [or] health impairment) that requires special education or related services.]

[A person [also] has a *disability* if _____ *<insert description of other condition not covered by the foregoing but included in Americans With Disabilities Act (ADA) of 1990>***.]**

[*Disability* does not include (sexual behavior disorders[,]/ [or] compulsive gambling[,]/ [or] kleptomania[,]/ [or] pyromania[,]/ [or] psychoactive substance–use disorders resulting from the current unlawful use of controlled substances or other drugs).]

BENCH NOTES

Instructional Duty
Give this instruction when using the term "disability" in any other instruction.

If the case involves a person with a mental disability, give alternative A. If the case involves a person with a physical disability, give alternative B.

Give any of the bracketed paragraphs on request.

AUTHORITY

Disability Defined ▸ Pen. Code, § 422.56(b); Gov. Code, § 12926(i)–(*l*).
Mental Disability ▸ Gov. Code, § 12926(i).
Physical Disability ▸ Gov. Code, § 12926(k).
Disability Includes Anything Covered by ADA ▸ Gov. Code, § 12926(*l*).

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STAFF NOTES

Disability Defined—As Amended 2004

Penal Code section 422.56(b) states: “Disability includes mental disability and physical disability as defined in Section 12926 of the Government Code.”

Government Code section 12926 (as amended in 2004) states, in relevant part:

> (i) "Mental disability" includes, but is not limited to, all of the following:
>
> (1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. For purposes of this section:
>
> > (A) "Limits" shall be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major
> > life activity.
> >
> > (B) A mental or psychological disorder or condition limits a major
> > life activity if it makes the achievement of the major life activity difficult.
> >
> > (C) "Major life activities" shall be broadly construed and shall include physical, mental, and social activities and working.
>
> (2) Any other mental or psychological disorder or condition not described in paragraph (1) that requires special education or related services.
>
> (3) Having a record or history of a mental or psychological disorder or condition described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.
>
> (4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult.

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(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability as described in paragraph (1) or (2).

"Mental disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs. . . .

(k) "Physical disability" includes, but is not limited to, all of the following:

(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs,
respiratory, including speech organs, cardiovascular, reproductive,
digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

(B) Limits a major life activity. For purposes of this section:
(i) "Limits" shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.
(ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.
(iii) "Major life activities" shall be broadly construed and includes physical, mental, and social activities and working.

(2) Any other health impairment not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment

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described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any physical condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).

(6) "Physical disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(l) Notwithstanding subdivisions (i) and (k), if the definition of "disability" used in the Americans with Disabilities Act of 1990 (Public Law 101-336) would result in broader protection of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (i) or (k), or would include any medical condition not included within those definitions, then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (i) and (k).

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1242. Distributing or Intending to Distribute Obscene Material

The defendant is charged [in Count __] with distributing obscene material.

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

<Alternative 1A—sent or brought>

[1. The defendant (sent/ [or] brought) obscene material into California [or caused obscene material to be (sent/ [or] brought) into California];]

<Alternative 1B—possessed>

[1. The defendant (possessed[,]/ [or] prepared[,]/ [or] published[,]/ [or] produced[,]/ [or] printed) obscene material;]

<Alternative 1C—offered to distribute>

[1. The defendant offered to distribute obscene material to someone else;]

<Alternative 1D—distributed>

[1. The defendant (distributed/ [or] showed) obscene material to someone else;]

[AND]

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

<Give element 3 when instructing with alternative 1A, 1B, or 1C; see Bench Notes.>

[AND

3. When the defendant acted, (he/she) intended to (sell or distribute/distribute or show/distribute) the material to someone else.]

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

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

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

AND

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

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

***Material* means [a] ((book[,]/ [or] magazine[,]/ [or] newspaper[,]/ [or] [other] printed or written material)[(,/;)]/ [or] [a] (picture[,]/ [or] drawing[,]/ [or] photograph[,]/ [or] motion picture[,]/ [or] [other] pictorial representation)[(,/;)]/ [or] [a] statue or other figure[(,/;)]/ [or] [a] (recording[,]/ [or] transcription[,]/ [or] mechanical, chemical, or electrical reproduction)[(,/;)]/ [or] any other article, equipment, or machine). [*Material* also means live or recorded telephone messages transmitted, disseminated, or distributed as part of a commercial transaction.]**

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

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

The material is not obscene unless a reasonable person would conclude that, taken as a whole, it lacks serious literary, artistic, political, or scientific value.

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When deciding whether the material is obscene, do not weigh its value against its prurient appeal.

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

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

[Material is not obscene if (all persons under the age of 18 years depicted in the material are legally emancipated/ [or] it only shows lawful conduct between spouses).]

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

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

[A *person* accused of committing this crime can be an individual, partnership, firm, association, corporation, limited liability company, or other legal entity.]

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

[In deciding whether the material lacks serious literary, artistic, political, or scientific value, you may [also] consider whether the defendant knew that the material showed persons under 16 years old engaging in sexual conduct. You must decide the weight, if any, to give this evidence.]

[In deciding whether, according to contemporary statewide standards, the material appeals to a prurient interest, you may consider whether similar material is openly shown in the statewide community. You must decide the weight, if any, to give this evidence.]

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

[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).]

[A person who possesses obscene material for his or her own personal use is not guilty of this crime.]

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

<Defense: Law Enforcement Agent>
[The defendant is not guilty of this crime if (he/she) was a member [or agent] of a law enforcement or prosecuting agency and was involved in the investigation or prosecution of crimes. The People have the burden of proving beyond a reasonable doubt that the defendant was not acting as a member [or agent] of a law enforcement or prosecuting agency. If the People have not met this burden, you must find the defendant not guilty of this crime.

[A person is an *agent* of a law enforcement or prosecuting agency if he or she does something at the request, suggestion, or direction of a law enforcement or prosecuting agency.]]

BENCH NOTES

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

In element 1, give one of the alternatives 1A–1D depending on the charges and evidence in the case. Give element 3 when instructing with alternative 1A, 1B, or

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1C. (*People v. Young* (1977) 77 Cal.App.3d Supp. 10, 12; *People v. Burrows* (1968) 260 Cal.App.2d 228, 231; *In re Klor* (1966) 64 Cal.2d 816, 819.) When giving alternative 1A, select "sell or distribute" in element 3. When giving alternative 1B, select "distribute or show" in element 3. When giving alternative 1C, select "distribute." Do not give element 3 with alternative 1D. No published case has held that distributing or showing obscene material requires specific intent.

Defenses—Instructional Duty

If there is sufficient evidence that the defendant was engaging in legitimate medical, scientific, or educational activities, the court has a **sua sponte** duty to instruct on that defense. (See Pen. Code, §§ 311.2(e), 311.8(a).) It is unclear who bears the burden of proof and what standard of proof applies to this defense. In the absence of statutory authority or case law stating that the defendant must prove the defense by a preponderance of the evidence, the committee has drafted the instruction to provide that the prosecution must prove beyond a reasonable doubt that the defense does not apply. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–479; see also *People v. Woodward* (2004) 116 CalApp.4th 821, 840–841 ["legitimate" does not require definition, and the trial court erred in giving amplifying instruction based on *People v. Marler* (1962) 199 Cal.App.2d Supp. 889].)

If there is sufficient evidence that the defendant was acting as a law enforcement agent, the court has a **sua sponte** duty to instruct on that defense. (See Pen. Code, § 311.2(e).) It is unclear who bears the burden of proof and what standard of proof applies to this defense. In the absence of statutory authority or case law stating that the defendant must prove the defense by a preponderance of the evidence, the committee has drafted the instruction to provide that the prosecution must prove beyond a reasonable doubt that the defense does not apply. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–479.)

AUTHORITY

Elements ▸ Pen. Code, § 311.2(a).

Specific Intent to Distribute or Exhibit ▸ *People v. Young* (1977) 77 Cal.App.3d Supp. 10, 12 [possession with intent to distribute or exhibit]; see *People v. Burrows* (1968) 260 Cal.App.2d 228, 231 [preparation or publication with specific intent to distribute]; *In re Klor* (1966) 64 Cal.2d 816, 819.

Obscene Matter Defined ▸ Pen. Code, § 311(a); see *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, 77, 81; *Miller v. California* (1973) 413 U.S. 15, 24; see also *Pope v. Illinois* (1987) 481 U.S. 497, 500–501.

Contemporary Community Standards ▸ See *Roth v. United States* (1957) 354 U.S. 476, 489–490.

Prurient Interest Defined ▸ *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, 77.

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Person Defined ▸ Pen. Code, § 311(c).
Distribute Defined ▸ Pen. Code, § 311(d).
Knowingly Defined ▸ Pen. Code, § 311(e); see *People v. Kuhns* (1976) 61 Cal.App.3d 735, 756–758.
Exhibit Defined ▸ Pen. Code, § 311(f).
Matter Designed for Deviant Sexual Group ▸ Pen. Code, § 311(a)(1); see *People v. Young* (1977) 77 Cal.App.3d Supp. 10, 14–15.
Commercial Exploitation Is Probative of Matter's Nature ▸ Pen. Code, § 311(a)(2); *People v. Kuhns* (1976) 61 Cal.App.3d 735, 748–753.
Knowledge That Matter Depicts Child Under 16 Is Probative of Matter's Nature ▸ Pen. Code, § 311(a)(3).
Similar Matter Shown in Community ▸ *In re Harris* (1961) 56 Cal.2d 879, 880; *People v. Heller* (1979) 96 Cal.App.3d Supp. 1, 7.
Exceptions to Statutory Prohibitions ▸ Pen. Code, §§ 311.1(b)–(d), 311.2(e)–(g); 311.8.
Agent Defined ▸ See *People v. McIntire* (1979) 23 Cal.3d 742, 748 [in context of entrapment].
Taken or Considered as a Whole ▸ *People v. Goulet* (1971) 21 Cal.App.3d Supp. 1, 3; *Kois v. Wisconsin* (1972) 408 U.S. 229, 231.
Obscenity Contrasted With Sex ▸ *Roth v. United States* (1957) 354 U.S. 476, 487.
Obscenity Contrasted With Nudity ▸ *People v. Noroff* (1967) 67 Cal.2d 791, 795–796; *In re Panchot* (1968) 70 Cal.2d 105, 108–109.
Possessing for Personal Use Not a Crime ▸ *Stanley v. Georgia* (1969) 394 U.S. 557, 568.
Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 79–91.
7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, §§ 310–313.

LESSER INCLUDED OFFENSES

Attempted Distribution of Obscene Matter ▸ Pen. Code, §§ 664, 311.1(a).

RELATED ISSUES

Definition of "Sexual Conduct"
"Obscene matter" must "depict or describe sexual conduct in a patently offensive way . . . ." (Pen. Code, § 311(a).) The statute does not define "sexual conduct." Penal Code sections 311.4(d)(1) and 311.3(b) provide definitions of the term "sexual conduct" as used in those sections. If the court determines that a definition

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of “sexual conduct” is necessary, the court may wish to review those statutes. (See also *People v. Spurlock* (2004) 114 CalApp.4th 1122, 1131 [discussing definition of sexual conduct in prosecution for violating Pen. Code, §§ 311.3 and 311.4].)

See the Related Issues section of Instruction 1241, Distributing Obscene Matter Showing Sexual Conduct by a Minor.

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STAFF NOTES

Pen. Code, § 311.2, in relevant part:

> (a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, produces, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is for a first offense, guilty of a misdemeanor. If the person has previously been convicted of any violation of this section, the court may, in addition to the punishment authorized in Section 311.9, impose a fine not exceeding fifty thousand dollars ($ 50,000). . . .
>
> (e) Subdivisions (a) to (d), inclusive, do not apply to the activities of law enforcement and prosecuting agencies in the investigation and prosecution of criminal offenses, to legitimate medical, scientific, or educational activities, or to lawful conduct between spouses.
>
> (f) This section does not apply to matter that depicts a legally emancipated child under the age of 18 years or to lawful conduct between spouses when one or both are under the age of 18 years.

Pen. Code, § 311.9, Punishment, in relevant part:

> (a) Every person who violates Section 311.2 or 311.5, except subdivision (b) of Section 311.2, is punishable by fine of not more than one thousand dollars ($ 1,000) plus five dollars ($ 5) for each additional unit of material coming within the provisions of this chapter, which is involved in the offense, not to exceed ten thousand dollars ($ 10,000), or by imprisonment in the county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter, and which is involved in the offense, such basic maximum and additional days not to exceed 360 days in the county jail, or by both such fine and imprisonment. If such person has previously been convicted of any offense in this chapter, or of a violation of Section 313.1, a violation of Section 311.2 or 311.5, except subdivision (b) of Section 311.2, is punishable as a felony.

Pen. Code, § 311, Definitions, in relevant part:

> As used in this chapter, the following definitions apply:

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(a) "Obscene matter" means matter, taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(1) If it appears from the nature of the matter or the circumstances of its dissemination, distribution, or exhibition that it is designed for clearly defined deviant sexual groups, the appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, if circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, this evidence is probative with respect to the nature of the matter and may justify the conclusion that the matter lacks serious literary, artistic, political, or scientific value.

(3) In determining whether the matter taken as a whole lacks serious literary, artistic, political, or scientific value in description or representation of those matters, the fact that the defendant knew that the matter depicts persons under the age of 16 years engaged in sexual conduct, as defined in subdivision (c) of Section 311.4, is a factor that may be considered in making that determination.

(b) "Matter" means any book, magazine, newspaper, or other printed or written material, or any picture, drawing, photograph, motion picture, or other pictorial representation, or any statue or other figure, or any recording, transcription, or mechanical, chemical, or electrical reproduction, or any other article, equipment, machine, or material. "Matter" also means live or recorded telephone messages if transmitted, disseminated, or distributed as part of a commercial transaction.

(c) "Person" means any individual, partnership, firm, association, corporation, limited liability company, or other legal entity.

(d) "Distribute" means transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter or live conduct.

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(f) "Exhibit" means show. . . .

(h) The Legislature expresses its approval of the holding of People v. Cantrell, 7 Cal. App. 4th 523, that, for the purposes of this chapter, matter that "depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct" is limited to visual works that depict that conduct.

Pen. Code, § 311.4, Employment of minor in sale or distribution of obscene matter or production of pornography, in relevant part:

(d) (1) As used in subdivisions (b) and (c), "sexual conduct" means any of the following, whether actual or simulated: sexual intercourse, oral copulation, anal intercourse, anal oral copulation, masturbation, bestiality, sexual sadism, sexual masochism, penetration of the vagina or rectum by any object in a lewd or lascivious manner, exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer, any lewd or lascivious sexual act as defined in Section 288, or excretory functions performed in a lewd or lascivious manner, whether or not any of the above conduct is performed alone or between members of the same or opposite sex or between humans and animals. An act is simulated when it gives the appearance of being sexual conduct.

Pen. Code, § 311.8, Defenses:

(a) It shall be a defense in any prosecution for a violation of this chapter that the act charged was committed in aid of legitimate scientific or educational purposes.

(b) It shall be a defense in any prosecution for a violation of this chapter by a person who knowingly distributed any obscene matter by the use of telephones or telephone facilities to any person under the age of 18 years that the defendant has taken either of the following measures to restrict access to the obscene matter by persons under 18 years of age:

(1) Required the person receiving the obscene matter to use an authorized access or identification code, as provided by the information provider, before transmission of the obscene matter begins, where the defendant has previously issued the code by mailing it to the applicant therefor after taking reasonable measures

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to ascertain that the applicant was 18 years of age or older and has established a procedure to immediately cancel the code of any person after receiving notice, in writing or by telephone, that the code has been lost, stolen, or used by persons under the age of 18 years or that the code is no longer desired.

(2) Required payment by credit card before transmission of the matter.

(c) Any list of applicants or recipients compiled or maintained by an information-access service provider for purposes of compliance with subdivision (b) is confidential and shall not be sold or otherwise disseminated except upon order of the court.

Source of Instruction

This instruction is modeled on Instruction 1241, Distributing Obscene Matter Showing Sexual Conduct by a Minor. The elements have been modified for clarity. The definition of “obscene” has also been changed slightly. We suggest these changes to Instruction 1241 as well.

The definition of “material” has been changed as it is based on a different code section.

In addition, several other items have been added, all highlighted. These are all similar to other standard instructions that have not yet been accounted for in our instructions. These sections are discussed below.

Average Adult Defined

[T]he trial judge instructed the jury as follows:

". . . The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved. . . .

"The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. . . .

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> “[Y]ou are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious -- men, women and children."

(*Roth v. United States* (1957) 354 U.S. 476, 490.)

> The trial court instructed the jury as follows: . . .
>
> "The term 'average adult person' as used in these instructions is a hypothetical composite person who typifies the entire community including persons of both sexes; the religious and the irreligious; of all nationalities and all adult ages; all economic, educational and social standings; neither a libertine nor a prude, but with normal, healthy, average contemporary attitudes, instincts and interests concerning sex."

(*People v. Young* (1977) 77 Cal.App.3d Supp. 10, 14 [judgment affirmed].)

> The relevant instructions as given to the jury in their entirety were as follows: . . .
>
> "The matter must be measured by its appeal to the average person. The average person is, of course, determined by a synthesis of the entire community, including persons of all sexes, religions, nationalities, creeds, ages, et cetera, but once the jury has determined the average person it must be remembered that the matter must be measured by such average person, and not by young persons or the susceptible.
>
> "Putting this in still another manner: In determining who is an average person under the definition of obscenity which I have previously given to you, you are to consider society as a whole, young and old, educated and uneducated, the religious and the irreligous, men, women and children."

(*People v. Adler* (1972) 25 Cal.App.3d Supp. 24, 32 [“no error in instruction”].)

Further Definition of Contemporary Community Standard

> The trial court instructed the jury as follows: . . .
>
> "The contemporary community standard referred to in these instructions is set by what is, in fact, acceptable to the community as

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> a whole, not by what some person or persons may believe the community as a whole ought to accept. Ascertainment of the standard must be based upon an objective determination of what affronts, and is unacceptable to, the community as a whole."

(*People v. Young* (1977) 77 Cal.App.3d Supp. 10, 13 [judgment affirmed].)

> The relevant instructions as given to the jury in their entirety were as follows: . . .
>
> "The contemporary standard to which the law makes reference is set by what is, in fact, accepted and not by what some persons or groups of persons may believe the community as a whole ought to accept or refuse to accept."

(*People v. Adler* (1972) 25 Cal.App.3d Supp. 24, 32 ["no error in instruction"].)

Contemporary Standards Not Based on Own Personal Views

> The trial court instructed the jury as follows: . . .
>
> "Your own personal, social or moral views on material such as that charged in the complaint may not be considered."

(*People v. Young* (1977) 77 Cal.App.3d Supp. 10, 13 [judgment affirmed].)

> The relevant instructions as given to the jury in their entirety were as follows: . . .
>
> "Your own personal and social views on material such as that charged in the complaint may not be considered. Thus, whether you believe that the material is good or bad is of no concern; so, too, you may not consider whether in your opinion the material is moral or immoral; whether it is likely to be helpful or injurious to the public morals. Similarly, whether you like or dislike the material; whether it offends or shocks you, may not be considered by you. You may think the material is immoral, shocking or offensive, and yet you must acquit the defendant if it is not obscene as the Court has defined that term for you."

(*People v. Adler* (1972) 25 Cal.App.3d Supp. 24, 32 ["no error in instruction"].)

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> To sanction convictions without expert evidence of community standards encourages the jury to condemn as obscene such conduct or material as is personally distasteful or offensive to the particular juror. (Cf. *United States* v. *Klaw, supra*, 350 F.2d 155, 167.) "[Community] standards . . . can . . . hardly be established except through experts. . . . There is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges . . . . Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of 'contemporary community standards.'" (*Smith* v. *California* (1959) 361 U.S. 147, 165 (Frankfurter, J., concurring).)

(*In re Giannini* (1968) 69 Cal.2d 563, 575.)

Evidence of Local Community May be Considered

> The trial court instructed the jury as follows: . . .
>
> "For the purposes of determining the obscenity of the material here in question the controlling community is the entire State of California. In that regard, you may consider evidence concerning the standard of any local community in the state for such bearing, if any, as you may determine it has upon the question of what the state-wide standard is. The standard of any such local community may not be taken in and of itself, to establish the state-wide standard, though it may be considered as some evidence of what the state-wide standard is."

(*People v. Young* (1977) 77 Cal.App.3d Supp. 10, 13–14 [judgment affirmed].)

Obscenity—Not Balancing of Value with Prurient Interest

> The relevant instructions as given to the jury in their entirety were as follows: . . .
>
> "The word 'redeeming' in the context herein refers not to a balancing of the alleged pruriency against the social importance of the material, but rather to the presence of matters of social importance in

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> the content which will recover for the material its position as constitutionally protected utterance."

(*People v. Adler* (1972) 25 Cal.App.3d Supp. 24, 32 ["no error in instruction"].)

Reasonable Person Standard Applies to Whether Matter Lacks Value

> The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.

(*Pope v. Illinois* (1987) 481 U.S. 497, 500–501.)

Obscenity Contrasted With Nudity

> We hold, under the authority of *People* v. *Noroff* [(1967)] 67 Cal.2d 791, that the materials sold in the present case are not obscene. *Noroff* involved a "nudist magazine" wherein nude male and female adults appeared in poses very similar in substance to those of the photographs in the instant case. After a careful scrutiny of the "obscenity" decisions of the United States Supreme Court, we held that the representation of the nude human form in a nonsexual context does not violate Penal Code section 311 et seq. As we said in *Noroff*: "Given the materials to which the Supreme Court has accorded constitutional protection, we cannot withhold such protection here." (*People* v. *Noroff, supra*, 67 Cal.2d 791, 796.)
>
> *Noroff* held, as a matter of law, that such matter was not obscene: "In the words of Penal Code section 311, we do not find that, 'taken as a whole,' the 'predominant appeal' of the magazine, including its depiction of nude adults, though revealing, 'is to prurient interest, *i.e.*, a *shameful* or *morbid* interest in nudity . . . which goes substantially beyond the customary limits of candor.' (Italics added.)" (*People* v. *Noroff, supra*, 67 Cal.2d 791, 795.) We concluded: "The Supreme Court has decided that the judiciary cannot engage in the task of placing legal fig leaves upon variegated presentations of the human figure. That court has told us that no matter how ugly or repulsive the presentation, we are not to hold nudity, absent a sexual activity, to be obscene." (*People* v. *Noroff, supra*, 67 Cal.2d 791, 797.)

(*In re Panchot* (1968) 70 Cal.2d 105, 108–109 [footnote omitted].)

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Obscenity Contrasted With Sex

> [S]ex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. n20 The portrayal of sex, *e. g*., in art, literature and scientific works, n21 is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.

(*Roth v. United States* (1957) 354 U.S. 476, 487.)

Possessing For Personal Use Not a Crime
See *Stanley v. Georgia* (1969) 394 U.S. 557, 568.

May Consider Exhibition of Similar Material

> Petitioner offered evidence that the books sold were not, according to contemporary community standards, obscene. The evidence consisted of expert testimony, comparable writings and pictures adjudged in Los Angeles County to be not obscene, and comparable writings and publications purchased in the community. All the offered evidence was excluded by the trial court. Petitioner contended before the trial court, and contends here, that he was thus denied due process of law.
>
> This is the sole question necessary for us to determine: *Was it a denial of due process for the trial court not to allow defendant to prove contemporary community standards*?
>
> *Yes*.

(*In re Harris* (1961) 56 Cal.2d 879, 880 [italics in original].)

> The trial court refused to instruct the jury in the words of CALJIC No. 16.193, relating to evidence that matter allegedly similar and comparable to that in question is openly exhibited in the community, apparently in the belief that *In re Harris*, *supra*, has been overruled by *Hamling* v. *United States*, *supra*. As we have stated, we are not of that opinion and if, in any future trial, evidence of comparable

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> materials available in the community is offered and received into evidence, CALJIC No. 16.193 should, if offered, be given.

(*People v. Heller* (1979) 96 Cal.App.3d Supp. 1, 7.)

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1243. Obscene Live Conduct

The defendant is charged [in Count __] with (participating in[,]/ [or] managing[,]/ [or] producing[,]/ [or] sponsoring[,]/ [or] presenting[,]/ [or] showing) obscene live conduct.

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

1. **The defendant (engaged in[,]/ [or] participated in[,]/ [or] managed[,]/ [or] produced[,]/ [or] sponsored[,]/ [or] presented[,]/ [or] showed) obscene live conduct;**

2. **The defendant knew of the character of the conduct;**

AND

3. **The obscene live conduct occurred in front of an audience of at least one person in (a public place/ [or] a place open to the public[, or a segment of the public,] or to public view).**

***Live conduct* means physical activity by a person acting alone or with someone else[, including but not limited to (dancing[,]/ [or] acting[,]/ [or] simulating[,]/ [or] pantomiming[,]/ [or] singing[,]/ [or] speaking)].**

You must decide whether the conduct at issue in this case meets the definition of obscene live conduct. Live conduct, when considered as a whole, is *obscene* if:

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

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

AND

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

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

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

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

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

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

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

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

[A *person* accused of committing this crime can be an individual, partnership, firm, association, corporation, limited liability company, or other legal entity.]

[In deciding the conduct's character and whether it lacks serious literary, artistic, political, or scientific value, consider whether the circumstances of its

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(production[,]/ [or] presentation[,]/ [or] advertising[,]/ [or] showing) indicate that the conduct was being commercially exploited because of its prurient appeal. You must decide the weight, if any, to give this evidence.]

[In deciding whether the conduct lacks serious literary, artistic, political, or scientific value, you may [also] consider whether the defendant knew that the conduct showed persons under 16 years old engaging in sexual activities. You must decide the weight, if any, to give this evidence.]

[In deciding whether, according to contemporary statewide standards, the conduct appeals to a prurient interest, you may consider whether similar conduct is openly shown in the statewide community. You must decide the weight, if any, to give this evidence.]

[If it appears from the character of the conduct or the circumstances of its presentation or showing that it is designed for a clearly defined deviant sexual group, the appeal of the conduct must be judged based on its intended audience.]

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

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 that the defendant was engaging in legitimate medical, scientific, or educational activities, the court has a **sua sponte** duty to instruct on that defense. (Pen. Code, § 311.8(a).) It is unclear who bears the burden of proof and what standard of proof applies to this defense. In the absence of statutory authority or case law stating that the defendant must prove the defense by a preponderance of the evidence, the committee has drafted the instruction to provide that the prosecution must prove beyond a reasonable doubt that the defense does not apply. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–479; see also *People v. Woodward* (2004) 116 CalApp.4th 821, 840–841 [“legitimate”

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does not require definition, and the trial court erred in giving amplifying instruction based on *People v. Marler* (1962) 199 Cal.App.2d Supp. 889].)

AUTHORITY

Elements ▸ Pen. Code, § 311.2(a).
Obscene Live Conduct Defined ▸ Pen. Code, § 311(g); see *In re Giannini* (1968) 69 Cal.2d 563, 575 [not all topless dancing obscene]; *Miller v. California* (1973) 413 U.S. 15, 24; *Pope v. Illinois* (1987) 481 U.S. 497, 500–501.
Contemporary Community Standards ▸ *Roth v. United States* (1957) 354 U.S. 476, 489–490.
Prurient Interest Defined ▸ *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, 77.
Person Defined ▸ Pen. Code, § 311(c).
Knowingly Defined ▸ Pen. Code, § 311(e); see *People v. Kuhns* (1976) 61 Cal.App.3d 735, 756–758.
Exhibit Defined ▸ Pen. Code, § 311(f).
Matter Designed for Deviant Sexual Group ▸ Pen. Code, § 311(g)(1); see *People v. Young* (1977) 77 Cal.App.3d Supp. 10, 13.
Commercial Exploitation Is Probative of Conduct's Nature ▸ Pen. Code, § 311(g)(2); see *People v. Kuhns* (1976) 61 Cal.App.3d 735, 748–753.
Knowledge That Matter Depicts Child Under 16 Is Probative of Conduct's Nature ▸ Pen. Code, § 311(g)(3).
Similar Conduct Shown in Community ▸ See *In re Harris* (1961) 56 Cal.2d 879, 880; *People v. Heller* (1979) 96 Cal.App.3d Supp. 1, 7.
Exceptions to Statutory Prohibitions ▸ Pen. Code, § 311.8.
Taken or Considered as a Whole ▸ *People v. Goulet* (1971) 21 Cal.App.3d Supp. 1, 3; *Kois v. Wisconsin* (1972) 408 U.S. 229, 231.
Obscenity Contrasted With Sex ▸ *Roth v. United States* (1957) 354 U.S. 476, 487.
Obscenity Contrasted With Nudity ▸ *People v. Noroff* (1967) 67 Cal.2d 791, 795–796; *In re Panchot* (1968) 70 Cal.2d 105, 108–109.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 79–91.
7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, §§ 310–313.

RELATED ISSUES

See the Related Issues section of Instruction 1241, Distributing Obscene Matter Showing Sexual Conduct by a Minor and Instruction 1242, Distributing or Intending to Distribute Obscene Material.

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STAFF NOTES

Pen. Code, § 311.6:

Every person who knowingly engages or participates in, manages, produces, sponsors, presents or exhibits obscene live conduct to or before an assembly or audience consisting of at least one person or spectator in any public place or in any place exposed to public view, or in any place open to the public or to a segment thereof, whether or not an admission fee is charged, or whether or not attendance is conditioned upon the presentation of a membership card or other token, is guilty of a misdemeanor.

Pen. Code, § 311, Definitions, in relevant part:

As used in this chapter, the following definitions apply: . . .

(c) "Person" means any individual, partnership, firm, association, corporation, limited liability company, or other legal entity.

(e) "Knowingly" means being aware of the character of the matter or live conduct.

(f) "Exhibit" means show.

(g) "Obscene live conduct" means any physical human body activity, whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting, simulating, or pantomiming, taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest and is conduct that, taken as a whole, depicts or describes sexual conduct in a patently offensive way and that, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(1) If it appears from the nature of the conduct or the circumstances of its production, presentation, or exhibition that it is designed for clearly defined deviant sexual groups, the appeal of the conduct shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, if circumstances of production, presentation, advertising, or exhibition indicate that live conduct is being commercially exploited by the defendant for the

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sake of its prurient appeal, that evidence is probative with respect to the nature of the conduct and may justify the conclusion that the conduct lacks serious literary, artistic, political, or scientific value.

(3) In determining whether the live conduct taken as a whole lacks serious literary, artistic, political, or scientific value in description or representation of those matters, the fact that the defendant knew that the live conduct depicts persons under the age of 16 years engaged in sexual conduct, as defined in subdivision (c) of Section 311.4, is a factor that may be considered in making that determination.

(h) The Legislature expresses its approval of the holding of People v. Cantrell, 7 Cal. App. 4th 523, that, for the purposes of this chapter, matter that "depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct" is limited to visual works that depict that conduct.

Pen. Code, § 311.8, Defenses:

(a) It shall be a defense in any prosecution for a violation of this chapter that the act charged was committed in aid of legitimate scientific or educational purposes.

(b) It shall be a defense in any prosecution for a violation of this chapter by a person who knowingly distributed any obscene matter by the use of telephones or telephone facilities to any person under the age of 18 years that the defendant has taken either of the following measures to restrict access to the obscene matter by persons under 18 years of age:

(1) Required the person receiving the obscene matter to use an authorized access or identification code, as provided by the information provider, before transmission of the obscene matter begins, where the defendant has previously issued the code by mailing it to the applicant therefor after taking reasonable measures to ascertain that the applicant was 18 years of age or older and has established a procedure to immediately cancel the code of any person after receiving notice, in writing or by telephone, that the code has been lost, stolen, or used by persons under the age of 18 years or that the code is no longer desired.

(2) Required payment by credit card before transmission of the matter.

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(c) Any list of applicants or recipients compiled or maintained by an information-access service provider for purposes of compliance with subdivision (b) is confidential and shall not be sold or otherwise disseminated except upon order of the court.

Source of Instruction

This instruction is modeled on Instruction 1242.

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1251. Lewd Conduct in Public

The defendant is charged [in Count __] with engaging in lewd conduct in public.

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

1. **The defendant willfully engaged in the touching of ((his/her) own/ [or] another person's) genitals, buttocks, or female breast;**

2. **(He/She) did so with the intent to sexually arouse or gratify (himself/herself) or another person, or to annoy or offend another person;**

3. **At the time the defendant engaged in the conduct, (he/she) was in (a public place/ [or] a place open to the public [or to public view]);**

4. **At the time the defendant engaged in the conduct, someone else who might have been offended was present;**

AND

5. **The defendant knew or reasonably should have known that another person who might have been offended by (his/her) conduct was present.**

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

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

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, § 647(a); *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257; *People v. Rylaarsdam* (1982) 130 Cal.App.3d Supp. 1, 3–4.

Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

"Lewd" and "Dissolute" Synonymous ▸ *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256.

Lewd Conduct Defined ▸ *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256.

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

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

RELATED ISSUES

Need Not Prove Someone Was Offended

"It is not the burden of the prosecution to prove that the observer was in fact offended by the conduct but only that the conduct was such that defendant should know that the observer 'may be offended.' " (*People v. Rylaarsdam* (1982) 130 Cal.App.3d Supp. 1, 11.)

Does Not Apply to Live Theater Performance

"It seems evident from the foregoing that the vagrancy law, [Penal Code] section 647, subdivision (a), was not intended to apply to live performances in a theater before an audience." (*Barrows v. Municipal Court* (1970) 1 Cal.3d 821, 827–828.)

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STAFF NOTES

Pen. Code, § 647(a):

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:
>
> (a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view.

Limiting Construction

> [W]e arrive at the following construction of section 647, subdivision (a): The terms "lewd" and "dissolute" in this section are synonymous, and refer to conduct which involves the touching of the genitals, buttocks, or female breast for the purpose of sexual arousal, gratification, annoyance or offense, if the actor knows or should know of the presence of persons who may be offended by his conduct. The statute prohibits such conduct only if it occurs in any public place or in any place open to the public or exposed to public view; it further prohibits the solicitation of such conduct to be performed in any public place or in any place open to the public or exposed to public view.
>
> Under the construction we have established in this opinion, section 647, subdivision (a), prohibits only the solicitation or commission of a sexual touching, done with specific intent when persons may be offended by the act.

(*Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257 [footnote omitted].)

> As we construe *Pryor*, the offense defined contains the following elements:
>
> (1) Sexually motivated conduct by defendant involving "the touching of the genitals, buttocks or female breast..." (p. 256);
>
> (2) The conduct must be accompanied by a specific intent, i.e., "for 'purposes of sexual arousal, gratification or affront'" (p. 256);
>
> (3) The conduct must occur "in any public place, or any place open

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> to the public or exposed to public view" (pp. 256-257);
>
> (4) The conduct must occur in the presence of another person or persons "who may be offended..." (p. 256); and
>
> (5) Defendant must know "or should know of the presence of persons who may be offended by his conduct." (P. 256.)

(*People v. Rylaarsdam* (1982) 130 Cal.App.3d Supp. 1, 3–4 [footnote omitted].)

Another Person Must Be Present

> We believe that the repeated references in the Supreme Court's opinion to the presence of a person who may be offended were not inadvertent. The offense is thus made one requiring a victim who witnesses the offensive conduct, thereby enhancing certainty of its commission, whereas if there were no victim, the fact of the commission of the conduct might depend upon proof derived solely from circumstantial evidence.
>
> The instruction, permitting the jury to find guilt if a person who may be offended "will be present," was erroneous.

(*People v. Rylaarsdam* (1982) 130 Cal.App.3d Supp. 1, 18 [footnote omitted].)

Sexual Arousal of Self or Another

> It is immaterial under section 647, subdivision (a) that the actor's touching of his genitals in the view of another is not for the purpose of the actor's sexual arousal or gratification. It is sufficient if the act is done for the purpose of the sexual arousal of the viewer. That Rylaarsdam held his penis so as to display it for that purpose is sufficient under this test.

(*People v. Rylaarsdam* (1982) 130 Cal.App.3d Supp. 1, 8.)

Knowledge Element

> As we view this element of *Pryor*, the requirement that defendant know or should know of the presence of a person who may be offended has two parts. First, it is a factual question whether defendant knew or should have known of the other person's

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> presence. [Citation.] Secondly, it is a factual question whether defendant knew or should have known that the observer "may be offended" by such conduct. [Citation.]
>
> It is not the burden of the prosecution to prove that the observer was in fact offended by the conduct but only that the conduct was such that defendant should know that the observer "may be offended." Although the distinction is a subtle one, it is significant. The thrust of this inquiry is the state of mind of defendant -- whether he should know that his conduct may offend another. Whether the observer thereafter is offended thus has minimal evidentiary bearing upon defendant's preceding state of mind.

(*People v. Rylaarsdam* (1982) 130 Cal.App.3d Supp. 1, 11.)

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1252. Soliciting Lewd Conduct in Public

The defendant is charged [in Count __] with soliciting another person to engage in lewd conduct in public.

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

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

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

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

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

5. **When the defendant made the request, a third person who might have been offended by the conduct was present;**

[AND]

6. **The defendant knew or reasonably should have known that someone who might have been offended by the conduct was present(;/.)**

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

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

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

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

BENCH NOTES

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

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

AUTHORITY

Elements ▸ Pen. Code, § 647(a); *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257; *People v. Rylaarsdam* (1982) 130 Cal.App.3d Supp. 1, 3–4.
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.
Solicitation Requires Specific Intent ▸ *People v. Norris* (1978) 88 Cal.App.3d Supp. 32, 38.
Solicitation Defined ▸ *People v. Superior Court of Alameda County* (1977) 19 Cal.3d 338, 345–346.
Person Solicited Must Receive Communication ▸ *People v. Saephanh* (2000) 80 Cal.App.4th 451, 458–459.
"Lewd" and "Dissolute" Synonymous ▸ *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256.
Lewd Conduct Defined ▸ *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256.
Public Place Defined ▸ *In re Zorn* (1963) 59 Cal.2d 650, 652; *People v. Belanger* (1966) 243 Cal.App.2d 654, 657; *People v. Perez* (1976) 64 Cal.App.3d 297, 300–301; but see *People v. White* (1991) 227 Cal.App.3d 886, 892–893 [fenced yard of defendant's home not a "public place"].

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

RELATED ISSUES

See the Related Issues sections of Instruction 1251, Lewd Conduct in Public and Instruction 530, Solicitation: Elements.

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STAFF NOTES

Pen. Code, § 647(a):

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:
>
> (a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view.

Source of Instruction
This instruction in based on Instruction 1251, Lewd Conduct in Public, and Instruction 530, Solicitation: Elements.

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1253A. Prostitution: Engaging in Act

The defendant is charged [in Count __] with engaging in an act of prostitution.

To prove that the defendant is guilty of this crime, the People must prove that the defendant willfully engaged in sexual intercourse or a lewd act with someone else in exchange for money [or other compensation].

A *lewd act* means touching the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification.

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.

If the defendant is charged with one or more prior convictions, give Instruction 200, Prior Conviction: Nonbifurcated Trial, unless the defendant has stipulated to the conviction. If the court has granted a bifurcated trial on the prior conviction, use Instruction 201, Prior Conviction: Bifurcated Trial.

AUTHORITY

Elements ▸ Pen. Code, § 647(b).
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.
Prostitution Defined ▸ Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535; *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433 [lewd act requires touching between prostitute and customer].
Lewd Conduct Defined ▸ *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 61–63.

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RELATED ISSUES

Payment Does Not Need to Be Made Directly to Person Doing Act
"[W]e know of no statutory or case law requiring that payment be made to the person actually providing sexual favors." (*People v. Bell* (1988) 201 Cal.App.3d 1396, 1400.)

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STAFF NOTES

Pen. Code, § 647(b):

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . .
>
> (b) Who solicits or who agrees to engage in or who engages in any act of prostitution. A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act. As used in this subdivision, "prostitution" includes any lewd act between persons for money or other consideration.

Prostitution—Defined

The definition of "act of prostitution" is taken from Instruction 1246, Pandering. The sources cited in that instruction follow.

> [W]e construe the term "prostitution," as used in Penal Code section 266h . . . as meaning sexual intercourse between persons for money or other considerations and only those "lewd and dissolute" acts between persons for money or other consideration as set forth in the *Pryor* case. . . . [F]or a "lewd" or "dissolute" act to constitute "prostitution," the genitals, buttocks, or female breast, of either the prostitute or the customer[,] must come in contact with some part of the body of the other for the purpose of sexual arousal or gratification of the customer or of the prostitute.

(

> [Penal Code] section 647, subdivision (b), defines prostitution as "any lewd act between persons for money or other consideration." Although this broad definition of prostitution could plausibly be interpreted to include sexual conduct between two dancers, for money or other consideration from a customer, *Hill* and *Freeman* [*People v. Freeman* (1988) 46 Cal.3d 419, 424–425] support a different interpretation: That a lewd act, an element of prostitution,

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> requires touching between the prostitute and the customer, even if the customer is simply an observer of sexual acts between two prostitutes. . . .[W]e conclude that the definition of prostitution under section 647, subdivision (b), . . . requires sexual contact between the prostitute and the customer.

(*Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433.)

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1253B. Prostitution: Soliciting Another

The defendant is charged [in Count __] with soliciting another person to engage in an act of prostitution.

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

1. **The defendant requested [or _____** *<insert other synonyms for "solicit," as appropriate>***] that another person engage in an act of prostitution;**

[AND]

2. **The defendant intended to engage in an act of prostitution with the other person(;/.)**

<Give element 3 when instructing that person solicited must receive message; see Bench Notes.>
[AND

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

A person *engages in an act of prostitution* if he or she has sexual intercourse or does a lewd act with someone else in exchange for money [or other compensation]. A *lewd act* means touching the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification.

