

# JUDICIAL COUNCIL OF CALIFORNIA

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## INVITATION TO COMMENT CALCRIM-2021-01

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**Title**

Criminal Jury Instructions: Revisions

**Proposed Rules, Forms, Standards, or Statutes**

New and revised jury instructions

**Proposed by**

Advisory Committee on Criminal Jury  
Instructions  
Hon. Peter J. Siggins, Chair

**Action Requested**

Review and submit comments by Friday, June  
18, 2021

**Proposed Effective Date**

October 1, 2021

**Contact**

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### Summary

New and revised jury instructions reflecting recent developments in the law and user suggestions.

*This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. It is circulated for comment purposes only.*

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### 336. In-Custody Informant

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View the (statement/ [or] testimony) of an in-custody informant against the defendant with caution and close scrutiny. In evaluating such (a statement/ [or] testimony), you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits. This does not mean that you may arbitrarily disregard such (statement/ [or] testimony), but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case.

*<Give the following paragraph if the issue of whether a witness was an in-custody informant is in dispute>*

[An *in-custody informant* is someone [, other than (a/an) (codefendant[,]/ [or] percipient witness[,]/ [or] accomplice[,]/ [or] coconspirator,)] whose (statement/ [or] testimony) is based on [a] statement[s] the defendant allegedly made while both the defendant and the informant were held within a correctional institution. If you decide that a (declarant/ [or] witness) was not an in-custody informant, then you should evaluate his or her (statement/ [or] testimony) as you would that of any other witness.]

*<Give the first bracketed phrase if the issue of whether a witness was an in-custody informant is in dispute>*

[If you decide that a (declarant/ [or] witness) was an in-custody informant, then] (Y/)you may not convict the defendant of \_\_\_\_\_ *<insert charged crime[s]>* based on the (statement/ [or] testimony) of that in-custody informant alone. [Nor may you find a special circumstance true/ [or] use evidence in aggravation based on the (statement/ [or] testimony) of that in-custody informant alone.]

You may use the (statement/ [or] testimony) of an in-custody informant **against the defendant** only if:

1. The (statement/ [or] testimony) is supported by other evidence that you believe;
2. That supporting evidence is independent of the (statement/ [or] testimony) ;  
AND
3. That supporting evidence connects the defendant to the commission of the crime[s] [or to the special circumstance/ [or] to evidence in aggravation]. The supporting evidence is not sufficient if it merely

shows that the charged crime was committed [or proves the existence of a special circumstance/ [or] evidence in aggravation].

**This supporting evidence requirement does not apply where the testimony of an in-custody informant is offered for any purpose other than proving (guilt/ [or] a special circumstance/evidence in aggravation).**

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

[Do not use the (statement/ [or] testimony) of an in-custody informant to support the (statement/ [or] testimony) of another in-custody informant unless you are convinced that \_\_\_\_\_ <insert name of party calling in-custody informant as witness> has proven it is more likely than not that the in-custody informant has not communicated with another in-custody informant on the subject of the testimony.]

[A *percipient witness* is someone who personally perceived the matter that he or she testified about.]

<Insert the name of the in-custody informant if his or her statue is not in dispute>  
[ \_\_\_\_\_ <insert name of witness> is an in-custody informant.]

[ \_\_\_\_\_ <insert name of institution> is a correctional institution.]

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*New January 2006; Revised August 2012, February 2016, October 2021*

## BENCH NOTES

### ***Instructional Duty***

The court must give this instruction on request. (Pen. Code, § 1127a.)

The court should also be aware of the following statutory provisions relating to in-custody informants: Penal Code sections 1127a(c) [prosecution must disclose consideration given to witness]; 1191.25 [prosecution must notify victim of in-custody informant]; and 4001.1 [limitation on payments to in-custody informants and action that may be taken by in-custody informant].

If there is no issue over whether the witness is an in-custody informant and the parties agree, the court may instruct the jury that the witness “is an in-custody informant.” If there is an issue over whether the witness is an in-custody informant, give the bracketed definition of the term.

The committee awaits guidance from courts of review on the issue of whether this instruction applies to witnesses other than those called by the People. Until the issue is resolved, the committee provides this version consistent with the language of the new statute.

If the court concludes that the corroboration requirement applies to an out-of-court statement, use the word “statement” throughout the instruction. (See discussion in Related Issues section to CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice.*)

### ***Related Instruction***

CALCRIM No. 337, *Witness in Custody or Physically Restrained.*

## **AUTHORITY**

- Instructional Duty ▶ Pen. Code, §§ 1111.5, 1127a.
- In-Custody Informant Testimony and Accomplice Testimony May Corroborate Each Other ▶ *People v. Huggins* (2015) 235 Cal.App.4th 715, 719-720 [185 Cal.Rptr.3d 672].

## **SECONDARY SOURCES**

2 Witkin, California Evidence (5th ed. 2012) Witnesses, § 20.

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, §§ 120, 123.  
2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 30, *Confessions and Admissions*, § 30.32[2] (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.03A, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][b], 85.03[2][b] (Matthew Bender).

### 417. Liability for Coconspirators' Acts

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**A member of a conspiracy is criminally responsible for the crimes that he or she conspires to commit, no matter which member of the conspiracy commits the crime.**

**A member of a conspiracy is also criminally responsible for any act of any member of the conspiracy if that act is done to further the conspiracy and that act is a natural and probable consequence of the common plan or design of the conspiracy. This rule applies even if the act was not intended as part of the original plan. [Under this rule, a defendant who is a member of the conspiracy does not need to be present at the time of the act.]**

***A natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.**

**A member of a conspiracy is not criminally responsible for the act of another member if that act does not further the common plan or is not a natural and probable consequence of the common plan.**

**To prove that the defendant is guilty of the crime[s] charged in Count[s] \_\_, the People must prove that:**

**1. The defendant conspired to commit one of the following crimes:  
\_\_\_\_\_ <insert target crime[s]>;**

**2. A member of the conspiracy committed \_\_\_\_\_ <insert nontarget offense[s]> to further the conspiracy;**

**AND**

**3. \_\_\_\_\_ <insert nontarget offense[s]> (was/were) [a] natural and probable consequence[s] of the common plan or design of the crime that the defendant conspired to commit.**

**[The defendant is not responsible for the acts of another person who was not a member of the conspiracy even if the acts of the other person helped accomplish the goal of the conspiracy.]**

**[A conspiracy member is not responsible for the acts of other conspiracy members that are done after the goal of the conspiracy had been accomplished.]**

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New January 2006; *Revised October 2021*

## **BENCH NOTES**

### ***Instructional Duty***

Give this instruction when there is an issue whether the defendant is liable for the acts of coconspirators. (See *People v. Flores* (1992) 7 Cal.App.4th 1350, 1363 [9 Cal.Rptr.2d 754] [no sua sponte duty when no issue of independent criminal act by coconspirator].)

The court **must** also give either CALCRIM No. 415, *Conspiracy*, or CALCRIM No. 416, *Evidence of Uncharged Conspiracy*, with this instruction. The court **must** also give all appropriate instructions on the offense or offenses alleged to be the target of the conspiracy. (*People v. Prettyman* (1996) 14 Cal.4th 248, 254 [58 Cal.Rptr.2d 827, 926 P.2d 1013].)

Give the bracketed sentence that begins with “Under this rule,” if there is evidence that the defendant was not present at the time of the act. (See *People v. Benenato* (1946) 77 Cal.App.2d 350, 356 [175 P.2d 296]; *People v. King* (1938) 30 Cal.App.2d 185, 203 [85 P.2d 928].)

Although no published case to date gives a clear definition of the terms “natural” and “probable,” nor holds that there is a sua sponte duty to define them, a suggested definition is included. (See *People v. Prettyman* (1996) 14 Cal.4th 248, 291 [58 Cal.Rptr.2d 827, 926 P.2d 1013] (conc. & dis. opn. of Brown, J.).)

Give either of the last two bracketed paragraphs on request, when supported by the evidence.

### ***Related Instructions***

CALCRIM No. 418, *Coconspirator’s Statements*.

## **AUTHORITY**



- Natural and Probable Consequences; Reasonable Person Standard ▶ *People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 842–843 [68 Cal.Rptr.2d 388]; see *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [26 Cal.Rptr.2d 323] [in context of aiding and abetting].
- Vicarious Liability of Conspirators ▶ *People v. Hardy* (1992) 2 Cal.4th 86, 188 [5 Cal.Rptr.2d 796, 825 P.2d 781].
- Must Identify and Describe Target Offense ▶ *People v. Prettyman* (1996) 14 Cal.4th 248, 254 [58 Cal.Rptr.2d 827, 926 P.2d 1013].

## **RELATED ISSUES**

### **Murder**

A verdict of murder may not be based on the natural and probable consequences doctrine. Pen. Code, § 188(a)(3). (Penal Code section 188, as amended by Statutes 2018, ch. 1015 (S.B. 1437), became effective January 1, 2019.) The amendment added “malice shall not be imputed to a person based solely on his or her participation in a crime.” The question whether this amendment abolished the natural and probable consequences doctrine as to attempted murder is unresolved.

## **SECONDARY SOURCES**

1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Elements, §§ 98-99.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 141, *Conspiracy, Solicitation, and Attempt*, §§ 141.01[6], 141.02 (Matthew Bender).

**582. Involuntary Manslaughter: Failure to Perform  
Legal Duty—Murder Not Charged (Pen. Code, § 192(b))**

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The defendant is charged [in Count \_\_\_\_] with involuntary manslaughter [in violation of Penal Code section 192(b)] based on failure to perform a legal duty.

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

1. The defendant had a legal duty to \_\_\_\_\_ <insert name of decedent>;
2. The defendant failed to perform that legal duty;
3. The defendant's failure was criminally negligent;

**AND**

4. The defendant's failure caused the death of \_\_\_\_\_ <insert name of decedent>.

(A/An) \_\_\_\_\_ <insert description of person owing duty> has a legal duty to (help/care for/rescue/warn/maintain the property of/ \_\_\_\_\_ <insert other required action[s]>) \_\_\_\_\_ <insert description of decedent, not name>.

***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 how 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.

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

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

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

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New January 2006; Revised September 2020, October 2021

## BENCH NOTES

### *Instructional Duty*

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

The second sentence of the great bodily injury definition could result in error if the prosecution improperly argues great bodily injury may be shown by greater than minor injury alone. (Compare *People v. Medellin* (2020) 45 Cal.App.5th 519, 533-535 [258 Cal.Rptr.3d 867] [the definition was reasonably susceptible to prosecutor's erroneous argument that the injury need only be greater than minor] with *People v. Quinonez* (2020) 46 Cal.App.5th 457, 466 [260 Cal.Rptr.3d 86] [upholding instructions containing great bodily injury definition as written].)

### *Legal Duty*

The existence of a legal duty is a matter of law to be decided by the judge. (*Kentucky Fried Chicken v. Superior Court* (1997) 14 Cal.4th 814, 819 [59 Cal.Rptr.2d 756, 927 P.2d 1260]; *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 124 [211 Cal.Rptr. 356, 695 P.2d 653].) The court should instruct the jury if a legal duty exists. (See *People v. Burden* (1977) 72 Cal.App.3d 603, 614 [140 Cal.Rptr. 282] [proper instruction that parent has legal duty to furnish necessary clothing, food, and medical attention for his or her minor child].) In the

instruction on legal duty, the court should use generic terms to describe the relationship and duty owed. For example:

A parent has a legal duty to care for a child.

A paid caretaker has a legal duty to care for the person he or she was hired to care for.

A person who has assumed responsibility for another person has a legal duty to care for that other person.

The court should not state “the defendant had a legal duty to the decedent.” (See *People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135] [correct to state “a Garden Grove Regular Police Officer [is a] peace officer”]; would be error to state “Officer Reed was a peace officer”].)

However, in a small number of cases where the legal duty to act is based on the defendant having created or increased risk to the victim, the existence of the legal duty may depend on facts in dispute. (See *People v. Oliver* (1989) 210 Cal.App.3d 138, 149 [258 Cal.Rptr. 138].) If there is a conflict in testimony over the facts necessary to establish that the defendant owed a legal duty to the victim, then the issue must be submitted to the jury. In such cases, the court should insert a section similar to the following:

**The People must prove that the defendant had a legal duty to (help/rescue/warn/\_\_\_\_\_ <insert other required action[s]> \_\_\_\_\_ <insert name of decedent>.**

**In order to prove that the defendant had this legal duty, the People must prove that the defendant \_\_\_\_\_ <insert facts that establish legal duty>.**

**If you decide that the People have proved that the defendant \_\_\_\_\_ <insert facts that establish legal duty>, then the defendant had a legal duty to (help/rescue/warn/\_\_\_\_\_ <insert other required action[s]>) \_\_\_\_\_ <insert name of decedent>.**

**If you have a reasonable doubt whether the defendant \_\_\_\_\_ <insert facts that establish legal duty>, then you must find (him/her) not guilty.**

## AUTHORITY

- Elements. ▶ Pen. Code, § 192(b); *People v. Oliver* (1989) 210 Cal.App.3d 138, 146 [258 Cal.Rptr. 138].
- Criminal Negligence. ▶ *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Legal Duty. ▶ *People v. Heitzman* (1994) 9 Cal.4th 189, 198–199 [37 Cal.Rptr.2d 236, 886 P.2d 1229]; *People v. Oliver* (1989) 210 Cal.App.3d 138, 149 [258 Cal.Rptr. 138].
- Causation. ▶ *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274].
- This Instruction Upheld. ▶ *People v. Skiff* (2021) 59 Cal.App.5th 571, 579–580 [273 Cal.Rptr.3d 572].

## LESSER INCLUDED OFFENSES

Aggravated assault is not a lesser included offense of involuntary manslaughter. (*People v. Murray* (2008) 167 Cal.App.4th 1133, 1140 [84 Cal.Rptr.3d 676].)