BENCH NOTES

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

One court has held that the person solicited must actually receive the solicitous communication. (*People v. Saephanh* (2000) 80 Cal.App.4th 451, 458–459.) In *Saephanh*, the defendant mailed a letter from prison containing a solicitation to harm the fetus of his girlfriend. (*Id.* at p. 453.) The letter was intercepted by prison

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authorities and, thus, never received by the intended person. *(Ibid.)* If there is an issue over whether the intended person actually received the communication, give bracketed element 3.

If the defendant is charged with one or more prior convictions, give Instruction 200, Prior Conviction: Nonbifurcated Trial, unless the defendant has stipulated to the conviction. If the court has granted a bifurcated trial on the prior conviction, use Instruction 201, Prior Conviction: Bifurcated Trial.

AUTHORITY

Elements ▸ Pen. Code, § 647(b).
Prostitution Defined ▸ Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535; *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433 [lewd act requires touching between prostitute and customer].
Lewd Conduct Defined ▸ *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256.
Solicitation Requires Specific Intent ▸ *People v. Norris* (1978) 88 Cal.App.3d Supp. 32, 38; *People v. Love* (1980) 111 Cal.App.3d Supp. 1, 13; *People v. Dell* (1991) 232 Cal.App.3d 248, 264.
Solicitation Defined ▸ *People v. Superior Court of Alameda County* (1977) 19 Cal.3d 338, 345–346.
Person Solicited Must Receive Communication ▸ *People v. Saephanh* (2000) 80 Cal.App.4th 451, 458–459.
Solicitation Applies to Either Prostitute or Customer ▸ *Leffel v. Municipal Court* (1976) 54 Cal.App.3d 569, 575.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 61–63.

RELATED ISSUES

See the Related Issues section of Instruction 530, Solicitation: Elements.

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STAFF NOTES

Pen. Code, § 647(b):

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . .
>
> (b) Who solicits or who agrees to engage in or who engages in any act of prostitution. A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act. As used in this subdivision, "prostitution" includes any lewd act between persons for money or other consideration.

Source of Instruction
This instruction in based on Instruction 530, Solicitation: Elements.

Solicitation Requires Specific Intent

> The decision in *People* v. *Norris* (1978) 88 Cal.App.3d Supp. 32, at p. 38 clearly held that the specific intent in the crime of solicitation of an act of prostitution in violation of Penal Code section 647, subdivision (b) is "*to engage in prostitution*." . . .
>
> A defendant is not guilty of the offense unless he or she seriously intends to carry through by performing an act of prostitution. A mere speaking of the words of solicitation is not enough for conviction of this offense.

(*People v. Love* (1980) 111 Cal.App.3d Supp. 1, 13; see *People v. Norris* (1978) 88 Cal.App.3d Supp. 32, 38; *People v. Dell* (1991) 232 Cal.App.3d 248, 264.)

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Solicitation Applies to Either Prostitute or Customer

> [T]he ordinary meaning of the statute is that *all persons*, customers as well as prostitutes, who solicit an act of prostitution are guilty of disorderly conduct.

(*Leffel v. Municipal Court* (1976) 54 Cal.App.3d 569, 575.)

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1253C. Prostitution: Agreeing to Engage in Act

The defendant is charged [in Count __] with agreeing to engage in an act of prostitution.

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

1. **The defendant agreed to engage in an act of prostitution with someone else;**

2. **The defendant intended to engage in an act of prostitution with that person;**

AND

3. **In addition to agreeing, the defendant did something to further the commission of an act of prostitution.**

A person *engages in an act of prostitution* if he or she has sexual intercourse or does a lewd act with someone else in exchange for money [or other compensation]. A *lewd act* means touching the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification.

[The conduct that furthers the commission of the act of prostitution may happen before, after, or at the same time as the agreement to engage in prostitution.]

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 one or more prior convictions, give Instruction 200, Prior Conviction: Nonbifurcated Trial, unless the defendant has stipulated to the conviction. If the court has granted a bifurcated trial on the prior conviction, use Instruction 201, Prior Conviction: Bifurcated Trial.

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AUTHORITY

Elements ▸ Pen. Code, § 647(b).
Prostitution Defined ▸ Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535; *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433 [lewd act requires touching between prostitute and customer].
Lewd Conduct Defined ▸ *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256.
Specific Intent Required ▸ Pen. Code, § 647(b).
Act in Furtherance Required ▸ Pen. Code, § 647(b).
Act in Furtherance May Precede Agreement ▸ *In re Cheri T.* (1999) 70 Cal.App.4th 1400, 1407–1408 [contra *People v. Davis* (1988) 201 Cal.App.3d Supp. 1, 4–5].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 61–63.

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STAFF NOTES

Pen. Code, § 647(b):

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . .
>
> (b) Who solicits or who agrees to engage in or who engages in any act of prostitution. A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act. As used in this subdivision, "prostitution" includes any lewd act between persons for money or other consideration.

Act in Furtherance May Proceed Agreement

> Senate Bill 2169 was amended to require an overt act in order to serve an entirely different purpose, however--to ease concerns that ambiguous conduct or statements might lead to false arrests for violations of section 647, subdivision (b). That purpose can be served by interpreting the language to require proof of some overt act in furtherance of the agreement which clarifies or corroborates that an agreement to engage in an act of prostitution was actually made. It is not necessary to impose the additional requirement that the clarifying or corroborative act must occur after the agreement was made. For the reasons set forth above, such an interpretation would produce the absurd result of making the offense of agreeing to an act of prostitution coextensive with the previously existing crime of conspiracy. . . .
>
> Given the plain meaning of this statute, we presume the Legislature meant what it said: for there to be a violation of the statute, there must exist both an act and an agreement, but in no particular order.

(*In re Cheri T.* (1999) 70 Cal.App.4th 1400, 1407–1408 [contra *People v. Davis* (1988) 201 Cal.App.3d Supp. 1, 4–5].)

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1254. Loitering: For Prostitution

The defendant is charged [in Count __] with loitering with the intent to commit prostitution.

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

1. **The defendant delayed or lingered in a public place;**

2. **When the defendant did so, (he/she) did not have a lawful purpose for being there;**

AND

3. **When the defendant did so, (he/she) intended to commit prostitution.**

As used here, a *public place* is (a/an/the) (area open to the public[(,/;)]/[or] alley[(,/;)]/ [or] plaza [(,/;)]/ [or] park[(,/;)]/ [or] driveway[(,/;)]/ [or] parking lot[(,/;)]/ [or] automobile[(,/;)]/ [or] building open to the general public[, including one that serves food or drink or provides entertainment[(,/;)]/ [or] doorway or entrance to a building or dwelling[(,/;)]/ [or] grounds enclosing a building or dwelling).

A person *intends to commit prostitution* if he or she intends to engage in sexual conduct with someone else in exchange for money [or other compensation]. *Sexual conduct* means sexual intercourse or touching the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification. [*Prostitution* does not include sexual conduct engaged in as a part of any stage performance, play, or other entertainment open to the public.]

The intent to commit prostitution may be shown by a person acting in a manner and under circumstances that openly demonstrate the intent to induce, entice, or solicit prostitution or to procure someone else to commit prostitution. In deciding whether the defendant acted with intent to commit prostitution, you may consider whether (he/she):

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- **[Repeatedly beckoned to, stopped, engaged in conversations with, or attempted to stop or engage in conversations with passersby in a way that indicated the solicitation of prostitution (./;)]**

- **[Repeatedly stopped or attempted to stop vehicles by hailing, waving, or gesturing, or engaged or attempted to engage drivers or passengers in conversation, in a way that indicated the solicitation of prostitution(./;)]**

- **[Circled an area in a vehicle and repeatedly beckoned to, contacted, or attempted to contact or stop pedestrians or other motorists in a way that indicated the solicitation of prostitution(./;)]**

- **[Has engaged in any behavior indicative of prostitution activity within the six months before (his/her) arrest in this case(./;)]**

- **[Has been convicted of this crime or of any other crime relating to or involving prostitution within five years of (his/her) arrest in this case.]**

You should also consider whether any of these activities occurred in an area known for prostitution.

This list of factors is not intended to be a complete list of all the factors you may consider on the question of intent. The factors are provided only as examples to assist you in deciding whether the defendant acted with the intent to commit prostitution. Consider all the evidence presented in this case for whatever bearing you conclude it has on the question of the defendant's intent. Give the evidence whatever weight you decide that it deserves.

BENCH NOTES

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

AUTHORITY

Elements ▸ Pen. Code, § 653.22(a).
Factors to Consider to Prove Intent ▸ Pen. Code, § 653.22(a), (b) & (c).

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Prostitution Defined ▸ Pen. Code, § 653.20(a); see also Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535; *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433; *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256.

Public Place Defined ▸ Pen. Code, § 653.20(b).

Loiter Defined ▸ Pen. Code, § 653.20(b).

Statute Constitutional ▸ *People v. Pulliman* (1998) 62 Cal.App.4th 1430, 1434–1439.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 54.

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STAFF NOTES

Pen. Code, § 653.22:

(a) It is unlawful for any person to loiter in any public place with the intent to commit prostitution. This intent is evidenced by acting in a manner and under circumstances which openly demonstrate the purpose of inducing, enticing, or soliciting prostitution, or procuring another to commit prostitution.

(b) Among the circumstances that may be considered in determining whether a person loiters with the intent to commit prostitution are that the person:

(1) Repeatedly beckons to, stops, engages in conversations with, or attempts to stop or engage in conversations with passersby, indicative of soliciting for prostitution.

(2) Repeatedly stops or attempts to stop motor vehicles by hailing the drivers, waving arms, or making any other bodily gestures, or engages or attempts to engage the drivers or passengers of the motor vehicles in conversation, indicative of soliciting for prostitution.

(3) Has been convicted of violating this section, subdivision (a) or (b) of Section 647, or any other offense relating to or involving prostitution, within five years of the arrest under this section.

(4) Circles an area in a motor vehicle and repeatedly beckons to, contacts, or attempts to contact or stop pedestrians or other motorists, indicative of soliciting for prostitution.

(5) Has engaged, within six months prior to the arrest under this section, in any behavior described in this subdivision, with the exception of paragraph (3), or in any other behavior indicative of prostitution activity.

(c) The list of circumstances set forth in subdivision (b) is not exclusive. The circumstances set forth in subdivision (b) should be considered particularly salient if they occur in an area that is known for prostitution activity. Any other relevant circumstances may be considered in determining whether a person has the requisite intent. Moreover, no one circumstance or combination of circumstances is

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in itself determinative of intent. Intent must be determined based on an evaluation of the particular circumstances of each case.

Pen. Code, § 653.20:

For purposes of this chapter, the following definitions apply:

(a) "Commit prostitution" means to engage in sexual conduct for money or other consideration, but does not include sexual conduct engaged in as a part of any stage performance, play, or other entertainment open to the public.

(b) "Public place" means an area open to the public, or an alley, plaza, park, driveway, or parking lot, or an automobile, whether moving or not, or a building open to the general public, including one which serves food or drink, or provides entertainment, or the doorways and entrances to a building or dwelling, or the grounds enclosing a building or dwelling.

(c) "Loiter" means to delay or linger without a lawful purpose for being on the property and for the purpose of committing a crime as opportunity may be discovered.

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1290. Sexual Abuse of Animal

The defendant is charged [in Count __] with sexual abuse of an animal.

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

1. **The defendant sexually assaulted an animal;**

2. **The defendant did so with the intent of arousing or gratifying (his/her) own sexual desire;**

AND

3. **The animal was (abandoned or neglected/_____** *<insert other description of "animal protected by Pen. Code, § 597f">***).**

BENCH NOTES

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

Penal Code section 286.5 only applies to an "animal protected by Section 597f." Penal Code section 597f broadly establishes the authority of public officers to take possession of and care for abandoned and neglected animals. Thus, the committee has included element 3.

AUTHORITY

Elements ▸ Pen. Code, §§ 286.5; 597f.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, § 25.

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STAFF NOTES

Pen. Code, § 286.5:

Any person who sexually assaults any animal protected by Section 597f for the purpose of arousing or gratifying the sexual desire of the person is guilty of a misdemeanor.

Pen. Code, § 597f:

(a) Every owner, driver, or possessor of any animal, who permits the animal to be in any building, enclosure, lane, street, square, or lot, of any city, city and county, or judicial district, without proper care and attention, shall, on conviction, be deemed guilty of a misdemeanor. And it shall be the duty of any peace officer, officer of the humane society, or officer of a pound or animal regulation department of a public agency, to take possession of the animal so abandoned or neglected and care for the animal until it is redeemed by the owner or claimant, and the cost of caring for the animal shall be a lien on the animal until the charges are paid. Every sick, disabled, infirm, or crippled animal, except a dog or cat, which shall be abandoned in any city, city and county, or judicial district, may, if after due search no owner can be found therefor, be killed by the officer; and it shall be the duty of all peace officers, an officer of such society, or officer of a pound or animal regulation department of a public agency to cause the animal to be killed on information of such abandonment. The officer may likewise take charge of any animal, including a dog or cat, that by reason of lameness, sickness, feebleness, or neglect, is unfit for the labor it is performing, or that in any other manner is being cruelly treated; and, if the animal is not then in the custody of its owner, the officer shall give notice thereof to the owner, if known, and may provide suitable care for the animal until it is deemed to be in a suitable condition to be delivered to the owner, and any necessary expenses which may be incurred for taking care of and keeping the animal shall be a lien thereon, to be paid before the animal can be lawfully recovered.

(b) It shall be the duty of all officers of pounds or humane societies, and animal regulation departments of public agencies to convey, and for police and sheriff departments, to cause to be conveyed all injured cats and dogs found without their owners in a public place directly to a veterinarian known by the officer or agency to be a

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veterinarian that ordinarily treats dogs and cats for a determination of whether the animal shall be immediately and humanely destroyed or shall be hospitalized under proper care and given emergency treatment.

If the owner does not redeem the animal within the locally prescribed waiting period, the veterinarian may personally perform euthanasia on the animal; or, if the animal is treated and recovers from its injuries, the veterinarian may keep the animal for purposes of adoption, provided the responsible animal control agency has first been contacted and has refused to take possession of the animal.

Whenever any animal is transferred pursuant to this subdivision to a veterinarian in a clinic, such as an emergency clinic which is not in continuous operation, the veterinarian may, in turn, transfer the animal to an appropriate facility.

If the veterinarian determines that the animal shall be hospitalized under proper care and given emergency treatment, the costs of any services which are provided pending the owner's inquiry to the agency, department, or society shall be paid from the dog license fees, fines, and fees for impounding dogs in the city, county, or city and county in which the animal was licensed or if the animal is unlicensed the jurisdiction in which the animal was found, subject to the provision that this cost be repaid by the animal's owner. No veterinarian shall be criminally or civilly liable for any decision which he or she makes or services which he or she provides pursuant to this section.

(c) An animal control agency which takes possession of an animal pursuant to subdivision (b), shall keep records of the whereabouts of the animal for a 72-hour period from the time of possession and those records shall be available to inspection by the public upon request.

(d) Notwithstanding any other provisions of this section, any officer of a pound or animal regulation department or humane society, or any officer of a police or sheriff's department may, with the approval of his or her immediate superior, humanely destroy any abandoned animal in the field in any case where the animal is too severely injured to move or where a veterinarian is not available and it would

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be more humane to dispose of the animal.

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1316B. Tampering With a Vehicle

The defendant is charged [in Count __] with (damaging/ [or] tampering with) a vehicle.

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

<Alternative 1A—damaged or tampered with>

[1. The defendant willfully (damaged/ [or] tampered with) someone else's vehicle [or the contents of that vehicle];]

<Alternative 1B—broke or removed part of>

[1. The defendant willfully (broke/ [or] removed) part of someone else's vehicle;]

[AND]

2. The defendant did not have the owner's consent to do that act(;/.)

<Give element 3 when instructing on "in association with" others.>

[AND

3. The defendant acted in association with one or more other people.]

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

[A *vehicle* is a device by which people or things may be moved on a road or highway. A vehicle does not include a device that is moved only by human power or used only on stationary rails or tracks.]

[In order to prove that the defendant acted *in association with one or more other people,* the People must prove that the defendant was a member of a conspiracy to commit the crime of (damaging/ [or] tampering with) a vehicle. Instruction 551 explains what the People must prove to establish that the defendant was a member of a conspiracy to commit this crime.]

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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 prosecution alleges that the defendant did not personally commit the act of tampering but acted "in association with" others, give bracketed element 3 and the paragraph that begins with "In order to prove that the defendant acted." (*People v. Farina* (1963) 220 Cal.App.2d 291, 294.) The court has a **sua sponte** duty to also give Instruction 551, Evidence of Uncharged Conspiracy.

The statute uses the term "injure." (Veh. Code, § 10852.) The committee has replaced the word "injure" with the word "damage" because the word "injure" generally refers to harm to a person rather than to property.

Give the bracketed definition of vehicle on request.

AUTHORITY

Elements ▸ Veh. Code, § 10852.
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.
Vehicle Defined ▸ Veh. Code, § 670.
"In Association With" Means to Conspire With ▸ *People v. Farina* (1963) 220 Cal.App.2d 291, 294.
Tamper Defined ▸ *People v. Anderson* (1975) 15 Cal.3d 806, 810–811; *People v. Mooney* (1983) 145 Cal.App.3d 502, 505.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 262.

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STAFF NOTES

Veh. Code, § 10852:

> No person shall either individually or in association with one or more other persons, wilfully injure or tamper with any vehicle or the contents thereof or break or remove any part of a vehicle without the consent of the owner.

Statute Covers Two Types of Conduct

> A careful reading of Vehicle Code section 10852 reveals that it specifies in the alternative two types of proscribed conduct: (1) tampering with or injuring the vehicle *as a whole*, or (2) breaking or removing individual *parts* of the vehicle.

(*People v. Anderson* (1975) 15 Cal.3d 806, 810–811.)

"In Association With" Means to Conspire With

> Appellant Farina contends that tampering with a motor vehicle in violation of Vehicle Code section 10852 cannot be the object of a conspiracy under Penal Code section 182. This contention has merit . . . .
>
> In *In re Williamson*, 43 Cal.2d 651, 654, the petitioner and four others were indicted on three counts of grand theft and one count of conspiracy to commit the crime of contracting without a license in violation of section 7028 of the Business and Professions Code. . . . The petitioner in *In re Williamson* contended that he could only be punished for a misdemeanor under the provisions of Business and Professions Code section 7030 and not the felony charge of conspiracy in violation of Penal Code section 182. The Supreme Court agreed. Quoting from *People* v. *Breyer*, 139 Cal.App. 547, 550, the court said: "It is the general rule that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment."
>
> There can be no doubt that Vehicle Code section 10852 is a special statute within the meaning of that term as used in *In re Williamson*, *supra*. It appears in a division of the Vehicle Code entitled "Special

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> Antitheft Laws," and its purpose is to prohibit the conduct therein described and to punish those who violate its terms. We must give the words "in association with" their usual, ordinary and commonly understood meaning (45 Cal.Jur.2d, Statutes, § 139; *Dupuy* v. *McColgan*, 112 Cal.App.2d 237. The word "association" is generally used to indicate a group of persons who have joined together for some common purpose. Thus, in *Stampolis* v. *Lewis*, 186 Pa.Super. 285, it was said: ". . . the word 'association' is used to indicate a collection of persons who have united or joined together for some special purpose or business. . . ." An "association" as defined by Bouvier's Law Dictionary, page 269, is "The act of a number of persons in uniting together for some purpose. The persons so joining." The criminal act in a conspiracy is the agreement or common design. (Witkin, Cal. Crimes, § 107; *People* v. *Hess*, 104 Cal.App.2d 642, 674 [234 P.2d 65].) **It seems clear that the Legislature by use of the words "in association with one or more other persons" in Vehicle Code section 10852 intended to reach those who conspire to violate its terms**, and for this reason appellant is not subject to the felony charge of conspiracy described in count 2 of the information, but is subject only to a charge under Vehicle Code section 10852.

(*People v. Farina* (1963) 220 Cal.App.2d 291, 294.)

Tamper Defined

> An accepted definition of "tamper" is to "interfere with." (Webster's New World Dict. (2d College ed. 1974).) Interference includes conduct which is broader in scope than merely damaging a vehicle, for it encompasses any act inconsistent with the ownership thereof. Irrespective of the means used, one who steals an automobile must necessarily "interfere with" it because the act of exercising control over the vehicle in the act of theft is inconsistent with the owner's right of immediate and continuous possession. We therefore conclude that stealing an automobile necessarily includes "tampering" with it, and thus constitutes conduct violative of Vehicle Code section 10852.

(*People v. Anderson* (1975) 15 Cal.3d 806, 810–811.)

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> Another common usage of the term tampering is "to alter improperly." (The American Heritage Dict. of the English Language (new college ed. 1979) p. 1314, col. 1.)

(*People v. Mooney* (1983) 145 Cal.App.3d 502, 505.)

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1317. Unlawful Taking of Bicycle or Vessel

The defendant is charged [in Count __] with unlawfully taking a (bicycle/vessel).

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

1. **The defendant took someone else's (bicycle/vessel) without the owner's consent;**

AND

2. **When the defendant acted, (he/she) intended to use [or operate] the (bicycle/vessel) for any period of time.**

[A *taking* requires that the (bicycle/vessel) be moved for any distance, no matter how slight.]

[A *vessel* includes ships of all kinds, steamboats, steamships, canal boats, barges, sailing vessels, and any structure intended to transport people or merchandise over water.]

BENCH NOTES

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

The defendant cannot be convicted of both unlawfully taking a bicycle or vessel and receiving the same item as stolen property where there is evidence of only one act or transaction. (See *People v. Black* (1990) 222 Cal.App.3d 523, 525; *People v. Strong* (1994) 30 Cal.App.4th 366, 376.) Similarly, a defendant cannot be convicted of both an unlawful taking and theft of the same item in the absence of evidence showing a substantial break between the theft and the use of the property. (See *People v. Kehoe* (1949) 33 Cal.2d 711, 715; *People v. Malamut* (1971) 16 Cal.App.3d 237, 242.) In such cases, the court has a **sua sponte** duty to instruct the jury that the defendant cannot be convicted of both offenses. Give Instruction 164, Multiple Counts: Alternative Charges for One Event.

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On request, give the bracketed definition of "taking." (*People v. White* (1945) 71 Cal.App.2d 524, 525.)

If the defendant is charged with a felony based on a qualifying prior conviction under Penal Code section 499, the court must give either Instruction 200, Prior Conviction: Nonbifurcated Trial or Instruction 201, Prior Conviction: Bifurcated Trial, unless the defendant stipulates to the truth of the conviction.

AUTHORITY

Elements ▸ Pen. Code, § 499b.
Felony Offense If Qualifying Prior Conviction ▸ Pen. Code, § 499.
Vessel Defined ▸ Harb. & Nav. Code, § 21.
Taking Defined ▸ *People v. White* (1945) 71 Cal.App.2d 524, 525; *People v. Frye* (1994) 28 Cal.App.4th 1080, 1088.
Expiration of Owner's Consent ▸ *People v. Hutchings* (1996) 242 Cal.App.2d 294, 295.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 71.

COMMENTARY

Prior to 1997, this statute also applied to the taking of vehicles. (See *People v. Howard* (1997) 57 Cal.App.4th 323, 326, fn. 2.) The Legislature determined that the previous statute was duplicative of Vehicle Code section 10851 and, therefore, restricted the scope of the statute to only bicycles and, later, vessels. (Stats. 1996, ch. 660, § 3; see *People v. Howard, supra*, 57 Cal.App.4th at p. 326, fn. 2.)

Prior to this amendment, a split in authority developed over whether this is a specific-intent crime. The statute requires that the defendant take the item "for the purpose of temporarily using or operating" it. (Pen. Code, § 499b(a) & (b).) Analyzing the statute when it still applied to vehicles, the majority of cases held that this required the specific intent to use or operate the vehicle. (*People v. Howard* (1997) 57 Cal.App.4th 323, 327–328; *People v. Ivans* (1992) 2 Cal.App.4th 1654, 1663–1664; *People v. Diaz* (1989) 212 Cal.App.3d 745, 749–751.) One case, however, held that this was a general-intent crime requiring only that the vehicle be taken by an act of driving or operating. (*People v. Frye* (1994) 28 Cal.App.4th 1080, 1090–1091.) The reasoning of the court in *People v. Frye*, *supra*, is based on the premise that one "takes" a vehicle by driving or operating it. (*Id.* at p. 1091 ["the 'taking' proscribed by Penal Code section 499b is an act of taking possession through driving . . . ."].) As discussed in *People v. Howard*,

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supra, however, one may "take" a vehicle without driving or operating it, such as by towing it. This distinction is even more apparent in the context of bicycles and vessels, the only items now covered by the statute. One can "take" a bicycle without using or operating it by simply carrying it away. Similarly, if a vessel is on land, one can "take" it without using or operating it by towing it away. In such circumstances, it would appear that the person has not violated Penal Code section 499b unless there is some evidence that he or she also intends to use or operate the bicycle or vessel. Thus, in light of the amendments to the statute, the committee believes that the reasoning of *Howard* and *Diaz, supra*, finding this to be a specific-intent crime, is more persuasive.

LESSER INCLUDED OFFENSES

Attempted Unlawful Taking of Bicycle or Vessel ▸ Pen. Code, § 664; Pen. Code, § 499b.

If the defendant is charged with a felony based on a prior conviction, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the prior conviction has been proved. If the jury finds that the prior conviction has not been proved, then the offense should be set at a misdemeanor.

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STAFF NOTES

Pen. Code, § 499b:

(a) Any person who shall, without the permission of the owner thereof, take any bicycle for the purpose of temporarily using or operating the same, is guilty of a misdemeanor, and shall be punishable by a fine not exceeding four hundred dollars ($ 400), or by imprisonment in a county jail not exceeding three months, or by both that fine and imprisonment.

(b) Any person who shall, without the permission of the owner thereof, take any vessel for the purpose of temporarily using or operating the same, is guilty of a misdemeanor, and shall be 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.

Pen. Code, § 499:

(a) Any person who, having been convicted of a previous violation of Section 10851 of the Vehicle Code, or of subdivision (d) of Section 487, involving a vehicle or vessel, and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for the offense, is subsequently convicted of a violation of Section 499b, involving a vehicle or vessel, is punishable for the subsequent offense by imprisonment in the county jail not exceeding one year or the state prison for 16 months, two, or three years.

(b) Any person convicted of a violation of Section 499b, who has been previously convicted under charges separately brought and tried two or more times of a violation of Section 499b, all such violations involving a vehicle or vessel, and who has been imprisoned therefore as a condition of probation or otherwise at least once, is punishable by imprisonment in the county jail for not more than one year or in the state prison for 16 months, two, or three years.

(c) This section shall become operative on January 1, 1997.

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Source of Instruction
This instruction is modeled on Instruction 1316, Unlawful Taking of a Vehicle. The definition of "vessel" is taken from Instruction 1401, Burglary.

Former Automobile Joyriding Statute
Previously, Penal Code section 499b prohibited the taking of an automobile for the temporary use or pleasure of the accused person. (See *People v. Frye* (1994) 28 Cal.App.4th 1080, 1083–1084.) Effective January 1, 1997, the Legislature deleted the taking of an automobile, motorcycle, or other vehicle from section 499b, declaring this provision to be generally duplicative of Vehicle Code section 10851(a). (Stats. 1996, ch. 660, sec. 3; see *People v. Howard* (1997) 57 Cal.App.4th 323, 326, fn. 2.) Section 499b now only applies to bicycles, motorboats, and vessels.

Split in Authority on Specific Intent
There is currently a split in authority as to whether this is a specific intent crime. The statute requires that the defendant take the item "for the purpose of temporarily using or operating" it. The majority of cases have held that this requires the specific intent to use or operate the item. (*People v. Howard* (1997) 57 Cal.App.4th 323, 327–328; *People v. Ivans* (1992) 2 Cal.App.4th 1654, 1663–1664; *People v. Diaz* (1989) 212 Cal.App.3d 745, 749–751.) One case, however, has held that this is a general intent crime. (*People v. Frye* (1994) 28 Cal.App.4th 1080, 1090–1091.)

The court in *People v. Howard* (1997) 57 Cal.App.4th 323, 327–328, explained the conflict as follows:

> "Penal Code section 499b, the joyriding statute, does not require a specific intent to deprive the owner of title or possession of a vehicle [citations]. However, the section does require a 'purpose' or 'intent' of 'temporarily using or operating the same.' [Citation.]" (*People v. Barrick* (1982) 33 Cal. 3d 115, 134.)
>
> The defendant in *People v. Diaz*, *supra*, 212 Cal. App. 3d 745 presented the same contention appellant raises here, that the jury was erroneously instructed that joyriding required a specific intent. The court considered the argument in light of the Supreme Court's explanation of specific and general intent in *People v. Hood* (1969) 1 Cal. 3d 444, 456-457 . . . .
>
> Under these definitions, the *Diaz* court concluded that joyriding is a specific intent crime. "Section 499b makes it a misdemeanor for

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> anyone to 'take any automobile . . . *for the purpose of temporarily using or operating the same*. . . .' [Italics added by the *Diaz* court.] The ordinary meaning of the phrase 'for the purpose of' is to delineate some additional consequence or purpose. Thus, the individual must not only intend to take the vehicle, but must also intend to temporarily use or operate the same. [Citation.] Along this same line, we observe that the Supreme Court has indicated that the taking of a vehicle does not necessarily connote its use or operation. (*People v. Barrick* (1982) 33 Cal. 3d 115, 134-135 . . . .) Thus, the word 'take,' as used in the statute, is not synonymous with temporarily using or operating the vehicle. (Cf. *Ibid*.)" (*People v. Diaz*, *supra*, 212 Cal. App. 3d at pp. 750-751, fn. omitted.)
>
> Appellant relies on *People v. Frye*, *supra*, 28 Cal. App. 4th 1080, which disagreed with the *Diaz* analysis. According to *Frye*, "The flaw in the *Diaz* court's analysis is the presupposition that the conduct proscribed--the taking--is the act of removing the vehicle from the owner's possession. The court found that that act of taking was not synonymous with, nor inclusive of, the act of driving the vehicle. [Citation.] We disagree and conclude that the 'taking' proscribed by Penal Code section 499b is an act of taking possession through driving and that the mental state required by the statute ('for the purpose of temporarily using or operating') is no more than the general intent to perform the act. The statute does not require an intent to achieve a consequence other than the act itself." (*Id*. at p. 1091.)
>
> We find the reasoning of *Diaz* more persuasive. The proscribed act under section 499b is the taking of the automobile without permission. But section 499b requires more than just that unpermitted taking: it requires that the taking be "for the purpose of temporarily using or operating the same, . . ." (§ 499b.) This is more than the general criminal intent to do the act. It is a requirement that the act be done with a specific intent, or a mental state that is so close to it that it defies an articulable distinction. The court's instructions on section 499b properly required the finding of a "specific intent to temporarily take and use or operate for the purpose of temporarily using or operating" the vehicle.

This division arose when Penal Code section 499b still applied to vehicles. As noted, the Legislature amended the statute to make it apply only to bicycles and

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vessels, effective in 1997. The Legislature did not change the wording of the statute with regard to the language at issue here.

The reasoning of the court in *People v. Frye*, *supra*, 28 Cal. App. 4th 1080, is based on the premise that one "takes" a vehicle by driving or operating it. (*Id.* at p. 1091.) The *Frye* court concluded that "the 'taking' proscribed by Penal Code section 499b is an act of taking possession through driving . . . ." *(Ibid.)* As noted in *People v. Howard*, *supra*, 57 Cal.App.4th 323, however, one may "take" a vehicle without driving or operating it, such as by towing it. This distinction is even more apparent in the context of bicycles and vessels, the only items now covered by the statute. One can "take" a bicycle without using or operating it by simply carrying it away. Similarly, if a vessel is on land, one can "take" it without using or operating it by towing it away. In such circumstances, it would appear that the person has not violated Penal Code section 499b unless there is some evidence that he or she also intends to use or operate the item. For example, if the person takes a bike by carrying it away because he or she intends to sell the bike, having no intention of riding it, it would seem that this statute is not violated. Thus, in light of the amendments to the statute, the reasoning of *Howard* and Diaz, finding this to be a specific intent crime, is more persuasive.

Taking

> To constitute a taking of the automobile there must be an asportation, but "Any removal, however, slight, of the entire article, which is not attached either to the soil, or to anything not removed, is sufficient." [Citations.]

(*People v. White* (1945) 71 Cal.App.2d 524, 525.)

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1655. Reckless Driving

The defendant is charged [in Count __] with reckless driving.

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

1. **The defendant drove a vehicle (on a highway/in an off-street parking facility);**

AND

2. **The defendant intentionally drove with wanton disregard for the safety of persons or property.**

A person acts with *wanton disregard for safety* when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk of harm, (2) he or she intentionally ignores that risk, and (3) ignoring the risk is grossly different from what a reasonable person would have done in the same situation. The person does not, however, have to intend to cause damage.

[If you conclude that the defendant drove faster than the legal speed limit, that fact by itself does not establish that the defendant drove with wanton disregard for safety. You may consider the defendant's speed, along with all the surrounding circumstances, in deciding whether the defendant drove with wanton disregard for safety.]

[A *vehicle* is a device by which people or things may be moved on a road or highway. A vehicle does not include a device that is moved only by human power or used only on stationary rails or tracks.]

[The term *highway* describes any area publicly maintained and open to the public for purposes of vehicular travel, and includes a street.]

[The term[s] (*vehicle/* [and] *highway*) (is/are) defined in another instruction to which you should refer.]

[An *off-street parking facility* is an off-street facility open for use by the public for parking vehicles. It includes a facility open to retail customers, where no fee is charged for parking.]

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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 defendant is charged with reckless driving on a highway (Veh. Code, § 23103(a)), select the phrase "on a highway" in element 1. If the defendant is charged with reckless driving in an off-street parking facility (Veh. Code, § 23103(b)), select that phrase in element 1.

Give the bracketed paragraph that begins with "If you conclude that the defendant was driving faster than" on request if relevant based on the evidence. (*People v. Nowell* (1941) 45 Cal.App.2d Supp. 811, 813–814.)

The court must define the terms "highway" and "vehicle." Give the bracketed definitions of the terms unless the court has already given these definitions in other instructions. In such cases, the court may give the bracketed sentence stating that the terms are defined elsewhere.

Give Instruction 1690, Driver and Driving Defined on request.

AUTHORITY

Elements ▸ Veh. Code, § 23103(a) & (b).
Vehicle Defined ▸ Veh. Code, § 670.
Highway Defined ▸ Veh. Code, § 360.
Off-Street Parking Facility Defined ▸ Veh. Code, § 12500(c).
Willful or Wanton Disregard ▸ *People v. Schumacher* (1961) 194 Cal.App.2d 335, 240; *People v. Young* (1942) 20 Cal.2d 832, 837.
Gross Negligence Insufficient ▸ *People v. Allison* (1951) 101 Cal.App.2d Supp. 932, 935.
Speeding May Constitute Recklessness Based on Circumstances ▸ *People v. Nowell* (1941) 45 Cal.App.2d Supp. 811, 813–814.
Requires Reckless Act of Driving, Not Merely Mental State ▸ *People v. McNutt* (1940) 40 Cal.App.2d Supp. 835, 838–839; *People v. Smith* (1939) 36 Cal.App.2d Supp. 748, 751.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 204.

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RELATED ISSUES

Offense Is a Misdemeanor, Not an Infraction
Reckless driving is a misdemeanor and may not be reduced to an infraction. (*People v. Dibacco* (2004) 117 Cal.App.4th Supp. 1, 4.)

Speeding Not Necessarily Lesser Included Offense
Speeding is not a necessarily lesser included offense of reckless driving. (*People v. Dibacco* (2004) 117 Cal.App.4th Supp. 1, 4.)

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STAFF NOTES

Veh. Code, § 23103:

> (a) Any person who drives any vehicle upon a highway in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.
>
> (b) Any person who drives any vehicle in any offstreet parking facility, as defined in subdivision (c) of Section 12500, in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.
>
> (c) Persons convicted of the offense of reckless driving shall be punished by imprisonment in a county jail for not less than five days nor more than 90 days or by a fine of not less than one hundred forty-five dollars ($ 145) nor more than one thousand dollars ($ 1,000), or by both that fine and imprisonment, except as provided in Section 23104.

Veh. Code, § 12500(c), in relevant part:

> As used in this subdivision, "offstreet parking facility" means any offstreet facility held open for use by the public for parking vehicles and includes any publicly owned facilities for offstreet parking, and privately owned facilities for offstreet parking where no fee is charged for the privilege to park and which are held open for the common public use of retail customers.

Willful or Wanton Disregard

> "In this case we are required . . . to construe the part of the statute descriptive of the forbidden driving. Its words are, 'in wilful or wanton disregard for the safety of persons or property.' The term 'wantonness' is thus defined: 'Wantonness includes the elements of consciousness of one's conduct, intent to do or omit the act in question, realization of the probable injury to another, and reckless disregard of consequences.' [Citation.] . . . The word 'wilful' in this connection means 'intentional' [citations]. The intention here referred to relates to the disregard of safety, etc., not merely to the act done in disregard thereof." (*People* v. *Nowell*, 45 Cal.App.2d Supp. 811, 815.)

(*People v. Schumacher* (1961) 194 Cal.App.2d 335, 240.)

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> While it is true that with reference to the disregard for the safety of others in defining reckless driving, the character of the disregard is described as "wilful or wanton" rather than "reckless" as appears in section 500, there is no substantial difference. It has been stated that:
>
> "The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him." (Restatement, Torts, § 500.) There may have been instances in which the phrase "reckless disregard for the safety of others" has been considered as conduct less reprehensible than that described in the above quotation, but it must be remembered that we are here interpreting a criminal statute carrying a severe penalty, and thus it is reasonable to suppose that the Legislature was concerned with conduct which was at least quasi criminal in character.

(*People v. Young* (1942) 20 Cal.2d 832, 837.)

> To convict under [this section] it is necessary that the trier of fact be convinced by the evidence beyond a reasonable doubt . . . that the defendant in the management of his automobile at the time and place in question intentionally did something with knowledge that injury to another was probable or acted with a wanton and reckless disregard for the safety of others and in reckless disregard of the consequences of his acts.

(*People v. Allison* (1951) 101 Cal.App.2d Supp. 932, 933; see also *People v. McNutt* (1940) 40 Cal.App.2d Supp. 835, 838–839.)

The definition contained in this instruction is derived from the Task Force definition of recklessness. See Task Force Instruction 1060, Unlawfully Causing a Fire and Task Force Instruction 1872, Possession of Explosive or Destructive Device in Specified Place.

Gross Negligence Insufficient

> It is of course thoroughly settled that negligence, even though it be gross negligence, is not wilful misconduct and does not amount to reckless driving.

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(*People v. Allison* (1951) 101 Cal.App.2d Supp. 932, 935; see also *People v. Thompson* (1940) 41 Cal.App.2d Supp. 965, 968.)

Speeding May Constitute Recklessness

> [I]t is declared in *Petersen* v. *Petersen*, (1937) 20 Cal. App.2d 680, 686: "Speed in itself and alone is not sufficient to establish willful misconduct."
>
> If we wished to be pedantic we would note that speed is never "in itself and alone". Of necessity, when referring to the speed of an automobile, there is involved the highway on which it travels, with its width, surface and the presence or lack of traffic upon it. There is involved, too, the factor of visibility; was the car driven before or after dark? When considered in relation to these matters mere speed, without other acts, may demonstrate wilful misconduct or that the driving is reckless. . . .
>
> "'We do not wish to be understood as holding that mere speed may never constitute wilful misconduct if indulged in under certain conditions. Wilful misconduct, like negligence, must relate to the time, place, person and surrounding circumstances, and must be measured by them. Excessive speed under some circumstances may amount to negligence, under others to gross negligence, and under still others to wilful misconduct.'"

(*People v. Nowell* (1941) 45 Cal.App.2d Supp. 811, 813–814.)

Requires Reckless Act

> It is still true that, as stated in *People* v. *Smith*, *supra*, (1939) 36 Cal. App. 2d at 751, "The prohibition and punishment laid down by the statute are directed at a manner of driving, which necessarily includes a series of overt acts, capable of observation and narration by witnesses. The reference to a state of mind is merely for a description of the prohibited acts."

(*People v. McNutt* (1940) 40 Cal.App.2d Supp. 835, 838–839.)

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1656. Speed Contest

The defendant is charged [in Count __] with engaging in a speed contest.

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

1. **The defendant drove a motor vehicle on a highway;**

AND

2. **While so driving, the defendant willfully engaged in a speed contest.**

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

A person *engages in a speed contest* when he or she uses a motor vehicle to race against another vehicle, a clock, or other timing device. [A *speed contest* does not include an event in which the participants measure the time required to cover a set route of more than 20 miles but where the vehicle does not exceed the speed limits.]

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

[The term *highway* describes any area publicly maintained and open to the public for purposes of vehicular travel, and includes a street.]

[The term[s] (*motor vehicle/* [and] *highway*) (is/are) defined in another instruction to which you should refer.]

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 court must define the terms “motor vehicle” and “highway.” Give the 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.

If the defendant is charged with aiding and abetting a speed contest under Vehicle Code section 23109(b), give Instruction 501, Aiding and Abetting: Intended Crimes. This instruction also must be given, but the court should modify the first sentence and change “defendant” to “perpetrator” throughout the instruction.

Give Instruction 1690, Driver and Driving Defined on request.

AUTHORITY

Elements ▸ Veh. Code, § 23109(a).
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.
Motor Vehicle Defined ▸ Veh. Code, § 415.
Highway Defined ▸ Veh. Code, § 360.
Speed Contest ▸ *In re Harvill* (1959) 168 Cal.App.2d 490, 492–493 [discussing prior version of statute].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 254.

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STAFF NOTES

Veh. Code, § 23109, in relevant part:

> (a) No person shall engage in any motor vehicle speed contest on a highway. As used in this section, a motor vehicle speed contest includes a motor vehicle race against another vehicle, a clock, or other timing device. For purposes of this section, an event in which the time to cover a prescribed route of more than 20 miles is measured, but where the vehicle does not exceed the speed limits, is not a speed contest. . . .
>
> (e) Any person convicted of a violation of subdivision (a) shall be punished by imprisonment in the county jail for not less than 24 hours nor more than 90 days or by a fine of not less than three hundred fifty-five dollars ($ 355) nor more than one thousand dollars ($ 1,000) or both that fine and imprisonment.

Speed Contest

> There is no case authority or statutory definition as to what is meant by "speed contest" or "exhibition of speed" in this particular section of the Vehicle Code. Webster's New International Dictionary, 2d edition, defines contest as: "Earnest struggle for superiority, victory, defense, etc.; competition; . . ." The dictionary defines exhibition as "Act or instance of exhibiting for inspection, or of holding forth to view; manifestation; display." Thus it would appear that section 601.5 of the Vehicle Code could be violated by two or more persons competing in speed in vehicles on the highway or by one person displaying the speed of his vehicle on the highway to another person in the first person's car or in another car.

(*In re Harvill* (1959) 168 Cal.App.2d 490, 492–493.)

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1657. Exhibition of Speed

The defendant is charged [in Count __] with engaging in an exhibition of speed.

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

1. **The defendant drove a motor vehicle on a highway;**

AND

2. **While so driving, the defendant willfully engaged in an exhibition of speed.**

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

A person *engages in an exhibition of speed* when he or she accelerates or drives at a rate of speed in order to show off or make an impression on someone else.

The People must prove that the defendant intended to show off or impress someone but are not required to prove that the defendant intended to show off to or impress any particular person.

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

[The term *highway* describes any area publicly maintained and open to the public for purposes of vehicular travel, and includes a street.]

[The term[s] (*motor vehicle/* [and] *highway*) (is/are) defined in another instruction to which you should refer.]

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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 must define the terms "motor vehicle" and "highway." Give the 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.

If the defendant is charged with aiding and abetting an exhibition of speed, give Instruction 501, Aiding and Abetting: Intended Crimes. This instruction also must be given, but the court should modify the first sentence and change "defendant" to "perpetrator" throughout the instruction.

Give Instruction 1690, Driver and Driving Defined on request.

AUTHORITY

Elements ▸ Veh. Code, § 23109(c).
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.
Motor Vehicle Defined ▸ Veh. Code, § 415.
Highway Defined ▸ Veh. Code, § 360.
Exhibition of Speed Defined ▸ *People v. Grier* (1964) 226 Cal.App.2d 360, 364; *In re Harvill* (1959) 168 Cal.App.2d 490, 492–493 [discussing prior version of statute]; see also *Tischoff v. Wolfchief* (1971) 16 Cal.App.3d 703, 707 [term did not require definition in civil case].
Screeching Tires ▸ *In re F. E.* (1977) 67 Cal.App.3d 222, 225; *People v. Grier* (1964) 226 Cal.App.2d 360, 363.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 254.

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STAFF NOTES

Veh. Code, § 23109, in relevant part:

> (c) No person shall engage in any motor vehicle exhibition of speed on a highway, and no person shall aid or abet in any motor vehicle exhibition of speed on any highway. . . .
>
> (i) Any person who violates subdivision (b), (c), or (d) of this section shall upon conviction thereof be punished by imprisonment in the county jail for not more than 90 days or by fine of not more than five hundred dollars ($ 500) or by both that fine and imprisonment.

Exhibition of Speed

> There is no case authority or statutory definition as to what is meant by "speed contest" or "exhibition of speed" in this particular section of the Vehicle Code. Webster's New International Dictionary, 2d edition, defines contest as: "Earnest struggle for superiority, victory, defense, etc.; competition; . . ." The dictionary defines exhibition as "Act or instance of exhibiting for inspection, or of holding forth to view; manifestation; display." Thus it would appear that section 601.5 of the Vehicle Code could be violated by two or more persons competing in speed in vehicles on the highway or by one person displaying the speed of his vehicle on the highway to another person in the first person's car or in another car.

(*In re Harvill* (1959) 168 Cal.App.2d 490, 492–493.)

> "Exhibition" is defined as: "An act or instance of showing, evincing, or showing off; . . ." (Webster's New Internat. Dict. (3d ed. 1961) p. 796.) Coupled as the word is in this statute with a prohibition against speed "contests," it may be argued that the statute requires not only an observer, but an observer known to defendant to be present and observing and an intent on the part of the defendant to impress that observer with the speed obtained -- whether the impression be one of admiration, envy, disgust, fear or resentment. While the record here is totally void of any showing that defendant knew he was under observation, much less that he intended in any way to impress any possible observer, it was for the trier of fact to determine from the evidence adduced whether such intent might properly be inferred. Had this display of acceleration and peeling and screaming of tires

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> taken place on a lonely strip of road in the Mojave desert with no one visible or within earshot, the point might have some merit. Here, the evidence showed this display took place in a highly developed and populated area. The officer testified several cars passed "behind the defendant" while the officer was leaving his observation post to pursue defendant. Not only is there evidence from which it may be inferred many persons were within earshot, but there was direct testimony that observers were present. There is no merit in the contention that the observer must be one known to the exhibitor.

(*People* v. *Grier* (1964) 226 Cal.App.2d 360, 364.)

> Defendant argues the term "speed exhibition" as used in section 23109 and in the court's instruction required further definition. The term has been held sufficiently certain to impose criminal sanctions for violating section 23109 (*In re Harvill*, 168 Cal. App.2d 490, 492). We think it is sufficiently certain for purposes of imposing civil responsibility. Defendant made no request for an instruction defining or clarifying the term "speed exhibition."

(*Tischoff v. Wolfchief* (1971) 16 Cal.App.3d 703, 707.)

Screeching Tires

> In *People* v. *Grier* (1964) 226 Cal.App.2d 360, this court construed subdivision (a) of section 23109 in language equally applicable to subdivision (b). We said, at page 363: "It is common knowledge that maximum control of a vehicle upon the highway is maintained through the retention of traction between tires and pavement and that, during any process of skidding of the wheels of a vehicle, there is a corresponding diminution of the driver's control over the vehicle. Accordingly, safety measures are designed to reduce the skidding of vehicles, even during the process of reducing speed through the application of brakes. (See *Roberts* v. *Trans World Airlines*, 225 Cal.App.2d 344.) Where a person accelerates a vehicle in such manner as to deliberately cause it to skid, he is not only diminishing his control but increasing the hazard to bystanders or other vehicles from flying gravel. Whether the action is deliberate or not is for the trier of fact under the circumstances of the particular case. Obviously, not all cases of tire 'peeling' or 'screeching' would constitute violations of the statute. It is also common knowledge that the deliberate screeching and screaming of tires on the pavement are

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> tension producers which increase nervousness in drivers and others, thereby increasing the likelihood of accident."

(*In re F. E.* (1977) 67 Cal.App.3d 222, 225.)

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1660. Driving Without a License

The defendant is charged [in Count __] with driving without a license.

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

1. **The defendant drove a motor vehicle on a highway;**

[AND]

2. **When the defendant drove, (he/she) did not hold a valid California driver's license(;/.)**

<Give element 3 when instructing on statutory exemption.>
[AND

3. **The defendant was not excused from the requirement to have a California driver's license.]**

Whether the defendant was properly licensed is a matter within (his/her) own knowledge. The defendant must produce evidence tending to show that (he/she) did hold a valid driver's license. If the evidence raises in your mind a reasonable doubt about whether the defendant held a valid driver's license, you must find the defendant not guilty of this crime.

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

[The term *highway* describes any area publicly maintained and open to the public for purposes of vehicular travel, and includes a street.]

[The term[s] (*motor vehicle/* [and] *highway*) (is/are) defined in another instruction to which you should refer.]

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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.

Exemptions to the licensing requirement are stated in Vehicle Code sections 12501 to 12505. If there is sufficient evidence that the defendant was exempt, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3.

The court must define the terms "highway" and "motor vehicle." 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.

Give Instruction 1690, Driver and Driving Defined on request.

AUTHORITY

Elements ▸ Veh. Code, § 12500(a).
Offense Is a Misdemeanor ▸ Veh. Code, § 40000.11(b).
Motor Vehicle Defined ▸ Veh. Code, § 415.
Highway Defined ▸ Veh. Code, § 360.
Instruction on Production of Evidence ▸ *People v. Garcia* (2003) 107 CalApp.4th 1159, 1164; *In re Shawnn F*. (1995) 34 Cal.App.4th 184, 198–199.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 238.

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STAFF NOTES

Veh. Code, § 12500(a):

> (a) No person shall drive a motor vehicle upon a highway, unless the person then holds a valid driver's license issued under this code, except those persons who are expressly exempted under this code.

Veh. Code, § 40000.11:

> A violation of any of the following provisions is a misdemeanor, and not an infraction: . . .
>
> (b) Section 12500, subdivision (a), relating to unlicensed drivers.

Exemptions
Exemptions from the licensing requirement are stated in Vehicle Code sections 12501 to 12505.

Instruction on Production of Evidence

> On the misdemeanor driving without a license charge, the evidence was uncontroverted that appellant did not have a driver's license. The trial court instructed on the elements of the offense and gave CALJIC 16.631, which stated: "It is not necessary for the People to introduce evidence that the defendant did not have a valid driver's license to operate a motor vehicle. Whether defendant was or was not properly licensed is a matter peculiarly within his or her own knowledge. The burden is on the defendant to raise a reasonable doubt as to his or her guilt of driving a motor vehicle upon a highway without being a holder of a valid driver's license."
>
> Appellant erroneously contends that the instruction violated his constitutional rights because it shifted the burden of proof. Where possession of a valid license is a complete defense, the burden is on the defendant to produce the license. (*In re Shawnn F.* (1995) 34 Cal.App.4th 184, 197 [CALJIC No. 16.631 based on "rule of convenience"].) CALJIC No. 16.631 is a correct statement of California law.
>
> The prosecution was not required to disprove all possible defenses such as the possibility that appellant held a valid driver's license

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> issued by another state or country. "[I]f the charge contains a negative averment or concerns a fact peculiarly within the knowledge of the accused, the initial burden of producing evidence on that issue may be placed upon the accused where he has more ready access to that proof and subjecting him to this burden will not be unduly harsh or unfair." [Citation.]

(*People v. Garcia* (2003) 107 CalApp.4th 1159, 1164.)

> [T]he California Supreme Court in *Boo Doo Hong* clearly held that a defendant has a burden of producing a license when a license would act as a complete defense. "As far back as the case of *People v. Boo Doo Hong* (1898), 122 Cal. 606 . . ., it has been the law that when a license or prescription would be a complete defense, the burden is upon the accused to prove that fact so clearly within his knowledge." [Citation.] . . .
>
> Driving without a valid driver's license is a negative averment just as possessing a controlled substance without a prescription has been held to be. Holding a valid driver's license is a matter within the defendant's personal knowledge and it would not be unduly harsh or inconvenient for a defendant to produce the license. The California Supreme Court in *Boo Doo Hong* specifically endorsed the rule in license cases.
>
> The one factor urged by Shawnn as a reason to not apply the rule of convenience is that the People have ready access to driver's license records in California. We cannot ignore that much has changed since 1898 in technology and that access to particular types of information can often be achieved with little or no inconvenience in a very short period of time. Yet there is insufficient evidence before us from which we can determine how easily accessible and producible in admissible form this information is to the People. Because the Supreme Court's ruling in *Boo Doo Hong* continues to be good law, and because of the lack of evidence as to the People's access to driver's license information, we choose not to deviate from the well-established principle of applying the rule of convenience to cases involving licenses.

(*In re Shawnn F.* (1995) 34 Cal.App.4th 184, 198–199.)

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1661. Failing to Present Driver's License

The defendant is charged [in Count __] with failing to present (his/her) driver's license to a peace officer.

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

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

2. **A peace officer, enforcing the Vehicle Code, demanded that the defendant present (his/her) driver's license for the officer to examine;**

AND

3. **The defendant did not present (his/her) driver's license in response to the officer's request.**

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

[The term *motor vehicle* is defined in another instruction to which you should refer.]

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 motor vehicle unless the court has already given the definition in another instruction. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Give Instruction 1690, Driver and Driving Defined on request.

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AUTHORITY

Elements ▸ Veh. Code, § 12951(b).
Offense Is a Misdemeanor ▸ Veh. Code, § 40000.11(h).
Motor Vehicle Defined ▸ Veh. Code, § 415.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 238.

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STAFF NOTES

Veh. Code, § 12951(b):

> (b) The driver of a motor vehicle shall present his or her license for examination upon demand of a peace officer enforcing the provisions of this code.

Veh. Code, § 40000.11:

> A violation of any of the following provisions is a misdemeanor, and not an infraction: . . .
>
> (h) Section 12951, subdivision (b), relating to refusal to display license.

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1662. Driving With Suspended or Revoked License

The defendant is charged [in Count __] with driving while (his/her) driver's license was (suspended/ [or] revoked).

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

1. **The defendant drove a motor vehicle while (his/her) driver's license was (suspended/ [or] revoked) [for _____** *<insert basis for suspension or revocation>***];**

AND

2. **When the defendant drove, (he/she) knew that (his/her) driver's license was (suspended/ [or] revoked).**

[If the People prove beyond a reasonable doubt that the California Department of Motor Vehicles mailed a notice to the defendant informing (him/her) that (his/her) driver's license had been (suspended/ [or] revoked), you may but are not required to conclude that the defendant knew that (his/her) driver's license was (suspended/ [or] revoked).]

[If the People prove beyond a reasonable doubt that a court informed the defendant that (his/her) driver's license had been (suspended/ [or] revoked), you may but are not required to conclude that the defendant knew that (his/her) driver's license was (suspended/ [or] revoked).]

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

[The term *motor vehicle* is defined in another instruction to which you should refer.]

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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, the court may insert the reason for the suspension or revocation unless the court has accepted a stipulation regarding this issue.

The two bracketed paragraphs that begin with "If the People prove beyond a reasonable doubt that" each explain rebuttable presumptions created by statute. (See Veh. Code, §§ 14601(a), 14601.1(a), 14602(c), 14601.5(c); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505.) In accordance with *Roder*, the bracketed paragraphs have been written as permissive inferences. In addition, it is only appropriate to instruct the jury on a permissive inference if there is *no* evidence to contradict the inference. (Evid. Code, § 640.) If any evidence has been introduced to support the opposite factual finding, then the jury "shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." *(Ibid.)*

Therefore, the court **must not** give the bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that the California Department of Motor Vehicles mailed a notice" if there is evidence that the defendant did not receive the notice or for other reasons did not know that his or her license was revoked or suspended.

Similarly, the court **must not** give the bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that a court informed the defendant" if there is evidence that the defendant did not receive the notice or for other reasons did not know that his or her license was revoked or suspended. In addition, this provision regarding notice by the court only applies if the defendant is charged with a violation of Vehicle Code section 14601.2. (See Veh. Code, § 14601.2(c).) Do not give this paragraph if the defendant is charged under any other Vehicle Code section.

Give the bracketed definition of motor vehicle unless the court has already given the definition in another instruction. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Give Instruction 1690, Driver and Driving Defined on request.

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If the defendant is charged with one or more prior convictions, give Instruction 200, Prior Conviction: Nonbifurcated Trial, unless the defendant has stipulated to the conviction. If the court has granted a bifurcated trial on the prior conviction, use Instruction 201, Prior Conviction: Bifurcated Trial.

AUTHORITY

Elements ▸ Veh. Code, §§ 14601, 14601.1, 14602, 14601.5.
Motor Vehicle Defined ▸ Veh. Code, § 415.
Actual Knowledge of Suspension or Revocation Required ▸ *In re Murdock* (1968) 68 Cal.2d 313, 315–316.
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 Public Peace and Welfare, § 239.

RELATED ISSUES

Suspension or Revocation Continues Until License Restored
In *People v. Gutierrez* (1998) 65 Cal.App.4th Supp. 1, the defendant's license had been suspended for a period of one year for driving under the influence. The defendant was arrested for driving after that one-year period had expired. The court held that the defendant's license remained suspended even though the stated time period had passed because the defendant had not taken the steps necessary to restore his driving privilege. (*Id.* at pp. 8–9.)

Privilege to Drive May Be Suspended or Revoked Even If No License Issued
A person's privilege to drive may be suspended or revoked even though that person has never been issued a valid driver's license. (*People v. Matas* (1988) 200 Cal.App.3d Supp. 7, 9.)

May Be Punished for This Offense and Driving Under the Influence
In *In re Hayes* (1969) 70 Cal.2d 604, 611, the court held that Penal Code section 654 did not preclude punishing the defendant for both driving under the influence and driving with a suspended license.

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STAFF NOTES

Veh. Code, § 14601, in relevant part:

> (a) No person shall drive a motor vehicle at any time when that person's driving privilege is suspended or revoked for reckless driving in violation of Section 23103 or 23104, any reason listed in subdivision (a) or (c) of Section 12806 authorizing the department to refuse to issue a license, negligent or incompetent operation of a motor vehicle as prescribed in subdivision (e) of Section 12809, or negligent operation as prescribed in Section 12810.5, if the person so driving has knowledge of the suspension or revocation. Knowledge shall be conclusively presumed if mailed notice has been given by the department to the person pursuant to Section 13106. The presumption established by this subdivision is a presumption affecting the burden of proof.

Veh. Code, § 14601.1, in relevant part:

> (a) No person shall drive a motor vehicle when his or her driving privilege is suspended or revoked for any reason other than those listed in Section 14601, 14601.2, or 14601.5, if the person so driving has knowledge of the suspension or revocation. Knowledge shall be conclusively presumed if mailed notice has been given by the department to the person pursuant to Section 13106. The presumption established by this subdivision is a presumption affecting the burden of proof.

Veh. Code, § 14601.2, in relevant part:

> (a) No person shall drive a motor vehicle at any time when that person's driving privilege is suspended or revoked for a conviction of a violation of Section 23152 or 23153 if the person so driving has knowledge of the suspension or revocation.
>
> (b) Except in full compliance with the restriction, no person shall drive a motor vehicle at any time when that person's driving privilege is restricted , if the person so driving has knowledge of the restriction.
>
> (c) Knowledge of suspension or revocation of the driving privilege shall be conclusively presumed if mailed notice has been given by

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the department to the person pursuant to Section 13106. Knowledge of restriction of the driving privilege shall be presumed if notice has been given by the court to the person. The presumption established by this subdivision is a presumption affecting the burden of proof.

Veh. Code, § 14601.5, in relevant part:

(a) No person shall drive a motor vehicle at any time when that person's driving privilege is suspended or revoked pursuant to Section 13353, 13353.1, or 13353.2 and that person has knowledge of the suspension or revocation.

(b) Except in full compliance with the restriction, no person shall drive a motor vehicle at any time when that person's driving privilege is restricted pursuant to Section 13353.6, 13353.7, or 13353.8 and that person has knowledge of the restriction.

(c) Knowledge of suspension, revocation, or restriction of the driving privilege shall be conclusively presumed if notice has been given by the department to the person pursuant to Section 13106. The presumption established by this subdivision is a presumption affecting the burden of proof.

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1663. Failure to Appear

The defendant is charged [in Count __] with failing to appear in court.

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

1. **The defendant received a citation for a violation of the Vehicle Code;**

2. **The defendant signed a written promise to appear in court in response to that citation;**

3. **The defendant signed that written promise (in court/ [or] before a person authorized to receive a deposit of bail);**

AND

4. **The defendant willfully failed to appear in court.**

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

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

BENCH NOTES

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

AUTHORITY

Elements ▸ Veh. Code, § 40508(a).
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

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

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STAFF NOTES

Veh. Code, § 40508, in relevant part:

> (a) A person willfully violating his or her written promise to appear or a lawfully granted continuance of his or her promise to appear in court or before a person authorized to receive a deposit of bail is guilty of a misdemeanor regardless of the disposition of the charge upon which he or she was originally arrested.

Note that the statute does not specify that the defendant received the citation under the Vehicle Code. Because the statute is included in the Vehicle Code, it has been interpreted as applying only to citations issued under that Code. (See 4 Witkin, Cal. Criminal Law (3d ed. 2000) Pretrial, § 50.)

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1770. Using or Being Under the Influence of Controlled Substance

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The defendant is charged [in Count __] with (using/ [or] being under the influence of) _____ *<insert controlled substance listed in Health & Saf. Code, § 11550>***, a controlled substance.**

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

<Alternative A—use of controlled substance>

1. **The defendant willfully [and unlawfully] used _____** *<insert controlled substance listed in Health & Saf. Code, § 11550>***, a controlled substance[, a short time before (his/her) arrest](;/.)**

[OR]

<Alternative B—under the influence of controlled substance>

(1/2). The defendant was willfully [and unlawfully] under the influence of _____ *<insert controlled substance listed in Health & Saf. Code, § 11550>***, a controlled substance, when (he/she) was arrested.**

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

[Someone is *under the influence of a controlled substance* if that person has taken or used a controlled substance that has appreciably affected the person's nervous system, brain, or muscles or has created in the person a detectable abnormal mental or physical condition.]

<Defense: Prescription>

[The defendant is not guilty of (using/ [or] being under the influence of) _____ *<insert controlled substance listed in Health & Saf. Code, § 11550>* **if (he/she) had a valid prescription for that substance written by a physician, dentist, [or] 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.]**

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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.

A violation of Health and Safety Code section 11550 based on "use" of a controlled substance requires " 'current use' or 'use immediately prior to arrest' . . . ." (*People v. Jones* (1987) 189 Cal.App.3d 398, 403–404; see also *People v. Velasquez* (1976) 54 Cal.App.3d 695, 699–700; *People v. Gutierrez* (1977) 72 Cal.App.3d 397, 402.) In *People v. Jones, supra,* 189 Cal.App.3d at p. 406, the court found evidence of use within 48 hours prior to the defendant's arrest sufficient. If there is an issue in the case over when the defendant allegedly used the substance, give the bracketed phrase "a short time before (his/her) arrest" in element 1. *(Ibid.)* Alternatively, the court may insert a specific time or time frame in element 1, e.g., "24 to 48 hours prior to (his/her) arrest."

If the court instructs the jury on both use and being under the influence, the court should consider whether a unanimity instruction is required. (See Instruction 160, Unanimity.)

Defenses—Instructional Duty
The prescription defense is codified in Health and Safety Code section 11550. The defendant need only raise a reasonable doubt about whether his or her use 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, the court has a **sua sponte** duty to instruct on the defense. Give the bracketed "and unlawfully" in the elements and the bracketed paragraph on the defense.

AUTHORITY

Elements ▸ Health & Saf. Code, § 11550.
Under the Influence ▸ *People v. Culberson* (1956) 140 Cal.App.2d Supp. 959, 960–961; see also *People v. Cantry* (2004) 32 Cal.4th 1266, 1278; *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665.
Under the Influence and Use Distinguished ▸ *People v. Gutierrez* (1977) 72 Cal.App.3d 397, 402.
Willfulness Element of Offense ▸ *People v. Little* (2004) 115 Cal.App.4th 766, 775.
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

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Specific Controlled Substance Must Be Alleged ▸ *People v. Sallas* (1978) 86 Cal.App.3d 737, 743.

Requires Current Use ▸ *People v. Jones* (1987) 189 Cal.App.3d 398, 403–404; see also *People v. Velasquez* (1976) 54 Cal.App.3d 695, 699–700; *People v. Gutierrez* (1977) 72 Cal.App.3d 397, 402.

Statute Constitutional ▸ *Bosco v. Justice Court* (1978) 77 Cal.App.3d 179, 191–192.

Prescription Defense ▸ Health & Saf. Code, § 11550.

Prescription Defined ▸ Health & Saf. Code, §§ 11027, 11164, 11164.5.

Persons Authorized to Write Prescriptions ▸ Health & Saf. Code, § 11150.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §73.

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STAFF NOTES

Health & Saf. Code, § 11550 in pertinent part:

> (a) No person shall use, or be under the influence of any controlled substance which is (1) specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), (21), (22), or (23) of subdivision (d) of Section 11054, specified in subdivision (b) or (c) of Section 11055, or specified in paragraph (1) or (2) of subdivision (d) or in paragraph (3) of subdivision (e) of Section 11055, or (2) a narcotic drug classified in Schedule III, IV, or V, except when administered by or under the direction of a person licensed by the state to dispense, prescribe, or administer controlled substances. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating this subdivision is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days or more than one year in a county jail . . . .

Under the Influence

> It is conceded that the evidence is sufficient to sustain the verdict, but error is claimed by the defendant because the court gave the following instruction:
>
> "If a narcotic drug is appreciably affecting the nervous system, brain, muscles, or other parts of a person's body, or is creating in him any perceptible abnormal mental or physical condition, then such a person is under the influence of a narcotic drug within the meaning of the statute." . . .
>
> The object of section 11721 [prior version to 11550] of the Health and Safety Code is to control the taking of a narcotic by an individual, which is deemed harmful to the human body. It does not prohibit any act or conduct while under the influence of the narcotic. . ..
>
> The instruction given was clear and concise and properly omitted any requirement that the defendant be performing an act, and it presented a reasonable and logical interpretation of section 11721 of the Health and Safety Code.

(*People v. Culberson* (1956) 140 Cal.App.2d Supp. 959, 960–961.)

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> The term "under the influence" differs for the purposes of section 23152, subdivision (a) and Health and Safety Code section 11550. "To be 'under the influence' within the meaning of the Vehicle Code, the . . . drug(s) must have so far affected the nervous system, the brain, or muscles as to impair to an appreciable degree *the ability to operate a vehicle* in a manner like that of an ordinarily prudent and cautious person in full possession of his faculties. [Citations.] In contrast, 'being under the influence' within the meaning of Health and Safety Code section 11550 merely requires that the person be under the influence in any detectable manner. The symptoms of being under the influence within the meaning of that statute are not confined to those commensurate with misbehavior, nor to those which demonstrate impairment of physical or mental ability. [Citation.]"

(*People v. Enriquez* (1996) 42 Cal.App.4th 661, 665.)

> As an initial matter, the offenses of being under the influence of drugs and driving while under the influence of drugs differ significantly in the level or degree of impairment required for conviction. One may be guilty of *being* under the influence of drugs in violation of Health and Safety Code section 11550 by being in that state in any detectable manner: " 'The symptoms of being under the influence within the meaning of that statute are not confined to those commensurate with misbehavior, nor to those which demonstrate impairment of physical or mental ability.' " [Citations.]

(*People v. Cantry* (2004) 32 Cal.4th 1266, 1278.)

Under the Influence and Use Distinguished

> [W]e must analyze the nature of the separate crimes of 'use' and of being 'under the influence of a controlled substance or a narcotic.
>
> "The term 'use' of narcotics refers to the act of injecting or ingesting a controlled substance or narcotic. [Citation.] 'The object of the statute is to proscribe a *use* of narcotics that is an activating part of the process of addiction whatever may be the stage of that process at the time of their use.' (Emphasis added.) [Citation.] . . .

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> The term 'under the influence' as used in section 11550 of the Health and Safety Code refers to the presence of physical symptoms of the unlawful use of narcotics or a controlled substance 'in any detectable manner.' [Citation.]

(*People v. Gutierrez* (1977) 72 Cal.App.3d 397, 402.)

Willful

> [The People] note that although defendant stipulated to being under the influence, he did not expressly stipulate to the requisite mens rea of the crime--i.e., that he *willfully and unlawfully* was under the influence of a controlled substance. (See CALJIC No. 16.060.) n5 We view the stipulation differently.
>
> n5 It is unclear whether the jury here was aware that a conviction required a finding of willfulness. The court instructed the jury that in order to prove the charge that defendant violated Health and Safety Code section 11550, subdivision (a), "the following elements must be proved: One, a person willfully and unlawfully used a controlled substance, namely methamphetamine, *or* a person is under the influence of a controlled substance, namely methamphetamine." (Italics added.) Moreover, in reading the information to the jury, the court stated, in pertinent part, that Count Two charged that on July 21, 2001, "the crime of using or being under the influence of a controlled substance in violation of Health and Safety Code section [11550], a misdemeanor, was committed by Deric Little, who was under the influence of a controlled substance, methamphetamine." [End footnote.]
>
> The stipulation was not expressly limited to the single evidentiary fact of being under the influence of methamphetamine. Rather, defendant stipulated that he "was under the influence of a controlled substance, methamphetamine, *in violation of Health and Safety Code section 11550(A)*." (Italics added.) This language mirrors the language of the information, and it directly and unambiguously represents a stipulation that defendant violated the statute. Thus, although defendant did not expressly stipulate that he acted willfully and unlawfully, the stipulation to a violation of the statute necessarily subsumed all elements and facts necessary for conviction and punishment, including the requisite mens rea.

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(*People v. Little* (2004) 115 Cal.App.4th 766, 775 [emphasis in original].)

> The defendant claims CALJIC No. 16.060 erroneously lowered the prosecution's burden of proving his consumption of PCP was willful. This occurred, he argues, because while the bulk of CALJIC No. 16.060 explains that such consumption must be willful, one section allows the defendant to be found guilty if the jury finds he "was under the influence of a controlled substance ...." While this section taken on its own could be misleading, the instructions on the whole made clear that only willful consumption of a controlled substance was penalized.
>
> Other instructions, outside of CALJIC No. 16.060 explained that consumption of PCP was a general intent crime, requiring the intent to commit the forbidden act. The jury was further told to regard each instruction in light of the others. In this way, the absence of the willfulness element in one portion of the instruction was remedied by other instructions. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) The instructions issued to the jury were thus not infirm in the manner suggested by the defendant.

(*People v. Garza* (2003) 112 Cal.App.4th 655, 667–668 [REVIEW GRANTED AND DEPUBLISHED January 14, 2004, S120551—unclear what issue court granted review on.])

Current Use Required

> The ‘use’ proscribed by section 11550 of the Health and Safety Code is a current use, not a use in the past. Even though defendant lied in claiming to have been free of narcotics for several months, the People’s own testimony supports no usage closer than the five-to seven-day period testified to by their own expert. We conclude that . . . [the evidence] does not support a finding of a current addiction and use.

(*People v. Velasquez* (1976) 54 Cal.App.3d 695, 699–700; see also *People v. Gutierrez* (1977) 72 Cal.App.3d 397, 402 [symptoms of withdrawal insufficient to establish probable cause that defendant was under the influence].)

> Appellant contends that there is insufficient evidence to support his conviction for use of heroin (Health & Saf. Code, § 11550 (hereinafter section 11550)). Specifically, appellant argues that the

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> use proscribed by section 11550 is a "current use" or "use immediately prior to arrest," and that his use two days prior to arrest does not fit within this definition.
>
> Respondent agrees that the "use" proscribed by section 11550 is "current use," not use in the past. Respondent argues, however, that the evidence of appellant's heroin use within 24 to 72 hours before his arrest fits within the definition of "current use" as intended by section 11550. . . .
>
> The evidence could reasonably be construed to show that appellant used heroin as little as 24 hours before he provided the urine sample, which, in turn, was some 3 hours after his arrest. Moreover, even if the evidence were construed to show use within forty-eight hours before appellant's arrest, such usage two days before arrest could clearly qualify for a finding of current use under the previously-cited statement in *Velasquez* to the effect that use less distant than five days prior to arrest might support a section 11550 conviction .
>
> **The jury was specifically instructed in this regard that use immediately prior to arrest meant a very brief period of time before arrest.** In sum, viewed in the light most favorable to the People [citation] the evidence supports the conclusion that appellant had recently used heroin within the meaning of section 11550.

(*People v. Jones* (1987) 189 Cal.App.3d 398, 403–404, 406.)

Must Identify Controlled Substance

In *People v. Sallas* (1978) 86 Cal.App.3d 737, 743, the defendants challenged complaints that alleged simply that they were “under the influence of the controlled substance. The court found this insufficient and held that the complaint had to specify what controlled substance. The court stated:

> Our holding goes no further than to declare that the Health and Safety Code section 11550 complaints at issue fall short of compliance with recognized standards of due process of law. We do not hold, or suggest, that in such prosecutions the charge must pinpoint one of the many controlled substances of the statute. It may be that among them are families, or classes, or chemical groupings, of such substances with substantially the same qualities, symptoms and behavioral effects, and that constitutional demands would be satisfied by charging use or abuse of one of the substances of that

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> family, class or group. But lacking any expertise or knowledge of the subject, and receiving no record aid, we leave that determination to the future, and to other and possibly better advised courts.

(*Id.* at p. 744.)

Prescription
See Health and Safety Code section 11164 for a definition of prescription.

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1771. Aiding and Abetting Unlawful Use of Controlled Substance

The defendant is charged [in Count __] with aiding and abetting unlawful use of a controlled substance in a place.

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

1. **The defendant willfully and intentionally (visited/ [or] was present in) a place where someone else was (smoking/ [or] using) _____** *<insert controlled substance specified in Health & Saf. Code, § 11365>***, a controlled substance;**

2. **The defendant knew that the other person intended to (smoke/ [or] use) the controlled substance;**

3. **The defendant intended to aid and abet the other person in (smoking/ [or] using) the controlled substance;**

4. **The defendant did or said something that did in fact aid and abet the other person in (smoking/ [or] using) the controlled substance;**

AND

5. **The defendant knew that (his/her) words or conduct aided and abetted the other person in (smoking/ [or] using) the controlled substance.**

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

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

[If you conclude that the defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a

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person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.]

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

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

AND

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

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

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. (See *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [duty to instruct on aiding and abetting].)

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

If there is evidence that the defendant withdrew from participation in the crime, the court has a **sua sponte** duty to instruct on withdrawal. (*People v. Norton* (1958) 161 Cal.App.2d 399, 403; *People v. Ross* (1979) 92 Cal.App.3d 391, 404–405.) Give the bracketed portion that begins with "A person who aids and abets a crime is not guilty."

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AUTHORITY

Elements ▸ Health & Saf. Code, § 11365.
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.
Aiding and Abetting Required ▸ Health. & Saf. Code, § 11365(b); *People v. Cressey* (1970) 2 Cal.3d 836, 848–849.
Knowledge and Willful, Intentional Involvement Required ▸ *People v. Brim* (1968) 257 Cal.App.2d 839, 842.
Requirements for Aiding and Abetting Generally ▸ *People v. Beeman* (1984) 35 Cal.3d 547, 560–561.
Withdrawal ▸ *People v. Norton* (1958) 161 Cal.App.2d 399, 403; *People v. Ross* (1979) 92 Cal.App.3d 391, 404–405.
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.

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

RELATED ISSUES

Drug Use in Car
A car is a "place" for the purposes of this offense. (*People v. Lee* (1968) 260 Cal.App.2d 836, 840–841.)

See also the Related Issues section of Instruction 501, Aiding and Abetting: Intended Crimes.

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STAFF NOTES

Health & Saf. Code, § 11365:

> (a) It is unlawful to visit or to be in any room or place where any controlled substances which are specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) or paragraph (2) or subdivision (d) of Section 11055, or which are narcotic drugs classified in Schedule III, IV, or V, are being unlawfully smoked or used with knowledge that such activity is occurring.
>
> (b) This section shall apply only where the defendant aids, assists, or abets the perpetration of the unlawful smoking or use of a controlled substance specified in subdivision (a). This subdivision is declaratory of existing law as expressed in People v. Cressey (1970) 2 Cal.3d 836.

Adding and Abetting Required

> If the defendant 'did not act to aid, assist, or abet' the perpetration of the crime, he is guilty of no violation of law from the mere fact that he was present . . . and knew of its commission.

(*People v. Cressey* (1970) 2 Cal.3d 836, 848.)

Knowledge and Willful, Intentional Involvement Required

> Brim contends the knowledge feature of section 11556 is unconstitutionally vague. On Brim's facts, the statute is constitutionally clear. A person of common intelligence would understand section 1556 by its plain meaning is designed for a person like Brim who knowingly, willfully and intentionally involves himself with unlawful marijuana smoking or using.

(*People v. Brim* (1968) 257 Cal.App.2d 839, 842.)

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1772. Possession of Controlled Substance Paraphernalia

The defendant is charged [in Count __] with possessing an object used for unlawfully injecting or consuming a controlled substance.

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

1. **The defendant [unlawfully] possessed an object used for unlawfully injecting or consuming a controlled substance;**

2. **The defendant knew of the object's presence;**

AND

3. **The defendant knew that the object was used for unlawfully injecting or consuming a controlled substance.**

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

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

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

<Defense: Authorized Possession for Personal Use>
[The defendant did not unlawfully possess [a] hypodermic (needle[s]/ [or] syringe[s]) if (he/she) was legally authorized to possess (it/them). The defendant was legally authorized to possess (it/them) if:

1. **(He/She) possessed the (needle[s]/ [or] syringe[s]) for personal use;**

[AND]

2. **(He/She) obtained (it/them) from an authorized source(;/.)**

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[AND

3. (He/She) possessed no more than 10 (needles/ [or] syringes).]

The People have the burden of proving beyond a reasonable doubt that the defendant was not legally authorized to possess the hypodermic (needle[s]/ [or] syringe[s]). If the People have not met this burden, you must find the defendant not guilty of this crime.]

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 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.

Defenses—Instructional Duty
In 2004, the Legislature created the Disease Prevention Demonstration Project. (Health & Saf. Code, § 12185.) The purpose of this project is to evaluate "the long-term desirability of allowing licensed pharmacists to furnish or sell nonprescription hypodermic needles or syringes to prevent the spread of blood-borne pathogens, including HIV and hepatitis C." (Health & Saf. Code, § 12185(a).) In a city or county that has authorized participation in the project, a pharmacist may provide up to 10 hypodermic needles and syringes to an individual for personal use. (Bus. & Prof. Code, § 4145(a)(2).) Similarly, in a city or county that has authorized participation in the project, Health and Safety Code section 11364(a) "shall not apply to the possession solely for personal use of 10 or fewer hypodermic needles or syringes if acquired from an authorized source." (Health & Saf. Code, § 11364(c).) If there is sufficient evidence, the court has a **sua sponte** duty to instruct on this defense. (See *People v. Fuentes* (1990) 224 Cal.App.3d 1041, 1045 [authorized possession of hypodermic is an affirmative defense]); *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [discussing affirmative defenses generally and the burden of proof].) Give the bracketed word "unlawfully" in element 1 and the bracketed paragraph on that defense.

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AUTHORITY

Elements ▸ Health & Saf. Code, § 11364.
Statute Constitutional ▸ *People v. Chambers* (1989) 209 Cal.App.3d Supp. 1, 4.
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.
Disease Prevention Demonstration Project ▸ Health & Saf. Code, § 12185; Bus. & Prof. Code, § 4145(a)(2).
Possession Permitted Under Project ▸ Health & Saf. Code, § 11364(c).

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 116.

RELATED ISSUES

Marijuana Paraphernalia Excluded
Possession of a device for smoking marijuana, without more, is not a crime. (*In re Johnny O.* (2003) 107 Cal.App.4th 888, 897.)

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STAFF NOTES

Health & Saf. Code, § 11364, as amended effective 1/1/05:

(a) It is unlawful to possess an opium pipe or any device, contrivance, instrument, or paraphernalia used for unlawfully injecting or smoking (a) a controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, specified in subdivision (b) or (c) of Section 11055, or specified in paragraph (2) of subdivision (d) of Section 11055, or (2) a controlled substance which is a narcotic drug classified in Schedule III, IV, or V.

(b) This section shall not apply to hypodermic needles or syringes that have been containerized for safe disposal in a container that meets state and federal standards for disposal of sharps waste.

(c) Pursuant to authorization by a county, with respect to all of the territory within the county, or a city, with respect to the territory within in the city, for the period commencing January 1, 2005, and ending December 31, 2010, subdivision (a) shall not apply to the possession solely for personal use of 10 or fewer hypodermic needles or syringes if acquired from an authorized source.

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1773. Possession of Hypodermic Needle or Syringe

The defendant is charged [in Count __] with possessing a hypodermic (needle/ [or] syringe).

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

1. **The defendant [unlawfully] possessed a hypodermic (needle/ [or] syringe);**

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

AND

3. **The defendant knew that the object was a hypodermic (needle/ [or] syringe).**

[Two or more persons 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).]

<Defense: Authorized Possession>
[The defendant did not unlawfully possess a hypodermic (needle/ [or] syringe) if (he/she) was legally authorized to possess it. The People have the burden of proving beyond a reasonable doubt that the defendant was not legally authorized to possess the hypodermic (needle/ [or] syringe). If the People have not met this burden, you must find the defendant not guilty of this crime.]

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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Defenses—Instructional Duty
Business and Professions Code section 4140 allows for the lawful possession of a hypodermic needle or hypodermic syringe when "acquired in accordance with this article." (*People v. Fuentes* (1990) 224 Cal.App.3d 1041, 1045 [authorized possession affirmative defense].) If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [discussing affirmative defenses generally and the burden of proof].) Give the bracketed word "unlawfully" in element 1 and the bracketed paragraph on that defense.