## RELATED ISSUES

### ***Legal Duty to Aid***

In *People v. Oliver* (1989) 210 Cal.App.3d 138, 147 [258 Cal.Rptr. 138], the court explained the requirement of a legal duty to act as follows:

A necessary element of negligence, whether criminal or civil, is a duty owed to the person injured and a breach of that duty. . . . Generally, one has no legal duty to rescue or render aid to another in peril, even if the other is in danger of losing his or her life, absent a special relationship which gives rise to such duty. . . . In California civil cases, courts have found a special relationship giving rise to an affirmative duty to act where some act or omission on the part of the defendant either created or increased the risk of injury to the plaintiff, or created a dependency relationship inducing reliance or preventing assistance from others. . . . Where, however, the defendant took no affirmative action which contributed to, increased, or changed the risk which would otherwise have existed, and did not voluntarily assume any responsibility to protect the person or induce a false sense of security, courts have refused to find a special relationship giving rise to a duty to act.

***Duty Based on Dependency/Voluntary Assumption of Responsibility***

A legal duty to act exists when the defendant is a caretaker or has voluntarily assumed responsibility for the victim. (*Walker v. Superior Court* (1988) 47 Cal.3d 112,134–138 [253 Cal.Rptr. 1, 763 P.2d 852] [parent to child]; *People v. Montecino* (1944) 66 Cal.App.2d 85, 100 [152 P.2d 5] [contracted caretaker to dependent].)

***Duty Based on Conduct Creating or Increasing Risk***

A legal duty to act may also exist where the defendant’s behavior created or substantially increased the risk of harm to the victim, either by creating the dangerous situation or by preventing others from rendering aid. (*People v. Oliver* (1989) 210 Cal.App.3d 138, 147–148 [258 Cal.Rptr. 138] [defendant had duty to act where she drove victim to her home knowing he was drunk, knowingly allowed him to use her bathroom to ingest additional drugs, and watched him collapse on the floor]; *Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, 456 [30 Cal.Rptr. 2d 681] [defendant had duty to prevent horses from running onto adjacent freeway creating risk].)

**SECONDARY SOURCES**

1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against the Person, §§ 258–260.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 140, *Challenges to Crimes*, §§ 140.03, 140.04, Ch. 142, *Crimes Against the Person*, § 142.02[2][b] (Matthew Bender).

**583–589. Reserved for Future Use**

**625. Voluntary Intoxication: Effects on Homicide Crimes (Pen. Code, § 29.4)**

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**You may consider evidence, if any, of the defendant’s voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill[,] [or] [the defendant acted with deliberation and premeditation[,] [[or] the defendant was unconscious when (he/she) acted[,] [or the defendant \_\_\_\_\_ <insert other specific intent required in a homicide charge or other charged offense>.]**

**A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.**

**You may not consider evidence of the defendant’s voluntary intoxication for any other purpose.**

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*New January 2006; Revised August 2014, February 2016, March 2019, October 2021*

**BENCH NOTES**

***Instructional Duty***

With the statutory elimination of diminished capacity as a defense, there is no sua sponte duty to instruct on the effect of voluntary intoxication on the mental states required for homicide. (Pen. Code, § 28(b); *People v. Saille* (1991) 54 Cal.3d 1103, 1119–1120 [2 Cal.Rptr.2d 364, 820 P.2d 588].) However, subsequent cases affirm that voluntary intoxication can be used to negate an element of the crime that must be proven by the prosecution. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 982 [61 Cal.Rptr.2d 39]; *People v. Visciotti* (1992) 2 Cal.4th 1, 56–57 [5 Cal.Rptr.2d 495, 825 P.2d 388].) Such an instruction is a “pinpoint” instruction, which must be given on request when there is sufficient evidence supporting the theory. (*People v. Saille, supra*, 54 Cal.3d at p. 1120.)

Include the bracketed language regarding unconsciousness if the court also gives CALCRIM No. 626, *Voluntary Intoxication Causing Unconsciousness: Effects on Homicide Crimes*.

If the defendant is charged with a homicide crime that has as an element an

additional specific intent requirement other than intent to kill, include the required intent in the last bracketed portion of the second sentence. For example, if the defendant is charged with torture murder, include “whether the defendant intended to inflict extreme and prolonged pain.” Or, if the defendant is charged with felony-murder, insert intent to commit the felony where indicated. Similarly, if the defendant is also charged with a nonhomicide crime with a specific intent requirement, include that intent requirement. For example, if the defendant is charged with murder and robbery, include “whether the defendant intended to permanently deprive the owner of the property.”

Evidence of voluntary intoxication is inadmissible on the question of whether a defendant believed it necessary to act in self-defense. (*People v. Soto* (2018) 4 Cal.5th 968, 970 [231 Cal.Rptr.3d 732, 415 P.3d 789].)

## AUTHORITY

- Voluntary Intoxication Defined. ▶ Pen. Code, § 29.4(c).
- Unconsciousness Not Required. ▶ *People v. Ray* (1975) 14 Cal.3d 20, 28–29 [120 Cal.Rptr. 377, 533 P.2d 1017], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675].
- No Sua Sponte Duty to Instruct. ▶ *People v. Saille* (1991) 54 Cal.3d 1103, 1120 [2 Cal.Rptr.2d 364, 820 P.2d 588].
- Evidence of Intoxication Inapplicable to Implied Malice. ▶ Pen. Code, § 29.4(b); *People v. Martin* (2000) 78 Cal.App.4th 1107, 1114–1115 [93 Cal.Rptr.2d 433].
- Applies to Attempted Murder. ▶ *People v. Castillo* (1997) 16 Cal.4th 1009, 1016 [68 Cal.Rptr.2d 648, 945 P.2d 1197].
- Voluntary Intoxication Relevant to Knowledge. ▶ *People v. Reyes* (1997) 52 Cal.App.4th 975, 982–986 [61 Cal.Rptr.2d 39].
- This Instruction Upheld. ▶ *People v. Turk* (2008) 164 Cal.App.4th 1361, 1381 [80 Cal.Rptr.3d 473]; *People v. Timms* (2007) 151 Cal.App.4th 1292, 1298 [60 Cal.Rptr.3d 677].

## RELATED ISSUES

### ***General Instruction on Voluntary Intoxication***

This instruction is a specific application of CALCRIM No. 3426, *Voluntary*



*Intoxication*, to homicide.

***Unconsciousness***

Unconsciousness (as defined in CALCRIM No. 3425, *Unconsciousness*) is not required. (*People v. Ray* (1975) 14 Cal.3d 20, 28–29 [120 Cal.Rptr. 377, 533 P.2d 1017], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675].)

***Not Applicable in Murder Cases Based Exclusively on Implied Malice***

This instruction is inapplicable to cases where the murder charge is exclusively based on a theory of *implied* malice because voluntary intoxication can only negate *express* malice. (Pen. Code, § 29.4(b); *People v. Martin* (2000) 78 Cal.App.4th 1107, 1114–1115 [93 Cal.Rptr.2d 433].) Drunk-driving second degree murder is one type of case that is typically based exclusively on an implied malice theory.

**SECONDARY SOURCES**

1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Defenses, §§ 30–34.

3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 73, *Defenses and Justifications*, §§ 73.01[4], 73.04 (Matthew Bender).

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

**775. Death Penalty: Intellectual Disability~~Mental Retardation~~ (Pen. Code, § 1376)**

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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 and decide this phase of the trial applying only the instructions that I am giving you now. 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 intellectually disabled~~mentally retarded~~.

In order to establish that (he/she) is intellectually disabled~~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) also has deficits in two or more areas of adaptive behavior;

AND

3. These conditions were observable before the defendant reached the end of the developmental periodage of 18 years.

*Adaptive behavior* is the set of learned skills that people generally need to function in their everyday lives. Those skill areas include communication, self-care, home-living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.

*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 intellectually disabled~~mentally retarded~~. If the defendant has not met this burden, you must find that (he/she) has not proved that (he/she) is intellectually disabled~~mentally retarded~~. In order to return a finding that the defendant is or is not intellectually disabled~~mentally retarded~~, you must all agree on that finding.

## 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 [248 Cal.Rptr. 69, 755 P.2d 253].) In the context of penalty phase instructions, 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 [111 Cal.Rptr.2d 2, 29 P.3d 103], cert. den. sub nom. *Weaver v. California* (2002) 535 U.S. 1058 [122 S.Ct. 1920, 152 L.Ed.2d 828].) 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~~ intellectual disability phase as well.

When the defendant in a capital trial raises the issue of intellectual disability~~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 intellectual disability~~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 intellectual disability~~mental retardation~~ shall be conducted after the sanity phase. (Pen. Code, § 1376(e).) The defense bears the burden of proving intellectual disability~~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 CALCRIM No. 222, *Evidence*, CALCRIM No. 226, *Witnesses*, and CALCRIM No. 332, *Expert Witness*. The court must conclude with CALCRIM No. 3550, *Pre-Deliberation Instructions*.

## AUTHORITY

- Hearing on Intellectual Disability~~Mental Retardation~~ in Death Penalty Case. ▶ Pen. Code, § 1376.
- Execution of Intellectually Disabled~~Mentally Retarded~~ Unconstitutional. ▶ *Atkins v. Virginia* (2002) 536 U.S. 304, 319–321 [122 S.Ct. 2242, 153 L.Ed.2d 335].
- Intellectual Disability~~Mental Retardation~~ Defined. ▶ Pen. Code, § 1376(a); ~~*In re Hawthorne* (2005) 35 Cal.4th 40, 47–49 [24 Cal.Rptr.3d 189, 105 P.3d 552];~~

~~American Association on Mental Retardation;~~  
~~[http://www.aamr.org/Policies/faq\\_mental\\_retardation.shtml](http://www.aamr.org/Policies/faq_mental_retardation.shtml)~~ (accessed August 16, 2006 [case sensitive]).

- Weight of IQ Tests in Assessing Intellectual Disability. ▶ *Hall v. Florida* (2014) 572 U.S. 701, 722–723 [134 S.Ct. 1986, 188 L.Ed.2d 1007]; *In re Hawthorne* (2005) 35 Cal.4th 40, 48–49 [24 Cal.Rptr.3d 189, 105 P.3d 552]
- Should Give Jury New Set of Instructions (Penalty Phase). ▶ *People v. Weaver* (2001) 26 Cal.4th 876, 982 [111 Cal.Rptr.2d 2, 29 P.3d 103], cert. den. sub nom. *Weaver v. California* (2002) 535 U.S. 1058 [122 S.Ct. 1920, 152 L.Ed.2d 828].

## RELATED ISSUES

### *Scope of Expert Testing*

When the defendant places at issue the question of whether he or she is ~~intellectually disabled~~~~mentally retarded~~, the defendant must submit to examination by a prosecution expert. (*Centeno v. Superior Court* (2004) 117 Cal.App.4th 30, 40 [11 Cal.Rptr.3d 533].) “However, those 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.)

## SECONDARY SOURCES

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty*, §§ 87.16, 87.17, 87.18 (Matthew Bender).

**840. Inflicting Injury on Spouse, Cohabitant, or Fellow Parent  
Resulting in Traumatic Condition (Pen. Code, § 273.5(a))**

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The defendant is charged [in Count \_\_] with inflicting an injury on [his/her] ([former] spouse/[former] cohabitant/the (mother/father) of (his/her) child/someone with whom (he/she) had, or previously had, an engagement or dating relationship that resulted in a traumatic condition [in violation of Penal Code section 273.5(a)].

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

1. The defendant willfully [and unlawfully] inflicted a physical injury on (his/her) ([former] spouse/[former] cohabitant/the (mother/father) of (his/her) child)/someone with whom (he/she) had, or previously had, an engagement or dating relationship);

[AND]

2. The injury inflicted by the defendant resulted in a traumatic condition.

<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.

A *traumatic condition* is a wound or other bodily injury, whether minor or serious, caused by the direct application of physical force.

[The term *cohabitants* means two unrelated persons living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of

property, (4) the parties' holding themselves out as (spouses/domestic partners), (5) the continuity of the relationship, and (6) the length of the relationship.]

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

[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.]

[A person is considered to be the (mother/father) of another person's child if the alleged male parent is presumed under 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>.]

[A traumatic condition is the *result of* an injury if:

1. The traumatic condition was the natural and probable consequence of the injury;
2. The injury was a direct and substantial factor in causing the condition;

AND

3. The condition would not have happened without the injury.

*A natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.

*A substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that resulted in the traumatic condition.]

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New January 2006; Revised June 2007, August 2012, August 2014, February 2015, February 2016, March 2018, October 2021

## 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 CALCRIM Nos. 3470–3477.)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590-591 [35 Cal.Rptr. 401]; *People v. Cervantes* (2001) 26 Cal.4th 860, 865–874 [111 Cal.Rptr.2d 148, 29 P.3d 225].) Give the bracketed paragraph that begins, “A traumatic condition is the *result of* an injury if . . . .”

~~Give CALCRIM No. 3404, *Accident*, on request if there is sufficient evidence that an alleged victim’s injuries were caused by an accident, **the court has a sua sponte duty to instruct on accident.** (*People v. Anderson* (2011) 51 Cal.4th 989, 998, fn. 3 [125 Cal.Rptr.3d 408, 252 P.3d 968]; *People v. Gonzales* (1999) 74 Cal.App.4th 382, 390 [88 Cal.Rptr.2d 111].) Give CALCRIM No. 3404, *Accident*.~~

Give the bracketed language “[and unlawfully]” in element 1 if there is evidence that the defendant acted in self-defense.

Give the third bracketed sentence that begins “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 [52 Cal.Rptr.2d 256].)

Give on request the bracketed paragraph that begins “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 [39 Cal.Rptr.2d 479] [parentage can be established without resort to any presumption].)

If the defendant is charged with an enhancement for a prior conviction for a similar offense within seven years and has not stipulated to the prior conviction, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*. If the court has granted a bifurcated trial, see CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

If there is evidence that the traumatic condition resulted from strangulation or suffocation, consider instructing according to the special definition provided in Pen. Code, § 273.5(c).

The amendment to Penal Code section 273.5(b) adding “someone with whom the offender has, or previously had, an engagement or dating relationship as defined in Penal Code section 243(f)(10)” to the list of potential victims became effective on January 1, 2014.