In 2004, the Legislature created the Disease Prevention Demonstration Project. (Health & Saf. Code, § 12185.) The purpose of this project is to evaluate "the long-term desirability of allowing licensed pharmacists to furnish or sell nonprescription hypodermic needles or syringes to prevent the spread of blood-borne pathogens, including HIV and hepatitis C." (Health & Saf. Code, § 12185(a).) In a city or county that has authorized participation in the project, a pharmacist may provide up to 10 hypodermic needles and syringes to an individual for personal use. (Bus. & Prof. Code, § 4145(a)(2).) If there is sufficient evidence that the defendant acquired the hypodermic needle or syringe in accordance with this project, the court has a **sua sponte** duty to instruct on the defense. Give the bracketed word "unlawfully" in element 1 and the bracketed paragraph on the defense of authorized possession.

AUTHORITY

Elements ‣ Bus. & Prof. Code, § 4140.
Authorized Possession Defense ‣ *People v. Fuentes* (1990) 224 Cal.App.3d 1041, 1045; *People v. Mower* (2002) 28 Cal.4th 457, 478–481.
Disease Prevention Demonstration Project ‣ Health & Saf. Code, § 12185; Bus. & Prof. Code, § 4145(a)(2).

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 381.

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STAFF NOTES

Bus. & Prof. Code § 4140:

> No person shall possess or have under his or her control any hypodermic needle or syringe except when acquired in accordance with this article.

Affirmative Defense

> In drafting Business and Professions Code section 4149 [prior 4140], the Legislature relegated to defendant the burden regarding lawful acquisition of a hypodermic needle or syringe. "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.]" [Citations.] Section 4149 does just that. It first defines the offense in unconditional terms: "No person shall possess or have under his or her control any hypodermic needle or syringe . . . ." It then specifies an exception to its operation: "except when acquired in accordance with the provisions of this article." This formulation clearly establishes the Legislature's intent to provide that authorized possession is an affirmative defense that must be raised and proved by the accused.

(*People v. Fuentes* (1990) 224 Cal.App.3d 1041, 1045.)

Related Instructions

The formulation of possession here is adapted from Instruction # 1720, “Simple Possession of Marijuana – Misdemeanor.”

The formulation of the affirmative defense here is adapted from Instruction # 1874A, “Sale or Transportation of Destructive Device.”

Disease Prevention Demonstration Project
The Legislature recently created this program. (See SB 1159, 2003-2004 Legislative Session, Chaptered September 20, 2004.) This legislation added to following section to Business and Professional Code section 4145(a):

> (2) Pursuant to authorization by a county, with respect to all of the territory within the county, or a city, with respect to the territory within the city, for the period commencing January 1, 2005,

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and ending December 31, 2010, a pharmacist may furnish or sell 10 or fewer hypodermic needles or syringes at any one time to a person 18 years of age or older if the pharmacist works for a pharmacy that is registered for the Disease Prevention Demonstration Project pursuant to Chapter 13.5 (commencing with Section 121285) of Part 4 of Division 105 of the Health and Safety Code and the pharmacy complies with the provisions of that chapter.

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1774. Obtaining a Hypodermic Needle or Syringe Fraudulently

The defendant is charged [in Count __] with fraudulently obtaining a hypodermic (needle/ [or] syringe).

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

1. **The defendant obtained a hypodermic (needle/ [or] syringe);**

AND

2. **To do so, the defendant (used fraud[,]/ [or] used a forged or fictitious name[,]/ [or] violated the law by _____** <*insert description of conduct in violation of statute*>**).**

[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.]

BENCH NOTES

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

AUTHORITY

Elements ▸ Bus. & Prof. Code, § 4326(a).
Fraud Defined ▸ See *People v. Pugh* (2002) 104 Cal.App.4th 66, 72.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 381.

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STAFF NOTES

Bus. & Prof. Code § 4326:

> (a) Any person who obtains a hypodermic needle or hypodermic syringe by a false or fraudulent representation or design or by a forged or fictitious name, or contrary to, or in violation of, any of the provisions of this chapter, is guilty of a misdemeanor.

No published case cites this statute.

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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1775. Using or Permitting Improper Use of a Hypodermic Needle or Syringe

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The defendant is charged [in Count __] with (using[,]/ [or] permitting[,]/ [or] causing) a hypodermic (needle/ [or] syringe) [to be used] for a purpose other than the one for which it had been obtained.

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

1. **The defendant obtained a hypodermic (needle/ [or] syringe) from someone who had a license to (sell/ [or] furnish) the (needle/ [or] syringe);**

AND

2. **The defendant (used[,]/ [or] permitted[,]/ [or] caused) that hypodermic (needle/ [or] syringe) [to be used] for a purpose other than the one for which it had been obtained.**

[The defendant may have either directly or indirectly caused the hypodermic (needle/ [or] syringe) to be used for a purpose other than the one for which it had been obtained.]

BENCH NOTES

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

AUTHORITY

Elements ▸ Bus. & Prof. Code, § 4326(b).

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 381.

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STAFF NOTES

Bus. & Prof. Code § 4326(b):

> (b) Any person who has obtained a hypodermic needle or hypodermic syringe from any person to whom a permit has been issued as provided in Article 9 (commencing with Section 4140) and who uses, or permits or causes, directly or indirectly, the hypodermic needle or hypodermic syringe to be used for any purpose other than that for which it was obtained is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or both a fine and imprisonment.

Bus. & Prof. Code § 4140:

> No person shall possess or have under his or her control any hypodermic needle or syringe except when acquired in accordance with this article.

Bus. & Prof. Code § 4141:

> No person shall furnish hypodermic needles or syringes, by sale or otherwise, without a license issued by the board, except as otherwise provided by this article.

No published case cites this statute.

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1850. Possession of Deadly Weapon With Intent to Assault

The defendant is charged [in Count __] with possessing a deadly weapon with intent to assault.

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

1. **The defendant possessed a deadly weapon on (his/her) person;**

2. **The defendant knew that (he/she) possessed the weapon;**

AND

3. **At the time the defendant possessed the weapon, (he/she) intended to assault someone.**

A person intends to assault someone else if he or she intends to do an act that by its nature would directly and probably result in the application of force to a person.

[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 *deadly weapon* is defined in another instruction to which you should refer.]

[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].]

The term *application of force* means 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

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clothing, is enough. The touching does not have to cause pain or injury of any kind.

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

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

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

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 and the possession was "fragmented as to time [or] space," the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185.) Give the bracketed paragraph that begins with "The People allege that the defendant possessed the following weapons," inserting the items alleged.

Give the definition of deadly weapon 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.

Give the bracketed paragraph that begins with "When deciding whether" if the object is not a weapon as a matter of law but 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.)

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

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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 [on duty to instruct generally]; *People v. Stevenson* (1978) 79 Cal.App.3d 976, 988 [instructions applicable to possession of weapon with intent to assault].) See Defenses and Insanity, Instruction 600 et seq.

AUTHORITY

Elements ▸ Pen. Code, § 12024; see also *People v. Rivera* (2003) 107 Cal.App.4th 1374, 1382 [discussing elements].

Deadly Weapon Defined ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029.

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.

Knowledge Required ▸ See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332; *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547.

Assault ▸ Pen. Code, § 240; see also *People v. Williams* (2001) 26 Cal.4th 779, 790.

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].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 140.

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STAFF NOTES

Pen. Code, § 12024:

> Every person having upon him or her any deadly weapon, with intent to assault another, is guilty of a misdemeanor.

Crime of Moral Turpitude

One of the few cases to discuss this statute is *People v. Rivera* (2003) 107 Cal.App.4th 1374, 1382, which held that the offense is a crime of moral turpitude:

> We believe the combination of the elements in the offense of possession of a deadly weapon with the intent to commit an assault generates a synergy that represents a degree of public harm significantly greater than simple assault or simple drug possession. We consider the act of carrying a deadly weapon while intending to assault another to be a clear example of conduct indicating "general readiness to do evil."

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1925. Resisting Peace Officer, Public Officer, or EMT

The defendant is charged [in Count __] with (resisting[,]/ [or] obstructing[,]/ [or] delaying) a (peace officer/public officer/emergency medical technician) in the performance or attempted performance of (his/her) duties.

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

1. **_____** *<insert name, excluding title>* **was a (peace officer/public officer/emergency medical technician) lawfully performing or attempting to perform (his/her) duties as a (peace officer/public officer/emergency medical technician);**

2. **The defendant willfully (resisted[,]/ [or] obstructed[,]/ [or] delayed) _____** *<insert name, excluding title>* **in the performance or attempted performance of those duties;**

AND

3. **When the defendant acted, (he/she) knew, or reasonably should have known, that _____** *<insert name, excluding title>* **was a (peace officer/public officer/emergency medical technician) performing or attempting to perform (his/her) duties.**

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

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

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

[An officer [or employee] of _____ *<insert name of state or local government agency that employs public officer>* **is a *public officer*.]**

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[An *emergency medical technician* is someone who holds a valid certificate under the Health and Safety Code as an emergency medical technician.]

[The duties of a _____ *<insert title of peace officer, public officer, or emergency medical technician>* **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 1935 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

[The People allege that the defendant (resisted[,]/ [or] obstructed[,]/ [or] delayed) _____ *<insert name, excluding title>* **by doing the following: _____** *<insert description of acts when multiple acts alleged>***. 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.]**

[If a person goes limp, requiring an officer to drag or carry the person in order to accomplish a lawful arrest, that person may have willfully (resisted[,]/ [or] obstructed[,]/ [or] delayed) the officer if all the other requirements are met.]

BENCH NOTES

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

"[I]f a defendant is charged with violating section 148 and the arrest is found to be unlawful, a defendant cannot be convicted of that section." (*People v. White* (1980) 101 Cal.App.3d 161, 166.) An unlawful arrest includes both an arrest made without legal grounds and an arrest made with excessive force. (*Id.* at p. 167.) "[D]isputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217.) The court has a **sua sponte** duty to instruct that the defendant is not guilty of the offense charged if the arrest was unlawful. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47.) On request, the court must instruct that the

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prosecution has the burden of proving the lawfulness of an arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145.)

If lawful performance is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of Instruction 1935, Lawful Performance. When giving the portion of Instruction 1935 on the "use of force," the court **must** either delete the following sentence or specify that this sentence does not apply to a charge of violating Penal Code section 148: "If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her, the person must not use force or any weapon to resist an officer's use of reasonable force." (*People v. White, supra,* 101 Cal.App.3d at pp. 168–169 [court must clarify that Pen. Code, § 834a does not apply to charge under section 148].)

If the prosecution alleges multiple, distinct acts of resistance, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 9.) Give the bracketed paragraph that begins with "The People allege that the defendant."

The jury must determine whether the alleged victim 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 alleged victim was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)* If the alleged victim is a police officer, give the bracketed sentence that begins with "A person employed as a police officer." If the alleged victim is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

The court may give the bracketed sentence that begins with "The duties of a _____ <*insert title . . .* > include" on request. The court may insert a description of the alleged victim's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222.)

If the facts indicate passive resistance to arrest, give the bracketed sentence that begins with "If a person goes limp." (*In re Bacon* (1966) 240 Cal.App.2d 34, 53.)

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AUTHORITY

Elements ▸ Pen. Code, § 148(a); see *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329.
General-Intent Crime ▸ *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329.
Knowledge Required ▸ *People v. Lopez* (1986) 188 Cal.App.3d 592, 599–600.
Multiple Violations Permissible If Multiple Officers ▸ Pen. Code, § 148(e).
Peace Officer Defined ▸ Pen. Code, § 830 et seq.
Emergency Medical Technician Defined ▸ Health & Saf. Code, §§ 1797.80–1797.84.
Delaying Officer From Performing Duties ▸ *People v. Allen* (1980) 109 Cal.App.3d 981, 985–986, 987.
Verbal Resistance or Obstruction ▸ *People v. Quiroga* (1993) 16 Cal.App.4th 961, 968, 970–972 [nondisclosure of identity following arrest for felony, not misdemeanor]; *People v. Green* (1997) 51 Cal.App.4th 1433, 1438 [attempt to intimidate suspected victim into denying offense].
Passive Resistance to Arrest ▸ *In re Bacon* (1966) 240 Cal.App.2d 34, 53.
Unanimity ▸ *People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 9.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 18–19.

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STAFF NOTES

Pen. Code, § 148, in relevant part:

> (a)(1) Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined in Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars ($ 1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment. . . .
>
> (e) . . . A person may be convicted of multiple violations of this section if more than one public officer, peace officer, or emergency medical technician are victims.

EMT Defined

Health & Saf. Code, § 1797.80: "Emergency Medical Technician-I"; "EMT-I"

> "Emergency Medical Technician-I" or "EMT-I" means an individual trained in all facets of basic life support according to standards prescribed by this part and who has a valid certificate issued pursuant to this part. This definition shall include, but not be limited to, EMT-I (FS) and EMT-I-A.

Health & Saf. Code, § 1797.82: "Emergency Medical Technician-II"; "EMT-II"

> "Emergency Medical Technician-II" or "EMT-II" means an EMT-I with additional training in limited advanced life support according to standards prescribed by this part and who has a valid certificate issued pursuant to this part.

Health & Saf. Code, § 1797.84: "Emergency Medical Technician-Paramedic"; "EMT-P"; "Paramedic"; "Mobile intensive care paramedic"

> "Emergency Medical Technician-Paramedic," "EMT-P," "paramedic" or "mobile intensive care paramedic" means an individual whose scope of practice to provide advanced life support

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> is according to standards prescribed by this division and who has a valid certificate issued pursuant to this division.

Source of Instruction
This instruction is modeled on Instruction 900, Taking Firearm or Weapon While Resisting Peace Officer.

Officer Should Be Named
This instruction includes blanks for the name of the officer being resisted, pursuant to a suggestion in *People v. White* (1980) 101 Cal.App.3d 161, 169, fn. 3:

> Count 6 (§ 148) failed to name a specific officer as the victim. Under the circumstances of this case, the victim could have been either [Officer] Gonzalez or Ciolli. The preferable practice is to allege in the information the specific officer whose lawful authority was resisted. If not so alleged, the jury must specifically be instructed as to the officer involved to assure a defendant, if convicted, that the jury has reached a unanimous verdict. Otherwise the jurors could base their conclusions on defendant's conduct towards one officer with other jurors reaching their conclusion with reference to defendant's conduct in resisting a different officer.

Obstruct
There is no duty to define "obstruct," as stated in *People v. Roberts* (1982) 131 Cal.App.3d Supp. 1, 6:

> The words used in section 148 are sufficiently definite in their terms so that a person of ordinary understanding could interpret them [citation]; accordingly, we see no error in the trial court's failure to define the word "obstruct."

Knowledge Other Person an Officer

> In the instant action, the act of fleeing from an officer trying to make a lawful arrest is proscribed. Before one can be found culpable, however, he or she must know, or through the exercise of reasonable care should have known, that the person attempting to make the arrest is an officer. Otherwise the statute is overbroad. It would make mere flight or fear of capture an offense.

(*People v. Lopez* (1986) 188 Cal.App.3d 592, 599–600.)

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Must Clarify That Pen. Code, § 834a Does Not Apply To Charge Under § 148

> Defendant also correctly points out the court erred in failing to instruct that section 834a -- a duty not to resist arrest -- does not apply to a charge of section 148. [Citations.] As we have stated, section 148 only applies to lawful arrests. When instructed as to section 834a in a case involving a single count of section 148, or multiple counts where a different police officer is involved in the section 148 violation, the jury is given the opportunity to improperly infer defendant could be guilty of a crime upon resisting an unlawful arrest. A court should expressly limit the application of that section (§ 834a).

(*People v. White* (1980) 101 Cal.App.3d 161, 168–169.)

Passive Resistance to Arrest

> [W]here the arrest is lawful a person arrested may not use passive resistance or interpose any obstacles which in any manner impede, hinder, interrupt, prevent or delay such arrest. We hold, therefore, that a person who goes limp and thereby requires the arresting officer to drag or bodily lift and carry him in order to effect his arrest causes such a delay and obstruction to a lawful arrest as to constitute the offense of resisting an officer as defined in section 148.

(*In re Bacon* (1966) 240 Cal.App.2d 34, 53.)

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1926. Courthouse Picketing

The defendant is charged [in Count __] with (picketing/ [or] parading) near a courthouse.

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

1. **The defendant (picketed/ [or] paraded) in or near a state court building;**

AND

2. **When the defendant acted, (he/she) did so with the intent (to interfere with, obstruct, or impede the administration of justice/ [or] to influence a (judge[,]/ [or] juror[,]/ [or] witness[,]/ [or] officer of the court) in the discharge of his or her duty).**

BENCH NOTES

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

AUTHORITY

Elements ▸ Pen. Code, § 169.
Similar Statute Constitutional ▸ *Cox v. Louisiana* (1964) 379 U.S. 559, 564 [upholding Louisiana statute nearly identical to Pen. Code, § 169].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 31.

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STAFF NOTES

Pen. Code, § 169:

> Any person who pickets or parades in or near a building which houses a court of this state with the intent to interfere with, obstruct, or impede the administration of justice or with the intent to influence any judge, juror, witness, or officer of the court in the discharge of his duty is guilty of a misdemeanor.

Staff was unable to locate any cases discussing this statute.

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1927. Disturbance of Public Meeting

The defendant is charged [in Count __] with (disturbing/ [or] breaking up) a public meeting.

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

1. **The defendant intentionally committed acts that violated (implicit customs or usages of/ [or] explicit rules for governing) the meeting;**

2. **The defendant knew or reasonably should have known that (his/her) acts violated those (customs[,]/ [or] usages[,]/ [or] rules);**

AND

3. **The defendant's acts substantially [and unlawfully] interfered with the conduct of the meeting.**

You may not find the defendant guilty of this crime unless you find that the defendant's acts themselves, not the message or expressive content of the acts, substantially interfered with the conduct of the meeting.

[When deciding whether the defendant knew or reasonably should have known that (his/her) acts violated the (implicit customs or usages of/ [or] explicit rules for governing) the meeting, you may consider whether someone warned or requested the defendant to stop (his/her) activities.]

BENCH NOTES

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

On request, give the bracketed sentence that begins with "When deciding whether," if the meeting did not have explicit rules of governance. (*In re Kay* (1970) 1 Cal.3d 930, 945.)

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AUTHORITY

Elements ▸ Pen. Code, § 403; *In re Kay* (1970) 1 Cal.3d 930, 941–943.
First Amendment Limitations on Statute ▸ *In re Kay* (1970) 1 Cal.3d 930, 941–942.
Must Be Public Meeting ▸ *Farraher v. Superior Court* (1919) 45 Cal.App.4, 6.
No Clear and Present Danger Requirement ▸ *McMahon v. Albany Unified School Dist.* (2002) 104 Cal.App.4th 1275, 1287–1288.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 16.

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STAFF NOTES

Pen. Code, § 403:

> Every person who, without authority of law, willfully disturbs or breaks up any assembly or meeting that is not unlawful in its character, other than an assembly or meeting referred to in Section 302 of the Penal Code or Section 18340 of the Elections Code, is guilty of a misdemeanor.

Penal Code section 302 makes it a separate misdemeanor to intentionally disturb a religious meeting.

Elections Code section 18340 makes it a separate misdemeanor to "willfully hinders or prevents electors from assembling in public meetings . . . ."

Must be Public Meeting
Farraher v. Superior Court (1919) 45 Cal.App.4, 6, held that this statute only applies to *public* meetings.

First Amendment Limitations on Scope of Statute

> On its face, section 403 applies to "every person who . . . willfully disturbs or breaks up any assembly or meeting . . . ," and if the section were literally applied with the breadth of coverage that its terms could encompass, the statute would be constitutionally overbroad and could not stand. In the instant case, in instructing the jury, the trial court simply read, verbatim, the language of section 403. In such a broad unrestricted rendition the court invited the jury to apply the statute unconstitutionally and to find individuals guilty of nothing more than an expression of free speech protected by the Constitution. Thus the jury, under such an instruction, might convict persons whose expressive conduct "[disturbed]" a meeting only because the content of the expression conflicted with the views espoused by the meeting's organizers or official speakers. The right to free expression articulated through "disturbances" that are no more than announced differences in ideology or beliefs lies at the heart of the First Amendment; governmental prohibition of such activity, under any statutory scheme, could not constitutionally be countenanced. [Citation.] . . .

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(*In re Kay* (1970) 1 Cal.3d 930, 941–942.)

> Accordingly, we now explicitly recognize that, in light of the purposes of the provision and the competing First Amendment interests at stake, section 403 authorizes the imposition of criminal sanctions only when the defendant's activity itself -- and *not* the content of the activity's expression -- substantially impairs the effective conduct of a meeting.
>
> To effectuate section 403 within constitutional limits we interpret it to require the following showing to establish its transgression: **that the defendant substantially impaired the conduct of the meeting by intentionally committing acts in violation of implicit customs or usages or of explicit rules for governance of the meeting, of which he knew, or as a reasonable man should have known.**
>
> In applying these standards, the nature of a meeting necessarily plays a major role. [Citation.] The customs and usages at political conventions may countenance prolonged, raucous, boisterous demonstrations as an accepted element of the meeting process; similar behavior would violate the customs and usages of a church service. Audience participation may be enthusiastically welcomed at a bonfire football rally or an athletic contest, but considered taboo at a solemn ceremony of a fraternal order. Explicit rules governing the time and place of permitted nonviolent expressions [citation] may in some circumstances fix the limits of permissible conduct. Violation of such customs or rules by one who knew or as a reasonable man should have known of them would justify the application of section 403.

(*Id.* at pp. 942–943.)

> In instances in which the appropriate standard of conduct lies in doubt, a warning and a request that defendants curtail their conduct, either by officials or law enforcement agents, should precede arrest or citation.

(*Id.* at p. 945.)

Approved Instruction Based on *Kay*

In *McMahon v. Albany Unified School Dist.* (2002) 104 Cal.App.4th 1275, the plaintiff alleged false arrest. The defense asserted that the plaintiff was properly

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arrested for violating Penal Code section 403. The trial court gave the following instructions, approved on by the Court of Appeal:

> A fundamental right under the First Amendment of our United States Constitution is freedom of speech. Freedom of speech includes expression which is not only spoken but may include acts or conduct. When conduct is intended to express a message and the likelihood is great that the message would be understood by those who view it, it is entitled to the same protection under the Constitution as the spoken word. [P]
>
> In determining whether Mr. McMahon's acts and conduct violated the law to warrant his arrest as a violation of Penal Code section 403, a distinction has to be drawn between expression which may include acts and an act independent of expression. An act may coexist with expression as well as being a part of the expression which is protected by the First Amendment. [P]
>
> Consequently, Penal Code section 403 authorizes an arrest by citizens or police officers only when a person's (for purposes of this trial Mr. McMahon's) activity itself--and *not the content* of the activity's expression--substantially impairs the effective conduct of the meeting. [P]
>
> For a violation of Penal Code section 403, *disturbing a lawful assembly*, the following elements must exist: [P]
>
> 1. Mr. McMahon must have substantially impaired the conduct of the meeting; [P]
>
> 2. by intentionally committing acts; [P]
>
> 3. in violation of implicit customs or usages for the governance of the meeting of which he knew or, as a reasonable person should have known. [P] . . .
>
> If you find that the standard of conduct for the Board of Education meeting lies in doubt, in determining whether Mr. McMahon violated implicit customs or usages for the governance of the meeting, a warning and request that Mr. McMahon curtail his conduct should proceed [*sic*] an arrest. You may consider whether or not a warning or request was directed to Mr. McMahon to cease his

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> activities, and if none, whether there was an opportunity for such a request to be directed to him. If you find that no warning was given and there was an opportunity to give such a request than [*sic*] the arrest is unlawful. . . .

(*Id.* at pp. 1285–1286.)

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1928. Inciting a Riot

The defendant is charged [in Count __] with inciting a riot.

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);**

AND

3. **When the defendant acted, (he/she) intended to cause a riot.**

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.

[The People do not have to prove that anyone actually (committed acts of force or violence/ [or] burned or destroyed property).]

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 have to prove” on request.

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AUTHORITY

Elements ▸ Pen. Code, § 404.6(a).
Riot Defined ▸ Pen. Code, § 404.
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.

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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.

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.

Source of Instruction

This instruction is modeled on Task Force Instruction 1945, Inciting a Riot in a Prison or Jail. Elements that do not apply have been deleted.

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

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> 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 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.)

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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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1929. Participating in a Riot

The defendant is charged [in Count __] with participating in a riot.

To prove that the defendant is guilty of this crime, the People must prove that the defendant willfully participated in a riot.

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.

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.

AUTHORITY

Elements ▸ Pen. Code, §§ 404, 405.
Riot Defined ▸ Pen. Code, § 404.
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 13.

RELATED ISSUES

Prior Agreement Not Necessary
"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* (1948) 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. [Citation.] All persons

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who encourage, incite, promote, give support to or countenance a riot are principals in a riot." (*People v. Cipriani* (1971) 18 Cal.App.3d 299, 304 [italics in original, citing *People v. Bundte, supra*, 87 Cal.App.2d at pp. 744–746].)

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STAFF NOTES

Penal Code, § 405:

> Every person who participates in any riot is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.

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.

Source of Instruction
This instruction is modeled on Task Force Instruction 1945, Inciting a Riot in a Prison or Jail. Elements that do not apply have been deleted.

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* [1948] 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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1930. Participating in a Rout

The defendant is charged [in Count __] with participating in a rout.

To prove that the defendant is guilty of this crime, the People must prove that the defendant willfully participated in a rout.

A *rout* occurs when two or more people, assembled and acting together, make an attempt to commit or advance toward committing an act that would be a riot if actually committed.

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.

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.

AUTHORITY

Elements ▸ Pen. Code, §§ 406, 408; *In re Wagner* (1981) 119 Cal.App.3d 90, 106.
Rout Defined ▸ Pen. Code, § 406.
Riot Defined ▸ Pen. Code, § 404.
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 10.

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STAFF NOTES

Penal Code, § 408:

> Every person who participates in any rout or unlawful assembly is guilty of a misdemeanor.

Penal Code, § 406, Rout Defined:

> Whenever two or more persons, assembled and acting together, make any attempt or advance toward the commission of an act which would be a riot if actually committed, such assembly is a rout.

Sufficient Evidence of Rout

> There was more than abundant evidence upon which a jury could convict Mr. Parker of rout. He was observed by more than one witness to be throwing pieces of concrete or rocks at police officers.
>
> So far as Mr. Parker's conviction for violation of section 404.6 is concerned, however, we agree with petitioner. Petitioner contends that there was absolutely no evidence that he intended to cause a riot, that he did any act or engaged in any conduct urging a riot, or that he urged others to commit acts of force or violence. The prosecutor in his return to the order to show cause virtually concedes that fact. Therefore the conviction thereof can not stand. [Citation.] The prosecutor informs us that the act of petitioner's throwing chunks of concrete at police officers constitutes evidence sufficient to convict petitioner of urging riot. Clearly this is not so.

(*In re Wagner* (1981) 119 Cal.App.3d 90, 106 [footnotes omitted].)

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1931. Participating in an Unlawful Assembly

The defendant is charged [in Count __] with participating in an unlawful assembly.

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

1. **The defendant willfully participated in an unlawful assembly;**

AND

2. **The defendant knew that the assembly was unlawful when (he/she) participated.**

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

An *unlawful* assembly occurs when two or more people assemble together (to commit a crime/ [or] to do a lawful act in a violent manner).

[When two or more people assemble to do a lawful act in a violent manner, the assembly is not *unlawful* unless violence actually occurs or there is a clear and present danger that violence will occur immediately.]

BENCH NOTES

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

Penal Code section 407 defines an "unlawful assembly" as two or more people assembled together "to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner." The Supreme Court has held that "the proscriptions of sections 407 and 408 on assemblies to do a lawful act must be limited to assemblies which are violent or which pose a clear and present danger of imminent violence." (*In re Brown* (1973) 9 Cal.3d 612, 623; see *Collins v. Jordan* (1996) 110 F.3d 1363, 1371.) Because the assembly must in fact be violent or pose an immediate threat of violence, an assembly that is "boisterous or

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tumultuous" does not establish a violation of the statute. The committee has therefore eliminated these words from the instruction since they are archaic and potentially confusing.

AUTHORITY

Elements ▸ Pen. Code, §§ 407, 408.
Unlawful Assembly Defined ▸ Pen. Code, § 407.
Assembly for Lawful Act Requires Violence or Clear and Present Danger of Violence ▸ *In re Brown* (1973) 9 Cal.3d 612, 623; see *Collins v. Jordan* (1996) 110 F.3d 1363, 1371.
Specific Intent to Commit Unlawful or Violent Act Not Required ▸ *People v. Kerrick* (1972) 86 Cal.App. 542, 551.
Knowledge That Assembly Unlawful Required ▸ *In re Wagner* (1981) 119 Cal.App.3d 90, 103–104; *Coverstone v. Davies* (1952) 38 Cal.2d 315, 320.
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 11.

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STAFF NOTES

Penal Code, § 408:

> Every person who participates in any rout or unlawful assembly is guilty of a misdemeanor.

Penal Code, § 407, Unlawful Assembly Defined:

> Whenever two or more persons assemble together to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly.

First Amendment Limitations on Scope of Statue—Assembly for Lawful Act Must Involve Violence of Immediate Threat of Violence

> The right to assemble peaceably, like freedom of speech, is guaranteed by the First Amendment. As noted earlier we held in *In re Bushman, supra*, 1 Cal.3d 767, 773, that in light of the First Amendment guarantee of freedom of speech, the provision in section 415 prohibiting disturbing the peace by tumultuous and offensive conduct must be limited to disruption of public order by acts that are themselves violent or that tend to incite others to violence. The First Amendment guarantee of the right to assemble peaceably, requires similar limitations on the provision in section 407 prohibiting assembly to do "a lawful act in a violent, boisterous or tumultuous manner." [Citations.]
>
> The foregoing is the traditional construction of the lawful act provision of section 407. It has long been recognized that the portion of section 407 which proscribes assembling to do a lawful act in a violent, boisterous or tumultuous manner must be narrowly construed. [Citation.] Although the public may fear a large, noisy assembly, particularly an assembly that espouses an unpopular idea, such an apprehension does not warrant restraints on the right to assemble unless the apprehension is justifiable and reasonable and the assembly poses a threat of violence. [Citation.] Accordingly, the proscriptions of sections 407 and 408 on assemblies to do a lawful act must be limited to assemblies which are violent or which pose a clear and present danger of imminent violence.

(*In re Brown* (1973) 9 Cal.3d 612, 623.)

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> [T]he California Supreme Court has properly narrowed [this] statute, in accordance with the requirements of the First Amendment, to those assemblies "which are violent or which pose a clear and present danger of imminent violence,"

(*Collins v. Jordan* (1996) 110 F.3d 1363, 1371.)

> In instructing concerning a violation of Penal Code section 407, unlawful assembly, for example, the court was very careful to point out, "Not every meeting where there is a [*sic*] violent, boisterous or tumultuous conduct is an unlawful assembly. To constitute an unlawful assembly, persons must be assembled under such circumstances as to excite terror and alarm in the neighborhood." At another point, the court pointed out to the jury that "[unlawful] assembly of two or more persons assembled to do a lawful act is limited to assemblies which are [in] themselves are [*sic*] violent or which give rise to a clear and present danger of immediate violence."

(*In re Wagner* (1981) 119 Cal.App.3d 90, 109.)

Unlawful Act

> An unlawful act within the meaning of section 407, as the Attorney General concedes, means criminal conduct prohibited by state law.

(*In re Brown* (1973) 9 Cal.3d 612, 624.)

Participating in Unlawful Assembly—Must Have Knowledge

> Petitioners further contend that in order for a person to be guilty of an unlawful assembly, it must be shown that such person actually committed acts which were violent or which posed a clear and present danger of violence. We cannot agree. The statutory denunciation pertains to the assembly at large. [Citation.] Not every member of the assembly must individually commit unlawful acts to render the assembly unlawful. [Citations.] If a person is a participant in a lawful assembly which becomes unlawful, he has an immediate duty upon learning of the unlawful conduct to disassociate himself from the group. . . .
>
> Webster's Third New International Dictionary (1966) page 1646 defines participate as follows: ". . . to take part . . . ." A person takes

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> part in an unlawful assembly by knowingly joining or remaining with the group after it has become unlawful. The trial court instructed the jury that the participation must be done knowingly. Whether or not a person acted knowingly is also merely a question of fact.

(*In re Wagner* (1981) 119 Cal.App.3d 90, 103–104.)

> It is not disputed that the group was assembled to view a "hot-rod" race. Such illegal purpose renders the action of the group knowingly participating therein an unlawful assembly within the meaning of section 407 of the Penal Code.

(*Coverstone v. Davies* (1952) 38 Cal.2d 315, 320.)

Tumultuous

> [The jurors in the first case] were told that "tumultuous" means "boisterous conduct, disorderly, noisy," . . . [In the second case, the] word "tumultuous" was defined as meaning "boisterous; conducted with disorder; disorderly; noisy; confused."

(*In re Brown* (1973) 9 Cal.3d 612, 617.)

Specific Intent Not Required

> "It is not always necessary that a specific intent of any sort should exist in the minds of the persons assembled in order to constitute the offense, because it is well settled that an assembly of persons attended by circumstances reasonably calculated to excite alarm is an unlawful assembly, regardless of the matter of intent." The text is supported by authorities from which we select the following: "There seem to be two modes in which an assembly of persons may become unlawful, so as to be a subject of indictment; one, by the purpose for which it meets, and the other, without regard to its purpose, by the numbers and demeanor of those present at it." [Citation.] And in another standard encyclopedia we read that the purpose or intent "may be formed either before or at the time of assembling, or it may be formed with the agreement of mutual assistance after the assembling." This latter manner of expressing it would seem to clarify the situation. It is immaterial at what time the intent to do the lawful act in an unlawful manner is formed -- whether prior to or

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> during the assembly. As stated in Wharton's Criminal Law, section 1856, "a lawful assembly becomes unlawful whenever the members agree to resort to violent and tumultuous measures to achieve even a lawful end."

(*People v. Kerrick* (1972) 86 Cal.App. 542, 551.)

Clear and Present Danger Does Not Require Further Definition
See Notes to Instruction 1928, Inciting a Riot.

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1932A. Refusal to Disperse: Riot, Rout, or Unlawful Assembly

The defendant is charged [in Count __] with refusal to disperse after being ordered to do so.

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

1. **The defendant was present at the location of (a/an) (riot[,]/ [or] rout[,]/ [or] unlawful assembly);**

2. **A public officer lawfully warned the defendant to disperse;**

[AND]

3. **The defendant willfully remained present at the location of the (riot[,]/ [or] rout[,]/ [or] unlawful assembly) after the order to disperse(;/.)**

<Give element 4 when instructing on the defense of being a public officer or person assisting an officer.>
[AND

4. **The defendant was not a public officer or a person assisting an officer in attempting to disperse the (riot[,]/ [or] rout[,]/ [or] unlawful assembly).]**

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

[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 *rout* occurs when two or more people, assembled and acting together, make an attempt to commit or advance toward committing an act that would be a riot if actually committed.]

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[An *unlawful* assembly occurs when two or more people assemble together (to commit a crime/ [or] to do a lawful act in a violent manner).

[When two or more people assemble to do a lawful act in a violent manner, the assembly is not *unlawful* unless violence actually occurs or there is a clear and present danger that violence will occur immediately.]]

A _____ *<insert description>* **is a *public officer*.**

A public officer *lawfully warns people to disperse* when the officer directs them, in the name of the People of the State, to immediately disperse. The officer is not required to use any particular words. However, the words used must be sufficient to inform a reasonable person that the officer is acting in an official capacity and ordering people to leave the area. In addition, the officer must communicate the order in a reasonable way that ensures that the order is heard.

[The People do not have to prove that the defendant participated in the (riot[,]/ [or] rout[,]/ [or] unlawful assembly).]

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 there is evidence that the defendant was a public officer or assisting a public officer.

Penal Code section 407 defines an "unlawful assembly" as two or more people assembled together "to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner." The Supreme Court has held that "the proscriptions of sections 407 and 408 on assemblies to do a lawful act must be limited to assemblies which are violent or which pose a clear and present danger of imminent violence." (*In re Brown* (1973) 9 Cal.3d 612, 623; see *Collins v. Jordan* (1996) 110 F.3d 1363, 1371.) Because the assembly must in fact be violent or pose an immediate threat of violence, an assembly that is "boisterous or tumultuous" does not establish a violation of the statute. The committee has therefore eliminated these words from the instruction since they are archaic and potentially confusing.

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The jury must determine whether the person who allegedly gave the order was a public officer. (See *People v. Brown* (1988) 46 Cal.3d 432, 444–445.) The court may instruct the jury on the appropriate definition of "public officer" (e.g., in the case of "peace officer," the court may state "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 public officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)*

Give the bracketed sentence that begins with "The People do not have to prove" on request. (*In re Bacon* (1966) 240 Cal.App.2d 34, 49.)

AUTHORITY

Elements ▸ Pen. Code, §§ 407, 409.
Command to Disperse ▸ Pen. Code, § 726.
Riot Defined ▸ Pen. Code, § 404.
Rout Defined ▸ Pen. Code, § 406.
Unlawful Assembly Defined ▸ Pen. Code, § 407.
Assembly for Lawful Act Requires Violence or Clear and Present Danger of Violence ▸ *In re Brown* (1973) 9 Cal.3d 612, 623; see *Collins v. Jordan* (1996) 110 F.3d 1363, 1371.
No Particular Manner of Warning Required ▸ *In re Bacon* (1966) 240 Cal.App.2d 34, 50–51; *People v. Cipriani* (1971) 18 Cal.App.3d 299, 307–308; *In re Wagner* (1981) 119 Cal.App.3d 90, 105.
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 15.

RELATED ISSUES

Penal Code Sections 409 and 416(a)
Penal Code section 409 applies to any person remaining at an unlawful assembly following an order to disperse, whether or not that person is involved in the violent or illegal activity. (*Dubner v. City and Co. of San Francisco* (2001) 266 F.3d 959, 967–968; *In re Bacon* (1966) 240 Cal.App.2d 34, 49.) Refusal to disperse is also punishable under Penal Code section 416(a). Penal Code section 416(a) applies only to those who have the specific intent to commit violent or unlawful acts but does not require that the gathering meet the definition of riot, rout, or unlawful assembly. (*Dubner v. City and Co. of San Francisco* (2001) 266 F.3d 959, 967–968; *In re Wagner* (1981) 119 Cal.App.3d 90, 110–111.) Use this instruction only

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for a charge of violating Penal Code section 409. If the defendant is charged under Penal Code section 416(a), give Instruction 1932B, Refusal to Disperse: Intent to Commit Unlawful Act.

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STAFF NOTES

Penal Code, § 409:

> Every person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor.

Penal Code, § 726:

> Where any number of persons, whether armed or not, are unlawfully or riotously assembled, the sheriff of the county and his or her deputies, the officials governing the town or city, or any of them, must go among the persons assembled, or as near to them as possible, and command them, in the name of the people of the state, immediately to disperse.

Manner of Warning

> Appellants' final contention as to the applicability of section 409 to the facts of the instant case is that they were not lawfully warned to disperse. Although section 409 does not specify the manner in which the persons assembled must be asked to disperse, the case of *People* v. *Sklar*, [1930] 111 Cal.App.Supp. 776, held that this gap was filled by section 726, ... *Sklar* also interpreted this section as including police officers among those persons empowered to give the command to disperse. Additionally, *Sklar* noted that "Under our code section no particular form of proclamation is required, but the section does require that something in the nature of a general command to disperse be given and that it purport to be in the name of the people of the state." (P. 779.)
>
> Whether section 726, which by its terms purports to deal with riotous situations, would be applicable to the facts in the instant case or whether, on the other hand, an effective command to disperse could have taken any reasonable form, it is apparent that appellants were fairly and adequately notified that they should leave Sproul Hall. Not only did Chancellor Strong give a command to disperse, but also a Captain of the Berkeley Police Department went from floor to floor in the building and announced over a portable loudspeaker that the persons gathered in the building were

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> participating in an unlawful assembly, that they were free to leave the building, but that those who remained would be arrested for trespass.

(*In re Bacon* (1966) 240 Cal.App.2d 34, 50–51.)

> [T]he statute does not specify that the dispersal order be given from any particular location or in any particular manner. It requires only "going among the people assembled" or "as near to them as possible."
>
> The ultimate question is whether the order was given in such a way as to reasonably assure that the persons involved heard the command to disperse and were made aware of the order.

(*People v. Cipriani* (1971) 18 Cal.App.3d 299, 307–308.)

> Petitioners contend that Penal Code section 726 n2 was not complied with by the police because no one went "among the persons assembled or as near to them as possible" to command their dispersal. This contention is based on the fact that the dispersal order was given on a public address system. We dispose of this complaint by quoting from *People* v. *Cipriani*, *supra*, 18 Cal.App.3d 299.
>
> It was pointed out by the *Cipriani* court that section 726 was enacted long before the invention of modern amplification devices. The court stated on page 308: "It seems obvious however that the use of such devices is not foreclosed by anything to be found in the statutes and in fact their use promises more effective compliance with the spirit of the law than does the unamplified voice of an individual speaking at or near an assemblage of persons. [para.] Whether a particular defendant was a member of an unlawful assembly to which a dispersal order was addressed and whether his actions constituted a wilfull [*sic*] failure to comply are simply questions of fact. The location of and the means used to give the order are matters for the consideration of the trier of fact."

(*In re Wagner* (1981) 119 Cal.App.3d 90, 105 [footnote omitted].)

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Defendant Need Not Participate in Riot, etc.

> Section 409 is distinguished from section 408 in that the offense proscribed by the former is committed when a person remains at the place of assembly after he has lawfully been warned to disperse, even though he may not have participated in the assembly. (See *People* v. *Anderson*, [1931] 117 Cal.App.Supp. 763, 769.)

(*In re Bacon* (1966) 240 Cal.App.2d 34, 49.)

Assembly Must be Unlawful

> California courts have since interpreted the statute to require a clear and present danger of imminent violence before bystanders can be arrested along with participants in an unlawful assembly. [Citations.] Absent these compelling circumstances, we hold that the police are at least required to differentiate between the participants and innocent bystanders. We find that this protest did not involve a sufficient threat of violence to justify arresting nonparticipants under section 409.

(*Dubner v. City and Co. of San Francisco* (2001) 266 F.3d 959, 967–968.)

See Notes to Instructions 1929–1931.

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1932B. Refusal to Disperse: Intent to Commit Unlawful Act

The defendant is charged [in Count __] with refusal to disperse after being ordered to do so.

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

1. **The defendant assembled with one or more other people;**

2. **The defendant intended to (disturb the public peace/ [or] commit a crime);**

3. **A public officer had probable cause to believe that the purpose of the assembly was unlawful;**

4. **The public officer lawfully warned the defendant to disperse;**

AND

5. **The defendant willfully remained present at the location after the order to disperse.**

[As used here, a person *intends to disturb the public peace* if he or she intends to commit overt acts that are themselves violent or that tend to incite others to violence.]

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

A _____ *<insert description>* **is a *public officer.***

A public officer *lawfully warns people to disperse* when the officer directs them, in the name of the People of the State, to immediately disperse. The officer is not required to use any particular words. However, the words used must be sufficient to inform a reasonable person that the officer is acting in an official capacity and ordering people to leave the area. In addition, the officer must communicate the order in a reasonable way that ensures that the order is heard.

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An officer has *probable cause* to believe that the purpose of the assembly is unlawful if the officer knows facts that would persuade someone of reasonable caution to believe that the people present intend to (immediately commit criminal or violent acts/ [or] incite others to immediately commit acts of violence).

In deciding whether the officer has probable cause, consider evidence of the officer's training and experience and all the circumstances the officer knew about at the time.

BENCH NOTES

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

The jury must determine whether the person who allegedly gave the order was a public officer. (See *People v. Brown* (1988) 46 Cal.3d 432, 444–445.) The court may instruct the jury on the appropriate definition of "public officer" (e.g., in the case of "peace officer," the court may state "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 public officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)*

AUTHORITY

Elements ▸ Pen. Code, § 416(a).
First Amendment Limitations on Statute ▸ *Chambers v. Municipal Court* (1977) 65 Cal.App.3d 904, 909–911.
Command to Disperse ▸ Pen. Code, § 726.
No Particular Manner of Warning Required ▸ *In re Bacon* (1966) 240 Cal.App.2d 34, 50–51; *People v. Cipriani* (1971) 18 Cal.App.3d 299, 307–308; *In re Wagner* (1981) 119 Cal.App.3d 90, 105.
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 15.

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RELATED ISSUES

Penal Code Sections 409 and 416(a)

Penal Code section 409 applies to any person remaining at an unlawful assembly following an order to disperse, whether or not that person is involved in the violent or illegal activity. (*Dubner v. City and Co. of San Francisco* (2001) 266 F.3d 959, 967–968; *In re Bacon* (1966) 240 Cal.App.2d 34, 49.) Refusal to disperse is also punishable under Penal Code section 416(a). Penal Code section 416(a) applies only to those who have the specific intent to commit violent or unlawful acts but does not require that the gathering meet the definition of riot, rout, or unlawful assembly. (*Dubner v. City and Co. of San Francisco* (2001) 266 F.3d 959, 967–968; *In re Wagner* (1981) 119 Cal.App.3d 90, 110–111.) Use this instruction only for a charge of violating Penal Code section 416(a). If the defendant is charged under Penal Code section 409, give Instruction 1932A, Refusal to Disperse: Riot, Rout, or Unlawful Assembly.

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STAFF NOTES

Penal Code, § 416:

(a) If two or more persons assemble for the purpose of disturbing the public peace, or committing any unlawful act, and do not disperse on being desired or commanded so to do by a public officer, the persons so offending are severally guilty of a misdemeanor.

First Amendment Limits on Scope of Statute

Penal Code section 416 has two separate parts which require analysis. Part of the statute deals with "disturbing the public peace"; that term, as used in analogous statutes has been construed to prevent overbreadth. The Supreme Court construed "disturbing the peace" in section 415 prior to its amendment in 1974, stating that the phrase had a commonly understood meaning of "disruption of public order by acts that are themselves violent or that tend to incite others to violence." The United States Supreme Court in *Cohen* v. *California* went further to hold that a charge of disturbing the peace (Pen. Code, § 415) depends on a showing of clear and present danger that violence will imminently ensue. [Citations.] We construe the same language in section 416 in the same manner; thus proof of intention to commit overt acts "that are themselves violent or that tend to incite others to violence" is requisite to criminal liability under the first part of the statute. . . .

Similarly, the "unlawful act" provision in section 416 must be interpreted as reaching conduct which the state may legitimately suppress -- i.e., actual violations of the law, or commission of overt acts leading toward a violation of the law. . . .

Peaceful assemblies are protected by the First Amendment. [Citation.] Therefore, section 416 must be construed to reach only *conduct* which the state can legitimately suppress, and not the assembly itself. . . .

We construe Penal Code section 416 as empowering a public official to demand dispersal only where there is probable cause to believe that the purpose of an assembly is unlawful, according to the facts and circumstances of each individual case. [Citation.]

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(*Chambers v. Municipal Court* (1977) 65 Cal.App.3d 904, 909–911.)

See Notes to Instructions 1929–1932A.

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1933A. Disturbing the Peace: Fighting or Challenging Someone to Fight

---

The defendant is charged [in Count __] with disturbing the peace.

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

1. **The defendant willfully [and unlawfully] (fought/ [or] challenged someone else to fight);**

[AND]

2. **The defendant and the other person were (in a public place/in a building or on the grounds of _____** *<insert description of school from Pen. Code, § 415.5>***) when (the fight occurred/ [or] the challenge was made)(;/.)**

<Give element 3 when instructing on self-defense or defense of another.>
[AND]

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

<Give element 4 when instructing on Pen. Code, § 415.5(f).>
[AND

(3/4). The defendant was not (a registered student at the school/ [or] a person engaged in lawful employee-related activity).]

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. Give this instruction if the defendant is charged with violating Penal Code section 415(1) or section 415.5(a)(1).

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If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on that defense. Give bracketed element 3, the phrase "and unlawfully" in element 1, and any appropriate defense instructions. (See Instructions 690–697.)

If the defendant is charged under Penal Code section 415.5(a)(1), select "within a building or on the grounds of" in element 2 and insert the type of school from the statute. If there is sufficient evidence that the exemption in Penal Code section 415.5(f) applies, the court has a **sua sponte** duty to give bracketed element 4.

If the defendant is charged under Penal Code section 415(1), select "in a public place" in element 2. Do not give bracketed element 4.

AUTHORITY

Elements ▸ Pen. Code, §§ 415(1), 415.5(a)(1).
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 2–4, 35.

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STAFF NOTES

Pen. Code, § 415:

Any of the following persons shall be punished by imprisonment in the county jail for a period of not more than 90 days, a fine of not more than four hundred dollars ($ 400), or both such imprisonment and fine:

(1) Any person who unlawfully fights in a public place or challenges another person in a public place to fight.

(2) Any person who maliciously and willfully disturbs another person by loud and unreasonable noise.

(3) Any person who uses offensive words in a public place which are inherently likely to provoke an immediate violent reaction.

Pen. Code, § 415.5:

(a) Any person who (1) unlawfully fights within any building or upon the grounds of any school, community college, university, or state university or challenges another person within any building or upon the grounds to fight, or (2) maliciously and willfully disturbs another person within any of these buildings or upon the grounds by loud and unreasonable noise, or (3) uses offensive words within any of these buildings or upon the grounds which are inherently likely to provoke an immediate violent reaction is guilty of a misdemeanor punishable by a fine not exceeding four hundred dollars ($ 400) or by imprisonment in the county jail for a period of not more than 90 days, or both. . . .

(e) As used in this section "state university," "university," "community college," and "school" have the same meaning as these terms are given in Section 626.

(f) This section shall not apply to any person who is a registered student of the school, or to any person who is engaged in any otherwise lawful employee concerted activity.

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1933B. Disturbing the Peace: Loud and Unreasonable Noise

The defendant is charged [in Count __] with disturbing the peace.

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

[1.] The defendant maliciously and willfully disturbed another person by causing loud and unreasonable noise(;/.)

<Give element 2 when instructing on Pen. Code, § 415.5(a)(2).>
[AND]

[2. The other person was in a building or on the grounds of _____ *<insert description of school from Pen. Code, § 415.5>* **at the time of the disturbance(;/.)]**

<Give element 3 when instructing on Pen. Code, § 415.5(f).>
[AND

(2/3). The defendant was not (a registered student of the school/ [or] a person engaged in lawful employee-related activity).]

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.

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

In order to *disturb another person by causing loud and unreasonable noise*, there must be either:

1. **A clear and present danger of immediate violence;**

OR

2. **The noise must be used for the purpose of disrupting lawful activities, rather than as a means to communicate.**

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The People do not have to prove that the defendant intended to provoke a violent response.

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with violating Penal Code section 415(2) or section 415.5(a)(2).

If the defendant is charged under Penal Code section 415.5(a)(2), give bracketed element 2 and insert the type of school from the statute. If there is sufficient evidence that the exemption in Penal Code section 415.5(f) applies, the court has a **sua sponte** duty to give bracketed element 3.

If the defendant is charged under Penal Code section 415(1), give only element 1. Do not give bracketed elements 2 and 3.

AUTHORITY

Elements ▸ Pen. Code, §§ 415(2), 415.5(a)(2).
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.
Maliciously Defined ▸ Pen. Code, § 7, subd. 4.
Loud and Unreasonable Noise Defined ▸ *In re Brown* (1973) 9 Cal.3d 612, 618–621.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 2–4, 35.

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STAFF NOTES

Pen. Code, § 415:

> Any of the following persons shall be punished by imprisonment in the county jail for a period of not more than 90 days, a fine of not more than four hundred dollars ($ 400), or both such imprisonment and fine:
>
> (1) Any person who unlawfully fights in a public place or challenges another person in a public place to fight.
>
> (2) Any person who maliciously and willfully disturbs another person by loud and unreasonable noise.
>
> (3) Any person who uses offensive words in a public place which are inherently likely to provoke an immediate violent reaction.

Pen. Code, § 415.5:

> (a) Any person who (1) unlawfully fights within any building or upon the grounds of any school, community college, university, or state university or challenges another person within any building or upon the grounds to fight, or (2) maliciously and willfully disturbs another person within any of these buildings or upon the grounds by loud and unreasonable noise, or (3) uses offensive words within any of these buildings or upon the grounds which are inherently likely to provoke an immediate violent reaction is guilty of a misdemeanor punishable by a fine not exceeding four hundred dollars ($ 400) or by imprisonment in the county jail for a period of not more than 90 days, or both. . . .

Subsection (2): Loud And Unreasonable Noise

> The Attorney General seeks to preserve the convictions of violating section 415 on the basis of the language in that section prohibiting "maliciously and wilfully disturbing the peace or quiet . . . by loud or unusual noise." . . .
>
> The statute, however, cannot be interpreted consistent with the First Amendment and traditional views as making criminal all loud shouting or cheering which disturbs and is intended to disturb

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> persons. When the word "noise" in the statute is properly construed consistent with the First Amendment and traditional views, it encompasses communications made in a loud manner only when there is a clear and present danger of violence or when the communication is not intended as such but is merely a guise to disturb persons. . . .
>
> We are satisfied that loud shouting and cheering constitute the loud "noise" prohibited by section 415 only in two situations: 1) where there is a clear and present danger of imminent violence and 2) where the purported communication is used as a guise to disrupt lawful endeavors.

(*In re Brown* (1973) 9 Cal.3d 612, 618–621 [footnotes omitted].)

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1933C. Disturbing the Peace: Offensive Words

The defendant is charged [in Count __] with disturbing the peace.

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

1. **The defendant used offensive words that were inherently likely to provoke an immediate violent reaction;**

[AND]

2. **When the defendant used those words, (he/she) was (in a public place/in a building or on the grounds of _____** *<insert description of school from Pen. Code, § 415.5>***)(;/.)**

<Give element 3 when instructing on Pen. Code, § 415.5(f).>
[AND

3. **The defendant was not (a registered student of the school/ [or] a person engaged in lawful employee-related activity).]**

A person *uses offensive words inherently likely to provoke an immediate violent reaction* if:

1. **He or she says something that is reasonably likely to provoke someone else to react violently;**

AND

2. **When he or she makes that statement, there is a clear and present danger that the other person will immediately erupt into violence.**

In deciding whether the People have proved both of these factors, consider all the circumstances in which the statement was made and the person to whom the statement was addressed.

The People do not have to prove that the defendant intended to provoke a violent response.

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<Defense: Good Faith Belief Language Not Likely to Provoke>
[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the language (he/she) used was not inherently likely to provoke an immediate violent reaction. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe this to be true. If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with violating Penal Code section 415(3) or section 415.5(a)(3).

If the defendant is charged under Penal Code section 415.5(a)(3), select "within a building or on the grounds of" in element 2 and insert the type of school from the statute. If there is sufficient evidence that the exemption in Penal Code section 415.5(f) applies, the court has a **sua sponte** duty to give bracketed element 3.

If the defendant is charged under Penal Code section 415(3), select "in a public place" in element 2. Do not give bracketed element 3.

Defenses—Instructional Duty
If there is sufficient evidence to support the defense that the defendant reasonably believed that his or her words would not provoke, the court has a **sua sponte** duty to give the instruction on that defense. (See *In re John V.* (1985) 167 Cal.App.3d 761, 770 [recognizing defense].)

AUTHORITY

Elements ▸ Pen. Code, §§ 415(3), 415.5(a)(3).
Must Be Clear and Present Danger of Immediate Violence ▸ *Cohen v. California* (1971) 403 U.S. 15, 17; *In re Brown* (1973) 9 Cal.3d 612, 618.
Statement Must Be Uttered in Provocative Manner ▸ *Jefferson v. Superior Court* (1975) 51 Cal.App.3d 721, 724–725*; In re John V.* (1985) 167 Cal.App.3d 761, 767–768; *In re Alejandro G.* (1995) 37 Cal.App.4th 44, 47–50.
Context Must Be Considered ▸ *Jefferson v. Superior Court* (1975) 51 Cal.App.3d 721, 724–725*; In re John V.* (1985) 167 Cal.App.3d 761, 767–768; *In re Alejandro G.* (1995) 37 Cal.App.4th 44, 47–50.

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Intention to Cause Violence Not Required ▸ *Cantwell v. Connecticut* (1940) 310 U.S. 296, 309.
Good Faith Defense ▸ *In re John V.* (1985) 167 Cal.App.3d 761, 770.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 2–4, 35.

RELATED ISSUES

Statement Made to Police Officer
"In determining whether section 415 subdivision (3) was violated, courts must consider the totality of the circumstances, including the status of the addressee. That the addressee was a police officer trained and obliged to exercise a higher degree of restraint than the average citizen is merely one factor to be considered along with the other circumstances." (*In re Alejandro G.* (1995) 37 Cal.App.4th 44, 47–50; see also *People v. Callahan* (1985) 168 Cal.App.3d 631, 635 [evidence showed officer "was neither offended . . . nor provoked"].)

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STAFF NOTES

Pen. Code, § 415:

> Any of the following persons shall be punished by imprisonment in the county jail for a period of not more than 90 days, a fine of not more than four hundred dollars ($ 400), or both such imprisonment and fine:
>
> (1) Any person who unlawfully fights in a public place or challenges another person in a public place to fight.
>
> (2) Any person who maliciously and willfully disturbs another person by loud and unreasonable noise.
>
> (3) Any person who uses offensive words in a public place which are inherently likely to provoke an immediate violent reaction.

Pen. Code, § 415.5:

> (a) Any person who (1) unlawfully fights within any building or upon the grounds of any school, community college, university, or state university or challenges another person within any building or upon the grounds to fight, or (2) maliciously and willfully disturbs another person within any of these buildings or upon the grounds by loud and unreasonable noise, or (3) uses offensive words within any of these buildings or upon the grounds which are inherently likely to provoke an immediate violent reaction is guilty of a misdemeanor punishable by a fine not exceeding four hundred dollars ($ 400) or by imprisonment in the county jail for a period of not more than 90 days, or both. . . .

History of Statute

> Section 415 in one form or another has had an interesting, dynamic and surprisingly long life. For a relatively innocuous misdemeanor it has traveled to high places: intrastate to the California Supreme Court in *In re Bushman* (1970) 1 Cal.3d 767 and *In re Brown* (1973) 9 Cal.3d 612; interstate to the United States Supreme Court in *Cohen* v. *California*, *supra*, 403 U.S. 15. These judicial experiences have been embellished by side trips to Sacramento where the Legislature has treated court-inflicted wounds. Full legislative revitalization was

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> attempted in 1974 when section 415 was repealed and replaced by a new statute with the same number designed to meet constitutional limitations. Amendments were also made in 1976.

(*In re John V.* (1985) 167 Cal.App.3d 761, 766.)

Must be Clear and Present Danger of Immediate Violence

> In *Cohen* v. *California* (1971) 403 U.S. 15, 17, the United States Supreme Court further limited the applicability of Penal Code section 415. The court reasoned that the portion of the statute dealing with "offensive" conduct could not validly be applied to speech or conduct which merely had a tendency to provoke others to violence and that the proscription was valid only where there was a clear and present danger that violence will imminently erupt.

(*In re Brown* (1973) 9 Cal.3d 612, 618.)

Must be Uttered in Provocative Manner—Circumstances Must Be Considered

> Section 415, subdivision (3) codifies the "fighting words" exception to the right of free speech under the First Amendment of the United States Constitution. "Fighting words" are " 'those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . .
>
> "[T]he mere use of a vulgar, profane, indecorous, scurrilous, opprobrious epithet cannot alone be grounds for prosecution . . . . [P] The context in which the words are used must be considered, and there must be a showing that the words were uttered in a provocative manner, so that there was a clear and present danger violence would erupt." (*Jefferson v. Superior Court* (1975) 51 Cal. App. 3d 721, 724-725.) . . .

(*In re Alejandro G.* (1995) 37 Cal.App.4th 44, 47–50; see also *In re John V.* (1985) 167 Cal.App.3d 761, 767–768.)

Fighting Words to Police Officer—Addressee is Factor to Consider

> We reject the contention that "fighting words" uttered to a police officer cannot, as a matter of law, constitute a violation of section

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> 415, subdivision (3) because a police officer is required to exercise a higher degree of restraint than the average citizen in reacting to verbal abuse. However, we also reject the People's suggestion that courts should look solely to the content of the words without regard to the fact they were uttered to a police officer. In determining whether section 415 subdivision (3) was violated, courts must consider the totality of the circumstances, including the status of the addressee. That the addressee was a police officer trained and obliged to exercise a higher degree of restraint than the average citizen is merely one factor to be considered along with the other circumstances.

(*In re Alejandro G.* (1995) 37 Cal.App.4th 44, 47–50.)

> Under these circumstances, Callahan's epithet was not inherently likely to provoke an immediate violent reaction. The record shows the officer was neither offended by Callahan's foul language nor provoked to react violently.

(*People v. Callahan* (1985) 168 Cal.App.3d 631, 635.)

Intention to Cause Violence Not Required

> One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended.

(*Cantwell v. Connecticut* (1940) 310 U.S. 296, 309.)

Good Faith Defense

> A defendant cannot be convicted under section 415(3) where from all the evidence the trier of fact has a reasonable doubt as to whether the defendant reasonably and in good faith believed the language used was not inherently likely to provoke an immediate violent reaction.

(*In re John V.* (1985) 167 Cal.App.3d 761, 770.)

Clear and Present Danger Does Not Require Further Definition
See Notes to Instruction 1928, Inciting a Riot.

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1934A. Violation of Court Order

The defendant is charged [in Count __] with violating a court order.

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

1. **A court [lawfully] issued a written order that the defendant _____** *<insert description of order>***;**

2. **The defendant knew about the court order;**

3. **The defendant had the ability to follow the court order;**

AND

4. **The defendant willfully violated the court order.**

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

[The People must prove that the defendant knew about the court order and that (he/she) had the opportunity to read the order or to otherwise become familiar with what it said. But the People do not have to prove that the defendant actually read the court order.]

BENCH NOTES

Instructional Duty

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

In order for a defendant to be guilty of violating Penal Code section 166(a)(4), the court order must be "lawfully issued." (Pen. Code, § 166(a)(4); *People v. Gonzalez* (1996) 12 Cal.4th 804, 816–817.) The defendant may not be convicted for violating an order that is unconstitutional, and the defendant may bring a collateral attack on the validity of the order as a defense to this charge. (*People v. Gonzalez, supra,* 12 Cal.4th at pp. 816–818; *In re Berry* (1968) 68 Cal.2d 137, 147.) The defendant may raise this issue on demurrer but is not required to. (*People v.*

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Gonzalez, supra, 12 Cal.4th at pp. 821, 824; *In re Berry, supra,* 68 Cal.2d at p. 146.) The legal question of whether the order was lawfully issued is the type of question normally resolved by the court. (*People v. Gonzalez, supra,* 12 Cal.4th at pp. 816–820; *In re Berry, supra,* 68 Cal.2d at p. 147.) If, however, there is a factual issue regarding the lawfulness of the court order and the trial court concludes that the issue must be submitted to the jury, give the bracketed word "lawfully" in element 1. The court must also instruct on the facts that must be proved to establish that the order was lawfully issued.

Penal Code section 166(b)(1) provides for an increased sentence if the defendant was previously convicted of stalking and violated a court order "by willfully contacting a victim by phone or mail, or directly." If the prosecution alleges this factor, in element 1, the court should state that the court ordered the defendant "not to contact _____ <*insert name of victim in stalking case*> directly, by phone, or by mail," or something similar. The jury must also determine if the prior conviction has been proved unless the defendant stipulates to the truth of the prior. (See Instructions 200–203 on prior convictions.)

If the prosecution alleges that the defendant violated a protective order in a case involving domestic violence (Pen. Code, §§ 166(c)(1), 273.6), do not use this instruction. Give Instruction 1934B, Violation of Court Order: Protective Order or Stay Away.

Give the bracketed paragraph that beings with "The People must prove that the defendant knew" on request. (*People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941; *People v. Brindley* (1965) 236 Cal.App.2d Supp. 925, 927–928, both decisions affd. *sub nom. People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943.)

AUTHORITY

Elements ▸ Pen. Code, § 166(a)(4) & (b)(1).
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.
Order Must Be Lawfully Issued ▸ Pen. Code, § 166(a)(4); *People v. Gonzalez* (1996) 12 Cal.4th 804, 816–817; *In re Berry* (1968) 68 Cal.2d 137, 147.
Knowledge of Order Required ▸ *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979.
Proof of Service Not Required ▸ *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979.
Must Have Opportunity to Read but Need Not Actually Read Order ▸ *People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941; *People v. Brindley* (1965) 236 Cal.App.2d Supp. 925, 927–928, both

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decisions affd. *sub nom. People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943.

Ability to Comply With Order ▸ *People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4.

General-Intent Offense ▸ *People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 30.

RELATED ISSUES

Violation of Order to Pay Support—Court May Suspend Proceedings

If the defendant is charged with violating Penal Code section 166(a)(4) based on a failure to pay child, spousal, or family support, the court may suspend criminal proceedings if the defendant acknowledges his or her obligation to pay and posts a bond or other surety. (Pen. Code, § 166.5.)

Person Not Directly Bound by Order

A person who is not directly bound by a court order may nevertheless violate Penal Code section 166(a)(4) if he or she acts in concert with a person who is directly bound by the order. (*People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 978–979; *Berger v. Superior Court* (1917) 175 Cal. 719, 721.) "[A] nonparty to an injunction is subject to the contempt power of the court when, with knowledge of the injunction, the nonparty violates its terms *with or for* those who are restrained." (*People v. Conrad* (1997) 55 Cal.App.4th 896, 903 [italics in original].) The mere fact that the nonparty shares the same purpose as the restrained party is not sufficient. *(Ibid.)* "An enjoined party . . . has to be demonstrably implicated in the nonparty's activity." *(Ibid.)*

Violating Condition of Probation

A defendant may not be prosecuted under Penal Code section 166(a)(4) for violating a condition of probation. (*People v. Johnson* (1993) 20 Cal.App.4th 106, 109.)

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STAFF NOTES

Pen. Code, § 166, in relevant part:

(a) Except as provided in subdivisions (b), (c), and (d), every person guilty of any contempt of court, of any of the following kinds, is guilty of a misdemeanor: . . .

(4) Willful disobedience of the terms as written of any process or court order or out-of-state court order, lawfully issued by any court, including orders pending trial. . . .

(b)(1) Any person who is guilty of contempt of court under paragraph (4) of subdivision (a) by willfully contacting a victim by phone or mail, or directly, and who has been previously convicted of a violation of Section 646.9 shall be punished by imprisonment in a county jail for not more than one year, by a fine of five thousand dollars ($ 5,000), or by both that fine and imprisonment.

(2) For the purposes of sentencing under this subdivision, each contact shall constitute a separate violation of this subdivision.

(3) The present incarceration of a person who makes contact with a victim in violation of paragraph (1) is not a defense to a violation of this subdivision.

(c)(1) Notwithstanding paragraph (4) of subdivision (a), any willful and knowing violation of any protective order or stay away court order issued pursuant to Section 136.2, in a pending criminal proceeding involving domestic violence, as defined in Section 13700, or issued as a condition of probation after a conviction in a criminal proceeding involving domestic violence, as defined in Section 13700, or that is an order described in paragraph (3), shall constitute contempt of court, a misdemeanor, punishable by imprisonment in a county jail for not more than one year, by a fine of not more than one thousand dollars ($ 1,000), or by both that imprisonment and fine.

(2) If a violation of paragraph (1) results in a physical injury, the person shall be imprisoned in a county jail for at least 48 hours, whether a fine or imprisonment is imposed, or the sentence is suspended.

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(3) Paragraphs (1) and (2) apply to the following court orders:

(A) Any order issued pursuant to Section 6320 or 6389 of the Family Code.

(B) An order excluding one party from the family dwelling or from the dwelling of the other.

(C) An order enjoining a party from specified behavior that the court determined was necessary to effectuate the orders described in paragraph (1).

(4) A second or subsequent conviction for a violation of any order described in paragraph (1) occurring within seven years of a prior conviction for a violation of any of those orders and involving an act of violence or "a credible threat" of violence, as provided in subdivisions (c) and (d) of Section 139, is punishable by imprisonment in a county jail not to exceed one year, or in the state prison for 16 months or two or three years. . . .

(d)(1) A person who owns, possesses, purchases, or receives a firearm knowing he or she is prohibited from doing so by the provisions of a protective order as defined in Section 136.2 of this code, Section 6218 of the Family Code, or Sections 527.6 or 527.8 of the Code of Civil Procedure, shall be punished under the provisions of subdivision (g) of Section 12021.

Pen. Code, § 166.5:

(a) After arrest and before plea or trial or after conviction or plea of guilty and before sentence under paragraph (4) of subdivision (a) of Section 166, for willful disobedience of any order for child, spousal, or family support issued pursuant to Division 9 (commencing with Section 3500) of the Family Code or Section 17400 of the Family Code, the court may suspend proceedings or sentence therein if:

(1) The defendant appears before the court and affirms his or her obligation to pay to the person having custody of the child, or the spouse, that sum per month as shall have been previously fixed by the court in order to provide for the minor child or the spouse.

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(2) The defendant provides a bond or other undertaking with sufficient sureties to the people of the State of California in a sum as the court may fix to secure the defendant's performance of his or her support obligations and that bond or undertaking is valid and binding for two years, or any lesser time that the court shall fix.

(b) Upon the failure of the defendant to comply with the conditions imposed by the court in subdivision (a), the defendant may be ordered to appear before the court and show cause why further proceedings should not be had in the action or why sentence should not be imposed, whereupon the court may proceed with the action, or pass sentence, or for good cause shown may modify the order and take a new bond or undertaking and further suspend proceedings or sentence for a like period.

Elements

For there to be a violation of this section, there must be proof that: the court order was made; the defendant had knowledge of the order; the defendant possessed the ability to comply; and that the defendant disobeyed the order. [Citation.]

(*People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4.)

General Intent

[W]e conclude that the crime of contempt is one of general intent. It is established by a showing that the defendant intended to do the proscribed act without the additional requirement that defendant intended "to do some further act or achieve some additional consequence."

(*People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4.)

Proof of Service Not Required—Actual Knowledge of Order Required

It is also well settled that service of a restraining order or injunction need not be shown to establish a charge of contempt. One who, with knowledge of the order or injunction, does some act forbidden by it, and who comes within one of the classes of persons already mentioned who are subject to the order or injunction, is guilty of contempt. [Citations.]

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(*People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979.)

Must Have Opportunity to Read but Need Not Actually Read Order

> The trial judge gave the following instruction with respect to Count III of the complaint: "You are instructed that in order to find a defendant guilty of willful disobedience to a court order, in the absence of the defendant actually having read the order or having had it read to him, you must find that the defendant had a reasonable amount of time or opportunity in which to gain actual knowledge of the contents of the order.
>
> "You are further instructed that in order to find a defendant guilty of willful disobedience to a court order, you must find that the defendant purposely refused to obey a court order after having knowledge of the order's contents."
>
> From our discussion on this subject in *People* v. *Poe, post*, p. 928 (Case D), it is clear that the defendants suffered no prejudice from this view of the law. It is more favorable to the defendants than it need have been.

(*People v. Brindley* (1965) 236 Cal.App.2d Supp. 925, 927–928.)

> [T]he judge instructed the jury on this subject as follows: "You are instructed that if the defendants were personally served with a copy of the Temporary Restraining Order, and had knowledge that they had been served with a Temporary Restraining Order, and thereafter wilfully violated the terms of the order, they are guilty of contempt." . . .
>
> Appellants argue that the bulk of the documents served (between 50 and 60 pages) and the time lapse between service and the arrests (from five minutes to an hour) made it impossible as a matter of law for the defendants to inform themselves of the terms of the restraining order. At the least they have mistaken facts for permissible proof of facts. The thrust of the argument, that the People must show each defendant (subjectively) read and understood 60 pages of legal documents, would reach to unsettle the requirement of 10 days to appear on a complaint if *that* document happened to be too much for a particular defendant. It might be

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> added here that the temporary restraining order was clearly titled, and was only two and a half pages long, including the title page. All defendants but one refused service altogether, and permitted the tendered documents to drop to the floor or street. . . .
>
> We do hold in the case before us that such knowledge as a defendant must be shown to possess, in order to be found guilty of *willful violation* of a court order, may be shown by evidence that he was personally served with the order, and that he knew that fact. If the bulk of the order or the time between service and arrest are important, they are no more important than a defendant's outright denial of any knowledge of the order. . . .
>
> We have been unable to find any requirement in the law of contempt, whether arising in criminal court or in the civil court, that a party to the action who is duly served with a preliminary order must be shown independently to have, subjectively, some additional information before being held to answer for disobedience.

(*People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941)

Order Must be Lawfully Issued—Collateral Attack Permitted

> In this state it is clearly the law that the violation of an order in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt [citations] and that the "jurisdiction" in question extends beyond mere subject matter or personal jurisdiction to that concept described by us in *Abelleira* v. *District Court of Appeal* (1941) 17 Cal.2d 280, at page 291: "Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of *stare decisis* , are in excess of jurisdiction, . . ."

(*In re Berry* (1968) 68 Cal.2d 137, 147.)

> The rule is well settled in California that a void order cannot be the basis for a valid contempt judgment. . . .
>
> Some other jurisdictions require persons affected by injunctive orders to challenge the injunctive order directly, and in the meantime, to obey the order. Disobedience of the order is punished

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> as contempt whether the order is valid or not. This is known as the "collateral bar" rule. California law is otherwise. Section 166 has defined misdemeanor contempt as involving only the violation of "lawfully issued" orders ever since the statute was first enacted in 1872. Further, out of a concern to protect the constitutional rights of those affected by invalid injunctive orders, and to avoid forcing citizens to obey void injunctive orders on pain of punishment for contempt, this court has firmly established that a person subject to a court's injunction may elect whether to challenge the constitutional validity of the injunction when it is issued, or to reserve that claim until a violation of the injunction is charged as a contempt of court.

(*People v. Gonzalez* (1996) 12 Cal.4th 804, 817–818.)

Person Not Party to Case May Violate Order by Acting in Concert With Others

> One who is not a party to an action and who has never been formally served with a restraining order made therein may, nevertheless, be guilty of contempt of court in violating such order, under some circumstances. . . . It is true, as held in *Berger v. Superior Court* (1917), 175 Cal. 719, 721, that one not included in the terms of a restraining order or injunction, who does not act in concert with any of the parties enjoined or in support of their claims, but is moved by some independent purpose of his own, cannot be held in contempt of court because he does some act forbidden to those who are bound by the restraining order or injunction. But, according to the complaint here, the restraining order was directed not only to the defendants in the action, among whom was included at least one unincorporated association, apparently a labor union, but also to "their agents, employees, representatives, organizers, attorneys and servants, and the officers and members of defendant associations and persons acting in concert with them, or any of them." Such provisions in a restraining order are held valid in *Berger v. Superior Court, supra*, where the court says, ". . . the whole effect of this is simply to make the injunction effectual against all through whom the *enjoined party* may act, and to prevent the prohibited action by persons acting in concert with or in support of the claim of the *enjoined party*, who are in fact *his* aiders and abetters. As we have said, this practice is thoroughly settled and approved by the courts, and there is a fair foundation for a conclusion that persons so co-operating with the enjoined party are guilty of a disobedience of the injunction."

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(*People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 978–979.)

> It is clear from this language that, in addition to knowledge of the injunction, some actual relationship with an enjoined party is required to bring a nonparty actor within the injunction's scope. An enjoined party, in other words, has to be demonstrably implicated in the nonparty's activity. Mere "mutuality of purpose" is not enough. Here, it must be appellants' actual relationship to an enjoined party, and not their convictions about abortion, that make them contemners. In sum, we conclude that a nonparty to an injunction is subject to the contempt power of the court when, with knowledge of the injunction, the nonparty violates its terms *with or for* those who are restrained.
>
> Here, the prosecutor argued, and the trial court appeared to accept, that knowing of the injunction and doing what it forbade, without more, placed appellants "in concert" with the enjoined parties and, therefore, in contempt of the injunction. As we have explained, while knowledge is required, it is not alone enough to make a contemner of an independent actor.

(*People v. Conrad* (1997) 55 Cal.App.4th 896, 903 [footnote omitted].)

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1934B. Violation of Court Order: Protective Order or Stay Away

The defendant is charged [in Count __] with violating a court order.

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

1. **A court [lawfully] issued a written order that the defendant _____** *<insert description of content of order>***;**

2. **The court order was a (protective order/stay-away court order/_____** *<insert other description of order from Pen. Code, § 166(c)(3) or § 273.6(c)>***), issued [in a criminal case involving domestic violence and] under _____** *<insert code section under which order made>***;**

3. **The defendant knew of the court order;**

4. **The defendant had the ability to follow the court order;**

AND

5. **The defendant willfully violated the court order.**

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

[The People must prove that the defendant knew of the court order and that (he/she) had the opportunity to read the order or to otherwise become familiar with what it said. But the People do not have to prove that the defendant actually read the court order.]

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

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***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 Forces, or otherwise being declared emancipated under the law.]

BENCH NOTES

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

In order for a defendant to be guilty of violating Penal Code section 166(a)(4), the court order must be "lawfully issued." (Pen. Code, § 166(a)(4); *People v. Gonzalez* (1996) 12 Cal.4th 804, 816–817.) The defendant may not be convicted for violating an order that is unconstitutional, and the defendant may bring a collateral attack on the validity of the order as a defense to this charge. (*People v. Gonzalez, supra,* 12 Cal.4th at pp. 816–818; *In re Berry* (1968) 68 Cal.2d 137, 147.) The defendant may raise this issue on demurrer but is not required to. (*People v. Gonzalez, supra,* 12 Cal.4th at pp. 821, 824; *In re Berry, supra,* 68 Cal.2d at p. 146.) The legal question of whether the order was lawfully issued is the type of question normally resolved by the court. (*People v. Gonzalez, supra,* 12 Cal.4th at pp. 816–820; *In re Berry, supra,* 68 Cal.2d at p. 147.) If, however, there is a factual issue regarding the lawfulness of the court order and the trial court concludes that the issue must be submitted to the jury, give the bracketed word "lawfully" in element 1. The court must also instruct on the facts that must be proved to establish that the order was lawfully issued.

In element 2, give the bracketed phrase "in a criminal case involving domestic violence" if the defendant is charged with a violation of Penal Code section

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166(c)(1). In such cases, also give the bracketed definition of "domestic violence" and the associated terms.

In element 2, if the order was not a "protective order" or "stay away order" but another type of qualifying order listed in Penal Code section 166(c)(3) or 273.6(c), insert a description of the type of order from the statute.

In element 2, in all cases, insert the statutory authority under which the order was issued. (See Pen. Code, §§ 166(c)(1) & (3), 273.6(a) & (c).)

Give the bracketed paragraph that beings with "The People must prove that the defendant knew" on request. (*People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941; *People v. Brindley* (1965) 236 Cal.App.2d Supp. 925, 927–928, both decisions affd. *sub nom. People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943.)

If the prosecution alleges that physical injury resulted from the defendant's conduct, in addition to this instruction, give Instruction 1934C, Violation of Court Order: Protective Order or Stay Away—Physical Injury. (Pen. Code, §§ 166(c)(2), 273.6(b).)

If the prosecution charges the defendant with a felony based on a prior conviction and the current offense's involving an act of violence or credible threat of violence, in addition to this instruction, give Instruction 1934D, Violation of Court Order: Protective Order or Stay Away—Act of Violence. (Pen. Code, §§ 166(c)(4), 273.6(d).) The jury also must determine if the prior conviction has been proved unless the defendant stipulates to the truth of the prior. (See Instructions 200–203 on prior convictions.)

AUTHORITY

Elements ▸ Pen. Code, §§ 166(c)(1), 273.6.
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.
Order Must Be Lawfully Issued ▸ Pen. Code, § 166(a)(4); *People v. Gonzalez* (1996) 12 Cal.4th 804, 816–817; *In re Berry* (1968) 68 Cal.2d 137, 147.
Knowledge of Order Required ▸ *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979.
Proof of Service Not Required ▸ *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979.
Must Have Opportunity to Read but Need Not Actually Read Order ▸ *People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941; *People v. Brindley* (1965) 236 Cal.App.2d Supp. 925, 927–928, both

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decisions affd. *sub nom. People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943.

Ability to Comply With Order ▸ *People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4.

General-Intent Offense ▸ *People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4.

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.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 30.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Persons, § 63.

COMMENTARY

Penal Code section 166(c)(1) also includes protective orders and stay aways "issued as a condition of probation after a conviction in a criminal proceeding involving domestic violence . . . ." However, in *People v. Johnson* (1993) 20 Cal.App.4th 106, 109, the court held that a defendant cannot be prosecuted for contempt of court under Penal Code section 166 for violating a condition of probation. Thus, the committee has not included this option in the instruction.

LESSER INCLUDED OFFENSES

If the defendant is charged with a felony based on a prior conviction and the allegation that the current offense involved an act of violence or credible threat of violence (Pen. Code, §§ 166(c)(4), 273.6(d)), then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the additional allegations have or have not been proved. If the jury finds that the either allegation was not proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

See the Related Issues section of Instruction 1934A, Violation of Court Order.

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STAFF NOTES

Pen. Code, § 166, in relevant part:

(c)(1) Notwithstanding paragraph (4) of subdivision (a), any willful and knowing violation of any protective order or stay away court order issued pursuant to Section 136.2, in a pending criminal proceeding involving domestic violence, as defined in Section 13700, or issued as a condition of probation after a conviction in a criminal proceeding involving domestic violence, as defined in Section 13700, or that is an order described in paragraph (3), shall constitute contempt of court, a misdemeanor, punishable by imprisonment in a county jail for not more than one year, by a fine of not more than one thousand dollars ($ 1,000), or by both that imprisonment and fine.

(2) If a violation of paragraph (1) results in a physical injury, the person shall be imprisoned in a county jail for at least 48 hours, whether a fine or imprisonment is imposed, or the sentence is suspended.

(3) Paragraphs (1) and (2) apply to the following court orders:

(A) Any order issued pursuant to Section 6320 or 6389 of the Family Code.

(B) An order excluding one party from the family dwelling or from the dwelling of the other.

(C) An order enjoining a party from specified behavior that the court determined was necessary to effectuate the orders described in paragraph (1).

(4) A second or subsequent conviction for a violation of any order described in paragraph (1) occurring within seven years of a prior conviction for a violation of any of those orders and involving an act of violence or "a credible threat" of violence, as provided in subdivisions (c) and (d) of Section 139, is punishable by imprisonment in a county jail not to exceed one year, or in the state prison for 16 months or two or three years. . . .

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Pen. Code, § 273.6, in relevant part:

(a) Any intentional and knowing violation of a protective order, as defined in Section 6218 of the Family Code, or of an order issued pursuant to Section 527.6 or 527.8 of the Code of Civil Procedure, or Section 15657.03 of the Welfare and Institutions Code, is a misdemeanor punishable by a fine of not more than one thousand dollars ($ 1,000), or by imprisonment in a county jail for not more than one year, or by both that fine and imprisonment.