## AUTHORITY

- Elements ▶ Pen. Code, § 273.5(a).
- Traumatic Condition Defined ▶ Pen. Code, § 273.5(c); *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952 [217 Cal.Rptr. 616].
- Willful Defined ▶ Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Cohabitant Defined ▶ *People v. Holifield* (1988) 205 Cal.App.3d 993, 1000 [252 Cal.Rptr. 729]; *People v. Ballard* (1988) 203 Cal.App.3d 311, 318–319 [249 Cal.Rptr. 806].
- Direct Application of Force ▶ *People v. Jackson* (2000) 77 Cal.App.4th 574, 580 [91 Cal.Rptr.2d 805].
- Duty to Define Traumatic Condition ▶ *People v. Burns* (1948) 88 Cal.App.2d 867, 873–874 [200 P.2d 134].
- Strangulation and Suffocation ▶ Pen. Code, § 273.5(d).
- General Intent Crime ▶ See *People v. Thurston* (1999) 71 Cal.App.4th 1050, 1055 [84 Cal.Rptr.2d 221]; *People v. Campbell* (1999) 76 Cal.App.4th 305, 307–309 [90 Cal.Rptr.2d 315]; contra *People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1402 [7 Cal.Rptr.2d 495] [dictum].
- Simultaneous Cohabitation ▶ *People v. Moore* (1996) 44 Cal.App.4th 1323, 1335 [52 Cal.Rptr.2d 256].
- Dating Relationship Defined ▶ Pen. Code, § 243(f)(10).



## LESSER INCLUDED OFFENSES

- Attempted Infliction of Corporal Punishment on Spouse ▶ Pen. Code, §§ 664, 273.5(a); *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1627, 1628 [47 Cal.Rptr.2d 769] [attempt requires intent to cause traumatic condition, but does not require a resulting “traumatic condition”].
- Misdemeanor Battery ▶ Pen. Code, §§ 242, 243(a); see *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952 [217 Cal.Rptr. 616].
- Battery Against Spouse, Cohabitant, or Fellow Parent ▶ Pen. Code, § 243(e)(1); see *People v. Jackson* (2000) 77 Cal.App.4th 574, 580 [91 Cal.Rptr.2d 805].
- Simple Assault ▶ Pen. Code, §§ 240, 241(a); *People v. Van Os* (1950) 96 Cal.App.2d 204, 206 [214 P.2d 554].

## RELATED ISSUES

### ***Continuous Course of Conduct***

Penal Code section 273.5 is aimed at a continuous course of conduct. The prosecutor is not required to choose a particular act and the jury is not required to unanimously agree on the same act or acts before a guilty verdict can be returned. (*People v. Thompson* (1984) 160 Cal.App.3d 220, 224–225 [206 Cal.Rptr. 516].)

### ***Multiple Acts of Abuse***

A defendant can be charged with multiple violations of Penal Code section 273.5 when each battery satisfies the elements of section 273.5. (*People v. Healy* (1993) 14 Cal.App.4th 1137, 1140 [18 Cal.Rptr.2d 274].)

### ***Prospective Parents of Unborn Children***

Penal Code section 273.5(a) does not apply to a man who inflicts an injury upon a woman who is pregnant with his unborn child. “A pregnant woman is not a ‘mother’ and a fetus is not a ‘child’ as those terms are used in that section.” (*People v. Ward* (1998) 62 Cal.App.4th 122, 126, 129 [72 Cal.Rptr.2d 531].)

### ***Termination of Parental Rights***

Penal Code section 273.5 “applies to a man who batters the mother of his child even after parental rights to that child have been terminated.” (*People v. Mora* (1996) 51 Cal.App.4th 1349, 1356 [59 Cal.Rptr.2d 801].)

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 64–67.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.13[3] (Matthew Bender).

## 852A. Evidence of Uncharged Domestic Violence

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

<Alternative A—As defined in Pen. Code, § 13700>

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

<Alternative B—As defined in Fam. Code, § 6211>

[**Domestic violence** means abuse committed against a (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/ [or] child[,]/ [or] grandchild[,]/ [or] parent[,]/ [or] grandparent[,]/ [or] brother[,]/ [or] sister) of the defendant.]

**Abuse** means intentionally or recklessly causing or attempting to cause bodily injury, [or] committing sexual assault[,]/ [or] placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else[, or engaging in \_\_\_\_\_ <insert behavior that was or could be enjoined pursuant to Fam. Code, § 6320>].

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

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

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

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

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

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

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*New January 2006; Revised August 2006, June 2007, April 2008, February 2014, March 2017, October 2021*

## **BENCH NOTES**

### ***Instructional Duty***

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

If the court has admitted evidence that the defendant was convicted of a felony or committed a misdemeanor for the purpose of impeachment in addition to evidence admitted under Evidence Code section 1109, then the court must specify for the

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

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

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

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

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

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

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

### ***Related Instructions***

CALCRIM No. 375, *Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.*

CALCRIM No. 1191A, *Evidence of Uncharged Sex Offense*.

CALCRIM No. 1191B, *Evidence of Charged Sex Offense*.

CALCRIM No. 852B, *Evidence of Charged Domestic Violence*.

CALCRIM No. 853A, *Evidence of Uncharged Abuse of Elder or Dependent Person*.

CALCRIM No. 853B, *Evidence of Charged Abuse of Elder or Dependent Person*.

## AUTHORITY

- Instructional Requirement ▶ Evid. Code, § 1109(a)(1); see *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1016 [130 Cal.Rptr.2d 254, 62 P.3d 601]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 37 [107 Cal.Rptr.2d 100]; *People v. Falsetta* (1999) 21 Cal.4th 903, 923–924 [89 Cal.Rptr.2d 847, 986 P.2d 182] [dictum].
- Abuse Defined ▶ Pen. Code, § 13700(a); [Fam. Code, § 6203](#); [People v. Kovacich \(2011\) 201 Cal.App.4th 863, 894–895 \[133 Cal.Rptr.3d 924\]](#).
- Cohabitant Defined ▶ Pen. Code, § 13700(b).
- Domestic Violence Defined ▶ Evid. Code, § 1109(d)(3); Pen. Code, § 13700(b); Fam. Code, § 6211; see *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1139 [83 Cal.Rptr.2d 320] [spousal rape is higher level of domestic violence].
- Emancipation of Minors Law ▶ Fam. Code, § 7000 et seq.
- Other Crimes Proved by Preponderance of Evidence ▶ *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal.Rptr.2d 1, 935 P.2d 708]; *People v. James* (2000) 81 Cal.App.4th 1343, 1359 [96 Cal.Rptr.2d 823].
- Propensity Evidence Alone Is Not Sufficient to Support Conviction Beyond a Reasonable Doubt ▶ *People v. Younger* (2000) 84 Cal.App.4th 1360, 1382 [101 Cal.Rptr.2d 624]; *People v. James* (2000) 81 Cal.App.4th 1343, 1357–1358, fn. 8 [96 Cal.Rptr.2d 823]; see *People v. Hill* (2001) 86 Cal.App.4th 273, 277–278 [103 Cal.Rptr.2d 127] [in context of prior sexual offenses].
- Charged Sex Offenses Proved Beyond a Reasonable Doubt May Be Evidence of Propensity ▶ *People v. Cruz* (2016) 2 Cal.App.5th 1178, 1186–1186 [206 Cal.Rptr.3d 835]; *People v. Villatoro* (2012) 54 Cal.4th 1152, 1161 [144 Cal.Rptr.3d 401, 281 P.3d 390].
- Previous Version of This Instruction Upheld ▶ *People v. Johnson* (2008) 164 Cal.App.4th 731, 738 [79 Cal.Rptr.3d 568].

- No Sua Sponte Duty to Give Similar Instruction ▶ *People v. Cottone* (2013) 57 Cal.4th 269, 293, fn. 15 [159 Cal.Rptr.3d 385, 303 P.3d 1163].

## COMMENTARY

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

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

## RELATED ISSUES

### *Constitutional Challenges*

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

Cal.App.4th 1301, 1310–1313 [97 Cal.Rptr.2d 727]; see *People v. Fitch* (1997) 55 Cal.App.4th 172, 184–185 [63 Cal.Rptr.2d 753] (construing Evid. Code, § 1108).

### ***Exceptions***

Evidence of domestic violence occurring more than 10 years before the charged offense is inadmissible under section 1109 of the Evidence Code, unless the court determines that the admission of this evidence is in the interest of justice. (Evid. Code, § 1109(e).) Evidence of the findings and determinations of administrative agencies regulating health facilities is also inadmissible under section 1109. (Evid. Code, § 1109(f).)

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

## **SECONDARY SOURCES**

5 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Criminal Trial, §§ 720-722.

1 Witkin, *California Evidence* (5th ed. 2012) Circumstantial Evidence, §§ 101, 102.

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

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



## 1001. Rape or Spousal Rape in Concert (Pen. Code, § 264.1)

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The defendant[s] [ \_\_\_\_\_ <insert name[s] if not all defendants in trial charged with this count>] (is/are) charged [in Count \_\_] with committing rape by acting in concert [with \_\_\_\_\_ <insert name[s] or description[s] of uncharged participant[s]>] [in violation of Penal Code section 264.1].

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

<Alternative A—defendant committed rape>

[1.] [The defendant personally committed forcible rape and voluntarily acted with someone else who aided and abetted its commission(;/.)]

[OR]

<Alternative B—defendant aided and abetted>

[(1/2).] [The defendant voluntarily aided and abetted someone else who personally committed forcible rape.]

To decide whether the defendant[s] [or \_\_\_\_\_ <insert name[s] or description[s] of uncharged participant[s]>] committed rape, please refer to the separate instructions that I (will give/have given) you on that crime. To decide whether the defendant[s] [or \_\_\_\_\_ <insert name[s] or description[s] of uncharged participant[s]>] aided and abetted rape, please refer to the separate instructions that I (will give/have given) you on aiding and abetting. You must apply those instructions when you decide whether the People have proved rape in concert.

<Make certain that all appropriate instructions on rape and aiding and abetting are given.>

[To prove the crime of rape in concert, the People do not have to prove a prearranged plan or scheme to commit rape.]

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New January 2006; *Revised October 2021*

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. (See Pen. Code, § 264.1; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 621 [236 Cal.Rptr. 404] [rape in concert is a separate crime, not an enhancement].) The court also has a **sua sponte** duty to instruct on rape. Give one or more of the following instructions defining rape: CALCRIM No. 1000, or CALCRIM Nos. 1005–1114.

Select alternative A or B, or both, depending on whether the defendant personally committed the crime or aided and abetted someone else.

Depending on the evidence, give the final bracketed paragraph on request regarding the lack of a prearranged plan. (See *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658].)

### *Related Instructions*

See generally CALCRIM No. 400, *Aiding and Abetting: General Principles* and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

*CALCRIM No. 3185, Sex Offenses: Sentencing Factor—Using Force or Fear Against Minor Under 14 Years/14 Years or Older.*

## AUTHORITY

- Elements. ▶ Pen. Code, § 264.1; see *People v. Mom* (2000) 80 Cal.App.4th 1217, 1224 [96 Cal.Rptr.2d 172] [requires no greater force than that necessary for forcible rape], disapproved on other grounds in *People v. Griffin* (2004) 33 Cal.4th 1015, 1028 [16 Cal.Rptr.3d 891, 94 P.3d 1089].
- Forcible Rape Defined. ▶ Pen. Code, § 261(a)(2).
- Spousal Rape Defined. ▶ Pen. Code, § 262(a)(1).
- Aiding and Abetting. ▶ *People v. Adams* (1993) 19 Cal.App.4th 412, 445–446 [23 Cal.Rptr.2d 512]; see *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].

## COMMENTARY

There is conflicting authority whether all types of forcible rape may be the basis for charging a rape in concert. (Compare *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [rape by duress, menace, and fear unavailable under Pen. Code, § 264.1] and *People v. Mom* (2000) 80 Cal.App.4th 1217, 1222–1223 [96 Cal.Rptr.2d 172] [§ 264.1 only includes rape involving “force” and “violence”], disapproved on other grounds in *People v. Griffin* (2004) 33 Cal.4th 1015, 1028 [16 Cal.Rptr.3d 891, 94 P.3d 1089], with *People v. Wheeler* (1977) 71 Cal.App.3d 902, 907 [139 Cal.Rptr. 737] [§ 264.1 includes any unlawful use of force, including threat of harm].) The instruction addresses rape accomplished by force or violence. (See Pen. Code, §§ 261(a)(2), 264.1.) If another basis for charging rape in concert is argued, for example, rape by duress, menace, fear, or threats (see Pen. Code, § 261(a)(2), (6), & (7)), see CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats* for appropriate language that may be included on request.

Penal Code section 264.1 deals with a crime of substance, and is not an enhancement statute, as discussed in *People v. Best* (1983) 143 Cal.App.3d 232, 237 [191 Cal.Rptr. 614].

## LESSER INCLUDED OFFENSES

- Assault. ▶ Pen. Code, § 240.
- Assault With Intent to Commit Rape. ▶ Pen. Code, § 220; *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible rape is charged].
- Attempted Rape. ▶ Pen. Code, §§ 664, 261.
- Battery. ▶ Pen. Code, § 242.
- Rape. ▶ Pen. Code, §§ 261, 262.

## RELATED ISSUES

### *Need Not Personally Participate*

A defendant may be convicted of rape in concert if he or she was at the general scene of the rape and aided and abetted another person in accomplishing the act, even if the defendant did not personally participate in the act or was not personally present at the exact scene of the act. (See *People v. Lopez* (1981) 116 Cal.App.3d 882, 887–888 [172 Cal.Rptr. 374]; *People v. Barnett* (1976) 54 Cal.App.3d 1046, 1049 [127 Cal.Rptr. 88] [oral copulation in concert although not in room when act

took place]; *People v. Champion* (1995) 9 Cal.4th 879, 933 [39 Cal.Rptr.2d 547] [rape in concert by holding victim's family at gun point in another room].) However, the Supreme Court has not resolved whether a person acts in concert when his accomplice assists in the commission of the crime, but is not present at the general scene (for example, when the accomplice provides the rapist with information about the victim, or pays the rapist to commit the act). (*People v. Champion* (1995) 9 Cal.4th 879, 933, fn. 22 [891 P.2d 93].)