(b) In the event of a violation of subdivision (a) which results in physical injury, the person shall be punished by a fine of not more than two thousand dollars ($ 2,000), or by imprisonment in a county jail for not less than 30 days nor more than one year, or by both that fine and imprisonment. However, if the person is imprisoned in a county jail for at least 48 hours, the court may, in the interest of justice and for reasons stated on the record, reduce or eliminate the 30-day minimum imprisonment required by this subdivision. In determining whether to reduce or eliminate the minimum imprisonment pursuant to this subdivision, the court shall consider the seriousness of the facts before the court, whether there are additional allegations of a violation of the order during the pendency of the case before the court, the probability of future violations, the safety of the victim, and whether the defendant has successfully completed or is making progress with counseling.

(c) Subdivisions (a) and (b) shall apply to the following court orders:

(1) Any order issued pursuant to Section 6320 or 6389 of the Family Code.

(2) An order excluding one party from the family dwelling or from the dwelling of the other.

(3) An order enjoining a party from specified behavior which the court determined was necessary to effectuate the order described in subdivision (a).

(4) Any order issued by another state that is recognized under Part 5 (commencing with Section 6400) of Division 10 of the Family Code.

(d) A subsequent conviction for a violation of an order described in

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> subdivision (a), occurring within seven years of a prior conviction for a violation of an order described in subdivision (a) and involving an act of violence or "a credible threat" of violence, as defined in subdivision (c) of Section 139, is punishable by imprisonment in a county jail not to exceed one year, or in the state prison.

Only Applies to Orders Specified in Statute

> Appellant next maintains that his misdemeanor conviction for violation of section 273.6 (violation of protective order) must be vacated because the stay-away order does not constitute a protective order and is thus unsupported by the evidence. Section 273.6, subdivision (a), by its terms, applies only to the protective orders set forth therein. . . . [quotes statute]
>
> The People concede that the stay-away order does not constitute a protective order such that appellant could be prosecuted under section 273.6. "Protective order" is a term of art defined within section 273.6. A cursory review of the statutes listed therein makes clear a probationary stay-away order is not included. We will direct the trial court to vacate appellant's misdemeanor conviction under section 273.6.

(*People v. Corpuz* (2004) 122 Cal.App.4th 804, 815.)

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1934C. Violation of Court Order: Protective Order or Stay Away—Physical Injury

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If you find the defendant guilty of violating a court order, you must then decide whether the People have proved that the defendant's conduct resulted in physical injury to another person.

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 prosecution alleges that the defendant's violation of the court order resulted in physical injury, the court has a **sua sponte** duty to instruct on this sentencing factor.

This instruction **must** be given with Instruction 1934B, Violation of Court Order: Protective Order or Stay Away.

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 allegation.

AUTHORITY

Elements ▸ Pen. Code, §§ 166(c)(2), 273.6(b).

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 30.

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STAFF NOTES

Pen. Code, § 166, in relevant part:

> (2) If a violation of paragraph (1) results in a physical injury, the person shall be imprisoned in a county jail for at least 48 hours, whether a fine or imprisonment is imposed, or the sentence is suspended.

Pen. Code, § 273.6, in relevant part:

> (b) In the event of a violation of subdivision (a) which results in physical injury, the person shall be punished by a fine of not more than two thousand dollars ($ 2,000), or by imprisonment in a county jail for not less than 30 days nor more than one year, or by both that fine and imprisonment. However, if the person is imprisoned in a county jail for at least 48 hours, the court may, in the interest of justice and for reasons stated on the record, reduce or eliminate the 30-day minimum imprisonment required by this subdivision. In determining whether to reduce or eliminate the minimum imprisonment pursuant to this subdivision, the court shall consider the seriousness of the facts before the court, whether there are additional allegations of a violation of the order during the pendency of the case before the court, the probability of future violations, the safety of the victim, and whether the defendant has successfully completed or is making progress with counseling.

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1934D. Violation of Court Order: Protective Order or Stay Away—Act of Violence

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If you find the defendant guilty of violating a court order, you must then decide whether the People have proved that the defendant's conduct involved an act of violence [or a credible threat of violence].

[A person makes a *credible threat of violence* when he or she communicates to someone else a believable threat of unlawful injury to a person or 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 this allegation has not been proved.

BENCH NOTES

Instructional Duty
If the defendant is charged with a felony for violating a court order based on a prior conviction and an act of violence or credible threat of violence, the court has a **sua sponte** duty to instruct on this sentencing factor.

This instruction **must** be given with Instruction 1934B, Violation of Court Order: Protective Order or Stay Away.

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 allegation.

The court must also give Instruction 200, Prior Conviction: Nonbifurcated Trial, unless the defendant has stipulated to the conviction. If the court has granted a bifurcated trial on the prior conviction, use Instruction 201, Prior Conviction: Bifurcated Trial.

AUTHORITY

Elements ▸ Pen. Code, §§ 166(c)(4), 273.6(d).

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 30.

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STAFF NOTES

Pen. Code, § 166, in relevant part:

> (4) A second or subsequent conviction for a violation of any order described in paragraph (1) occurring within seven years of a prior conviction for a violation of any of those orders and involving an act of violence or "a credible threat" of violence, as provided in subdivisions (c) and (d) of Section 139, is punishable by imprisonment in a county jail not to exceed one year, or in the state prison for 16 months or two or three years.

Pen. Code, § 273.6, in relevant part:

> (d) A subsequent conviction for a violation of an order described in subdivision (a), occurring within seven years of a prior conviction for a violation of an order described in subdivision (a) and involving an act of violence or "a credible threat" of violence, as defined in subdivision (c) of Section 139, is punishable by imprisonment in a county jail not to exceed one year, or in the state prison.

Credible Threat

Penal Code section 139 defines the crime of threats of force or violence against a witness. The definition of “credible threat” here is taken from the Task Force instruction on that crime, Instruction 1907, Using Force or Threatening a Witness Before Testimony or Information Given.

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1936. Lawful Performance: Resisting Unlawful Arrest With Force

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The defendant is not guilty of the crime of (battery against a peace officer[,]/ [or] assault against a peace officer[,]/ [or] assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon) against a peace officer[,]/ [or] _____ *<insert other crime charged, e.g., resisting arrest>***) if the officer was not lawfully performing (his/her) duties because (he/she) was unlawfully arresting someone.**

However, even if the arrest was unlawful, as long as the officer used only reasonable force to accomplish the arrest, the defendant may be guilty of the lesser crime[s] of (battery[,]/ [or] assault[,]/ [or] assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon)).

On the other hand, if the officer used unreasonable or excessive force, and the defendant used only reasonable force in (self-defense/ [or] defense of another), then the defendant is not guilty of the lesser crime[s] of (battery[,]/ [or] assault[,]/ [or] assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon)).

The People have the burden of proving beyond a reasonable doubt that the officer was lawfully performing (his/her) duties. If the People have not met this burden, you must find the defendant not guilty [of _____ *<insert crime[s]>***].**

BENCH NOTES

Instructional Duty
The court may give this instruction on request.

AUTHORITY

No Right to Forcibly Resist Arrest ▸ Pen. Code, § 834a.
Applies to Arrest, Not Detention ▸ *People v. Coffey* (1967) 67 Cal.2d 204, 221; *People v. Jones* (1970) 8 Cal.App.3d 710, 717.

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Forcible Resistance to Unlawful Arrest Is Battery or Assault on Nonofficer ‣ *People v. Curtis* (1969) 70 Cal.2d 347, 355–356; *People v. White* (1980) 101 Cal.App.3d 161, 166.

Use of Reasonable Force in Response to Excessive Force Is Complete Defense ‣ *People v. White* (1980) 101 Cal.App.3d 161, 168.

May Not Be Convicted of Resisting Unlawful Arrest ‣ *People v. White* (1980) 101 Cal.App.3d 161, 166; *People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 10.

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STAFF NOTES

Pen. Code, § 834a:

> If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest.

Forceful Resistance to Unlawful Arrests Prohibited
"[S]ection 834a prohibits forceful resistance to unlawful as well as lawful arrests." (*People v. Curtis* (1969) 70 Cal.2d 347, 357.)

Defendant Forcibly Resisting Unlawful Arrest May Only be Convicted of Battery or Assault on Non-Officer
"[A] person may not use force to resist any arrest, lawful or unlawful, except that he may use reasonable force to defend life and limb against excessive force . . . ." (*People v. Curtis* (1969) 70 Cal.2d 347, 357.) "[I]f the arrest is ultimately determined factually to be unlawful [but the officer did not use excessive force], the defendant can be validly convicted only of simple assault or battery." (*Id.* at pp. 355–356.) The defendant cannot be convicted of battery or assault on an officer because the officer is not lawfully performing his or her duties. *(Ibid.)*

> Section 245, subdivision (b) makes it unlawful to assault an officer by means of force likely to produce great bodily injury. Section 148 makes it unlawful to resist an officer. An essential element of both offenses is the officer at the time of the arrest must be engaged in the performance of his duties. If a defendant is charged with violating section 245, subdivision (b), and the arrest is factually determined to be unlawful, a defendant can be convicted only of a lesser included offense, i.e., section 245, subdivision (a) (assault by means of force likely to produce great bodily injury on a person other than a police officer or a police officer not in the performance of his duties). Likewise, if a defendant is charged with violating section 148 and the arrest is found to be unlawful, a defendant cannot be convicted of that section.

(*People v. White* (1980) 101 Cal.App.3d 161, 166.)

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Applies Only to Arrest, Not Detention

"[S]ection 834a concerns itself with *arrest*, not with detention for questioning." (*People v. Coffey* (1967) 67 Cal.2d 204, 221 [italics in original]; see also *People v. Jones* (1970) 8 Cal.App.3d 710, 717.)

Defendant Who Uses Reasonable Force in Self-Defense in Response to Excessive Force is Not Guilty of a Crime

> Once the use of excessive force by the officers became an issue, it was necessary to explain further that where an officer uses unreasonable or excessive force in making an arrest, the person arrested has the right to use reasonable force to protect himself. As discussed above, where the officer uses excessive force, the defendant cannot be guilty of sections 245, subdivision (b), 243 or 148 and where the jury finds reasonable force was properly used in self-defense, the defendant may not be convicted of any crime.

(*People v. White* (1980) 101 Cal.App.3d 161, 168.)

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1937. Pat-Down Search

An officer who has lawfully detained someone may conduct a carefully limited search of the detained person's outer clothing, in order to discover whether that person has a weapon. The officer may conduct this limited search only if he or she has reason to believe that the detained person is armed and dangerous.

[If, during the search, the officer finds an object that feels reasonably like a (knife[,]/ [or] gun[,]/ [or] club[,]/ [or] _____ <*insert specific type of weapon*>**), the officer may remove the object.]**

BENCH NOTES

Instructional Duty
The court may give this instruction on request.

AUTHORITY

Stop and Frisk Permissible ▸ *Terry v. Ohio* (1968) 392 U.S. 1, 30–31; *People v. Scott* (1976) 16 Cal.3d 242, 248.

Officer May Remove Object That Feels Like Typical Weapon ▸ *People v. Collins* (1970) 1 Cal.3d 658, 663; *People v. Watson* (1970) 12 Cal.App.3d 130, 135.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Illegally Obtained Evidence, § 249 et seq.

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STAFF NOTES

Terry Stop

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

(*Terry v. Ohio* (1968) 392 U.S. 1, 30–31.)

> The *Simon* concurrence emphasized that different standards are applicable in arrest and nonarrest situations: "In *Terry* v. *Ohio* [1968] 392 U.S. 1, the court held that before a pat-down search in *nonarrest* circumstances can be made, the officer must have reason to believe he may be dealing with an armed and dangerous individual.

(*People v. Scott* (1976) 16 Cal.3d 242, 248.)

Officer May Remove Object that Feels Like Typical Weapon

> [W]e hold that an officer who exceeds a pat-down without first discovering an object which feels reasonably like a knife, gun, or club must be able to point to specific and articulable facts which reasonably support a suspicion that the particular suspect is armed with an atypical weapon which would feel like the object felt during the pat-down.

(*People v. Collins* (1970) 1 Cal.3d 658, 663.)

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> Where it is found that an object feels reasonably like a knife, gun or club to the searcher, he may properly withdraw the item from the clothing of the suspect.

(*People v. Watson* (1970) 12 Cal.App.3d 130, 135.)

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1997. Damaging Phone or Electrical Line

The defendant is charged [in Count __] with (removing [,]/ [or] damaging[,]/ [or] obstructing/severing/making an unauthorized connection to) a (telegraph/telephone/cable television/electrical) line.

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

<Alternative 1A—removed, damaged, or obstructed>

[1. The defendant unlawfully (took down[,]/ [or] removed[,]/ [or] damaged[,]/ [or] obstructed) [part of] a (telegraph/telephone/cable television/electrical) line [or mechanical equipment connected to the line];]

<Alternative 1B—severed>

1. The defendant unlawfully severed a wire of a (telegraph/telephone/cable television/electrical) line;]

<Alternative 1C—unauthorized connection>

[1. The defendant unlawfully made an unauthorized connection with [part of] a line used to conduct electricity [or mechanical equipment connected to the line];]

AND

2. The defendant did so maliciously.

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.

[As used here, *mechanical equipment* includes a telephone.]

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 statute uses the term “injure.” (Pen. Code, § 591.) The committee has replaced the word “injure” with the word “damage” because the word “injure” generally refers to harm to a person rather than to property.

The statute uses the phrase “appurtenances or apparatus.” (Pen. Code, § 591.) The committee has chosen to use the more understandable “mechanical equipment” in place of this phrase.

Give the bracketed sentence that states “*mechanical equipment* includes a telephone” on request. (*People v. Tafoya* (2001) 92 Cal.App.4th 220, 227; *People v. Kreiling* (1968) 259 Cal.App.2d 699, 704.)

AUTHORITY

Elements ▸ Pen. Code, § 591.
Maliciously Defined ▸ Pen. Code, § 7, subd. 4; *People v. Lopez* (1986) 176 Cal.App.3d 545, 550.
Applies to Damage to Telephone ▸ *People v. Tafoya* (2001) 92 Cal.App.4th 220, 227; *People v. Kreiling* (1968) 259 Cal.App.2d 699, 704.
“Obstruct” Not Unconstitutionally Vague ▸ *Kreiling v. Field* (9th Cir. 1970) 431 F.2d 502, 504.
Applies to Theft of Service ▸ *People v. Trieber* (1946) 28 Cal.2d 657, 661.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 258.

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STAFF NOTES

Pen. Code, § 591:

> A person who unlawfully and maliciously takes down, removes, injures, or obstructs any line of telegraph, telephone, or cable television, or any other line used to conduct electricity, or any part thereof, or appurtenances or apparatus connected therewith, or severs any wire thereof, or makes any unauthorized connection with any line, other than a telegraph, telephone, or cable television line, used to conduct electricity, or any part thereof, or appurtenances or apparatus connected therewith, is punishable by imprisonment in the state prison, or by a fine not exceeding five hundred dollars ($ 500), or imprisonment in the county jail not exceeding one year.

“Appurtenances”—Dictionary Definition

> 3. *esp.* in *pl.* The mechanical accessories employed in any function or complex scheme; apparatus, gear.

(OED, 2nd ed. 1989, accessed on web.)

“Apparatus”—Dictionary Definition

> 3. The things collectively in which this preparation consists, and by which its processes are maintained; equipments, material, mechanism, machinery; material appendages or arrangements.

(OED, 2nd ed. 1989, accessed on web.)

Applies to Damage to Telephone

> [T]he jury was seeking clarification of the concept of "obstructing" an "appurtenance" or "apparatus." The trial court indicated that, based on *People v. Kreiling* (1968) 259 Cal. App. 2d 699, it would instruct the jury that "one who tampers with a telephone instrument in such a way as to preclude its use for receiving or placing calls . . . 'obstructs any line of telephone or apparatus connected therewith.' " . . .
>
> “The statute as it is presently written is not confined to telephone or telegraph lines. It encompasses conduct by which the transmission of

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> telephone and telegraph messages is interrupted by any of the enunciated methods. One who tampers with a telephone instrument in such way as to preclude its use for receiving or placing calls 'obstructs . . . any line of . . . telephone . . . or apparatus connected therewith' as effectively as if he physically severed the telephone line.” [*People v. Kreiling, supra,* 259 Cal. App. 2d at p. 704] . . .
>
> We conclude that disabling a private telephone can violate section 591. We note, however, that section 591 applies only to one who acts "unlawfully and maliciously." Thus, it does not make it a crime to leave a phone off the hook either negligently or accidentally. (*Kreiling v. Field* (9th Cir. 1970) 431 F.2d 502, 504.) For the same reason, we believe it would not make it a crime to remove the battery from one's own phone to avoid taking calls.
>
> Defendant also makes a somewhat more subtle argument. He argues that section 591 requires some kind of damage which completely prevents access to the telephone *line*. . . . Here, defendant argues, the same telephone line was still accessible from another phone. . . .
>
> Section 591 is in the disjunctive; it makes it a crime to injure or obstruct *either* a telephone line "*or* appurtenances or apparatus connected therewith . . . . " (Italics added.) This necessarily means it is a crime to injure or obstruct "appurtenances or apparatus" connected to a telephone line, regardless of whether the defendant injures or obstructs the telephone line itself. . . .
>
> Defendant also contends that the trial court erred by responding to the jury's questions by instructing it, in the language of *Kreiling*, that "one who tampers with a telephone instrument in such a way as to preclude its use for receiving or placing calls . . . 'obstructs any line of telephone or apparatus connected therewith.' " *Kreiling*, however, was controlling, and the trial court's instruction was correct, responsive, and directly applicable to the evidence.

(*People v. Tafoya* (2001) 92 Cal.App.4th 220, 223–228.)

Applies to Theft of Service

> This section protects telegraph and telephone facilities from physical injury by prescribing punishment for one who "takes down, removes, injures or obstructs" such facilities. It also safeguards

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> communication and power systems from theft of services or of electric current by prescribing punishment for one who "makes any unauthorized connection" with telephone, telegraph or "other electric" lines or facilities. A subscriber is therefore punishable under section 591 if he makes a connection to his telephone line without the approval of the operator of the line. [Citation.] A subscriber is also punishable thereunder if, instead of making the connection himself, he permits another to make it without the authority of the operator of the system, for by so enabling another to violate section 591 he becomes punishable himself under section 31 of the Penal Code as a principal to the crime. [Citations.]

(*People v. Trieber* (1946) 28 Cal.2d 657, 661.)

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2000. Possession of Alcoholic Beverage by Person Under 21

The defendant is charged [in Count __] with [unlawfully] possessing an alcoholic beverage when under 21 years old.

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

1. **The defendant [unlawfully] possessed an alcoholic beverage (in/on) a (street[,]/ [or] highway[,]/ [or] public place[,]/ [or] any place open to the public);**

AND

2. **At the time, the defendant was under 21 years old.**

An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains one-half of 1 percent or more of alcohol by volume. [An *alcoholic beverage* includes _____ *<insert type[s] of beverage[s] from Bus. & Prof. Code, § 23004, e.g., wine, beer>*.**]**

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

[Two or more persons 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).]

<Defense: Following Reasonable Adult Instructions>
[The defendant did not unlawfully possess an alcoholic beverage if (he/she) was following, in a timely manner, the reasonable instructions of (his/her) (parent/legal guardian/responsible adult relative/employer/_____ *<insert name or description of person designated by parent or legal guardian>***) to deliver [or dispose of] the alcoholic beverage. The People have the burden of proving beyond a reasonable doubt that the defendant was not following such instructions. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

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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 about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

Defenses—Instructional Duty
Business and Professions Code section 25662 allows for the lawful possession of alcohol by a minor if authorized by a responsible adult for a limited purpose. If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [discussing affirmative defenses generally and the burden of proof].) Give the bracketed word "unlawfully" in the first sentence and element 1, and the bracketed paragraph on the defense.

AUTHORITY

Elements ▸ Bus. & Prof. Code, § 25662(a).
Alcoholic Beverage Defined ▸ Bus. & Prof. Code, § 23004.
Authorized Possession Defense ▸ See *People v. Fuentes* (1990) 224 Cal.App.3d 1041, 1045; *People v. Mower* (2002) 28 Cal.4th 457, 478–481.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 291.

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STAFF NOTES

Bus. & Prof. Code § 25662(a) in pertinent part:

> Any person under the age of 21 years who has any alcoholic beverage in his or her possession on any street or highway or in any public place or in any place open to the public is guilty of a misdemeanor and shall be punished by a fine of two hundred fifty dollars ($250) or the person shall be required to perform not less than 24 hours or more than 32 hours of community service during hours when the person is not employed or is not attending school . . . This section does not apply to possession by a person under the age of 21 years making a delivery of an alcoholic beverage in pursuance of the order of his or her parent, responsible adult relative, or any other adult designated by the parent or legal guardian, or in pursuance of his or her employment. That person shall have a complete defense if he or she was following, in a timely manner, the reasonable instructions of his or her parent, legal guardian, responsible adult relative, or adult designee relating to disposition of the alcoholic beverage.

Bus. & Prof. Code, § 23004, "Alcoholic beverage":

> "Alcoholic beverage" includes alcohol, spirits, liquor, wine, beer, and every liquid or solid containing alcohol, spirits, wine, or beer, and which contains one-half of 1 percent or more of alcohol by volume and which is fit for beverage purposes either alone or when diluted, mixed, or combined with other substances.

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2001. Purchase of Alcoholic Beverage by Person Under 21

The defendant is charged [in Count __] with (purchasing/drinking/consuming) an alcoholic beverage when under 21 years old.

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

<Alternative 1A—purchased>
[1. The defendant purchased an alcoholic beverage;]

<Alternative 1B—drank or consumed>
[1. The defendant (drank/consumed) an alcoholic beverage at a business that was lawfully licensed to sell alcoholic beverages;]

AND

2. At the time, the defendant was under 21 years old.

An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains one-half of 1 percent or more of alcohol by volume. [An *alcoholic beverage* includes _____ *<insert type[s] of beverage[s] from Bus. & Prof. Code, § 23004, e.g., wine, beer>***.]**

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

BENCH NOTES

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

Give the bracketed sentence about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

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AUTHORITY

Elements ▸ Bus. & Prof. Code, § 25658(b).
Alcoholic Beverage Defined ▸ Bus. & Prof. Code, § 23004.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 291.

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STAFF NOTES

Bus. & Prof. Code § 25658(b):

> Any person under the age of 21 years who purchases any alcoholic beverage, or any person under the age of 21 years who consumes any alcoholic beverage in any on-sale premises, is guilty of a misdemeanor.

Bus. & Prof. Code § 23004:

> "Alcoholic beverage" includes alcohol, spirits, liquor, wine, beer, and every liquid or solid containing alcohol, spirits, wine, or beer, and which contains one-half of 1 percent or more of alcohol by volume and which is fit for beverage purposes either alone or when diluted, mixed, or combined with other substances.

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2002. Selling or Furnishing Alcoholic Beverage to Person Under 21

The defendant is charged [in Count __] with [unlawfully] (selling[,]/ [or] furnishing[,]/ [or] giving away)[, or causing to be (sold[,]/ [or] furnished[,]/ [or] given away),] an alcoholic beverage to a person under 21 years old.

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

1. **The defendant [unlawfully] (sold[,]/ [or] furnished[,]/ [or] gave away)[, or caused to be (sold[,]/ [or] furnished[,]/ [or] given away),] an alcoholic beverage to _____** *<insert name of person under 21>***;**

AND

2. **When the defendant did so, _____** *<insert name of person under 21>* **was under 21 years old.**

An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains one-half of 1 percent or more of alcohol by volume. [An *alcoholic beverage* includes _____ *<insert type[s] of beverage[s] from Bus. & Prof. Code, § 23004, e.g., wine, beer>***.]**

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

<Defense: Good Faith Belief at Least21>
[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that _____ *<insert name of person under 21>* **was at least 21 years old. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that _____** *<insert name of person under 21>* **was at least 21 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

<Defense: Actual Reliance on Identification>
[The defendant did not unlawfully (sell[,]/ [or] furnish[,]/ [or] give away)[, or cause to be (sold[,]/ [or] furnished[,]/ [or] given away,) an alcoholic beverage to a person under 21 years old if:

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1. **The defendant [or (his/her) (employee/ [or] agent)] demanded to see a government-issued document as evidence of _____'s** *<insert name of person under 21>* **age and identity;**

2. **_____** *<insert name of person under 21>* **showed the defendant [or (his/her) employee/ [or] agent)] a government-issued document, or what appeared to be a government-issued document, as evidence of (his/her) age and identity;**

AND

3. **The defendant [or (his/her) employee/ [or] agent)] actually relied on the document as evidence of _____'s** *<insert name of person under 21>* **age and identity.**

As used here, a *government-issued document* is a document that has been issued by a government agency and contains the person's name, date of birth, description, and picture. This definition includes a driver's license [or an identification card issued to a person in the armed forces].

The People have the burden of proving beyond a reasonable doubt that the defendant did not actually rely on a government-issued document, or what appeared to be a government-issued document, as evidence of _____'s *<insert name of person under 21>* **age and identity. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

BENCH NOTES

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

Give the bracketed sentence about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

Defenses—Instructional Duty
In *In re Jennings* (2004) 34 Cal.4th 254, 280, the Supreme Court held that, although the prosecution is not required to prove that the defendant knew the age of the person he or she provided with alcohol, the defendant may assert as a defense a good faith belief that the person was at least 21. The burden is on the defendant to prove this defense. *(Ibid.)* The court failed to state what burden of

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proof applies. Following *People v. Mower* (2002) 28 Cal.4th 457, 478–481, the committee has drafted the instruction on the premise that the defendant's burden is to merely raise a reasonable doubt about the defense, and the prosecution must then prove beyond a reasonable doubt that the defense does not apply. If there is sufficient evidence, the court has a **sua sponte** duty to give the bracketed paragraph on the defense. *(Ibid.)*

Business and Professions Code section 25660 provides a defense for those who rely in good faith on bona fide evidence of age and identity. If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Mower, supra,* 28 Cal.4th at pp. 478–481.) Give the bracketed word "unlawfully" in the first sentence and element 1, and the bracketed paragraph on the defense.

AUTHORITY

Elements ▸ Bus. & Prof. Code, § 25658(a).
Alcoholic Beverage Defined ▸ Bus. & Prof. Code, § 23004.
Knowledge of Age Not an Element ▸ *In re Jennings* (2004) 34 Cal.4th 254, 280.
Good Faith Belief Person at Least 21 Defense ▸ *In re Jennings* (2004) 34 Cal.4th 254, 280.
Bona Fide Evidence of Age Defense ▸ Bus. & Prof. Code, § 25660; *Kirby v. Alcoholic Beverage Control Appeals Board* (1968) 267 Cal.App.2d 895, 897, 898–899.
Affirmative Defenses ▸ See *People v. Mower* (2002) 28 Cal.4th 457, 478–481.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 291.

RELATED ISSUES

Use of Underage Decoys
The police may use underage decoys to investigate sales of alcohol to people under 21. (*Provigo Corp. v. Alcoholic Beverage Control Appeals Board* (1994) 7 Cal.4th 561, 564.) Moreover, a criminal defendant may not raise as a defense the failure of the police to follow the administrative regulations regarding the use of decoys. (*People v. Figueroa* (1999) 68 Cal.App.4th 1409, 1414–1415 [court properly denied instruction on failure to follow regulation].)

"Furnishing" Requires Affirmative Act
"In order to violate section 25658, there must be some affirmative act of furnishing alcohol. . . . It is clear that assisting with food and decorations cannot conceivably be construed as acts of 'furnishing' liquor, nor . . . can providing the

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room for the party, even with the knowledge that minors would be drinking. . . . A permissible inference from [the] undisputed testimony was that [the defendant] tacitly authorized his son to provide his beer to the plaintiffs. . . . Such an authorization constitutes the requisite affirmative act as a matter of law. In order to furnish an alcoholic beverage the offender need not pour the drink; it is sufficient if, having control of the alcohol, the defendant takes some affirmative step to supply it to the drinker." (*Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1157–1158.)

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STAFF NOTES

Bus. & Prof. Code § 25658(a):

> Except as otherwise provided in subdivision (c), every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

Bus. & Prof. Code § 25660:

> Bona fide evidence of majority and identity of the person is a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license or an identification card issued to a member of the Armed Forces, which contains the name, date of birth, description, and picture of the person. Proof that the defendant-licensee, or his employee or agent, demanded, was shown and acted in reliance upon such bona fide evidence in any transaction, employment, use or permission forbidden by Sections 25658, 25663 or 25665 shall be a defense to any criminal prosecution therefore or to any proceedings for the suspension or revocation of any license based thereon.

Bus. & Prof. Code § 23004:

> "Alcoholic beverage" includes alcohol, spirits, liquor, wine, beer, and every liquid or solid containing alcohol, spirits, wine, or beer, and which contains one-half of 1 percent or more of alcohol by volume and which is fit for beverage purposes either alone or when diluted, mixed, or combined with other substances.

Defense of Good Faith Reliance on Document Issued by Governmental Entity

> Thus a licensee charged with violating sections 25658, 25663 or 25665 has to meet a dual burden: not only must he show that he acted in good faith, free from an intent to violate the law . . . but he must demonstrate that he also exercised such good faith in reliance upon a document delineated by section 25660. Where all he shows is good faith in relying upon evidence other than that within the ambit of section 25660, he has failed to meet his burden of proof.

(*Kirby v. Alcoholic Beverage Control Appeals Board* (1968) 267 Cal.App.2d 895,

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899.) *Kirby* held that the licensee failed to establish the defense where he relied on a notarized identification card and other information but not a document issued by a governmental entity. (*Id.* at p. 898.)

Reliance on False Document May Be in Good Faith

> It is well established that reliance in good faith upon a document issued by one of the governmental entities enumerated in section 25660 constitutes a defense to a license suspension proceeding even though the document is altered, forged or otherwise spurious.

(*Kirby v. Alcoholic Beverage Control Appeals Board* (1968) 267 Cal.App.2d 895, 897.)

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2003. Permitting Person Under 21 to Consume Alcoholic Beverage

The defendant is charged [in Count __] with [unlawfully] permitting a person under 21 years old to consume an alcoholic beverage.

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

1. **The defendant was licensed to sell alcoholic beverages on the premises of a business;**

2. **The defendant [unlawfully] permitted _____** *<insert name of person under 21>* **to consume an alcoholic beverage on the premises of that business;**

AND

3. **The defendant knew that _____** *<insert name of person under 21>* **was consuming an alcoholic beverage.**

An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains one-half of 1 percent or more of alcohol by volume. [An *alcoholic beverage* includes _____ *<insert type[s] of beverage[s] from Bus. & Prof. Code, § 23004, e.g., wine, beer>*.**]**

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

The People are not required to prove that the defendant knew that _____ *<insert name of person under 21>* **was under 21.**

<Defense: Actual Reliance on Identification>
[The defendant did not unlawfully permit a person under 21 years old to consume an alcoholic beverage if:

1. **The defendant [or (his/her) (employee/ [or] agent)] demanded to see a government-issued document as evidence of _____'s** *<insert name of person under 21>* **age and identity;**

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2. _____ *<insert name of person under 21>* **showed the defendant [or (his/her) employee/ [or] agent)] a government-issued document, or what appeared to be a government-issued document, as evidence of (his/her) age and identity;**

AND

3. The defendant [or (his/her) employee/ [or] agent)] actually relied on the document as evidence of _____'s *<insert name of person under 21>* **age and identity.**

As used here, a *government-issued document* is a document that has been issued by a government agency and contains the person's name, date of birth, description, and picture. This definition includes a driver's license [or an identification card issued to a person in the armed forces].

The People have the burden of proving beyond a reasonable doubt that the defendant did not actually rely on a government-issued document, or what appeared to be a government issued document, as evidence of _____'s *<insert name of person under 21>* **age and identity. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

BENCH NOTES

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

Give the bracketed sentence about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

Defenses—Instructional Duty
Business and Professions Code section 25660 provides a defense for those who rely in good faith on bona fide evidence of age and identity. If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [discussing affirmative defenses generally and the burden of proof].) Give the bracketed word "unlawfully" in the first sentence and element 1, and the bracketed paragraph on the defense.

In *In re Jennings* (2004) 34 Cal.4th 254, 280, the Supreme Court held that, for a prosecution under Business and Professions Code section 25658(a), the defendant

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may assert as a defense a good faith belief that the person was at least 21. If the trial court concludes that this defense also applies to a prosecution under Business and Professions Code section 25658(d) and there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. The court may insert the appropriate language from Instruction 2002, Selling or Furnishing Alcoholic Beverage to Person Under 21. (See also Bench Notes for that instruction.)

AUTHORITY

Elements ▸ Bus. & Prof. Code, § 25658(d).
Alcoholic Beverage Defined ▸ Bus. & Prof. Code, § 23004.
Bona Fide Evidence of Age Defense ▸ Bus. & Prof. Code, § 25660; *Kirby v. Alcoholic Beverage Control Appeals Board* (1968) 267 Cal.App.2d 895, 897, 898–899.
Affirmative Defenses ▸ See *People v. Mower* (2002) 28 Cal.4th 457, 478–481.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 291.

RELATED ISSUES

See the Related Issues section of Instruction 2002, Selling or Furnishing Alcoholic Beverage to Person Under 21.

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STAFF NOTES

Bus. & Prof. Code § 25658 (d):

> Any on-sale licensee who knowingly permits a person under the age of 21 years to consume any alcoholic beverage in the on-sale premises, whether or not the licensee has knowledge that the person is under the age of 21 years, is guilty of a misdemeanor.

See Notes to Instruction 2002.

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2004. Purchasing Alcoholic Beverage for Person Under 21: Resulting in Death or Great Bodily Injury

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The defendant is charged [in Count __] with [unlawfully] (purchasing an alcoholic beverage for[,]/ [or] (furnishing[,]/ [or] giving[,]/ [or] giving away) an alcoholic beverage to[,]) a person under 21 years old causing (death/ [or] great bodily injury) results.

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

1. **The defendant [unlawfully] (purchased an alcoholic beverage for[,]/ [or] (furnished[,]/ [or] gave[,]/ [or] gave away) an alcoholic beverage to[,]) _____** *<insert name of person under 21>***;**

2. **When the defendant did so, _____** *<insert name of person under 21>* **was under 21 years old;**

3. **_____** *<insert name of person under 21>* **consumed the alcoholic beverage;**

AND

4. **_____'s** *<insert name of person under 21>* **consumption of the alcoholic beverage caused (death/ [or] great bodily injury) to (himself/herself/another person).**

An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains one-half of 1 percent or more of alcohol by volume. [An *alcoholic beverage* includes _____ *<insert type[s] of beverage[s] from Bus. & Prof. Code, § 23004, e.g., wine, beer>*.**]**

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

An act causes (death/ [or] great bodily injury) if the (death/ [or] injury) is the direct, natural, and probable consequence of the act and the (death/ [or] injury) would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if

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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 (death/ [or] great bodily injury). An act causes (death/ [or] injury) only if it is a substantial factor in causing the (death/ [or] injury). A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the (death/ [or] injury).]

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

<Defense: Good Faith Belief at Least 21>
[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that _____ *<insert name of person under 21>* **was at least 21 years old. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that _____** *<insert name of person under 21>* **was at least 21 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

<Defense: Actual Reliance on Identification>
[The defendant did not unlawfully furnish an alcoholic beverage to a person under 21 years old if:

1. **The defendant [or (his/her) (employee/ [or] agent)] demanded to see a government-issued document as evidence of _____'s** *<insert name of person under 21>* **age and identity;**

2. **_____***<insert name of person under 21>* **showed the defendant [or (his/her) employee/ [or] agent)] a government-issued document, or what appeared to be a government-issued document, as evidence of (his/her) age and identity;**

AND

3. **The defendant [or (his/her) employee/ [or] agent)] actually relied on the document as evidence of _____'s** *<insert name of person under 21>* **age and identity.**

As used here, a *government-issued document* is a document that has been issued by a government agency and contains the person's name, date of birth,

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description, and picture. This definition includes a driver's license [or an identification card issued to a person in the armed forces].

The People have the burden of proving beyond a reasonable doubt that the defendant did not actually rely on a government-issued document, or what appeared to be a government-issued document, as evidence of _____'s *<insert name of person under 21>* **age and identity. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

BENCH NOTES

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

The court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591.) If there is evidence of multiple causes of death or injury, the court should also give the bracketed paragraph on causation that begins with "There may be more than one cause of (death/ [or] great bodily injury)." (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 sentence about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

Defenses—Instructional Duty
In *In re Jennings* (2004) 34 Cal.4th 254, 280, the Supreme Court held that, although the prosecution is not required to prove that the defendant knew the age of the person he or she provided with alcohol, the defendant may assert as a defense a good faith belief that the person was at least 21. The burden is on the defendant to prove this defense. *(Ibid.)* The court failed to state what burden of proof applies. Following *People v. Mower* (2002) 28 Cal.4th 457, 478–481, the committee has drafted the instruction on the premise that the defendant's burden is to merely raise a reasonable doubt about the defense, and the prosecution must then prove beyond a reasonable doubt that the defense does not apply. If there is sufficient evidence supporting the defense, the court has a **sua sponte** duty to give the bracketed paragraph on the defense. *(Ibid.)*

Business and Professions Code section 25660 provides a defense for those who rely in good faith on bona fide evidence of age and identity. If there is sufficient

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evidence, the court has a **sua sponte** duty to instruct on the defense. (See *People v. Mower, supra,* 28 Cal.4th at pp. 478–481.) Give the bracketed word "unlawfully" in the first sentence and element 1, and the bracketed paragraph on the defense.

AUTHORITY

Elements ▸ Bus. & Prof. Code, §§ 25658(a) & (c), 25660; *In re Jennings* (2004) 34 Cal.4th 254, 263.
Alcoholic Beverage Defined ▸ Bus. & Prof. Code, § 23004.
Great Bodily Injury Defined ▸ Pen. Code, § 12022.7(f).
Knowledge of Age Not an Element ▸ *In re Jennings* (2004) 34 Cal.4th 254, 280.
Good Faith Belief Person at Least 21 Defense ▸ *In re Jennings* (2004) 34 Cal.4th 254, 280.
Bona Fide Evidence of Age Defense ▸ Bus. & Prof. Code, § 25660; *Kirby v. Alcoholic Beverage Control Appeals Board* (1968) 267 Cal.App.2d 895, 897, 898–899.
Affirmative Defenses ▸ See *People v. Mower* (2002) 28 Cal.4th 457, 478–481.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 291.

RELATED ISSUES

See the Related Issues section of Instruction 2002, Selling or Furnishing Alcoholic Beverage to Person Under 21.

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STAFF NOTES

Bus. & Prof. Code § 25658, in relevant part, as amended effective 1/1/05:

> (a) Except as otherwise provided in subdivision (c), every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor. . . .
>
> (c) Any person who violates subdivision (a) by purchasing an alcoholic beverage for, *or furnishing, giving, or giving away any alcoholic beverage to* a person under the age of 21 years, and the person under the age of 21 years thereafter consumes the alcohol and thereby proximately causes great bodily injury or death to himself, herself, or any other person, is guilty of a misdemeanor.

See Notes to Instruction 2002.

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2005. Parent Permitting Child to Consume Alcoholic Beverage: Causing Traffic Collision

---

The defendant is charged [in Count __] with permitting a child to consume an alcoholic beverage at (his/her) home.

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

1. **The defendant was the (parent/guardian) of _____** *<insert name of defendant's child>***;**

2. **The defendant permitted _____** *<insert name of defendant's child>* **[or _____,** *<insert name of other person under 18 years old>* **who was in the company of _____** *<insert name of defendant's child >***, or both,] to (consume an alcoholic beverage/ [or] use _____** *<insert controlled substance listed in Health & Saf. Code, § 11550>***, a controlled substance) in the defendant's home;**

3. **_____** *<insert name of defendant's child>* **[and _____** *<insert name of other person under 18 years old>***] (was/were) under 18 years old at the time.**

4. **The defendant knew that (he/she) was permitting _____** *<insert name of defendant's child>* **[or _____** *<insert name of other person under 18 years old>***, or both,] to (consume an alcoholic beverage/ [or] use _____** *<insert controlled substance listed in Health & Saf. Code, § 11550>***, a controlled substance) in the defendant's home;**

5. **As a result of (consuming the alcoholic beverage/ [or] using the controlled substance), _____** *<insert name of defendant's child or other person under 18 years old>* **(had a blood-alcohol concentration of 0.05 percent or greater, as measured by a chemical test[,]/ [or] was under the influence of a controlled substance);**

6. **The defendant allowed _____** *<insert name of defendant's child or other person under 18 years old>* **to drive a vehicle after leaving the defendant's home;**

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7. **The defendant knew that (he/she) was allowing _____** *<insert name of defendant's child or other person under 18 years old>* **to drive a vehicle after leaving the defendant's home;**

AND

8. **_____** *<insert name of defendant's child or other person under 18 years old>* **caused a traffic collision while driving the vehicle.**

An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains one-half of 1 percent or more of alcohol by volume. [An *alcoholic beverage* includes _____ *<insert type[s] of beverage[s] from Bus. & Prof. Code, § 23004, e.g., wine, beer>*.**]**

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

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

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

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

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 court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591.) If there is evidence of multiple causes of the collision, the court should also give bracketed paragraph on causation that begins with "There may be more than one cause of a traffic collision." (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 sentence about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

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

Subdivision (a)(2) of Business and Professions Code section 25658.2 only contemplates a "parent" as a defendant, whereas the other subdivisions include both "parent" as well as "legal guardian." The committee concluded that this omission, as well as the typographical error in subdivision (a) of the statute, are inadvertent and has therefore included both options. If the court disagrees, it must revise the language of element 1 accordingly.