## **SECONDARY SOURCES**

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 21.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.20[1][a], [2][c] (Matthew Bender).  
Couzens & Bigelow, *Sex Crimes: California Law and Procedure* §§ 12:16, 12:17 (The Rutter Group).

**1015. Oral Copulation by Force, Fear, or Threats (Pen. Code, § 287(c)(2) & (3), (k))**

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The defendant is charged [in Count \_\_] with oral copulation by force [in violation of Penal Code section 287].

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

1. The defendant committed an act of oral copulation with someone else;
2. The other person did not consent to the act;

**AND**

3. The defendant accomplished the act by

*<Alternative 3A—force or fear>*

[force, violence, duress, menace, or fear of immediate and unlawful bodily injury to someone.]

*<Alternative 3B—future threats of bodily harm>*

[threatening to retaliate against someone when there was a reasonable possibility that the threat would be carried out. A *threat to retaliate* is a threat to kidnap, unlawfully restrain or confine, or inflict extreme pain, serious bodily injury, or death.]

*<Alternative 3C—threat of official action>*

[threatening to use the authority of a public office to incarcerate, arrest, or deport someone. A *public official* is a person employed by a government agency who has the authority to incarcerate, arrest, or deport. The other person must have reasonably believed that the defendant was a public official even if (he/she) was not.]

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

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

[Evidence that the defendant and the person (dated/were married/had been married) is not enough by itself to constitute consent.]

[Evidence that the person (requested/suggested/communicated) that the defendant use a condom or other birth control device is not enough by itself to constitute consent.]

[An act is *accomplished by force* if a person uses enough physical force to overcome the other person's will.]

[*Duress* means a direct or implied threat of force, violence, danger, hardship, or retribution that causes a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to]. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the other person and (his/her) relationship to the defendant.]

[*Retribution* is a form of payback or revenge.]

[*Menace* means a threat, statement, or act showing an intent to injure someone.]

[An act is *accomplished by fear* if the other person is actually and reasonably afraid [or (he/she) is actually but unreasonably afraid and the defendant knows of (his/her) fear and takes advantage of it].]

[The defendant is not guilty of forcible oral copulation if he or she actually and reasonably believed that the other person consented to the act. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the person consented. If the People have not met this burden, you must find the defendant not guilty.]

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New January 2006; Revised August 2006, October 2021

## BENCH NOTES

### *Instructional Duty*

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

Select the appropriate alternative in element 3 to instruct how the act was allegedly accomplished.

**Related Instructions**

**CALCRIM No. 3185, Sex Offenses: Sentencing Factor—Using Force or Fear Against Minor Under 14 Years/14 Years or Older.**

**AUTHORITY**

- Elements. ▶ Pen. Code, § 287(c)(2) & (3), (k).
- Consent Defined. ▶ Pen. Code, §§ 261.6, 261.7.
- Duress Defined. ▶ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221].
- Menace Defined. ▶ Pen. Code, § 261(c) [in context of rape].
- Oral Copulation Defined. ▶ Pen. Code, § 287(a); *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].
- Threatening to Retaliate Defined. ▶ Pen. Code, § 287(1).
- Fear Defined. ▶ *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. ▶ *People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089]; *People v. Guido* (2005) 125 Cal.App.4th 566, 574–576 [22 Cal.Rptr.3d 826].
- Threatening to Retaliate. ▶ *People v. White* (2005) 133 Cal.App.4th 473, 484–485 [34 Cal.Rptr.3d 848]; *People v. Ward* (1986) 188 Cal.App.3d 459, 468 [233 Cal.Rptr. 477].

**COMMENTARY**

Penal Code section 287 requires that the oral copulation be “against the will” of the other person. (Pen. Code, § 287(c)(2) & (3), (k).) “Against the will” has been defined as “without consent.” (*People v. Key* (1984) 153 Cal.App.3d 888, 895 [203 Cal.Rptr. 144]; see also *People v. Young* (1987) 190 Cal.App.3d 248, 257 [235 Cal.Rptr. 361].)

The instruction includes a definition of the sufficiency of “fear” because that term has meaning in the context of forcible oral copulation that is technical and may not

be readily apparent to jurors. (See *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].)

The court is not required to instruct sua sponte on the definition of “duress” or “menace” and Penal Code section 288a does not define either term. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress]). Optional definitions are provided for the court to use at its discretion. The definition of “duress” is based on *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071], and *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]. The definition of “menace” is based on the statutory definitions contained in Penal Code sections 261 and 262 [rape]. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416] [using rape definition in case involving forcible lewd acts].) In *People v. Leal*, *supra*, 33 Cal.4th at pp. 1004–1010, the court held that the statutory definition of “duress” contained in Penal Code sections 261 and 262 does not apply to the use of that term in any other statute. The court did not discuss the statutory definition of “menace.” The court should consider the *Leal* opinion before giving the definition of “menace.”

The term “force” as used in the forcible sex offense statutes does not have a specialized meaning and court is not required to define the term sua sponte. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024; *People v. Guido* (2005) 125 Cal.App.4th 566, 574–576 [22 Cal.Rptr.3d 826]). In *People v. Griffin*, *supra*, the Supreme Court further stated,

Nor is there anything in the common usage definitions of the term “force,” or in the express statutory language of section 261 itself, that suggests force in a forcible rape prosecution actually means force “*substantially* different from or *substantially* greater than” the physical force normally inherent in an act of consensual sexual intercourse. [*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582].] To the contrary, it has long been recognized that “in order to establish force within the meaning of section 261, subdivision (2), the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim].” (*People v. Young* (1987) 190 Cal.App.3d 248, 257–258 [235 Cal.Rptr. 361].)

(*People v. Griffin*, *supra*, 33 Cal.4th at pp. 1023–1024 [emphasis in original]; see also *People v. Guido* (2005) 125 Cal.App.4th 566, 574–576 [22 Cal.Rptr.3d 826] [*Griffin* reasoning applies to violation of Pen. Code, § 287(c)(2)].)



The committee has provided a bracketed definition of “force,” consistent with *People v. Griffin, supra*, that the court may give on request.

### LESSER INCLUDED OFFENSES

- Assault. ▶ Pen. Code, § 240.
- Assault With Intent to Commit Oral Copulation. ▶ Pen. Code, § 220; see *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible crime is charged].
- Attempted Oral Copulation. ▶ Pen. Code, §§ 663, 287.
- Battery. ▶ Pen. Code, § 242.

### RELATED ISSUES

#### ***Consent Obtained by Fraudulent Representation***

A person may also induce someone else to consent to engage in oral copulation by a false or fraudulent representation made with an intent to create fear, and which does induce fear and would cause a reasonable person to act contrary to his or her free will. (Pen. Code, § 266c.) While section 266c requires coercion and fear to obtain consent, it does not involve physical force or violence. (See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937–938 [26 Cal.Rptr.2d 567] [rejecting defendant’s argument that certain acts were consensual and without physical force, and were only violations of section 266c].)

#### ***Consent Withdrawn***

A forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection. (*In re John Z.* (2003) 29 Cal.4th 756, 760 [128 Cal.Rptr.2d 783, 60 P.3d 183].) If there is an issue whether consent to oral copulation was withdrawn, see CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*, for language that may be adapted for use in this instruction.

#### ***Multiple Acts of Oral Copulation***

An accused may be convicted for multiple, nonconsensual sex acts of an identical nature that follow one another in quick, uninterrupted succession. (*People v. Catelli* (1991) 227 Cal.App.3d 1434, 1446–1447 [278 Cal.Rptr. 452] [defendant properly convicted of multiple violations of former Pen. Code, § 288a where he interrupted the acts of copulation and forced victims to change positions].)

***Sexual Organ***

A man's "sexual organ" for purposes of Penal Code section 287 includes the penis and the scrotum. (Pen. Code, § 287; *People v. Catelli* (1991) 227 Cal.App.3d 1434, 1448–1449 [278 Cal.Rptr. 452].)

**SECONDARY SOURCES**

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 35–38, 178.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.20[1][c], [2] (Matthew Bender).

Couzens & Bigelow, *Sex Crimes: California Law and Procedure* §§ 12:16, 12:17 (The Rutter Group).

**1016. Oral Copulation in Concert (Pen. Code, § 287(d))**

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**The defendant[s] [ \_\_\_\_\_ <insert name[s] if not all defendants in trial charged with this count>] (is/are) charged [in Count \_\_] with committing oral copulation by acting in concert [with \_\_\_\_\_ <insert name[s] or description[s] of uncharged participant[s]>] [in violation of Penal Code section 287(d)].**

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

*<Alternative A—defendant committed oral copulation>*

**[1.] [The defendant personally committed oral copulation and voluntarily acted with someone else who aided and abetted its commission(;/.)]**

**[OR]**

*<Alternative B—defendant aided and abetted>*

**[(1/2).] [The defendant voluntarily aided and abetted someone else who personally committed oral copulation.]**

**To decide whether the defendant[s] [or \_\_\_\_\_ <insert name[s] or description[s] of uncharged participant[s]>] committed oral copulation, please refer to the separate instructions that I (will give/have given) you on that crime. To decide whether the defendant[s] [or \_\_\_\_\_ <insert name[s] or description[s] of uncharged participant[s]>] aided and abetted oral copulation, please refer to the separate instructions that I (will give/have given) you on aiding and abetting. You must apply those instructions when you decide whether the People have proved oral copulation in concert.**

*<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ORAL COPULATION AND AIDING AND ABETTING ARE GIVEN.>*

**[To prove the crime of oral copulation in concert, the People do not have to prove a prearranged plan or scheme to commit oral copulation.]**

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*New January 2006; Revised October 2021*

**BENCH NOTES**

***Instructional Duty***

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. (See Pen. Code, § 287(d).) The court also has a **sua sponte** duty to instruct on oral copulation. Give one or more of the following instructions defining oral copulation: CALCRIM No. 1015 or CALCRIM Nos. 1017–1022.

Select alternative A or B, or both, depending on whether the defendant personally committed the crime or aided and abetted someone else.

Depending on the evidence, give the final bracketed paragraph on request regarding the lack of a prearranged plan. (See *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658].)

### ***Related Instructions***

See generally CALCRIM No. 400, *Aiding and Abetting: General Principles*, and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

*CALCRIM No. 3185, Sex Offenses: Sentencing Factor—Using Force or Fear Against Minor Under 14 Years/14 Years or Older.*

## **AUTHORITY**

- Elements. ▶ Pen. Code, § 287(d).
- Aiding and Abetting. ▶ *People v. Adams* (1993) 19 Cal.App.4th 412, 429, 444–446 [23 Cal.Rptr.2d 512]; *People v. Caldwell* (1984) 153 Cal.App.3d 947, 951–952 [200 Cal.Rptr. 508]; *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658] [in context of sodomy in concert].
- Consent Defined. ▶ *People v. Boggs* (1930) 107 Cal.App. 492, 495–496 [290 P. 618].

## **LESSER INCLUDED OFFENSES**

- Assault. ▶ Pen. Code, § 240.
- Assault With Intent to Commit Oral Copulation. ▶ Pen. Code, § 220; see *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [when forcible crime is charged].
- Attempted Oral Copulation. ▶ Pen. Code, §§ 664, 287.
- Attempted Oral Copulation in Concert. ▶ Pen. Code, §§ 663, 287(d).
- Battery. ▶ Pen. Code, § 242.

- Oral Copulation. ▶ Pen. Code, § 287.

## RELATED ISSUES

See the Related Issues sections under CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*, and CALCRIM No. 1001, *Rape or Spousal Rape in Concert*.

## SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 35, 40, 178.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.20[1][c], [2][c] (Matthew Bender).

Couzens & Bigelow, *Sex Crimes: California Law and Procedure* §§ 12:16, 12:17 (The Rutter Group).

**1030. Sodomy by Force, Fear, or Threats (Pen. Code, § 286(c)(2), (3), (k))**

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The defendant is charged [in Count \_\_] with sodomy by force [in violation of Penal Code section 286].

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

1. The defendant committed an act of sodomy with another person;
2. The other person did not consent to the act;

**AND**

3. The defendant accomplished the act:

*<Alternative 3A—force or fear>*

[by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to another person.]

*<Alternative 3B—future threats of bodily harm>*

[by threatening to retaliate against someone when there was a reasonable possibility that the defendant would carry out the threat. A *threat to retaliate* is a threat to kidnap, unlawfully restrain or confine, or inflict extreme pain, serious bodily injury, or death.]

*<Alternative 3C—threat of official action>*

[by threatening to use the authority of a public office to incarcerate, arrest, or deport someone. A *public official* is a person employed by a government agency who has authority to incarcerate, arrest, or deport. The other person must have reasonably believed that the defendant was a public official even if (he/she) was not.]

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

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

[Evidence that the defendant and the other person (dated/were married/had been married) is not enough by itself to constitute consent.]

[Evidence that the other person (requested/suggested/communicated) that the defendant use a condom or other birth control device is not enough by itself to constitute consent.]

[An act is *accomplished by force* if a person uses enough physical force to overcome the other person's will.]

[*Duress* means a direct or implied threat of force, violence, danger, hardship, or retribution that causes a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to]. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the other person and (his/her) relationship to the defendant.]

[*Retribution* is a form of payback or revenge.]

[*Menace* means a threat, statement, or act showing an intent to injure someone.]

[An act is *accomplished by fear* if the other person is actually and reasonably afraid [or he or she is actually but unreasonably afraid and the defendant knows of his or her fear and takes advantage of it].]

[The other person must be alive at the time of the act for the crime of sodomy to occur.]

<Defense: Reasonable Belief in Consent>

[The defendant is not guilty of forcible sodomy if (he/she) actually and reasonably believed that the other person consented to the act. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the other person consented. If the People have not met this burden, you must find the defendant not guilty.]

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New January 2006; Revised August 2006, February 2012, October 2021

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to give an instruction defining the elements of sodomy. (Pen. Code, § 286(c)(2), (3), (k); *People v. Martinez* (1986) 188

Cal.App.3d 19, 24–26 [232 Cal.Rptr. 736]; *People v. Moore* (1989) 211 Cal.App.3d 1400, 1407 [260 Cal.Rptr. 134].)

The court should select the appropriate alternative in element 3 to instruct how the sodomy was accomplished.

Sodomy requires that the victim be alive at the moment of the act. (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1175–1177 [270 Cal.Rptr. 286, 791 P.2d 965]; If this is an issue in the case, give the bracketed sentence that begins with “The other person must be alive . . .”

### ***Defenses—Instructional Duty***

The court has a **sua sponte** duty to instruct on the defense of reasonable belief in consent if there is “substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not.” (See *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337].)

### **Related Instructions**

**CALCRIM No. 3185, Sex Offenses: Sentencing Factor—Using Force or Fear Against Minor Under 14 Years/14 Years or Older.**

## **AUTHORITY**

- Elements. ▶ Pen. Code, § 286(c)(2), (3), (k).
- Consent Defined. ▶ Pen. Code, §§ 261.6, 261.7.
- Duress Defined. ▶ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221].
- Menace Defined. ▶ Pen. Code, § 261(c) [in context of rape].
- Sodomy Defined. ▶ Pen. Code, § 286(a); see *People v. Singh* (1923) 62 Cal.App. 450, 452 [217 P. 121] [ejaculation is not required].
- Threatening to Retaliate Defined. ▶ Pen. Code, § 286(l).
- Fear Defined. ▶ *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. ▶ *People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089]; see also *People v. Guido* (2005) 125 Cal.App.4th 566, 574 [22 Cal.Rptr.3d 826].



## COMMENTARY

Penal Code section 286 requires that the sodomy be “against the will” of the other person. (Pen. Code, § 286(c)(2), (3), (k).) “Against the will” has been defined as “without consent.” (*People v. Key* (1984) 153 Cal.App.3d 888, 895 [203 Cal.Rptr. 144] [in context of rape]; see also *People v. Young* (1987) 190 Cal.App.3d 248, 257 [235 Cal.Rptr. 361].)

The instruction includes a definition of the sufficiency of “fear” because that term has meaning in the context of forcible sodomy that is technical and may not be readily apparent to jurors. (See *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651] [fear]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].)

The court is not required to instruct sua sponte on the definition of “duress” or “menace” and Penal Code section 286 does not define either term. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress]). Optional definitions are provided for the court to use at its discretion. The definition of “duress” is based on *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071], and *People v. Pitmon, supra*, 170 Cal.App.3d at 50. The definition of “menace” is based on the statutory definitions contained in Penal Code sections 261 and 262 [rape]. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416] [using rape definition in case involving forcible lewd acts].) In *People v. Leal, supra*, 33 Cal.4th at pp. 1004–1010, the court held that the statutory definition of “duress” contained in Penal Code sections 261 and 262 does not apply to the use of that term in any other statute. The court did not discuss the statutory definition of “menace.” The court should consider the *Leal* opinion before giving the definition of “menace.”

The term “force” as used in the forcible sex offense statutes does not have a specialized meaning and court is not required to define the term sua sponte. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089].) In *People v. Griffin, supra*, the Supreme Court further stated,

Nor is there anything in the common usage definitions of the term “force,” or in the express statutory language of section 261 itself, that suggests force in a forcible rape prosecution actually means force “*substantially* different from or *substantially* greater than” the physical force normally inherent in an act of consensual sexual intercourse. (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582].) To the contrary, it has long been recognized that “in order to establish force within the meaning of section 261, [former]

subdivision (2), the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim].” (*People v. Young* (1987) 190 Cal.App.3d 248, 257–258 [235 Cal.Rptr. 361].)

(*Ibid.* [emphasis in original]; see also *People v. Guido* (2005) 125 Cal.App.4th 566, 574 [22 Cal.Rptr.3d 826].)

The committee has provided a bracketed definition of “force,” consistent with *People v. Griffin, supra*, that the court may give on request.

### **LESSER INCLUDED OFFENSES**

- Assault. ▶ Pen. Code, § 240.
- Assault With Intent to Commit Sodomy. ▶ Pen. Code, § 220; see *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible crime is charged].
- Attempted Forcible Sodomy. ▶ Pen. Code, §§ 664, 286.
- Battery. ▶ Pen. Code, § 242; *People v. Hughes* (2002) 27 Cal.4th 287, 366 [116 Cal.Rptr.2d 401, 39 P.3d 432].

Non-forcible sex crimes requiring the perpetrator and victim to be within certain age limits are not lesser included offenses of forcible sex crimes. (*People v. Scott* (2000) 83 Cal.App.4th 784, 794 [100 Cal.Rptr.2d 70].)

### **RELATED ISSUES**

#### ***Consent Obtained by Fraudulent Representation***

A person may also induce someone else to consent to engage in sodomy by a false or fraudulent representation made with an intent to create fear, and which does induce fear and would cause a reasonable person to act contrary to his or her free will. (Pen. Code, § 266c.) While section 266c requires coercion and fear to obtain consent, it does not involve physical force or violence. (See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937–938 [26 Cal.Rptr.2d 567] [rejecting defendant’s argument that certain acts were consensual and without physical force, and were only violations of section 266c].)

### ***Consent Withdrawn***

A forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection. (*In re John Z.* (2003) 29 Cal.4th 756, 760 [128 Cal.Rptr.2d 783, 60 P.3d 183].) If there is an issue whether consent to sodomy was withdrawn, see CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*, for language that may be adapted for use in this instruction.

### ***Victim Must Be Alive***

Sodomy requires that the victim be alive at the moment of penetration. (*People v. Davis* (1995) 10 Cal.4th 463, 521, fn. 20 [41 Cal.Rptr.2d 826, 896 P.2d 119]; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1176 [270 Cal.Rptr. 286, 791 P.2d 965].) Sodomy with a deceased victim can constitute attempted sodomy if the defendant attempted an act of forcible sodomy while the victim was alive or with the mistaken belief that the victim was alive. (*People v. Davis, supra*, 10 Cal.4th at p. 521, fn. 20; *People v. Hart* (1999) 20 Cal.4th 546, 611 [85 Cal.Rptr.2d 132, 976 P.2d 683].)

### ***Penetration May Be Through Victim's Clothing***

If there is penetration into a victim's anus by a perpetrator's sexual organ, it is sodomy, even if the victim is wearing clothing at the time. (*People v. Ribera* (2005) 133 Cal.App.4th 81, 85–86 [34 Cal.Rptr.3d 538]).

## **SECONDARY SOURCES**

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 27, 28, 30, 178.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.20[1][b], [2] (Matthew Bender).

Couzens & Bigelow, *Sex Crimes: California Law and Procedure* §§ 12:16, 12:17 (The Rutter Group).

### 1031. Sodomy in Concert (Pen. Code, § 286(d))

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The defendant[s] [ \_\_\_\_\_ <insert name[s] if not all defendants in trial charged with this count>] (is/are) charged [in Count \_\_] with committing sodomy by acting in concert [with \_\_\_\_\_ <insert name[s] or description[s] of uncharged participant[s]>] [in violation of Penal Code section 286(d)].

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

<Alternative A—defendant committed sodomy >

[1.] [The defendant personally committed sodomy and voluntarily acted with someone else who aided and abetted its commission(;/.)]

[OR]

<Alternative B—defendant aided and abetted>

[(1/2).] [The defendant voluntarily aided and abetted someone else who personally committed sodomy.]

To decide whether the defendant[s] [or \_\_\_\_\_ <insert name[s] or description[s] of uncharged participant[s]>] committed sodomy, please refer to the separate instructions that I (will give/have given) you on that crime. To decide whether the defendant[s] [or \_\_\_\_\_ <insert name[s] or description[s] of uncharged participant[s]>] aided and abetted sodomy, please refer to the separate instructions that I (will give/have given) you on aiding and abetting. You must apply those instructions when you decide whether the People have proved sodomy in concert.

<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON SODOMY AND AIDING AND ABETTING ARE GIVEN.>

[To prove the crime of sodomy in concert, the People do not have to prove a prearranged plan or scheme to commit sodomy.]

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New January 2006; *Revised October 2021*

### BENCH NOTES

#### *Instructional Duty*

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. (*People v. Ramirez* (1987) 189 Cal.App.3d 603, 621 [236 Cal.Rptr. 404])

[rape in concert is a separate crime, not an enhancement].) The court also has a **sua sponte** duty to instruct on sodomy. Give one or more of the following instructions defining sodomy: CALCRIM No. 1030 or CALCRIM Nos. 1032–1037.

Select alternative A or B, or both, depending on whether the defendant personally committed the crime or aided and abetted someone else.

Depending on the evidence, give the final bracketed paragraph on request regarding the lack of a prearranged plan. (See *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658].)

### ***Related Instructions***

See CALCRIM No. 400, *Aiding and Abetting: General Principles*, and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

*CALCRIM No. 3185, Sex Offenses: Sentencing Factor—Using Force or Fear Against Minor Under 14 Years/14 Years or Older.*

## **AUTHORITY**

- Elements. ▶ Pen. Code, § 286(d).
- Aiding and Abetting. ▶ *People v. Adams* (1993) 19 Cal.App.4th 412, 429, 444–446 [23 Cal.Rptr.2d 512]; *People v. Caldwell* (1984) 153 Cal.App.3d 947, 951–952 [200 Cal.Rptr. 508]; *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658].

## **LESSER INCLUDED OFFENSES**

- Assault. ▶ Pen. Code, § 240.
- Assault With Intent to Commit Sodomy. ▶ Pen. Code, § 220; see *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [109 Cal.Rptr. 287] [where forcible crime is charged].
- Attempted Sodomy. ▶ Pen. Code, §§ 664, 286.
- Attempted Sodomy in Concert. ▶ Pen. Code, §§ 663, 286(d).
- Battery. ▶ Pen. Code, § 242.

- Sodomy. ▶ Pen. Code, §§ 663, 286.

## **RELATED ISSUES**

See the Related Issues section under CALCRIM No. 1030, *Sodomy by Force, Fear, or Threats*, and CALCRIM No. 1001, *Rape or Spousal Rape in Concert*.

## **SECONDARY SOURCES**

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 34.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.20[1][b], [2][c] (Matthew Bender).

Couzens & Bigelow, *Sex Crimes: California Law and Procedure* §§ 12:16, 12:17 (The Rutter Group).

**1045. Sexual Penetration by Force, Fear, or Threats (Pen. Code, § 289(a)(1), (2), (g))**

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The defendant is charged [in Count \_\_] with sexual penetration by force [in violation of Penal Code section 289].

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

1. The defendant committed an act of sexual penetration with another person;
2. The penetration was accomplished by using (a/an) (foreign object[,]/ [or] substance[,]/ [or] instrument[,]/ [or] device[,]/ [or] unknown object);
3. The other person did not consent to the act;

**AND**

4. The defendant accomplished the act:

*<Alternative 4A—force or fear>*

[by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to another person.]

*<Alternative 4B—future threats of bodily harm>*

[by threatening to retaliate against someone when there was a reasonable possibility that the defendant would carry out the threat. A *threat to retaliate* is a threat to kidnap, unlawfully restrain or confine, or inflict extreme pain, serious bodily injury, or death.]

*<Alternative 4C—threat of official action>*

[by threatening to use the authority of a public office to incarcerate, arrest, or deport someone. A *public official* is a person employed by a government agency who has authority to incarcerate, arrest, or deport. The other person must have reasonably believed that the defendant was a public official even if (he/she) was not.]

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

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

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

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

[Evidence that the defendant and the other person (dated/were married/had been married) is not enough by itself to constitute consent.]

[Evidence that the other person (requested/suggested/communicated) that the defendant use a condom or other birth control device is not enough by itself to constitute consent.]

[An act is ***accomplished by force*** if a person uses enough physical force to overcome the other person's will.]

[***Duress*** means a direct or implied threat of force, violence, danger, hardship, or retribution that is enough to cause a reasonable person of ordinary sensitivity to do [or submit to] something that he or she would not otherwise do [or submit to]. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the other person and (his/her) relationship to the defendant.]

[***Retribution*** is a form of payback or revenge.]

[***Menace*** means a threat, statement, or act showing an intent to injure someone.]

[An act is ***accomplished by fear*** if the other person is actually and reasonably afraid [or (he/she) is actually but unreasonably afraid and the defendant knows of (his/her) fear and takes advantage of it].]



<Defense: Reasonable Belief in Consent>

**[The defendant is not guilty of forcible sexual penetration if (he/she) actually and reasonably believed that the other person consented to the act. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the other person consented. If the People have not met this burden, you must find the defendant not guilty.]**

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*New January 2006; Revised August 2016, April 2020, October 2021*

## BENCH NOTES

### ***Instructional Duty***

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

The court should select the appropriate alternative in element 4 to instruct how the sexual penetration was accomplished.

### ***Defenses—Instructional Duty***

The court has a **sua sponte** duty to instruct on the defense of reasonable belief in consent if there is “substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not.” (See *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337].) The statutory presumption that a minor over fourteen is incapable of legal consent does not apply to a violation of Penal Code section 289(a)(1)(C). (*People v. Duarte-Lara* (2020) 49 Cal.App.5th 332, 339 [262 Cal.Rptr.3d 774].)

### ***Related Instructions***

CALCRIM No. 3185, *Sex Offenses: Sentencing Factor—Using Force or Fear Against Minor Under 14 Years/14 Years or Older.*

## AUTHORITY

- Elements. ▶ Pen. Code, § 289(a)(1), (2), (g).
- Specific Intent Crime. ▶ *People v. McCoy* (2013) 215 Cal.App.4th 1510, 1538 [156 Cal.Rptr.3d 382].
- Consent Defined. ▶ Pen. Code, §§ 261.6, 261.7.