Defenses—Instructional Duty
In *In re Jennings* (2004) 34 Cal.4th 254, 280, the Supreme Court held that, for a prosecution under Business and Professions Code section 25658(a), the defendant may assert as a defense a good faith belief that the person was at least 21. If the trial court concludes that this defense also applies to a prosecution under Business and Professions Code section 25658.2, and there is sufficient evidence that the defendant had a good faith belief that the "other person under 18" with the defendant's child was actually over 18, the court has a **sua sponte** duty to instruct on the defense. The court may insert the appropriate language from Instruction 2002, Selling or Furnishing Alcoholic Beverage to Person Under 21. (See also Bench Notes for that instruction.)

AUTHORITY

Elements ▸ Bus. & Prof. Code, § 25658.2.
Alcoholic Beverage Defined ▸ Bus. & Prof. Code, § 23004.

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2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 291.

RELATED ISSUES

See the Related Issues section of Instruction 2002, Selling or Furnishing Alcoholic Beverage to Person Under 21.

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STAFF NOTES

Bus. & Prof. Code § 25658.2:

(a) A parent or legal guardian who knowingly permits his or her child, or a person in the company of the child, or both, who are under the age of 18 years, to consume an alcoholic beverage or use a controlled substance at the home of the parent or legal guardian is guilty of misdemeanor (*sic*) if all of the following occur:

(1) As the result of the consumption of an alcoholic beverage or use of a controlled substance at the home of the parent or legal guardian, the child or other underage person has a blood-alcohol concentration of 0.05 percent or greater, as measured by a chemical test, or is under the influence of a controlled substance.

(2) The parent knowingly permits that child or other underage person, after leaving the parent's or legal guardian's home, to drive a vehicle.

(3) That child or underage person is found to have caused a traffic collision while driving the vehicle.

(b) A person who violates subdivision (a) shall be punished by imprisonment in a county jail for a term not to exceed one year, by a fine not exceeding one thousand dollars ($1,000), or by both imprisonment and fine.

See Notes to Instructions 2002 and 2004.

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2007. Disorderly Conduct: Under the Influence in Public

The defendant is charged [in Count __] with being under the influence of (alcohol/ [and/or] a drug) in public.

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

1. **The defendant was willfully under the influence of (alcohol[,]/ [and/or] a drug[,]/ [and/or] a controlled substance[,]/ [and/or] toluene);**

2. **When the defendant was under the influence, (he/she) was in a public place;**

AND

<Alternative 3A—unable to care for self>

[3. The defendant was unable to exercise care for (his/her) own safety [or the safety of others].]

<Alternative 3B—obstructed public way>

[3. Because the defendant was under the influence, (he/she) interfered with, obstructed, or prevented the free use of a street, sidewalk, or other public way.]

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

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

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, § 647(f).
Public Place Defined ▸ *In re Zorn* (1963) 59 Cal.2d 650, 652; *People v. Belanger* (1966) 243 Cal.App.2d 654, 657; *People v. Perez* (1976) 64 Cal.App.3d 297, 300–301; but see *People v. White* (1991) 227 Cal.App.3d 886, 892–893 [fenced yard of defendant's home not a "public place"].
Statute Constitutional ▸ *Sundance v. Municipal Court* (1986) 42 Cal.3d 1101, 1119–1121; *In re Joseph G.* (1970) 7 Cal.Ap.3d 695, 703–704; *In re Spinks* (1967) 253 Cal.App.2d 748, 745.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 55–58.

RELATED ISSUES

Defendant in Parked Car
In *People v. Belanger* (1966) 243 Cal.App.2d 654, 657, the court held that the defendant was in a public place when he was found sitting in a parked car on a public street.

Defendant in Place Exposed to Public View
In *People v. White* (1991) 227 Cal.App.3d 886, 892–893, the court held that the defendant, who was found on his front lawn, was not in a public place. The defendant "may have been found intoxicated in a place exposed to public view but that, in and of itself, is not a violation of section 647, subdivision (f)." (*Id.* at p. 893.)

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STAFF NOTES

Pen. Code, § 647(a):

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . .
>
> (f) Who is found in any public place under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, controlled substance, or toluene, in such a condition that he or she is unable to exercise care for his or her own safety or the safety of others, or by reason of his or her being under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, or toluene, interferes with or obstructs or prevents the free use of any street, sidewalk, or other public way.

Under the Influence

Staff have been unable to locate any case discussing the meaning of “under the influence” as used here. Currently, it appears that courts do not provide a definition of “under the influence” in 647(f) cases. If the committee wishes to include a definition, the definition from H&S 11550, under the influence of a controlled substance may be modified:

> [Someone is *under the influence of a controlled substance* if that person has taken or used a controlled substance that has appreciably affected the person’s nervous system, brain, or muscles, or has created in the person a detectable abnormal mental or physical condition.]

Public Place

> “[P]ublic" has been defined as "'Common to all or many; general; open to common use,'" and "'Open to common, or general use, participation, enjoyment, etc.; as, a *public* place, tax, or meeting.'

(*In re Zorn* (1963) 59 Cal.2d 650, 652.)

> We think it is obvious that public streets and highways are public places . . . . "A public place has been defined to be a place where the public has a right to go and to be, and includes public streets, roads, highways, and sidewalks . . . ." (28 C.J.S., § 14, p. 560.) "One

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> definition of 'public' given by Webster is 'Open to common, or general use, participation, enjoyment, etc.; as, a *public* place, tax, or meeting. Specif.: *a* Open to the free and unrestricted use of the public; as, a *public* park or road. . . .'" . . . . . From Words & Phrases, First Series, vol. 6, p. 5809, the following statement is taken: 'A public place, as used in Acts 1875, § 11, providing for the punishment of any person found in a public place in a state of intoxication, is a place where all persons are entitled to be. A public street, highway, and sidewalk is a public place, within the meaning of the statute. [Citations.]'"

(*People v. Belanger* (1966) 243 Cal.App.2d 654, 657.)

> In the context of section 647, subdivision (f), California courts have defined a public place variously as "common to all or many; general; open to common use". . .; "a place where the public has a right to go and to be . . . . open to the free and unrestricted use of the public" . . . ; and a place where a "stranger . . . was able to walk through the outside area of [a] home to the front door without challenge." . . .
>
> New York's former public intoxication statute has been construed to define a public place as one where the public has a right to go, not necessarily a place solely for the use of the public, but a place which is merely accessible to the neighboring public. . . .
>
> The hallway in this case is the kind of public place contemplated in the California and New York cases. There were no locked gates or doors to keep the public from entering. Hallways and stairways of multiple dwellings are open to delivery men, service men, solicitors, visitors and other strangers, whether those hallways are interior or exterior to the buildings, and are therefore public places within the meaning of section 647, subdivision (f). In other words, a "public place" within the meaning of this subdivision is a location readily accessible to all those who wish to go there rather than a place which the general public frequents.

(*People v. Perez* (1976) 64 Cal.App.3d 297, 300–301 [footnotes and citations omitted].)

> Whether a particular location is a "public place" depends upon the facts of the individual case. . . . Appellant herein was located in his own front yard surrounded by a three-and-a-half-foot-high fence

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> with a gate which was unlocked at the time. The gate was not standing open. Deputy Moore opened it. Appellant released three dogs into the yard, which from all appearances acted as an effective if unintentional deterrent to the arresting officer. This fenced yard cannot be characterized as a "public place," i.e., "common to all or many; general; open to common use." . . . In contrast to *Olson*, the fence, gate and dogs all provided challenge to public access. Appellant may have been found intoxicated in a place exposed to public view but that, in and of itself, is not a violation of section 647, subdivision (f).

(*People v. White* (1991) 227 Cal.App.3d 886, 892–893 [footnote and citations omitted].)

"Safety" Commonly Understood

> The word "safety," as used in Penal Code section 647, subdivision (f), whether related to a defendant himself or to others, like the words "good faith" as used in Health and Safety Code section 11330, has a commonly understood meaning which gives adequate notice of the conduct proscribed. To begin with, there is a clear and understandable dictionary definition of "safety": "1. Condition of being safe; freedom from danger or hazard. 2. Quality of being devoid of whatever exposes one to danger or harm; safeness." (Webster's New Collegiate Dict., 1960 ed.) . . .
>
> The point is, the word "safety" is widely and commonly used, as evidenced by the foregoing catalogue of code and Constitution uses, and it cannot be said that by reason of its use in subdivision (f) of Penal Code section 647 the statute is unconstitutionally vague and uncertain. Appellants beg the question, really, as the thrust of their argument is directed at the difficulty in establishing a degree of intoxication, not at the vagueness of the word "safety." But it is not uncommon for the issue of guilt to turn upon a question of degree even though the result may hinge upon a jury's interpretation of subjective evidence.. . .
>
> In short, we find no constitutional vagueness emanating from use of the word "safety" in subdivision (f) of section 647 of the Penal Code, nor in the fact application of the term may rest in large part upon opinion evidence, a subjective test. In the case before us, the officers, in addition to expressing their respective opinions that the

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> three appellants were intoxicated, testified in detail as to what they perceived, including the belligerent, obnoxious and abrasive verbal statements and physical actions of appellants.

(*In re Joseph G.* (1970) 7 Cal.Ap.3d 695, 703–704.)

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2010. Loitering

The defendant is charged [in Count __] with loitering.

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

1. **The defendant delayed, lingered, prowled, or wandered on the private property of someone else;**

2. **When the defendant was on that property, (he/she) did not have a lawful purpose for being there;**

AND

3. **When the defendant was on the property, (he/she) intended to commit a crime if the opportunity arose.**

BENCH NOTES

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

AUTHORITY

Elements ▸ Pen. Code, § 647(h).
Specific Intent to Commit Crime Required ▸ *In re Cregler* (1961) 56 Cal.2d 308, 311–312; see *In re Joshua M.* (2001) 91 Cal.App.4th 743, 746–747.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 51.

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STAFF NOTES

Pen. Code, § 647(h):

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . .
>
> (h) Who loiters, prowls, or wanders upon the private property of another, at any time, without visible or lawful business with the owner or occupant. As used in this subdivision, "loiter" means to delay or linger without a lawful purpose for being on the property and for the purpose of committing a crime as opportunity may be discovered.

Specific Intent to Commit a Crime an Element of Loitering But Not Peeking

In *Cregler*, the Supreme Court upheld the consitutionality of former section 647, subdivision 4, which prohibited loitering in enumerated public places by persons convicted of certain specified crimes. [(*In re Cregler* (1961) 56 Cal.2d 308, 309–312.)] Taken literally, the statute as written would make it unlawful for a person convicted of one of the enumerated crimes to simply be in one of the specified public places. A literal interpretation is obviously unconstitutional. It cannot be unlawful for a person convicted of one of the enumerated offenses to simply be in one of the specified public places.

In order to save the statute from a constitutional challenge, the court wrote an additional element into the statute, i.e., it defined loitering as "connot[ing] lingering in the designated places for the purpose of committing a crime as opportunity may be discovered." (*Cregler*, *supra*, 56 Cal. 2d at p. 312.) The Legislature included this intent element when it redrafted former section 647, subdivision 4 as present section 647, subdivision (h).

Section 647, subdivisions (h) and (i) define separate and distinct crimes, along with others specified in section 647, under the general heading of disorderly conduct. In subdivision (h), a person is guilty of disorderly conduct if he or she is found loitering on the private property of another with the specific intent to commit a crime "as opportunity may be discovered." By its own wording, subdivision (h)'s definition of loitering is limited to subdivision (h).

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> This intent is not a required element for the offense of peeking as defined by section 647, subdivision (i) because being on the property *and* peeking into a window constitutes the crime. Because the statute explicitly requires peeking, in addition to merely being on someone's private property, the statute, unlike the one in *Cregler*, is constitutional without the necessity of engrafting the additional element of specific intent to commit a crime as opportunity may be discovered. The peeking itself satisfies the specific intent element added by *Cregler* to its definition of loitering.

(*In re Joshua M.* (2001) 91 Cal.App.4th 743, 746–747 [footnote omitted].)

> [T]he word "loiter" as used in the subject statute (and in many other police power regulations) in our view has a sinister or wrongful as well as a reasonable definite implication. As proscribed by the statute the word "loiter" obviously connotes lingering in the designated places for the purpose of committing a crime as opportunity may be discovered.

(*In re Cregler* (1961) 56 Cal.2d 308, 311–312 [footnote omitted].)

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2011. Loitering: Peeking

The defendant is charged [in Count __] with peeking in the door or window of an inhabited (building/ [or] structure).

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

1. **The defendant delayed, lingered, prowled, or wandered on the private property of someone else;**

2. **When the defendant was on that property, (he/she) did not have a lawful purpose for being there;**

AND

3. **When the defendant was on the property, (he/she) peeked in the door or window of an inhabited building or structure.**

[A (building/ [or] structure) is *inhabited* if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged peeking.]

[A (building/ [or] structure) is *not inhabited* if the former residents have moved out and do not intend to return, even if some personal property remains inside.]

BENCH NOTES

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

AUTHORITY

Elements ▸ Pen. Code, § 647(i).
Specific Intent to Commit Crime Not Required ▸ *In re Joshua M.* (2001) 91 Cal.App.4th 743, 746–747.
Inhabitation Defined ▸ See Pen. Code, § 459.

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House Not Inhabited If Former Residents Not Returning ▸ *People v. Cardona* (1983) 142 Cal.App.3d 481, 483.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 51.

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STAFF NOTES

Pen. Code, § 647(i):

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . .
>
> (h) Who loiters, prowls, or wanders upon the private property of another, at any time, without visible or lawful business with the owner or occupant. As used in this subdivision, "loiter" means to delay or linger without a lawful purpose for being on the property and for the purpose of committing a crime as opportunity may be discovered.
>
> (i) Who, while loitering, prowling, or wandering upon the private property of another, at any time, peeks in the door or window of any inhabited building or structure, without visible or lawful business with the owner or occupant.

Specific Intent to Commit a Crime an Element of Loitering But Not Peeking

> The elements of this offense include (1) a person loitered, prowled, or wandered upon the private property of another; (2) the person did so without a lawful purpose for being on the property; and (3) the person, while doing so, peeked in the door or window of any inhabited building or structure located thereon. . . .
>
> In *Cregler*, the Supreme Court upheld the consitutionality of former section 647, subdivision 4, which prohibited loitering in enumerated public places by persons convicted of certain specified crimes. [(*In re Cregler* (1961) 56 Cal.2d 308, 309–312.)] Taken literally, the statute as written would make it unlawful for a person convicted of one of the enumerated crimes to simply be in one of the specified public places. A literal interpretation is obviously unconstitutional. It cannot be unlawful for a person convicted of one of the enumerated offenses to simply be in one of the specified public places.
>
> In order to save the statute from a constitutional challenge, the court wrote an additional element into the statute, i.e., it defined loitering as "connot[ing] lingering in the designated places for the purpose of committing a crime as opportunity may be discovered." (*Cregler*, *supra*, 56 Cal. 2d at p. 312.) The Legislature included this intent

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> element when it redrafted former section 647, subdivision 4 as present section 647, subdivision (h).
>
> Section 647, subdivisions (h) and (i) define separate and distinct crimes, along with others specified in section 647, under the general heading of disorderly conduct. In subdivision (h), a person is guilty of disorderly conduct if he or she is found loitering on the private property of another with the specific intent to commit a crime "as opportunity may be discovered." By its own wording, subdivision (h)'s definition of loitering is limited to subdivision (h).
>
> This intent is not a required element for the offense of peeking as defined by section 647, subdivision (i) because being on the property *and* peeking into a window constitutes the crime. Because the statute explicitly requires peeking, in addition to merely being on someone's private property, the statute, unlike the one in *Cregler*, is constitutional without the necessity of engrafting the additional element of specific intent to commit a crime as opportunity may be discovered. The peeking itself satisfies the specific intent element added by *Cregler* to its definition of loitering.

(*In re Joshua M.* (2001) 91 Cal.App.4th 743, 746–747 [footnote omitted].)

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2012. Loitering: About School

The defendant is charged [in Count __] with loitering at or near (a school children attend/ [or] a public place where children normally congregate).

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

<Alternative 1A—loitered>

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

<Alternative 1B—remained or returned after being asked to leave>

[1. The defendant remained at, reentered, or returned to (a school children attend/ [or] a public place where children normally congregate) within 72 hours after being asked to leave by (the chief administrative official of that school/the person acting as the chief administrative official/an authorized member of the security patrol of the school district/a city police officer/a sheriff or deputy sheriff/a California Highway Patrol peace officer);]

2. When the defendant was at or near the (school/ [or] public place), (he/she) did not have a lawful purpose for being there;

AND

3. When the defendant was at or near the (school/ [or] public place), (he/she) intended to commit a crime if the opportunity arose.

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, § 653g.
Specific Intent to Commit Crime Required ▸ *In re Christopher S.* (1978) 80 Cal.App.3d 903, 911; *People v. Hirst* (1973) 31 Cal.App.3d 75, 82–83; *People v. Frazier* (1970) 11 Cal.App.3d 174, 183; *Mandel v. Municipal Court* (1969) 276 Cal.App.2d 649, 663.
Request to Leave Not Required If Defendant Charged With Loitering ▸ *McSherry v. Block* (1989) 880 F.2d 1049, 1052–1053.

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

RELATED ISSUES

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

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STAFF NOTES

Pen. Code, § 653g:

> Every person who loiters about any school or public place at or near which children attend or normally congregate and who remains at any school or public place at or near which children attend or normally congregate, or who reenters or comes upon a school or place within 72 hours, after being asked to leave by the chief administrative official of that school or, in the absence of the chief administrative official, the person acting as the chief administrative official, or by a member of the security patrol of the school district who has been given authorization, in writing, by the chief administrative official of that school to act as his or her agent in performing this duty, or a city police officer, or sheriff or deputy sheriff, or Department of the California Highway Patrol peace officer is a vagrant, and is punishable by a fine of not exceeding one thousand dollars ($ 1,000) or by imprisonment in the county jail for not exceeding six months, or by both the fine and the imprisonment.
>
> As used in this section, "loiter" means to delay, to linger, or to idle about a school or public place without lawful business for being present.

Specific Intent to Commit Crime Required

> Under the rule in *Huddleson*, section 653g becomes in effect a specific intent crime, so that there must be substantial evidence that the defendants intended to commit crime as the opportunity may have appeared. . . . The statute does not require that the defendant have an opportunity to commit the crime for which he is loitering, or that he have any proximity to it. Neither a crime nor the opportunity to commit one need actually occur, and a fortiori no proximity need be shown. The requirement of *Huddleson* that defendant be present "for the purpose of committing a crime as opportunity *may be* discovered" (italics added) implies that the opportunity need not actually occur but only be awaited. Nor need there be evidence that the defendant ever took any steps toward the commission of any specific crime, or committed any prior crime. Assuming that there must be evidence that defendants were lingering to commit some *specific* crime, such evidence may fall far short of what would be necessary to convict for such crime. No specific evidence is

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> necessary to show what such crime is, or defendant's relation to it. On appeal, it is enough if considering all the evidence there is substantial evidence that the defendants were lingering for the purpose of committing any specific crime.

(*People v. Frazier* (1970) 11 Cal.App.3d 174, 183; see also *Mandel v. Municipal Court* (1969) 276 Cal.App.2d 649, 663.)

> The statute as amended is constitutional and its constitutionality is based upon the same meaning of the word "loiter" given to its use in the preceding statute by those decisions that held such former statute to be constitutional. . . .
>
> A fair conclusion from those cases that have upheld the constitutionality of statutes against loitering upon the ground the word as used in the statutes has the sinister connotation of loitering with intent to commit a crime as the opportunity might present itself is that neither allegation nor proof requires an intent to commit a specific crime, but only a specific intent to commit some crime, the fact of the existence of such an intent to be inferred from all the circumstances.

(*People v. Hirst* (1973) 31 Cal.App.3d 75, 82–83.)

Warning Requirement Does Not Apply to Loitering Clause

In *McSherry v. Block* (1989) 880 F.2d 1049, 1052–1053, the defendant was convicted of five counts of loitering near a school. In habeas corpus proceedings, the defendant argued that any violation of the statute required that the defendant be asked to leave the area and that the evidence indicated that no such request had been made in his case. The federal court stated that,

> We agree with appellant that, prior to the affirmance of his conviction by the Appellate Department, the statute on its face was vague and ambiguous with respect to whether loitering about school grounds, in the absence of a request to leave, was criminal. That facial ambiguity, however, was expressly and unequivocally removed when the Appellate Department held, relying in part on common sense, as well as the legislative and judicial history of the school loitering statute, that the request to leave language applies only to the vagrancy and not to the loitering provision of the statute.

(*Id.* at p. 1052.)

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Thus, the Court of Appeals held that no request to leave is required for a violation of the statute based only on "loitering" about or near a school. However, the opinion of the Court of Appeal in this matter was subsequently ordered depublished by the California Supreme Court. (*Id.* at p. 1053, fn. 2.) The Ninth Circuit concluded that it was nevertheless bound by this ruling and, further, that the ruling was foreseeable and consistent with prior interpretations of the statute. (*Id.* at pp. 1052–1053, 1056–1058.)

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2015. Trespass: To Interfere With Business

The defendant is charged [in Count __] with trespassing.

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

1. **The defendant willfully entered (land/ [or] a building) belonging to someone else;**

2. **When the defendant entered, (he/she) intended (to damage someone else's property [or property right]/ [or] to interfere with, obstruct, or damage a lawful business or occupation carried on by the (owner of the land[,]/ [or] owner's agent[,]/ [or] person in lawful possession of the land));**

AND

3. **The defendant actually did (damage someone else's property [or property right]/ [or] interfere with, obstruct, or damage a lawful business or occupation carried on by the (owner of the land[,]/ [or] owner's agent[,]/ [or] person in lawful possession of the land)).**

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

[An *agent* is a person who is authorized to act for someone else in dealings with third parties.]

BENCH NOTES

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

The statute uses the term "injure." (Pen. Code, § 602(k).) The committee has replaced the word "injure" with the word "damage" because the word "injure" generally refers to harm to a person rather than to property.

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AUTHORITY

Elements ▸ Pen. Code, § 602(k).
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.
Actual Damage Required ▸ *In re Wallace* (1970) 3 Cal.3d 289, 295; *In re Ball* (1972) 23 Cal.App.3d 380, 386.
"Land" Includes Building on the Land ▸ *People v. Brown* (1965) 236 Cal.App.2d Supp. 915, 917–919.
Agent Defined ▸ Civ. Code, § 2295.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, §§ 247–248.

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STAFF NOTES

Pen. Code, § 602(k):

> [E]very person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor:. . .
>
> (k) Entering any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent or by the person in lawful possession.

Actual Injury Required

> The record is thus devoid of evidence that petitioners "obstructed" the business of the fair. . . . Penal Code section 602, subdivision (j) [now (k)], does not prohibit the conduct in which these petitioners engaged.

(*In re Wallace* (1970) 3 Cal.3d 289, 295.)

> The testimony that it was necessary to divert offloading of the tram into another area because of petitioner's activities constitutes substantial evidence that he did interfere with Disneyland's lawful business. That petitioner knew that his conduct was substantially certain to result in such interference, the requisite intent, may be inferred from his deliberately entering the parking lot and engaging in the conduct disclosed after having requested and been denied permission to do so and from his refusal to leave when asked to do so.

(*In re Ball* (1972) 23 Cal.App.3d 380, 386.)

Land Includes Buildings

> It is defendants' position that the foregoing section deals only with unimproved lands. We conclude that the clear intention of the Legislature was to give to the term "any lands" its normal and generally accepted meaning, and to include within the phrase everything normally considered to fall within the scope of its general definition. In Webster's Unabridged Dictionary the term land is

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> defined as follows: "Land. Any ground, soil, or earth whatsoever, regarded as the subject of ownership, as meadows, pastures, woods, etc., and everything annexed to it, whether by nature, as trees, water, etc., or by man, as buildings, fences, etc., extending indefinitely vertically upwards and downwards."
>
> Black's Law Dictionary includes the following definition: "Land includes not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage, and water, or by the hand of man, as buildings and fences."
>
> See also subdivision 11 of Penal Code section 7, which provides that, "The words 'real property' are coextensive with lands, tenements, and hereditaments.". . .
>
> Defendants contend that the section is not intended to apply to urban land occupied by a building, where the public is invited to enter. It is clear from the wording that the question of invitation is immaterial in this subdivision. The prohibited conduct is the entry with an improper purpose or intention. Nor is the section limited to "open" or "rural" lands, but on the contrary its scope is extended to "any" lands. If there had been an intention to restrict or limit the prohibition to unimproved lands it would have been a simple matter so to provide.
>
> We conclude that the trial court properly instructed the jury that the word "lands" in section 602, subdivision (j), includes buildings and fixtures, and is synonymous with real property.

(*People v. Brown* (1965) 236 Cal.App.2d Supp. 915, 917–919.)

Meaning of “Interfere With Property Rights” Unclear

> It is fundamental, of course, that a statute will be construed to avoid unconstitutionality if that can reasonably be done [citation] and we have little doubt that in a case in which these issues are appropriately raised, a court will find the words "property rights" as used in subdivision (j) of Penal Code, section 602 to have a reasonably definite and accepted meaning and that it will limit the words to lawful property rights, that is, those property rights consistent with the First Amendment to the United States Constitution, [Citations.] But the issues of unconstitutional overbreadth and vagueness based

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> on the statutory words "property rights" are not appropriately raised in this case, for the record establishes that these words in the statute played no part in petitioner's conviction.
>
> In the disjunctive the statute makes it unlawful to enter land "for the purpose of injuring any property or property rights *or* with the intention of interfering with, obstructing or injuring any lawful business . . . carried on by the owner of such land, his agent or by the person in lawful possession." [Citation.] Even if we were to assume the doubtful proposition that the clause including the words "property rights" is constitutionally infirm, it would not follow that petitioner's conviction should be set aside. That clause could be severed without distorting the purpose of the subdivision, and the clause "with the intention of interfering with, obstructing, or injuring any lawful business" would remain intact.

(*In re Ball* (1972) 23 Cal.App.3d 380, 383.)

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2016. Trespass: Unlawfully Occupying Property

The defendant is charged [in Count __] with trespassing.

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

1. **The defendant willfully entered (land/ [or] a building) belonging to someone else without the consent of the (owner[,]/ [or] owner's agent[,]/ [or] person in lawful possession of the property);**

2. **After the defendant entered, (he/she) occupied the (land/ [or] building) without the consent of the (owner[,]/ [or] owner's agent[,]/ [or] person in lawful possession of the property);**

3. **The defendant occupied the (land/ [or] building) continuously until removed;**

4. **The defendant occupied the (land/ [or] building) for more than a brief period of time;**

AND

5. **When the defendant occupied the (land/ [or] building), (he/she) intended to prevent the (owner[,]/ [or] person in lawful possession of the property) from exercising that person's lawful right to occupy or use that portion of the (land/ [or] building) occupied by the defendant.**

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

[An *agent* is a person who is authorized to act for someone else in dealings with third parties.]

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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.

AUTHORITY

Elements ▸ Pen. Code, § 602(m).
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.
Entry Must Be Without Consent ▸ *People v. Brown* (1965) 236 Cal.App.2d Supp. 915, 920–921; *People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 932, adhered to in *People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943, 954.
Occupy Defined ▸ *People v. Wilkinson* (1967) 248 Cal.App.2d Supp. 906, 909–911.
"Land" Includes Building on the Land ▸ *People v. Brown* (1965) 236 Cal.App.2d Supp. 915, 917–919 [partially abrogated by statute].
Agent Defined ▸ Civ. Code, § 2295.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, §§ 247–248.

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STAFF NOTES

Pen. Code, § 602(m):

> [E]very person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor:. . .
>
> (m) Entering and occupying real property or structures of any kind without the consent of the owner, the owner's agent, or the person in lawful possession.

Entry Must be Without Consent

> Recent enactments of the Legislature, such as Penal Code section 602.5 (1961): "Every person . . . who enters *or* remains . . . without consent of the owner . . ." (italics ours) indicate that the distinction between the use of the word "and" and the word "or" was well understood by the framers of the legislation. Section 602.5 by its wording gives fair warning that either the act of entering or the act of remaining on certain premises without consent will constitute a trespass. Section 602, subdivision (*l*) gives no such warning. There is nothing in the wording of this statute to indicate that it makes criminal the act of occupying without the consent of the owner after an original entry by permission. . . .
>
> We conclude that the language of this subdivision will not permit the conclusion that it was intended to have any other than its ordinary acceptation, and that it requires proof that both the entry and occupancy be without the consent of the owner. Such proof being lacking, the convictions as to this subdivision must be reversed.

(*People v. Brown* (1965) 236 Cal.App.2d Supp. 915, 920–921.)

"Occupy" Defined

> It is not a violation of Penal Code section 602, subdivision (*l*) to enter private property without consent unless such entry is followed by occupation thereof without consent. Nor is it a violation to occupy without consent if the entry be made with consent. This is so because the conjunction used is "and" not "or." [Citation.]
>
> The jury was instructed that "occupy" is defined as follows: "To take

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or enter upon, possession of, to hold possession of, to hold or keep for use, to possess, to tenant, to do business in." While this instruction might have been difficult to follow literally, it is not per se erroneous. The general tenor of the instruction is in conformity with the varying definitions found in briefs of both parties. Among the synonyms for "occupy" are fill, hold and pervade. (Webster's Dictionary.) . . .

We believe that the evil sought to be cured, and intention with which the particular word "occupy" was used can be readily ascertained by a consideration of the statement of urgency which accompanied the passage of Assembly Bill 1732 (Pen.Code, § 602, subd. (*l*)) in 1945. It reads: "This act is hereby declared to be an urgency measure. . . . A statement of the facts constituting such necessity is as follows: The tremendous increase in the population of this state in the last few years, resulting in a particularly heavy influx of people into the centers of defense industries and areas near military camps, has led to a serious housing shortage. In consequence, there has been an alarming increase in squatter occupancy of lands by lawless and irresponsible persons. This evil should be corrected at once. To enable the authorities to stamp out this epidemic, it is necessary that this act take immediate effect."

The purpose of the Legislature in passing subdivision (*l*) of the trespass law is quite clear. **It intended the word "occupy" to mean a nontransient, continuous type of possession.** Surely the transient overnight use of four 3 x 7 foot areas in a very large ranch for sleeping bags and campfire purposes was not the type of conduct which the Legislature intended to prevent when it used the word "occupy." Had this been so, many another verb could have been used in place of "occupy" to express an intention of preventing such transient use of so small an area, e.g., be, remain, loiter, tarry, camp, stay, and probably many more. Having in mind the legislative purpose in passing subdivision (*l*) of section 602, **it is rather obvious that some degree of dispossession and permanency be intended**. . . .

To further illustrate the meaning of the word "occupying" reference to the common, ordinary, lay use of the word as is exemplified in everyday conversation comes quickly to mind. A theater goer may be said to occupy a balcony seat, but not the theater; a visitor to the courthouse may be said to occupy the telephone booth but not the

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> building; and a scouting party may remain on the beachhead overnight but that beachhead would not be occupied until it was captured and the enemy ousted.

(*People v. Wilkinson* (1967) 248 Cal.App.2d Supp. 906, 909–911.)

Distinguished from Pen. Code, § 602.5

> Certainly if transient and insubstantial use of so small an area in such a big ranch as is here involved is covered by Penal Code section 602, subdivision (*l*), then many of the other subdivisions of that section, as well as the later adopted section 602.5 (1961) would be unnecessary. The last named section uses language appropriate to the present situation if there had been a structure used instead of open beach area. Note that 602, subdivision (*l*) covers "structures" as does 602.5, but that the former uses "entering *and occupying*" and the latter uses "enters *or remains*." The section discussed so far as is here pertinent reads: "602.5 Unauthorized entering. . . . Every person . . . who enters or remains in any noncommercial dwelling, house, apartment or other such place without consent of the owner . . . is guilty of a misdemeanor.

(*People v. Wilkinson* (1967) 248 Cal.App.2d Supp. 906, 911.)

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2017. Trespass: Entry Into Dwelling

The defendant is charged [in Count __] with trespassing.

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

1. **The defendant willfully entered or remained in a noncommercial (dwelling house[,]/ [or] apartment[,]/ [or other] residential place) belonging to someone else;**

[AND]

2. **The defendant entered or remained without the consent of the (owner[,]/ [or] owner's agent[,]/ [or] person in lawful possession of the property)(;/.)**

<Give element 3 if evidence shows defendant may have been public officer.>
[AND

3. **The defendant was not a public officer or employee acting in the lawful performance of (his/her) duties as a public officer or employee.]**

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

[An *agent* is a person who is authorized to act for someone else in dealings with third parties.]

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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If the defendant is charged with aggravated trespass under Penal Code section 603.5(b), the court **must** also give Instruction 2018, Trespass: Person Present with this instruction.

If there is sufficient evidence that the defendant was a public officer or employee, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3. If lawful performance is an issue, the court has a **sua sponte** duty to instruct on when a public officer is lawfully performing his or her duties and that the prosecution has the burden of proving lawful performance beyond a reasonable doubt. (See *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217.) For instructions on lawful performance by a public officer, see Instructions 1935A–1937.

AUTHORITY

Elements ▸ Pen. Code, § 602.5(a) & (b).
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.
Entry Need Not Be Without Consent ▸ See *People v. Brown* (1965) 236 Cal.App.2d Supp. 915, 920–921.
Building Must Be Used for Residential Purposes ▸ *In re D. C. L.* (1978) 82 Cal.App.3d 123, 125–126.
Agent Defined ▸ Civ. Code, § 2295.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, §§ 247–248.

LESSER INCLUDED OFFENSES

If the defendant is charged with aggravated trespass under Penal Code section 602.5(b) based on another person being present in the building, then "nonaggravated" trespass is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the aggravating factor has been proved. If the jury finds that the factor has not been proved, then the offense should be set at the lower level misdemeanor.

RELATED ISSUES

Not Necessarily a Lesser Included Offense of Burglary
Trespassing in violation of Penal Code section 602.5 is not necessarily a lesser included offense of burglary based on the elements test. (*People v. Lohbauer* (1981) 29 Cal.3d 364, 369.) A violation of Penal Code section 602.5 may be a lesser included offense of burglary depending on how that offense is charged. (See

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People v. Waidla (2000) 22 Cal.4th 690, 733 [assuming for argument that trespass was a lesser included offense of burglary under accusatory pleading test].)

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STAFF NOTES

Pen. Code, § 602.5:

> (a) Every person other than a public officer or employee acting within the course and scope of his or her employment in performance of a duty imposed by law, who enters or remains in any noncommercial dwelling house, apartment, or other residential place without consent of the owner, his or her agent, or the person in lawful possession thereof, is guilty of a misdemeanor.
>
> (b) Every person other than a public officer or an employee acting within the course and scope of his employment in performance of a duty imposed by law, who, without the consent of the owner, his or her agent, or the person in lawful possession thereof, enters or remains in any noncommercial dwelling house, apartment, or other residential place while a resident, or another person authorized to be in the dwelling, is present at any time during the course of the incident is guilty of aggravated trespass punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars ($ 1,000), or by both that fine and imprisonment.

Entry Need Not Be Without Consent

> Recent enactments of the Legislature, such as Penal Code section 602.5 (1961): "Every person . . . who enters *or* remains . . . without consent of the owner . . ." (italics ours) indicate that the distinction between the use of the word "and" and the word "or" was well understood by the framers of the legislation. Section 602.5 by its wording gives fair warning that either the act of entering or the act of remaining on certain premises without consent will constitute a trespass.

(*People v. Brown* (1965) 236 Cal.App.2d Supp. 915, 920–921.)

Building Must be Used for Residential Purposes

> On appeal, it is again contended that the evidence is insufficient to support the finding, in that the shed, which was used for hobby activities, was not protected by Penal Code section 602.5. This contention is sound. The statute does not refer generally to

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> noncommercial structures but to "any noncommercial dwelling house, apartment, or other such place . . . ." The two classes specified, "dwelling house" and "apartment," indicate legislative intention to protect against unauthorized entry, even in the absence of specific intent requisite to a burglary conviction, structures of the most private character, i.e., places of habitation. To construe the more general provision in section 602.5, "or other *such* place" (italics added) as extending the force of the statute to nonresidential structures would be inconsistent with the legislative intent expressed in Penal Code section 602, subdivision (*l*), n2 in that a penalty could be imposed for an unauthorized entry of any noncommercial structure even though no substantial occupation occurred.

(*In re. D. C. L.* (1978) 82 Cal.App.3d 123, 125–126 [footnote omitted].)

Distinguished from Pen. Code, § 602(m)

> Certainly if transient and insubstantial use of so small an area in such a big ranch as is here involved is covered by Penal Code section 602, subdivision (*l*), then many of the other subdivisions of that section, as well as the later adopted section 602.5 (1961) would be unnecessary. The last named section uses language appropriate to the present situation if there had been a structure used instead of open beach area. Note that 602, subdivision (*l*) covers "structures" as does 602.5, but that the former uses "entering *and occupying*" and the latter uses "enters *or remains*." The section discussed so far as is here pertinent reads: "602.5 Unauthorized entering. . . . Every person . . . who enters or remains in any noncommercial dwelling, house, apartment or other such place without consent of the owner . . . is guilty of a misdemeanor.

(*People v. Wilkinson* (1967) 248 Cal.App.2d Supp. 906, 911.)

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2018. Trespass: Person Present

If you find the defendant guilty of trespassing, you must then decide whether the People have proved that a resident [or other person authorized to be in the dwelling] was present at some time while the defendant was trespassing.

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 if the defendant is charged with aggravated trespass under Penal Code section 602.5(b).

This instruction **must** be given with Instruction 2017, Trespass: Entry Into Dwelling.

The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has or has not proved that another person was present.

AUTHORITY

Elements ▸ Pen. Code, § 602.5(b).

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, §§ 247–248.

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STAFF NOTES

Pen. Code, § 602.5:

. . .

(b) Every person other than a public officer or an employee acting within the course and scope of his employment in performance of a duty imposed by law, who, without the consent of the owner, his or her agent, or the person in lawful possession thereof, enters or remains in any noncommercial dwelling house, apartment, or other residential place while a resident, or another person authorized to be in the dwelling, is present at any time during the course of the incident is guilty of aggravated trespass punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars ($ 1,000), or by both that fine and imprisonment.

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2030. Contributing to Delinquency of Minor

The defendant is charged [in Count __] with contributing to the delinquency of a minor.

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

<Alternative A—caused minor to become ward>

[1. The defendant (committed an act/ [or] failed to perform a duty);

AND

2. In (doing so/ [or] failing to do so)[,] the defendant (caused[,]/ [or] encouraged[,]/ [or] contributed to (causing/ [or] encouraging)) a minor to become [or continue to be] a (ward/dependent child/delinquent child) of the juvenile court.]

<Alternative B—induced minor not to follow order or to act in manner likely to make minor a ward>

[1. The defendant by (act[,]/ [or] failure to act[,]/ [or] threat[,]/ [or] command[,]/ [or] persuasion) induced or tried to induce a (ward/dependent child) of the juvenile court to do either of the following:

A. Fail or refuse to conform to a lawful order of the juvenile court;

OR

B. (Do any act/Follow any course of conduct/Live in a way) that would cause or obviously tend to cause a minor to become or remain a (ward/dependent child/delinquent child) of the juvenile court.]

In order to commit this crime, a person must act with [either] (general criminal intent/ [or] criminal negligence).

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[In order to act with *general criminal intent,* 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.]

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

1. **He or she acts in a reckless way that creates a high risk of death or great bodily injury;**

AND

2. **A reasonable person would have known that acting in that way would create such a risk.**

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

A *minor* is a person under 18 years old.

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

[A parent [or legal guardian] has a duty to exercise reasonable care, supervision, protection, and control over his or her minor child.]

[A *guardian* means the legal guardian of a child.]

<A. Dependent Child Defined: Physical Abuse>

[A minor may become a *dependent child* if his or her parent [or guardian] has intentionally inflicted serious physical harm on him or her, or there is a substantial risk that the parent [or guardian] will do so.

[The manner in which a less serious injury, if any, was inflicted, any history of repeated infliction of injuries on the child or the child's siblings, or a combination of these and other actions by the parent or guardian may be relevant to whether the child is at substantial risk of serious physical harm.]

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[*Serious physical harm* does not include reasonable and age-appropriate spanking of the buttocks when there is no evidence of serious physical injury.]]

<B. Dependent Child Defined: Neglect>

[A minor may become a *dependent child* if he or she has suffered, or is at substantial risk of suffering, serious physical harm or illness as a result of [one of the following]:

> **[1.] [The failure or inability of his or her parent [or guardian] to adequately supervise or protect the child(;/.)]**
>
> **[OR]**
>
> **[(1/2).] [The willful or negligent failure of his or her parent [or guardian] to provide the child with adequate food, clothing, shelter, or medical treatment(;/.)]**
>
> **[OR]**
>
> **[(1/2/3).] [The inability of his or her parent [or guardian] to provide regular care for the child due to the parent's [or guardian's] (mental illness[,]/ [or] developmental disability[,]/ [or] substance abuse).]**

[A minor cannot become a dependent child based only on the fact that there is a lack of emergency shelter for the minor's family.]

[Deference must be given to a parent's [or guardian's] decision to give medical treatment, nontreatment, or spiritual treatment through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by one of its accredited practitioners. A minor cannot be found to be a dependent child unless such a finding is necessary to protect the minor from suffering serious physical harm or illness. The following factors may bear on such a determination:

> **1. The nature of the treatment proposed by the parent [or guardian];**
>
> **2. The risks, if any, to the child posed by the course of treatment or nontreatment proposed by the parent [or guardian];**

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3. **The risks, if any, of any alternative course of treatment being proposed for the child by someone other than the parent [or guardian];**

AND

4. **The likely success of the course of treatment or nontreatment proposed by the parent [or guardian].]**

[A minor may be a dependent child only as long as necessary to protect him or her from the risk of suffering serious physical harm or illness.]]