- Duress Defined. ▶ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221].
- Foreign Object, Substance, Instrument, or Device Defined. ▶ Pen. Code, § 289(k)(2); *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [a finger is a “foreign object”].
- Menace Defined. ▶ Pen. Code, § 261(c) [in context of rape].
- Sexual Penetration Defined. ▶ Pen. Code, § 289(k); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].
- Threatening to Retaliate Defined. ▶ Pen. Code, § 289(l).
- Unknown Object Defined. ▶ Pen. Code, § 289(k)(3).
- Fear Defined. ▶ *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [200 Cal.Rptr. 651]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. ▶ *People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089].
- Intent. ▶ *People v. Senior* (1992) 3 Cal.App.4th 765, 776 [5 Cal.Rptr.2d 14] [specific intent is “purpose of sexual arousal, gratification, or abuse”].
- Mistake of Fact Regarding Consent. ▶ See *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337] [in context of kidnapping and rape]; *People v. Duarte-Lara* (2020) 49 Cal.App.5th 332, 339 [262 Cal.Rptr.3d 774] [noting minor over fourteen].
- Sexual Abuse Defined. ▶ *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].

## COMMENTARY

Penal Code section 289 requires that the sexual penetration be “against the victim’s will.” (Pen. Code, § 289(a)(1), (2), (g).) “Against the will” has been defined as “without consent.” (See *People v. Key* (1984) 153 Cal.App.3d 888, 895 [203 Cal.Rptr. 144] [in context of rape]; see also *People v. Young* (1987) 190 Cal.App.3d 248, 257 [235 Cal.Rptr. 361].)

The instruction includes an optional definition of the sufficiency of “fear” because that term has meaning in the context of forcible sex offenses that is technical and may not be readily apparent to jurors. (See *People v. Reyes* (1984) 153 Cal.App.3d

803, 810 [200 Cal.Rptr. 651] [fear in context of sodomy and oral copulation]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].)

The court is not required to instruct sua sponte on the definition of “duress” or “menace” and Penal Code section 289 does not define either term. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress]). Optional definitions are provided for the court to use at its discretion. The definition of “duress” is based on *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071], and *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]. The definition of “menace” is based on the statutory definitions contained in Penal Code sections 261 and 262 [rape]. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416] [using rape definition in case involving forcible lewd acts].) In *People v. Leal*, *supra*, 33 Cal.4th at pp. 1004–1010, the court held that the statutory definition of “duress” contained in Penal Code sections 261 and 262 does not apply to the use of that term in any other statute. The court did not discuss the statutory definition of “menace.” The court should consider the *Leal* opinion before giving the definition of “menace.”

The term “force” as used in the forcible sex offense statutes does not have a specialized meaning and court is not required to define the term sua sponte. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1023–1024 [16 Cal.Rptr.3d 891, 94 P.3d 1089].) In *People v. Griffin*, *supra*, the Supreme Court further stated,

Nor is there anything in the common usage definitions of the term “force,” or in the express statutory language of section 261 itself, that suggests force in a forcible rape prosecution actually means force “*substantially* different from or *substantially* greater than” the physical force normally inherent in an act of consensual sexual intercourse. [*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582].] To the contrary, it has long been recognized that “in order to establish force within the meaning of section 261, subdivision (2), the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim].” (*People v. Young* (1987) 190 Cal.App.3d 248, 257–258 [235 Cal.Rptr. 361] . . . .)

(*Ibid.* at 1023–1024 [emphasis in original].)

The committee has provided a bracketed definition of “force,” consistent with *People v. Griffin*, *supra*, that the court may give on request.

## LESSER INCLUDED OFFENSES

- Assault. ▶ Pen. Code, § 240.
- Assault With Intent to Commit Forcible Sexual Penetration. ▶ See Pen. Code, § 220; *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 [27 Cal.Rptr.2d 55] [in context of rape].
- Attempted Forcible Sexual Penetration. ▶ Pen. Code, §§ 664, 289(a)(1), (2), (g).
- Battery. ▶ Pen. Code, § 242.
- Sexual Battery. Pen. Code, §§ 243.4(a), (e)(1) under the expanded accusatory pleading test; *People v. Ortega* (2015) 240 Cal.App.4th 956, 967–970 [193 Cal.Rptr.3d 142].

Nonforcible sex crimes requiring the perpetrator and victim to be within certain age limits are not lesser included offenses of forcible sex crimes. (*People v. Scott* (2000) 83 Cal.App.4th 784, 794 [100 Cal.Rptr.2d 70].)

## RELATED ISSUES

### ***Consent Obtained by Fraudulent Representation***

A person may also induce someone else to consent to engage in sexual penetration by a false or fraudulent representation made with an intent to create fear, and which does induce fear and would cause a reasonable person to act contrary to his or her free will. (Pen. Code, § 266c [wobbler offense].) While section 266c requires coercion and fear to obtain consent, it does not involve physical force or violence. (See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937–938 [26 Cal.Rptr.2d 567] [rejecting defendant’s argument that certain acts were consensual and without physical force, and were only violations of section 266c].)

### ***Consent Withdrawn***

A forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection. (*In re John Z.* (2003) 29 Cal.4th 756, 760 [128 Cal.Rptr.2d 783, 60 P.3d 183].) If there is an issue whether consent to sexual penetration was withdrawn, see CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*, for language that may be adapted for use in this instruction.

### ***Minor Victim***

When sexual penetration is committed against the will of a person who is incapable of consent, such as a baby, and is accomplished by physical force that results in physical

injury to the victim, the statutory requirements “against the will” and “use of force” are fully satisfied. (*People v. White* (1986) 179 Cal.App.3d 193, 202 [224 Cal.Rptr. 467].)

***Multiple Penetrations***

A violation of section 289 is complete when “slight” penetration occurs. A new and separate violation is completed each time a new and separate penetration, however slight, occurs. (*People v. Harrison* (1989) 48 Cal.3d 321, 329, 334 [256 Cal.Rptr. 401, 768 P.2d 1078] [disapproving *People v. Hammon* (1987) 191 Cal.App.3d 1084, 1097 [236 Cal.Rptr. 822]].)

**SECONDARY SOURCES**

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 56, 58, 178.

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 292.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][d], [2] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:16, 12:17 (The Rutter Group).

**1046. Sexual Penetration in Concert (Pen. Code, §§ 264.1, 289(a)(1))**

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**The defendant[s] [ \_\_\_\_\_ <insert name[s] if not all defendants in trial charged with this count>] (is/are) charged [in Count \_\_] with committing sexual penetration by acting in concert [with \_\_\_\_\_ <insert name[s] or description[s] of uncharged participant[s]>] [in violation of Penal Code sections 264.1 and 289(a)(1)].**

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

*<Alternative A—defendant committed sexual penetration>*

**[1.] [The defendant personally committed sexual penetration and voluntarily acted with someone else who aided and abetted its commission(;/.)]**

**[OR]**

*<Alternative B—defendant aided and abetted>*

**[(1/2).] [The defendant voluntarily aided and abetted someone else who personally committed sexual penetration.]**

**To decide whether the defendant[s] [or \_\_\_\_\_ <insert name[s] or description[s] of uncharged participant[s]>] committed sexual penetration, please refer to the separate instructions that I (will give/have given) you on that crime. To decide whether the defendant[s] [or \_\_\_\_\_ <insert name[s] or description[s] of uncharged participant[s]>] aided and abetted sexual penetration, please refer to the separate instructions that I (will give/have given) you on aiding and abetting. You must apply those instructions when you decide whether the People have proved sexual penetration in concert.**

*<MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON SEXUAL PENETRATION AND AIDING AND ABETTING ARE GIVEN.>*

**[To prove the crime of sexual penetration in concert, the People do not have to prove a prearranged plan or scheme to commit sexual penetration.]**

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*New January 2006; Revised October 2021*

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. (*People v. Ramirez* (1987) 189 Cal.App.3d 603, 621 [236 Cal.Rptr. 404] [rape in concert is a separate crime, not an enhancement].) The court also has a **sua sponte** duty to instruct on sexual penetration. Give one or more of the following instructions defining sexual penetration: CALCRIM Nos. 1045 or 1047–1051.

Select alternative A or B, or both, depending on whether the defendant personally committed the crime or aided and abetted someone else.

Depending on the evidence, give the final bracketed paragraph on request regarding the lack of a prearranged plan. (See *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [122 Cal.Rptr. 658].)

### *Related Instructions*

See generally CALCRIM No. 400, *Aiding and Abetting: General Principles*, and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

*CALCRIM No. 3185, Sex Offenses: Sentencing Factor—Using Force or Fear Against Minor Under 14 Years/14 Years or Older.*

## AUTHORITY

- Elements. ▶ Pen. Code, §§ 264.1, 289(a)(1); see *People v. Mom* (2000) 80 Cal.App.4th 1217, 1224 [96 Cal.Rptr.2d 172] [rape in concert requires no greater force than that necessary for forcible rape], disapproved on other grounds in *People v. Griffin* (2004) 33 Cal.4th 1015, 1028 [16 Cal.Rptr.3d 891, 94 P.3d 1089].
- Aiding and Abetting. ▶ *People v. Adams* (1993) 19 Cal.App.4th 412, 445–446 [23 Cal.Rptr.2d 512]; see *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].

## LESSER INCLUDED OFFENSES

- Assault. ▶ Pen. Code, § 240.
- Attempted Sexual Penetration. ▶ Pen. Code, §§ 664, 289(a)(1).

- Attempted Sexual Penetration in Concert. ▶ Pen. Code, §§ 663, 264.1, 289(a)(1).
- Battery. ▶ Pen. Code, § 242.
- Sexual Penetration. ▶ Pen. Code, § 289(a)(1).

## **RELATED ISSUES**

See the Related Issues section under CALCRIM No. 1045, *Sexual Penetration by Force, Fear, or Threats*, and CALCRIM No. 1001, *Rape or Spousal Rape in Concert*.

## **SECONDARY SOURCES**

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 21.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.20[1][d], [2][c] (Matthew Bender).

Couzens & Bigelow, *Sex Crimes: California Law and Procedure* §§ 12:16, 12:17 (The Rutter Group).



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

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

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

1. The defendant used (physical force/deception) to take and carry away an unresisting (child/ [or] person with a mental impairment);
2. The defendant moved the (child/ [or] person with a mental impairment) a substantial distance(;/.)

[AND]

<Section 207(e)>

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

[AND]

<Alternative 4A—alleged victim under 14 years.>

[4. The child was under 14 years old at the time of the movement(;/.)]

<Alternative 4B—alleged victim has mental impairment.>

[(3/4). \_\_\_\_\_ <Insert name of complaining witness> suffered from a mental impairment that made (him/her) incapable of giving legal consent to the movement.]

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

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

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

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

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*New January 2006; Revised April 2008, April 2020, September 2020, October 2021*

## **BENCH NOTES**

### ***Instructional Duty***

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

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

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

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

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

### ***Related Instructions***

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

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

## **AUTHORITY**

- Elements. ▶ Pen. Code, § 207(a), (e).
- Punishment If Victim Under 14 Years of Age. ▶ Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206] [ignorance of victim’s age not defense].
- Asportation Requirement. ▶ See *People v. Martinez* (1999) 20 Cal.4th 225, 235–237 [83 Cal.Rptr.2d 533, 973 P.2d 512] [adopting modified two-pronged asportation test from *People v. Rayford* (1994) 9 Cal.4th 1, 12–14 [36 Cal.Rptr.2d 317, 884 P.2d 1369] and *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225]].
- Force Required to Kidnap Unresisting Infant or Child. ▶ *In re Michele D.* (2002) 29 Cal.4th 600, 610 [128 Cal.Rptr.2d 92, 59 P.3d 164]; Pen. Code, § 207(e).
- Force Required to Kidnap Unconscious and Intoxicated Adult. ▶ *People v. Daniels* (2009) 176 Cal.App.4th 304, 333 [97 Cal.Rptr.3d 659].
- Movement Must Be for Illegal Purpose or Intent if Victim Incapable of Consent. ▶ *In re Michele D.* (2002) 29 Cal.4th 600, 610–611 [128 Cal.Rptr.2d 92, 59 P.3d 164]; *People v. Oliver* (1961) 55 Cal.2d 761, 768 [12 Cal.Rptr. 865, 361 P.2d 593]; but see *People v. Hartland* (2020) 54 Cal.App.5th 71, 80 [268 Cal.Rptr.3d 1] [An illegal purpose or intent is not required for an intoxicated and resisting adult victim].
- Substantial Distance Requirement. ▶ *People v. Daniels* (1993) 18 Cal.App.4th 1046, 1053 [22 Cal.Rptr.2d 877]; *People v. Stanworth* (1974) 11 Cal.3d 588,

600–601 [114 Cal.Rptr. 250, 522 P.2d 1058] [since movement must be more than slight or trivial, it must be substantial in character].

- Deceit May Substitute for Force. ▶ *People v. Dalerio* (2006) 144 Cal.App.4th 775, 783 [50 Cal.Rptr.3d 724] [taking requirement satisfied when defendant relies on deception to obtain child’s consent and through verbal directions and his constant physical presence takes the child substantial distance].
- This Instruction Upheld. ▶ *People v. Singh* (2019) 42 Cal.App.5th 175, 181-183 [254 Cal.Rptr.3d 871] [no sua sponte duty to define “illegal intent” or “illegal purpose”].

## COMMENTARY

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

## LESSER INCLUDED OFFENSES

Attempted kidnapping is not a lesser included offense of simple kidnapping under subdivision (a) of section 207. (*People v. Fontenot* (2019) 8 Cal.5th 57, 65-71 [251 Cal.Rptr.3d 341, 447 P.3d 252].)

## RELATED ISSUES

### *Victim Must Be Alive*

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

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 286-289.

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

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

## 1215. Kidnapping (Pen. Code, § 207(a))

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The defendant is charged [in Count \_\_] with kidnapping [in violation of Penal Code section 207(a)].

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

1. The defendant took, held, or detained another person by using force or by instilling reasonable fear;
2. Using that force or fear, the defendant moved the other person [or made the other person move] a substantial distance;

[AND]

3. The other person did not consent to the movement(;/.)

<Give element 4 when instructing on reasonable belief in consent.>

[AND]

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

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

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

<Defense: Good Faith Belief in Consent>

[The defendant is not guilty of kidnapping if (he/she) reasonably and actually believed that the other person consented to the movement. The People have the burden of proving beyond a reasonable doubt that the defendant did not

**reasonably and actually believe that the other person consented to the movement. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

*<Defense: Consent Given>*

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

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

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*New January 2006; Revised October 2010, April 2020, October 2021*

## **BENCH NOTES**

### ***Instructional Duty***

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

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

The court must give the bracketed language on movement incidental to an associated crime when it is supported by the evidence. (*People v. Martinez*, *supra*, 20 Cal.4th at p. 237; *People v. Bell* (2009) 179 Cal.App.4th 428, 439 [102 Cal.Rptr.3d 300].)