<C. Dependent Child Defined: Serious Emotional Damage>

[A minor may become a *dependent child* if (his or her parent's [or guardian's] conduct[,]/ [or] the lack of a parent [or guardian] who is capable of providing appropriate care[,]) has caused the minor to suffer serious emotional damage or to face a substantial risk of suffering serious emotional damage. *Serious emotional damage* may be shown by severe anxiety, depression, withdrawal, or unruly, aggressive behavior toward himself, herself, or others. [However, a minor cannot become a *dependent child* on this basis if the parent [or guardian] willfully fails to provide mental health treatment to the minor based on a sincerely held religious belief and a less-intrusive intervention is available.]]

<D. Dependent Child Defined: Sexually Abused>

[A minor may become a *dependent child* if he or she:

1. **Has been sexually abused;**

2. **Faces a substantial risk of being sexually abused by (his or her (parent/ [or] guardian)/ [or] a member of his or her household);**

OR

3. **Has a parent [or guardian] who has failed to adequately protect him or her from sexual abuse when the parent [or guardian] knew or reasonably should have known that the child was in danger of sexual abuse.]**

<E. Dependent Child Defined: Severe Physical Abuse Under Age Five>

[A minor may become a *dependent child* if he or she is under five years old and has suffered severe physical abuse by a parent or by any person known

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by the parent if the parent knew or reasonably should have known that the person was physically abusing the child.

As used here, the term *severe physical abuse* means any of the following:

1. **A single act of abuse that causes physical trauma of sufficient severity that, if left untreated, would cause permanent physical disfigurement, permanent physical disability, or death;**

2. **A single act of sexual abuse that causes significant bleeding, deep bruising, or significant external or internal swelling;**

3. **More than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness;**

OR

4. **The willful, prolonged failure to provide adequate food.]**

<F. Dependent Child Defined: Parent or Guardian Caused Death>
[A minor may become a *dependent child* if his or her parent [or guardian] caused the death of another child through abuse or neglect.]

<G. Dependent Child Defined: Left Without Support>
[A minor may become a *dependent child* if he or she has been left without any provision for support.]

[A minor may become a *dependent child* if he or she has been voluntarily surrendered according to law and has not been reclaimed within the 14-day period following that surrender.]

[A minor may become a *dependent child* if his or her parent [or guardian] has been incarcerated or institutionalized and cannot arrange for the child's care.]

[A minor may become a *dependent child* if his or her relative or other adult custodian with whom he or she resides or has been left is unwilling or unable to provide care or support for the child, the parent's whereabouts are unknown, and reasonable efforts to locate the parent have been unsuccessful.]

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<H. Dependent Child Defined: Freed for Adoption>

[A minor may become a *dependent child* if he or she has been freed for adoption by one or both parents for 12 months by either relinquishment or termination of parental rights, or an adoption petition has not been granted.]

<I. Dependent Child Defined: Acts of Cruelty>

[A minor may become a *dependent child* if he or she has been subjected to an act or acts of cruelty by (his or her (parent/ [or] guardian)/ [or] a member of his or her household), or the parent [or guardian] has failed to adequately protect the child from an act or acts of cruelty when the parent [or guardian] knew or reasonably should have known that the child was in danger of being subjected to an act or acts of cruelty.]

<J. Dependent Child Defined: Sibling Abused>

[A minor may become a *dependent child* if his or her sibling has been abused or neglected, as explained above, and there is a substantial risk that the child will be abused or neglected in the same way. The circumstances surrounding the abuse or neglect of the sibling, the mental condition of the parent [or guardian], and other factors may bear on whether there is a substantial risk to the child.]

<Delinquent Child Defined>

[A *delinquent child* is a minor whom a court has found to have committed a crime.]

[A *delinquent child* is [also] a minor who has violated a curfew based solely on age.]

[A *delinquent child* is [also] a minor who persistently or habitually refuses to obey the reasonable and proper orders or directions of his or her parent [or guardian or custodian], or who is beyond the control of that person.]

[A *delinquent child* is [also] a minor who _____ *<insert other grounds for delinquency from Welf. & Inst. Code, § 601>*.**]**

<Sexual Abuse Defined>

[*Sexual abuse* includes (rape[,]/ [and] statutory rape[,]/ [and] rape in concert[,]/ [and] incest[,]/ [and] sodomy[,]/ [and] lewd or lascivious acts on a child[,]/ [and] oral copulation[,]/ [and] sexual penetration [,]/ [and] child molestation[,]/ [and] employing a minor to perform obscene acts[,]/ [and] preparing, selling, or distributing obscene matter depicting a minor).

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To decide whether the (parent/guardian/_____ *<insert description of person alleged to have committed abuse>* **committed (that/one of those) crime[s], please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].**

[*Sexual abuse* also includes, but is not limited to, the following:

- **[Any penetration, however slight, of the vagina or anal opening of one person by the penis of another person, whether or not semen is emitted(;/.)]**

- **[Any sexual contact between the genitals or anal opening of one person and the mouth or tongue of another person(;/.)]**

- **[Any intrusion by one person into the genitals or anal opening of another person, including the use of any object for this purpose[, unless it is done for a valid medical purpose](;/.)]**

- **[The intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs, and buttocks), or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification(;/.) [However, *sexual abuse* does not include touching that may be reasonably construed as normal caretaker responsibilities, interactions with, or demonstrations of affection for the child, or acts performed for a valid medical purpose(;/.)]]**

- **[The intentional masturbation of the perpetrator's genitals in the child's presence(;/.)]**

- **[Conduct by (someone who knows that he or she is aiding, assisting, employing, using, persuading, inducing, or coercing/a person responsible for a child's welfare who knows that he or she is permitting or encouraging) a child to engage in[, or assist others to engage in,] (prostitution[,]/ [or] a live performance involving obscene sexual conduct[,]/ [or] posing or modeling, alone or with others, for purposes of preparing a film, photograph, negative, slide, drawing, painting, or other pictorial depiction involving obscene sexual conduct)(;/.) [A *person responsible for a child's welfare* is a (parent[,]/ [or] guardian[,]/ [or] foster parent[,]/ [or] licensed administrator or employee of a public or private residential home, residential school, or other residential institution)(;/.)]]**

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- **[Photographing, developing, duplicating, printing, depicting, or exchanging, any film, photograph, videotape, negative, or slide knowing that it shows a child engaged in an act of obscene sexual conduct. [However, *sexual abuse* does not include (conduct by a person engaged in legitimate medical, scientific, or educational activities[;]/ [or] lawful conduct between spouses[;]/ conduct by a person engaged in law enforcement activities[;]/ [or] conduct by an employee engaged in work for a commercial film developer while acting within the scope of his or her employment and as instructed by his or her employer, provided that the employee has no financial interest in the commercial developer who employs him or her).]]**

BENCH NOTES

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

If more than one act is alleged as a basis for the charge, the court has a **sua sponte** duty to give a unanimity instruction. (*People v. Madden* (1981) 116 Cal.App.3d 212, 215–216.) Give Instruction 160, Unanimity. A unanimity instruction is not required if the acts "constitute a continuing course of conduct." *(Ibid.)* See the discussion in the Bench Notes for Instruction 160. (See also *People v. Schoonderwood* (1945) 72 Cal.App.2d 125, 127 [continuous course of conduct exception applied to charge of contributing to delinquency of a minor]; *People v. Dutra* (1946) 75 Cal.App.2d 311, 321–322 [exception did not apply].)

If the case involves allegations of child molestation and the evidence has been presented in the form of "generic testimony" about recurring events without specific dates and times, the 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 in the Related Issues section of Instruction 160, Unanimity.

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

The remaining bracketed paragraphs should be given on request if relevant.

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AUTHORITY

Elements and Definitions ▸ Pen. Code, § 272.
Willfully Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.
Sexual Abuse Defined ▸ Pen. Code, § 11165.1.
Delinquent/Ward of Court Defined ▸ Welf. & Inst. Code, §§ 601–602.
Dependent Child Defined ▸ Welf. & Inst. Code, § 300.
Minor Defined ▸ Pen. Code, § 270e; Fam. Code, § 6500.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Crimes and Crimes Against Decency, § 153.

RELATED ISSUES

Lesser Offense of Rape or Lewd Acts
There is disagreement regarding whether a violation of Penal Code section 272 is a necessarily lesser included offense of rape or lewd and lascivious acts. The Supreme Court concluded that it was in *People v. Greer* (1947) 30 Cal.2d 589, 597–598. However, in *People v. Bobb* (1989) 207 Cal.App.3d 88, 92, the Court of Appeal expressly declined to follow *Greer*, concluding that "the calculus has been altered" by an intervening amendment to Welfare and Institutions Code section 601 and further faulting *Greer* for failing to analyze the elements of the lesser included offenses.

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STAFF NOTES

Elements

Penal Code section 272 provides in pertinent part:

> (a)(1) Every person who commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of 18 years to come within the provisions of Section 300, 601, or 602 of the Welfare and Institutions Code or which act or omission contributes thereto, or any person who, by any act or omission, or by threats, commands, or persuasion, induces or endeavors to induce any person under the age of 18 years or any ward or dependent child of the juvenile court to fail or refuse to conform to a lawful order of the juvenile court, or to do or to perform any act or to follow any course of conduct or to so live as would cause or manifestly tend to cause that person to become or to remain a person within the provisions of Section 300, 601, or 602 of the Welfare and Institutions Code, is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in the county jail for not more than one year, or by both fine and imprisonment in a county jail, or may be released on probation for a period not exceeding five years.
>
> (2) For purposes of this subdivision, a parent or legal guardian to any person under the age of 18 years shall have the duty to exercise reasonable care, supervision, protection, and control over their minor child.

Definition of Minor

A minor is an individual who is under 18 years of age. The period of minority is calculated from the first minute of the day on which the individual is born to the same minute of the corresponding day completing the period of minority.

Fam. Code section 6500.

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Definition of Dependent Child

Welfare and Institutions Code section 300 defines a dependent child as follows:

Any child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court:

(a) The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian. For the purposes of this subdivision, a court may find there is a substantial risk of serious future injury based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries on the child or the child's siblings, or a combination of these and other actions by the parent or guardian which indicate the child is at risk of serious physical harm. For purposes of this subdivision, "serious physical harm" does not include reasonable and age-appropriate spanking to the buttocks where there is no evidence of serious physical injury.

(b) The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, or the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse. No child shall be found to be a person described by this subdivision solely due to the lack of an emergency shelter for the family. Whenever it is alleged that a child comes within the jurisdiction of the court on the basis of the parent's or guardian's willful failure to provide adequate medical treatment or specific decision to provide spiritual treatment through prayer, the court shall give deference to the parent's or guardian's medical treatment, nontreatment, or spiritual treatment through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by an accredited practitioner thereof, and shall not assume jurisdiction unless necessary to protect the child from suffering serious physical harm or illness. In making its determination, the court shall consider (1) the nature of the treatment proposed by the parent or guardian, (2) the risks to the

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child posed by the course of treatment or nontreatment proposed by the parent or guardian, (3) the risk, if any, of the course of treatment being proposed by the petitioning agency, and (4) the likely success of the courses of treatment or nontreatment proposed by the parent or guardian and agency. The child shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness.

(c) The child is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as a result of the conduct of the parent or guardian or who has no parent or guardian capable of providing appropriate care. No child shall be found to be a person described by this subdivision if the willful failure of the parent or guardian to provide adequate mental health treatment is based on a sincerely held religious belief and if a less intrusive judicial intervention is available.

(d) The child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the Penal Code, by his or her parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse.

(e) The child is under the age of five and has suffered severe physical abuse by a parent, or by any person known by the parent, if the parent knew or reasonably should have known that the person was physically abusing the child. For the purposes of this subdivision, "severe physical abuse" means any of the following: any single act of abuse which causes physical trauma of sufficient severity that, if left untreated, would cause permanent physical disfigurement, permanent physical disability, or death; any single act of sexual abuse which causes significant bleeding, deep bruising, or significant external or internal swelling; or more than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness; or the willful, prolonged failure to provide adequate food . A child may not be removed from the physical custody of his or her parent or guardian on the basis of a finding of severe physical abuse unless the social worker has made an allegation of severe physical abuse pursuant to Section 332.

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(f) The child's parent or guardian caused the death of another child through abuse or neglect.

(g) The child has been left without any provision for support; physical custody of the child has been voluntarily surrendered pursuant to Section 1255.7 of the Health and Safety Code and the child has not been reclaimed within the 14-day period specified in subdivision (e) of that section; the child's parent has been incarcerated or institutionalized and cannot arrange for the care of the child; or a relative or other adult custodian with whom the child resides or has been left is unwilling or unable to provide care or support for the child, the whereabouts of the parent are unknown, and reasonable efforts to locate the parent have been unsuccessful.

(h) The child has been freed for adoption by one or both parents for 12 months by either relinquishment or termination of parental rights or an adoption petition has not been granted.

(i) The child has been subjected to an act or acts of cruelty by the parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from an act or acts of cruelty when the parent or guardian knew or reasonably should have known that the child was in danger of being subjected to an act or acts of cruelty .

(j) The child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions. The court shall consider the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child.

It is the intent of the Legislature that nothing in this section disrupt the family unnecessarily or intrude inappropriately into family life, prohibit the use of reasonable methods of parental discipline, or prescribe a particular method of parenting. Further, nothing in this section is intended to limit the offering of voluntary services to those families in need of assistance but who do not come within the descriptions of this section. To the extent that savings accrue to the state from child welfare services funding obtained as a result of the enactment of the act that enacted this section, those savings shall be used to promote services which support family maintenance and family reunification plans, such as client transportation, out-of-home respite

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care, parenting training, and the provision of temporary or emergency in-home caretakers and persons teaching and demonstrating homemaking skills. The Legislature further declares that a physical disability, such as blindness or deafness, is no bar to the raising of happy and well-adjusted children and that a court's determination pursuant to this section shall center upon whether a parent's disability prevents him or her from exercising care and control.

As used in this section "guardian" means the legal guardian of the child.

(k) This section shall be repealed on January 1, 2006, unless a later enacted statute extends or deletes that date.

Definition of Delinquent Child/Ward of Court

Welfare and Institutions Code section 601 defines a delinquent child/ward of court as follows:

(a) Any person under the age of 18 years who persistently or habitually refuses to obey the reasonable and proper orders or directions of his or her parents, guardian, or custodian, or who is beyond the control of that person, or who is under the age of 18 years when he or she violated any ordinance of any city or county of this state establishing a curfew based solely on age is within the jurisdiction of the juvenile court which may adjudge the minor to be a ward of the court.

(b) If a minor has four or more truancies within one school year as defined in Section 48260 of the Education Code or a school attendance review board or probation officer determines that the available public and private services are insufficient or inappropriate to correct the habitual truancy of the minor, or to correct the minor's persistent or habitual refusal to obey the reasonable and proper orders or directions of school authorities, or if the minor fails to respond to directives of a school attendance review board or probation officer or to services provided, the minor is then within the jurisdiction of the juvenile court which may adjudge the minor to be a ward of the court. However, it is the intent of the Legislature that no minor who is adjudged a ward of the court pursuant solely to this subdivision shall be removed from the custody of the parent or guardian except during school hours.

(c) To the extent practically feasible, a minor who is adjudged a ward of the court pursuant to this section shall not be permitted to come into or remain

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in contact with any minor ordered to participate in a truancy program, or the equivalent thereof, pursuant to Section 602.

(d) Any peace officer or school administrator may issue a notice to appear to a minor who is within the jurisdiction of the juvenile court pursuant to this section.

Definition of Sexual Abuse

Penal Code section 11165.1 defines sexual abuse as follows:

As used in this article, "sexual abuse" means sexual assault or sexual exploitation as defined by the following:

(a) "Sexual assault" means conduct in violation of one or more of the following sections: Section 261 (rape), subdivision (d) of Section 261.5 (statutory rape), 264.1 (rape in concert), 285 (incest), 286 (sodomy), subdivision (a) or (b), or paragraph (1) of subdivision (c) of Section 288 (lewd or lascivious acts upon a child), 288a (oral copulation), 289 (sexual penetration), or 647.6 (child molestation).

(b) Conduct described as "sexual assault" includes, but is not limited to, all of the following:

(1) Any penetration, however slight, of the vagina or anal opening of one person by the penis of another person, whether or not there is the emission of semen.

(2) Any sexual contact between the genitals or anal opening of one person and the mouth or tongue of another person.

(3) Any intrusion by one person into the genitals or anal opening of another person, including the use of any object for this purpose, except that, it does not include acts performed for a valid medical purpose.

(4) The intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs, and buttocks) or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification, except that, it does not include acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed for a valid medical purpose.

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(5) The intentional masturbation of the perpetrator's genitals in the presence of a child.

(c) "Sexual exploitation" refers to any of the following:

(1) Conduct involving matter depicting a minor engaged in obscene acts in violation of Section 311.2 (preparing, selling, or distributing obscene matter) or subdivision (a) of Section 311.4 (employment of minor to perform obscene acts).

(2) Any person who knowingly promotes, aids, or assists, employs, uses, persuades, induces, or coerces a child, or any person responsible for a child's welfare, who knowingly permits or encourages a child to engage in, or assist others to engage in, prostitution or a live performance involving obscene sexual conduct, or to either pose or model alone or with others for purposes of preparing a film, photograph, negative, slide, drawing, painting, or other pictorial depiction, involving obscene sexual conduct. For the purpose of this section, "person responsible for a child's welfare" means a parent, guardian, foster parent, or a licensed administrator or employee of a public or private residential home, residential school, or other residential institution.

(3) Any person who depicts a child in, or who knowingly develops, duplicates, prints, or exchanges, any film, photograph, video tape, negative, or slide in which a child is engaged in an act of obscene sexual conduct, except for those activities by law enforcement and prosecution agencies and other persons described in subdivisions (c) and (e) of Section 311.3.

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2031. Failure to Provide

The defendant is charged [in Count __] with failing to provide for (his/her) (child/children).

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

1. **The defendant was the parent of _____** *<insert name[s] of child or children>***;**

2. **_____** *<insert name[s] of child or children>* **(was/were) [a] minor[s];**

3. **The defendant failed to provide necessities for _____** *<insert name[s] of child or children>***;**

AND

4. **The failure to provide was willful and without lawful excuse.**

A *minor* is a person under 18 years old.

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

***Necessities* are necessary clothing, food, shelter, [and] medical care[, or other remedial care] for a minor child.**

[*Other remedial care* includes spiritual treatment through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination and by one of its duly accredited practitioners.]

[A parent must do all that is reasonable in order to provide necessities for minor children. A parent has a *lawful excuse* for failing to do so if, through no fault of his or her own, he or she is unable to earn enough money and does not have other income or assets to pay for those necessities.] [It is not a *lawful excuse* if the parent is unable to provide necessities because he or she has unreasonably chosen to spend money on other things or has failed to diligently seek work.]

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[When you decide whether the defendant was able to provide necessities for _____ <*insert name[s] of child or children*>, consider all of (his/her) income, including social insurance benefits and gifts.]

[A parent must provide necessities for a minor child even if he or she never married or is divorced from the child's other parent. This duty also exists regardless of any court order for alimony or child support in a divorce action.]

[It is not a *lawful excuse* that the other parent has legal custody of the minor child or that the other parent, another person, or an organization voluntarily or involuntarily has provided necessities for the minor child or undertaken to do so.]

[If the People prove beyond a reasonable doubt that the defendant knew of _____'s <*insert name[s] of child or children*> **existence and either:**

1. **Abandoned or deserted _____** <*insert name[s] of child or children*>**,**

OR

2. **Failed to provide _____** <*insert name[s] of child or children*> **with necessities,**

then you may but are not required to conclude that the defendant's failure to provide was willful and without lawful excuse.]

[The husband of a woman who bears a child as a result of artificial insemination is the father of that child if he consented in writing to the artificial insemination.]

[If the People prove beyond a reasonable doubt that:

1. **_____** <*insert name[s] of child or children*> **(was/were) born while the defendant's wife's was cohabiting with him,**

AND

2. **The defendant is neither impotent nor sterile,**

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then you may but are not required to conclude that the defendant is _____'s *<insert name[s] of child or children>* **father.]**

[The People have the burden of proving beyond a reasonable that the defendant is the parent of _____ *<insert name[s] of child or children>***. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

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

[An unborn child is considered a minor for whom a parent must provide necessities.]

BENCH NOTES

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

The bracketed paragraphs that begin with "If the People prove beyond a reasonable doubt that" explain rebuttable presumptions created by statute. (See Pen. Code, § 270; Fam. Code, § 7540; 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*, these paragraphs of the instruction 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 defendant knew of _____'s *<insert name[s] of child or children>* existence" if there is evidence that the defendant either did not know of the child's existence or did not act willfully or without a lawful excuse.

In addition, the court **must not** give the bracketed paragraph that begins with "If the People prove beyond a reasonable doubt that: 1. _____ *<insert name[s]*

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of child or children> was born while the defendant's wife's was cohabiting with him" if there is evidence that the defendant is not the child's father.

If there is evidence that the defendant is not the child's parent, give the bracketed paragraph that begins with "The People have the burden of proving beyond a reasonable that the defendant is the parent."

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

The remaining bracketed paragraphs should be given on request if supported by the evidence.

AUTHORITY

Elements and Definitions ▸ Pen. Code, § 270.
Willfully Defined ▸ Pen. Code, § 7, subd. 1.
Minor Defined ▸ Pen. Code, § 270e; Fam. Code, § 6500.
Inability as Excuse ▸ *People v. Wallach* (1923) 62 Cal.App. 385, 391.
Must Do All Reasonable ▸ *People v. Caseri* (1933) 129 Cal.App. 88, 91–92.
Parentage Through Artificial Insemination Defined ▸ Fam. Code, § 7613.
Presumption and Inference Defined ▸ Evid. Code, § 600.
Permissive Inference of Parentage ▸ Fam. Code, § 7540; *People v. Roder* (1983) 33 Cal.3d 491, 506–507.
Evidentiary Presumptions ▸ Evid. Code, §§ 602–604.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Crimes and Crimes Against Decency, § 143.

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STAFF NOTES

Penal Code section 270:

If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. If a court of competent jurisdiction has made a final adjudication in either a civil or a criminal action that a person is the parent of a minor child and the person has notice of such adjudication and he or she then willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter, medical attendance or other remedial care for his or her child, this conduct is punishable by imprisonment in the county jail not exceeding one year or in a state prison for a determinate term of one year and one day, or by a fine not exceeding two thousand dollars ($2,000), or by both such fine and imprisonment. This statute shall not be construed so as to relieve such parent from the criminal liability defined herein for such omission merely because the other parent of such child is legally entitled to the custody of such child nor because the other parent of such child or any other person or organization voluntarily or involuntarily furnishes such necessary food, clothing, shelter or medical attendance or other remedial care for such child or undertakes to do so.

Proof of abandonment or desertion of a child by such parent, or the omission by such parent to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his or her child is prima facie evidence that such abandonment or desertion or omission to furnish necessary food, clothing, shelter or medical attendance or other remedial care is willful and without lawful excuse.

The court, in determining the ability of the parent to support his or her child, shall consider all income, including social insurance benefits and gifts.

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The provisions of this section are applicable whether the parents of such child are or were ever married or divorced, and regardless of any decree made in any divorce action relative to alimony or to the support of the child. A child conceived but not yet born is to be deemed an existing person insofar as this section is concerned.

The husband of a woman who bears a child as a result of artificial insemination shall be considered the father of that child for the purpose of this section, if he consented in writing to the artificial insemination.

If a parent provides a minor with treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof, such treatment shall constitute "other remedial care", as used in this section.

Conclusive Presumption of Parentage

Except as provided in Section 7541, the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.

(Fam. Code section 7540.)

Definition of Minor

A minor is an individual who is under 18 years of age. The period of minority is calculated from the first minute of the day on which the individual is born to the same minute of the corresponding day completing the period of minority.

(Fam. Code section 6500.)

Parentage of Child Conceived by Artificial Insemination

(a) If, under the supervision of a licensed physician and surgeon and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician and surgeon shall certify their

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signatures and the date of the insemination, and retain the husband's consent as part of the medical record, where it shall be kept confidential and in a sealed file. However, the physician and surgeon's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician and surgeon or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

(b) The donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

(Fam. Code section 7613.)

Presumption and Inference Defined

(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.

(Evid. Code section 600.)

Prima Facie Evidence

A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption.

(Evid. Code section 602.)

Presumption Affecting the Burden of Producing Evidence

A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied.

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(Evid. Code section 603.)

Mandatory Presumption

> 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 section 604.)

Mandatory Presumption vs. Permissive Inference in Criminal Cases

> Under Evidence Code section 501, any statute which assigns the burden of proof in a criminal case is made subject to the overriding rule that the prosecution bears the burden of proving guilt beyond a reasonable doubt. Before *Ulster County* and *Sandstrom*, it was not clear how that principle affected presumptions in criminal cases, but now that the Supreme Court has - at least in part - clarified the constitutional limits on the use of such presumptions, it appears more in keeping with the overall legislative intent for courts to pare down existing statutory presumptions to constitutionally permissible limits, rather than to abrogate them altogether.
>
> With respect to section 496, the transformation of the statutory rebuttable presumption into a permissible inference appears quite reasonable and feasible. From the point of view of the defendant, a carefully drafted instruction which places the inference in context and does no more than inform the jury that upon the prosecution's proof of the four basic facts it is permitted - but not required - to infer guilty knowledge is fairly innocuous, for even without such an instruction a jury could, of course, reasonably infer that a secondhand dealer who fails to make reasonable inquiry when obtaining stolen property under suspicious circumstances knew that the property was stolen. [FN15] As a number of commentators have pointed out, a trial court's instruction on such a permissive inference with reference to the specific facts of the case is comparable to a restrained form of judicial comment on the evidence. (See Nesson, Reasonable Doubt and Permissive Inferences: The Value of

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Complexity (1979) 92 Harv.L.Rev. 1187, 1222-1224; Nesson, Rationality, Presumptions and Judicial Comment: A Reply to Professor Allen (1981) 94 Harv.L.Rev. 1574, 1587- 1590; Allen, Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices (1980) 94 Harv.L.Rev. 321, 334- 338.) The common law has long recognized the propriety of instructing the jury in receiving stolen property cases that it may - but is not required to - similarly infer a defendant's guilty knowledge from his unexplained possession of recently stolen property, and both this court and the United States Supreme Court have confirmed the constitutionality of instructing the jury as to this permissive inference. (*People v. McFarland* (1962) 58 Cal.2d 748 [26 Cal.Rptr. 473, 376 P.2d 449]; *Barnes v. United States, supra,* 412 U.S. 837.) *507

FN15 We do not agree with the Attorney General's contention that the jury should be instructed that if they find the basic facts beyond a reasonable doubt they "should" draw the suggested inference, rather than that they "are permitted, but not required," to draw such an inference. In our view, the use of the word "should" in this context could easily be interpreted by a reasonable juror to transform the instruction from a permissive guideline into a mandatory directive, reintroducing the same constitutional problems posed by the current mandatory presumption. Although the Attorney General relies on a portion of the legislative comment to Evidence Code section 607 to support an instruction using the "should" language, section 607 and its comment were written as part of a statutory scheme which contemplated that the jury would be required to assume the existence of the presumed fact from proof of other facts. (Evid. Code, § 600, subd. (a).)

From the state's point of view, there is considerable benefit in retaining the "secondhand dealer" provision of section 496 in revised form as a permissive inference, even if it cannot survive as a mandatory presumption. First, preservation of the statutory provisions in a restrained form will still enable the court to inform the jury of an inference which the Legislature - drawing on its general experience - has concluded can often reasonably be drawn from proof of the basic facts (cf. *United States v. Gainey, supra,* 380 U.S. 63, 67 [13 L.Ed.2d 658, 662]); elimination of the device would deprive the jury of any legislative guidance in circumstances in which direct evidence of actual guilty knowledge will rarely be

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> available. (See generally ALI, Model Pen. Code, § 223.6, coms. 1, 4(d), pp. 232, 241-245.) Second, even as a permissive inference, the statutory provision will serve an important substantive function in regulating the conduct of secondhand dealers, inducing such dealers to make reasonable inquiry when they are offered property that may be stolen. (Blakely & Goldsmith, Criminal Redistribution of Stolen Property: The Need for Law Reform (1976) 74 Mich.L.Rev. 1511, 1572-1589.) The state has a strong interest in encouraging dealers to conduct their business in this fashion in order to make it more difficult for thieves to dispose of their wares, and it appears appropriate to interpret section 496 to preserve this interest insofar as is constitutionally permissible.
>
> Accordingly, we conclude that pursuant to Evidence Code section 501, section 496 should be construed as authorizing only a permissive inference, not a mandatory presumption. On remand, the trial court should fashion an appropriate instruction, which informs the jury of the permissive inference but at the same time makes clear that the prosecution retains the burden of proving every element of the offense beyond a reasonable doubt. (See, e.g., Nesson, Rationality, Presumptions and Judicial Comment, supra, 94 Harv.L.Rev. at p. 1589.)

(*People v. Roder* (1983) 33 Cal.3d 491, 506.)

> In evidentiary terms, section 270 creates a mandatory, rebuttable presumption. (Evid. Code, § 602 [a rebuttable presumption is created when a statute makes one fact prima facie evidence of another fact].) Since section 270 establishes a presumption rather than an inference (*People v. Dewberry, supra*, 8 Cal.App.4th at p. 1021), the statute may arguably be read to reflect a legislative intent to require the jury to draw the assumption of willfulness from proof of the basic facts unless the defendant comes forward with sufficient evidence to rebut the presumed fact. (*People v. Roder* (1983) 33 Cal.3d 491, 501-502 [189 Cal.Rptr. 501, 658 P.2d 1302].) [FN4] Since this is a criminal case, and since a presumption cannot be used to undermine the defendant's right to have the jury determine the ultimate facts beyond a 938 reasonable doubt (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 156 [99 S.Ct. 2213, 2224, 60 L.Ed.2d 777]), the verdict in this case depends upon the words actually spoken to the jury and the manner in which a reasonable juror would have

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interpreted those words. (*People v. Roder, supra*, 33 Cal.3d at p. 502.)

FN4 "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." (Evid. Code, § 600, subd. (a).) "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." (Evid. Code, § 600, subd. (b).)

(1c) The CALJIC committee anticipated this issue and offered this Comment about section 270: "Although no appellate court has determined whether the jury may presume the defendant was willful and without lawful excuse ... from the fact of the failure to [provide] itself, the Committee is of the opinion that such a presumption would not meet the constitutional requirements of *People v. Roder* (1983) 33 Cal.3d 491 ... because willfulness is an element of the offense and hence an ultimate fact for the jury to decide." (Com. to CALJIC No. 16.152 (6th ed. 1996 bound vol.) pp. 402-403.) To rescue section 270 from the jaws of constitutional infirmity, the Committee drafted CALJIC No. 16.152 to define a permissible inference, not to state a required presumption: "If the evidence establishes beyond a reasonable doubt that the parent of a child abandoned or deserted that child, or that the parent omitted to furnish the necessary food, clothing, shelter or medical attendance, or other remedial care, you may infer that the omission was willful and without lawful excuse." (Italics added.) This instruction does not tell the jury that there is a presumption or that it is the defendant's burden to disprove some element of the case against him, only that the jurors may draw from other evidence an inference of willfulness and of the absence of excuse. When a jury is not informed of the existence of a statutory presumption or otherwise told that the law requires a certain inference, and where the jury is not told that the defendant has a burden to disprove an element of the offense, there is no constitutional error. (*People v. Roder, supra*, 33 Cal.3d at pp. 502-503.)

It follows that there is nothing facially wrong with CALJIC No. 16.152.

(2c) Moore put on evidence that his failure to provide care was not willful and was lawfully excused. As a result, CALJIC No. 16.152

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should not have been given at all. As the "Use Note" cautions: "Do not give this instruction if evidence has been received tending to prove that the failure to provide was not willful or was not without lawful excuse." (Use Note to CALJIC No. 16.152, supra, p. 402.) And as the CALJIC Committee explains, the rebuttable presumption created by section 270 is a presumption 939 affecting the burden of producing evidence (*People v. Sorensen* (1968) 68 Cal.2d 280, 286-287 [66 Cal.Rptr. 7, 437 P.2d 495, 25 A.L.R.3d 1093]), which means the presentation of the required evidence places the issue before the jury for its determination based solely on the evidence presented, without regard to the presumption (Evid. Code, § 604) and without any reason to pinpoint a specific inference. In this case, it was error to give CALJIC No. 16.152.

Any doubt about whether the error was prejudicial is resolved in Moore's favor by reference to the prosecutor's closing argument, during which he told the jurors that Moore "has to raise the defense. He has to prove to you by [a] preponderance of the evidence" that "he could not have provided that necessary support." The "evidence is clear. The People need not even prove to you that [Moore] willfully and without lawful excuse failed to provide for his child. Why? Because upon establishing that he's the father and upon establishing that he failed to provide, you may presume that the failure was both willful and without lawful excuse." (Italics added.) This argument relieved the prosecutor of the burden to prove every element of the charged offense beyond a reasonable doubt. (*People v. Roder, supra*, 33 Cal.3d at p. 504.) [FN5]

FN5 With regard to the prosecutor's reference to a "preponderance of the evidence" standard for the defense, we note that, where the burden is properly placed on the defendant to interject a factual contention which, if established, would tend to overcome or negate proof of an element of the charged crime, the defendant need only raise a reasonable doubt as to the existence or nonexistence of the fact in issue. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 963 [127 Cal.Rptr. 135, 544 P.2d 1335]; see also *People v. Dewberry, supra*, 8 Cal.App.4th at p. 1021.)

(*People v. Moore* (1998) 65 Cal.App.4th 933, 937-938.)

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Spiritual Treatment as “Other Remedial Care”

"Remedial" is defined as "affording a remedy: intended for a remedy or for the removal or abatement of a disease or of an evil." (Webster's New Internat. Dict. (3d ed. 1961) p. 1920.) "Remedy," in turn, is defined as "something that relieves or cures a disease: a medicine or application that serves or helps to terminate disease and restore health." (Ibid.) Finally, "other" is defined as "not the same: different." (d. at p. 1598.) When these definitions are substituted for the words of the statute, the provision penalizes parents who fail to provide "clothing, food, shelter or medical attendance, or [different] care [intended to relieve or cure a disease]." It thus is apparent that the Legislature intended "other remedial care" to represent an alternative to medical attendance under the terms of section 270.

Any doubt regarding this interpretation cannot survive examination of the legislative history of the 1976 amendment defining "other remedial care" to include prayer. When the members of the Assembly considered the amendment, contained in Assembly Bill No. 3843, 1975-1976 Regular Session, they had before them the third reading analysis of the legislation prepared by the Assembly Office of Research. The analysis stated: "Under this bill, the parents may not be liable for failing to provide for the health of the child because they choose treatment by prayer rather than common medical treatment ...." (Assem. Office of Research, 3d reading analysis of Assem. Bill No. 3843 (1975-1976 Reg. Sess.).) Similarly, the members of the Senate received an analysis of the legislation prepared by either the Republican or Democratic Caucus. Both caucus analyses stated that the amendment would shield from liability those parents who provide prayer in lieu of medical care for their children. (Sen. Democratic Caucus, 3d reading analysis of Assem. Bill No. 3843 (1975-1976 Reg. Sess.); Sen. Republican Caucus, 3d reading analysis of Assem. Bill No. 3843 (1975-1976 Reg. Sess.).) While these materials are not dispositive evidence of legislative intent (*Shippen v. Department of Motor Vehicles* (1984) 161 Cal.App.3d 1119, 1126 [208 Cal.Rptr. 13]), they are significant insofar as their contents do not contradict the plain language of the statute. (*Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 219 [*123 185 Cal.Rptr. 270, 649 P.2d 912].) We accordingly conclude that section 270 exempts parents who utilize prayer treatment from the statutory requirement to furnish medical

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> care, and overrule *People v. Arnold, supra*, 66 Cal.2d 438, 452, to the extent it concludes to the contrary.

(*Walker v. Superior Court* (1988) 47 Cal.3d 112, 122.)

Must Do All Reasonable

> One who exercises reasonable diligence to procure employment and fails to secure work through no fault of his own, and who is without property or means with which to support his children, is not guilty of wilfully omitting to supply them with necessary food or clothing. (*People* v. *Wallach*, 62 Cal. App. 385, 393; 20 Cal. Jur. 422, sec. 21.) A man is expected to neither steal nor beg in order to supply his children with the necessities of life. All that is required to refute the theory of wilful failure to supply the necessities of life is that a man shall honestly seek for employment and diligently perform his service to the best of his ability, contributing all that he can reasonably spare for the maintenance of his children.

(*People v. Caseri* (1933) 129 Cal.App. 88, 91–92.)

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2032. Persuading, Luring, or Transporting a Minor 12 Years Old or Younger

The defendant is charged [in Count __] with persuading, luring, or transporting a minor 12 years old or younger.

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

1. **The defendant contacted or communicated with _____** *<insert name of minor>***;**

2. **When the defendant did so, (he/she) was an adult stranger to the minor;**

3. **_____** *<insert name of minor>* **was 12 years old or younger at the time;**

4. **The defendant knew that (he/she) was contacting or communicating with _____** *<insert name of minor>***;**

5. **The defendant knew or reasonably should have known that _____** *<insert name of minor>* **was 12 years old or younger at the time;**

6. **The defendant contacted or communicated with _____** *<insert name of minor>* **with the intent to persuade, lure, or transport[, or attempt to persuade, lure, or transport,] (him/her), for any purpose, away from (_____'s** *<insert name of minor>* **home/ [or] any location known by _____'s** *<insert name of minor>* **parent[, legal guardian, or custodian] as a place where the child is located);**

7. **The defendant did not have the express consent of _____'s** *<insert name of minor>* **parent [or legal guardian];**

[AND]

8. **When the defendant acted, (he/she) intended to avoid the consent of _____'s** *<insert name of minor>* **parent [or legal guardian](;/.)**

<Give element 9 when instructing on an emergency situation.>

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[AND

9. The defendant was not acting in an emergency situation.]

An *adult stranger* is a person at least 21 years old who has no substantial relationship with the child or is merely a casual acquaintance, or who has established or promoted a relationship with the child for the primary purpose of victimization.

***Express consent* means oral or written permission that is positive, direct, and unequivocal, requiring no inference or implication to supply its meaning.**

[*Contact* or *communication* includes the use of a telephone or the Internet.]

[*Internet* means the global information system that is logically linked together by a globally unique address space based on the Internet Protocol (IP), or its subsequent extensions, and that is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite, or its subsequent extensions, or other IP-compatible protocols, and that provides, uses, or makes accessible, either publicly or privately, high-level services layered on the communications and related infrastructure described in this definition.]

[An *emergency situation* is a situation where a child is threatened with imminent bodily, emotional, or psychological harm.]

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

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, the court has a **sua sponte** duty to instruct on the defense of an "emergency situation." (Pen. Code, § 272(b)(2).) Give element 9 and the definition of "emergency situation."

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

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The remaining bracketed paragraphs should be given on request as appropriate.

AUTHORITY

Elements and Definitions ▸ Pen. Code, § 272(b)(1).
Internet Defined ▸ Bus. & Prof. Code, § 17538(f)(6).
Victimization as Predatory Sexual Conduct ▸ Welf. & Inst. Code, § 6600(e).
Minor Defined ▸ Pen. Code, § 270e; Fam. Code, § 6500.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Crimes and Crimes Against Decency, § 153.

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STAFF NOTES

Elements

Penal Code section 272 provides in pertinent part:

> (b)(1) An adult stranger who is 21 years of age or older, who knowingly contacts or communicates with a minor who is 12 years of age or younger, who knew or reasonably should have known that the minor is 12 years of age or younger, for the purpose of persuading and luring, or transporting, or attempting to persuade and lure, or transport, that minor away from the minor's home or from any location known by the minor's parent, legal guardian, or custodian, to be a place where the minor is located, for any purpose, without the express consent of the minor's parent or legal guardian, and with the intent to avoid the consent of the minor's parent or legal guardian, is guilty of an infraction or a misdemeanor.
>
> (2) This subdivision shall not apply in an emergency situation.
>
> (3) As used in this subdivision, the following terms are defined to mean:
>
> (A) "Emergency situation" means a situation where the minor is threatened with imminent bodily harm, emotional harm, or psychological harm.
>
> (B) "Contact" or "communication" includes, but is not limited to, the use of a telephone or the Internet, as defined in Section 17538 of the Business and Professions Code.
>
> (C) "Stranger" means 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, as defined in subdivision (e) of Section 6600 of the Welfare and Institutions Code.
>
> (D) "Express consent" means oral or written permission that is positive, direct, and unequivocal, requiring no inference or implication to supply its meaning.

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> (4) This section shall not be interpreted to criminalize acts of persons contacting minors within the scope and course of their employment, or status as a volunteer of a recognized civic or charitable organization.
>
> (5) This section is intended to protect minors and to help parents and legal guardians exercise reasonable care, supervision, protection, and control over minor children.

No published case cites this subsection of section 272.

Definition of the Internet

Bus. & Prof. Code section 17538(f)(6) provides:

> "Internet" means the global information system that is logically linked together by a globally unique address space based on the Internet Protocol (IP), or its subsequent extensions, and that is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite, or its subsequent extensions, or other IP-compatible protocols, and that provides, uses, or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described in this paragraph.

"Victimization" As Used in the Sexually Violent Predator Statute

Welf. & Inst. Code section 6600(e) provides:

> "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 relation has been established or promoted for the primary purpose of victimization.

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