Give the bracketed definition of “consent” on request.

### ***Defenses—Instructional Duty***

The court has a **sua sponte** duty to instruct on the defense of consent if there is sufficient evidence to support the defense. (See *People v. Davis* (1995) 10 Cal.4th 463, 516–518 [41 Cal.Rptr.2d 826, 896 P.2d 119] [approving consent instruction as given]; see also *People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7 [112 Cal.Rptr. 1, 518 P.2d 913] overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 165 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [when court must instruct on defenses].) An optional paragraph is provided for this purpose, “Defense: Consent Given.”

On request, if supported by the evidence, also give the bracketed paragraph that begins with “Consent may be withdrawn.” (See *People v. Camden* (1976) 16 Cal.3d 808, 814 [129 Cal.Rptr. 438, 548 P.2d 1110].)

The court has a **sua sponte** duty to instruct on the defendant’s reasonable and actual belief in the victim’s consent to go with the defendant, if supported by the evidence. (See *People v. Greenberger* (1997) 58 Cal.App.4th 298, 375 [68 Cal.Rptr.2d 61]; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [127 Cal.Rptr. 279] [reasonable, good faith belief that victim consented to movement is a defense to kidnapping].) Give bracketed element 4 and the bracketed paragraph on the defense.

### ***Related Instructions***

If the victim is incapable of consent because of immaturity or mental condition, see CALCRIM No. 1201, *Kidnapping: Child or Person Incapable of Consent*. [An illegal purpose or intent is not required for an intoxicated and resisting adult victim. \*People v. Hartland\* \(2020\) 54 Cal.App.5th 71, 80 \[268 Cal.Rptr.3d 1\].](#)

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

For instructions relating to other defenses to kidnapping, see CALCRIM No. 1225, *Defense to Kidnapping: Protecting Child From Imminent Harm*, and CALCRIM No. 1226, *Defense to Kidnapping: Citizen’s Arrest*.

## **AUTHORITY**

- Elements. ▶ Pen. Code, § 207(a).

- Punishment If Victim Under 14 Years of Age. ▶ Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206] [ignorance of victim’s age not a defense].
- Asportation Requirement. ▶ *People v. Martinez* (1999) 20 Cal.4th 225, 235–237 [83 Cal.Rptr.2d 533, 973 P.2d 512] [adopting modified two-pronged asportation test from *People v. Rayford* (1994) 9 Cal.4th 1, 12–14 [36 Cal.Rptr.2d 317, 884 P.2d 1369], and *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225]].
- Consent to Physical Movement. ▶ See *People v. Davis* (1995) 10 Cal.4th 463, 516–518 [41 Cal.Rptr.2d 826, 896 P.2d 119].
- Force or Fear Requirement. ▶ *People v. Moya* (1992) 4 Cal.App.4th 912, 916–917 [6 Cal.Rptr.2d 323]; *People v. Stephenson* (1974) 10 Cal.3d 652, 660 [111 Cal.Rptr. 556, 517 P.2d 820]; see *People v. Davis* (1995) 10 Cal.4th 463, 517, fn. 13, 518 [41 Cal.Rptr.2d 826, 896 P.2d 119] [kidnapping requires use of force or fear; consent not vitiated by fraud, deceit, or dissimulation].
- Good Faith Belief in Consent. ▶ Pen. Code, § 26(3) [mistake of fact]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–155 [125 Cal.Rptr. 745, 542 P.2d 1337]; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [127 Cal.Rptr. 279]; *People v. Patrick* (1981) 126 Cal.App.3d 952, 968 [179 Cal.Rptr. 276].
- Incidental Movement Test. ▶ *People v. Martinez* (1999) 20 Cal.4th 225, 237–238 [83 Cal.Rptr.2d 533, 973 P.2d 512].
- Intent Requirement. ▶ *People v. Thornton* (1974) 11 Cal.3d 738, 765 [114 Cal.Rptr. 467, 523 P.2d 267], disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Davis* (1995) 10 Cal.4th 463, 519 [41 Cal.Rptr.2d 826, 896 P.2d 119]; *People v. Moya* (1992) 4 Cal.App.4th 912, 916 [6 Cal.Rptr.2d 323].
- Substantial Distance Requirement. ▶ *People v. Derek Daniels* (1993) 18 Cal.App.4th 1046, 1053; *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058] [since movement must be more than slight or trivial, it must be substantial in character].

## COMMENTARY

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



## LESSER INCLUDED OFFENSES

- False Imprisonment ▶ Pen. Code, §§ 236, 237; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1120–1121 [281 Cal.Rptr. 338]; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547 [90 Cal.Rptr. 866].

Attempted kidnapping is not a lesser included offense of simple kidnapping under subdivision (a) of section 207. (*People v. Fontenot* (2019) 8 Cal.5th 57, 65-71 [251 Cal.Rptr.3d 341, 447 P.3d 252].)

## RELATED ISSUES

### *Victim Must Be Alive*

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

### *Threat of Arrest*

“[A]n implicit threat of arrest satisfies the force or fear element of section 207(a) kidnapping if the defendant’s conduct or statements cause the victim to believe that unless the victim accompanies the defendant the victim will be forced to do so, and the victim’s belief is objectively reasonable.” (*People v. Majors* (2004) 33 Cal.4th 321, 331 [14 Cal.Rptr.3d 870, 92 P.3d 360].)

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 281–291, 316.

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

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

**1216–1224. Reserved for Future Use**

**1243. Human Trafficking (Pen. Code, § 236.1(a) & (b))**

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

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

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

**AND**

*<Give Alternative 2A if the defendant is charged with a violation of subsection (a).>*

**[2A. When the defendant acted, (he/she) intended to obtain forced labor or services(./;)]**

**[OR]**

*<Give Alternative 2B if the defendant is charged with a violation of subsection (b).>*

**[2B. When the defendant acted, (he/she) intended to (commit/ [or] maintain) a [felony] violation of \_\_\_\_\_ *<insert appropriate code section[s]>*.]**

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

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

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

**[Duress includes (a direct or implied threat to destroy, conceal, remove, confiscate, or possess any actual or purported passport or immigration document of the other person/ [or] knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or immigration document of the other person).]**

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

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

**[Coercion includes any scheme, plan, or pattern intended to cause a person to believe that failing to perform an act would result in (serious harm to or physical restraint against someone else/ [or] the abuse or threatened abuse of the legal process/ [or] debt bondage/ [or] providing or facilitating the possession of any controlled substance to impair the other person's judgment).]**

**[When you decide whether the defendant (used *duress*/ [or] used *coercion*/ [or] *deprived another person of personal liberty or violated that other person's personal liberty*), consider all of the circumstances, including the age of the other person, (his/her) relationship to the defendant [or defendant's agent[s]], and the other person's handicap or disability, if any.]**

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*New August 2009; Revised August 2013, February 2014, October 2021*

## **BENCH NOTES**

### ***Instructional Duty***

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

If necessary, insert the correct Penal Code section into the blank provided in element 2B and give the corresponding CALCRIM instruction.

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

This instruction is based on the language of the statute effective November 7, 2012, and only applies to crimes committed on or after that date.

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

### **AUTHORITY**

- Elements and Definitions ▶ Pen. Code, § 236.1.
- Menace Defined [in context of false imprisonment]. ▶ *People v. Matian* (1995) 35 Cal.App.4th 480, 484–486 [41 Cal.Rptr.2d 459]
- Violence Defined [in context of false imprisonment]. ▶ *People v. Babich* (1993) 14 Cal.App.4th 801, 806 [18 Cal.Rptr.2d 60]

### **RELATED ISSUES**

The victim’s consent is irrelevant. *People v. Oliver* (2020) 54 Cal.App.5th 1084, 1097 [269 Cal.Rptr.3d 201].

### **SECONDARY SOURCES**

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 278.

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

**1244. Causing Minor to Engage in Commercial Sex Act (Pen. Code, § 236.1(c))**

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The defendant is charged [in Count \_\_] with (causing, inducing, or persuading / (and/or) attempting to cause, induce, or persuade) a minor to engage in a commercial sex act [in violation of Penal Code section 236.1(c)].

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

1. The defendant (caused/ [or] induced/ [or] persuaded) [or] attempted to (cause/ [or] induce/ [or] persuade) another person to engage in a commercial sex act;
2. When the defendant acted, (he/she) intended to (commit/ [or] maintain) a [felony] violation of \_\_\_\_\_ *<insert appropriate code section[s]>*;

**AND**

3. When the defendant did so, (the other person was under 18 years of age/ [or] the defendant believed that the person was under 18 years of age).

A *commercial sex act* is sexual conduct that takes place in exchange for anything of value.

When you decide whether the defendant (caused/ [or] induced/ [or] persuaded) the other person to engage in a commercial sex act, consider all of the circumstances, including the age of the other person, (his/her) relationship to the defendant [or defendant's agent[s]], and the other person's handicap or disability, if any.

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

[The other person's consent is not a defense to this crime.]

[Being mistaken about the other person's age is not a defense to this crime.]

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*New February 2014; Revised March 2019, October 2021*

## BENCH NOTES

### *Instructional Duty*

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

Insert the correct Penal Code section into the blank provided in element 2 and give the corresponding instruction or instructions.

This instruction is based on the language of the statute effective November 7, 2012, and applies only to crimes committed on or after that date.

~~If the charged crime is a Penal Code section 21a attempt to violate Penal Code section 236.1(c) (e.g. when the intended victim is an undercover officer), also give CALCRIM No. 460, Attempt Other Than Attempted Murder. If the charged crime includes a violation of the attempt provision of Penal Code section 236.1(c) (e.g., when the victim is a minor), do not give CALCRIM No. 460, Attempt Other Than Attempted Murder. *People v. Shields* (2018) 23 Cal.App.5th 1242, 1257 [233 Cal.Rptr.3d 701] [“the attempt prong of the statute is distinct from the separate crime of attempt because a completed violation of the statute requires a person under the age of 18 while an attempt to violate the statute does not.”]~~

### *Related Instructions*

*CALCRIM No. 3184 (Sex Offenses: Sentencing Factors—Using Force or Fear to Cause Minor to Engage in Commercial Sex Act)*

## AUTHORITY

- Elements and Definitions ▶ Pen. Code, § 236.1.
- Menace Defined [in context of false imprisonment] ▶ *People v. Matian* (1995) 35 Cal.App.4th 480, 484–486 [41 Cal.Rptr.2d 459].
- Calculating Age ▶ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].
- Attempt to Cause, Induce, or Persuade Does Not Require Minor Victim Actual Minor Required ▶ *People v. Moses* (2020) 10 Cal.5th 893, 912–913 [272 Cal.Rptr.3d 862, 477 P.3d 579]~~*People v. Shields* (2018) 23 Cal.App.5th 1242, 1256–1257 [233 Cal.Rptr.3d 701].~~

## SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 278.

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

**1807. Theft From Elder or Dependent Adult (Pen. Code, § 368(d), (e))**

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The defendant is charged [in Count \_\_] with theft of property from (an elder/a dependent adult) [in violation of Penal Code section 368].

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

1. The defendant committed (theft[,]/ embezzlement[,]/ forgery[,]/ fraud[,]/ [or] identity theft);
2. The (property taken/ [or] personal identifying information used) was (owned by/that of) (an elder/a dependent adult);

*<Do not give element 3 in misdemeanor cases where the value is \$950 or less.>*

3. [The property, goods, or services obtained was worth more than \$950;]

**AND**

*<Alternative 4A—defendant not caretaker>*

4. The defendant knew or reasonably should have known that the (owner of the property/person to whom the identifying information belonged) was (an elder/a dependent adult).]

**[OR]**

*<Alternative 4B—defendant caretaker>*

4. The defendant was a caretaker of the (elder/dependent adult).]

To decide whether the defendant committed (theft[,]/ embezzlement[,]/ forgery[,]/ fraud[,]/ [or] identity theft), please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

[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/ or \_\_\_\_\_ <insert relevant type of health facility from Health & Safety Code, § 1250>] that provides 24-hour inpatient care.]

[A *caretaker* is someone who has the care, custody, or control of (a/an) (elder/dependent adult), or is someone who stands in a position of trust with (a/an) (elder/dependent adult).]

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

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

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*New January 2006; Revised February 2012, February 2013, October 2021*

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of the underlying theft offense.

If the defendant is charged with taking property valued at more than \$950 -(see Pen. Code, § 368(d), (e)), give element 3.

If the person charged is not alleged to be a caretaker (see Pen. Code, § 368(i)), give alternative 4A. If the person charged stipulated to be a caretaker, give alternative 4B. If it is in dispute whether the person charged is a caretaker, give both alternatives 4A and 4B and the bracketed paragraph defining caretaker.

Give the bracketed definition of “elder” or “dependent adult” (see Pen. Code, § 368(g), (h)) on request depending on the evidence in the case. Give the second and/or third bracketed sentences of the definition of “dependent adult” if a further definition is requested.

The definition of “property” may be given on request. (See Pen. Code, § 368(d), (e).)

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

## AUTHORITY

- Elements ▶ Pen. Code, § 368(d), (e).
- Caretaker Defined ▶ Pen. Code, § 368(i).
- Dependent Adult Defined ▶ Pen. Code, § 368(h).
- Elder Defined ▶ Pen. Code, § 368(g).
- 24-Hour Health Facility ▶ Health & Saf. Code, §§ 1250, 1250.2, 1250.3.
- Felony Value Threshold Applies to Identity Theft ▶ *People v. Baratang* (2020) 56 Cal.App.5th 252, 260–263 [270 Cal.Rptr.3d 280].

## LESSER INCLUDED OFFENSES

- Attempted Theft From Elder or Dependent Adult ▶ Pen. Code, §§ 664, 368(d), (e).
- Theft ▶ Pen. Code, § 484.

## SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 179-184.

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

**1808–1819. Reserved for Future Use**

### 1930. Possession of Forged Document (Pen. Code, § 475(a))

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The defendant is charged [in Count \_\_] with (possessing/ [or] receiving) (a/an) (forged[,]/ [or] altered[,]/ [or] counterfeit) document [in violation of Penal Code section 475(a)].

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

1. The defendant (possessed/ [or] received) (a/an) (forged[,]/ [or] altered[,]/ [or] counterfeit) (document/ [or] completed \_\_\_\_\_ <insert type[s] of document[s] from Pen. Code, § 470(d)>);
2. The defendant knew that the document was (forged[,]/ [or] altered[,]/ [or] counterfeit);
3. The defendant intended to (pass[,]/ [or] use[,]/ [or] aid the passage or use of) the document as genuine;

AND

4. When the defendant (possessed/ [or] received) the document, (he/she) intended to defraud.

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

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

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

A person (*passes/ [or] uses*) a document if he or she represents to someone that the document is genuine. The representation may be made by words or conduct and may be either direct or indirect.

[A person *alters* a document if he or she adds to, erases, or changes a part of the document that affects a legal, financial, or property right.]

**[The People allege that the defendant possessed the following documents:**  
\_\_\_\_\_ <insert description of each document 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 documents and  
you all agree on which document (he/she) possessed.]**

**<Sentencing factor for instruments specified in Penal Code section 473(b)>**  
[If you find the defendant guilty of **(possessing/ [or] receiving) (a/an) (forged[,]/  
[or] altered[,]/[or] counterfeit) document**, you must then decide whether the  
value of the \_\_\_\_\_ (check/bond/bank bill/note/cashier's check/traveler's  
check/money order) was more than \$950. If you have a reasonable doubt whether  
the value of the \_\_\_\_\_ (check/bond/bank bill/note/cashier's check/traveler's  
check/money order) has a value of more than \$950, you must find this allegation  
has not been proved

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New January 2006; Revised March 2019, October 2021

## BENCH NOTES

### ***Instructional Duty***

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

If the prosecution alleges under a single count that the defendant possessed multiple forged items, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

*People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770], defines the term “utter” as to “use” or “attempt to use” an instrument. The committee has omitted the unfamiliar term “utter” in favor of the more familiar terms “use” and “attempt to use.”

Give the bracketed sentence that begins with “For the purpose of this instruction” if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with “It is not necessary” if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

## AUTHORITY

- Elements ▶ Pen. Code, § 475(a); *People v. Abrahamian* (2020) 45 Cal.App.5th 314, 330–333 [258 Cal.Rptr.3d 670].
- Intent to Defraud ▶ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity ▶ Pen. Code, § 8.
- Pass or Attempt to Use Defined ▶ *People v. Tomlinson* (1868) 35 Cal. 503, 509; *People v. Jackson* (1979) 92 Cal.App.3d 556, 562 [155 Cal.Rptr. 89], disapproved on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1123 [240 Cal.Rptr. 585, 742 P.2d 1306].
- Alteration Defined ▶ *People v. Nesseth* (1954) 127 Cal.App.2d 712, 718–720 [274 P.2d 479]; *People v. Hall* (1942) 55 Cal.App.2d 343, 352 [130 P.2d 733].
- Unanimity Instruction If Multiple Items ▶ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].
- Required Additional Findings ▶ Pen. Code, § 473(b).
- Scope of Pen. Code, § 473(b) ▶ *People v. Gonzales* (2018) 6 Cal.5th 44 [237 Cal.Rptr.3d 193, 424 P.3d 280].

## RELATED ISSUES

### ***Possession and Uttering***

The defendant cannot be convicted of possessing and uttering the same document. (*People v. Reisdorff* (1971) 17 Cal.App.3d 675, 679 [95 Cal.Rptr.224].)

### ***Possession of Multiple Documents Only One Offense***

Even if the defendant possessed multiple forged documents at the same time, only one violation of Penal Code section 475 may be charged. (*People v. Bowie* (1977) 72 Cal.App.3d 143, 156–157 [140 Cal.Rptr.49] [11 checks supported 1 count, not 11].)

## SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Property, § 192.

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

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 143, *Crimes Against Property*, § 143.04[1], [2] (Matthew Bender).

**2045. False Personation (Pen. Code, § 530)**

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**The defendant is charged [in Count \_\_\_\_] with falsely impersonating another person in that person's private or official capacity and performing certain acts [in violation of Penal Code section 530].**

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

- 1. The defendant falsely impersonated another person in the other person's private or official capacity;**

**AND**

- 2. While falsely impersonating that person:**

- A. The defendant received money or property;**

- B. The defendant knew that the money or property was intended to be delivered to the person that (he/she) was falsely impersonating;**

**[AND]**

- C. When the defendant acted, (he/she) intended to deprive the true owner of the money or property, or to use it for (his/her) own benefit, or to let someone else use it(;/.)**

**[AND]**

*<Do not give element 3 in misdemeanor cases where the value is \$950 or less.>*

- [3. The money or property was worth more than \$950.]**

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*New October 2021*

**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, § 530.
- Determination of Grand vs. Petty Theft. ▶ Pen. Code, § 490.2.

### **SECONDARY SOURCES**

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, § 202

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 10, *Investigative Detention*, § 10.05[2] (Matthew Bender)

**2046–2099. Reserved for Future Use**



**2100. Driving a Vehicle or Operating a Vessel Under the Influence  
Causing Injury (Veh. Code, § 23153(a), (f), (g))**

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

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

1. The defendant (drove a vehicle/operated a vessel);
2. When (he/she) (drove a vehicle/operated a vessel), the defendant was under the [combined] influence of (an alcoholic beverage/ [or] a drug/ [or] an alcoholic beverage and a drug);
3. While (driving a vehicle/operating a vessel) under the influence, the defendant also (committed an illegal act/ [or] neglected to perform a legal duty);

AND

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

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

**The manner in which a person drives is not enough by itself to establish whether the person is or is not under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug]. However, it is a factor to be considered, in light of all the surrounding circumstances, in deciding whether the person was under the influence.**

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

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

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

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

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

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

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

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

<Alternative A—unanimity required; see Bench Notes>

[You must all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

<Alternative B—unanimity not required; see Bench Notes>

[But you do not have to all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

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

the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

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

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

[It is not a defense that the defendant was legally entitled to use the drug.]

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

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*New January 2006; Revised June 2007, April 2008, December 2008, August 2015, September 2017, March 2018, September 2019, October 2021*

## BENCH NOTES

### *Instructional Duty*

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

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

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

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr.

401].) If the evidence indicates that there was only one cause of injury, the court should give the first bracketed paragraph on causation, which includes the “direct, natural, and probable” language. If there is evidence of multiple causes of injury, the court should also give the second bracketed paragraph on causation, which includes the “substantial factor” definition. (See *People v. Austry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

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

The bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that the defendant’s blood alcohol level was 0.08 percent” explains a rebuttable presumption created by statute. (See Veh. Code, § 23610; Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences.

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

The statute also creates a rebuttable presumption that the defendant was not under the influence if his or her blood alcohol level was less than 0.05 percent. (*People v. Gallardo* (1994) 22 Cal.App.4th 489, 496 [27 Cal.Rptr.2d 502].) Depending on

the facts of the case, the defendant may be entitled to a pinpoint instruction on this presumption. It is not error to refuse an instruction on this presumption if the prosecution's theory is that the defendant was under the combined influence of drugs and alcohol. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250 [32 Cal.Rptr.2d 442].)

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

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

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra*, 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].)

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

### ***Defenses—Instructional Duty***

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

### ***Related Instructions***

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

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

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

## AUTHORITY

- Elements. ▶ Veh. Code, § 23153(a), (f), (g); *People v. Minor* (1994) 28 Cal.App.4th 431, 438 [33 Cal.Rptr.2d 641].
- Alcoholic Beverage Defined. ▶ Veh. Code, § 109, Bus. & Prof. Code, § 23004.
- Drug Defined. ▶ Veh. Code, § 312.
- Presumptions. ▶ Veh. Code, § 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Under the Influence Defined. ▶ *People v. Schoonover* (1970) 5 Cal.App.3d 101, 105–107 [85 Cal.Rptr. 69]; *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665–666 [49 Cal.Rptr.2d 710].
- Manner of Driving. ▶ *People v. Stockman* (2020) 56 Cal.App.5th 1093, 1099–1101 [270 Cal.Rptr.3d 812]; *People v. Weathington* (1991) 231 Cal.App.3d 69, 84 [282 Cal.Rptr. 170]; *People v. McGrath* (1928) 94 Cal.App. 520, 524 [271 P. 549].
- Must Instruct on Elements of Predicate Offense. ▶ *People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Negligence—Ordinary Care. ▶ Pen. Code, § 7, subd. 2; Restatement Second of Torts, § 282; *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243] [ordinary negligence standard applies to driving under the influence causing injury].
- Causation. ▶ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Legal Entitlement to Use Drug Not a Defense. ▶ Veh. Code, § 23630.
- Unanimity Instruction. ▶ *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].

- Prior Convictions. ▶ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

## **LESSER INCLUDED OFFENSES**

- Misdemeanor Driving Under the Influence or With 0.08 Percent. ▶ Veh. Code, § 23152(a) & (b); *People v. Capetillo* (1990) 220 Cal.App.3d 211, 220 [269 Cal.Rptr. 250].
- Driving Under the Influence Causing Injury is not a lesser included offense of vehicular manslaughter without gross negligence. ▶ *People v. Binkerd* (2007) 155 Cal.App.4th 1143, 1148–1149 [66 Cal.Rptr.3d 675].
- Violations of Vehicle Code section 23153(a), are not lesser included offenses of Vehicle Code section 23153(f) [now 23153(g)]. ▶ *People v. Cady* (2016) 7 Cal.App.5th 134, 145-146 [212 Cal.Rptr.3d 319].

## **RELATED ISSUES**

### ***DUI Cannot Serve as Predicate Unlawful Act***

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

### ***Act Forbidden by Law***

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

### ***Neglect of Duty Imposed by Law***

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

### ***Multiple Victims to One Drunk Driving Accident***

“In *Wilkoff v. Superior Court* [(1985) 38 Cal.3d 345, 352 [211 Cal.Rptr. 742, 696 P.2d 134]] we held that a defendant cannot be charged with multiple counts of felony drunk driving under Vehicle Code section 23153, subdivision (a), where injuries to several people result from one act of drunk driving.” (*People v. McFarland* (1989) 47 Cal.3d 798, 802 [254 Cal.Rptr. 331, 765 P.2d 493].) However, when “a defendant commits vehicular manslaughter with gross negligence[,] . . . he may properly be punished for [both the vehicular manslaughter and] injury to a separate individual that results from the same incident.” (*Id.* at p. 804.) The prosecution may also charge an enhancement for multiple victims under Vehicle Code section 23558.

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

## **SECONDARY SOURCES**

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Public Peace and Welfare §§ 272-277.

2 Witkin, *California Evidence* (5th ed. 2012) Demonstrative, Experimental, and Scientific Evidence § 56.

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

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



## 2200. Reckless Driving (Veh. Code, § 23103(a) & (b))

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The defendant is charged [in Count \_\_] with reckless driving [in violation of Vehicle Code section 23103].

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, and (2) he or she intentionally ignores that risk. 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 [114 P.2d 81].)

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.

If the People allege that defendant violated Vehicle Code section 23105(b) in committing this crime, give CALCRIM No. 3223, *Reckless Driving With Specified Injury*, in addition to this instruction.

Give CALCRIM No. 2241, *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, 340 [14 Cal.Rptr. 924]; *People v. Young* (1942) 20 Cal.2d 832, 837 [129 P.2d 353].
- Gross Negligence Insufficient. ▶ *People v. Allison* (1951) 101 Cal.App.2d Supp. 932, 935 [226 P.2d 85].
- Speeding May Constitute Recklessness Based on Circumstances. ▶ *People v. Nowell* (1941) 45 Cal.App.2d Supp. 811, 813–814 [114 P.2d 81].

- Requires Reckless Act of Driving, Not Merely Mental State. ▶ *People v. McNutt* (1940) 40 Cal.App.2d Supp. 835, 838–839 [105 P.2d 657]; *People v. Smith* (1939) 36 Cal.App.2d Supp. 748, 751 [92 P.2d 1039].
- This Instruction Upheld. ▶ *People v. Barber* (2020) 55 Cal.App.5th 787, 808 [269 Cal.Rptr.3d 712].

## 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 [12 Cal.Rptr.3d 258].)

### ***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 [12 Cal.Rptr.3d 258].)

## SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Public Peace and Welfare, § 271.

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 91, *Sentencing*, §§ 91.60[2][b][i], [ii], 91.81[1][d], [8] (Matthew Bender).

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

**2656. Resisting Peace Officer, Public Officer, or EMT (Pen. Code, § 148(a))**

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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 [in violation of Penal Code section 148(a)].

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

1. \_\_\_\_\_ <insert name, excluding title> was (a/an) (*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/an) (*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 Wildlife”> 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*.]

[An *emergency medical technician* is someone who holds a valid certificate as an emergency medical technician.]

[The duties of (a/an) \_\_\_\_\_ <insert title of peace officer, public officer, or emergency medical technician> include \_\_\_\_\_ <insert job duties>.]

[Taking a photograph or making an audio or video recording of a (*peace officer/public officer/emergency medical technician*) while the officer is in a public place or the person taking the photograph or making the recording is in a place where he or she has the right to be is not, by itself, a crime.]

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

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

[[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 may not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of the alleged acts of (resisting[,]/ [or] obstructing[,]/ [or] delaying) a (*peace officer/public officer/emergency medical technician*) who was lawfully performing his or her duties, and you all agree on which act (he/she) committed.]

[If a person intentionally 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.]

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New January 2006; Revised June 2007, August 2016, October 2021

## BENCH NOTES

### *Instructional Duty*

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

The court may use the optional bracketed language in the penultimate paragraph to insert a description of the multiple acts alleged if appropriate.

“[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 [161 Cal.Rptr. 541].) 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 [275 Cal.Rptr. 729, 800 P.2d 1159].) 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 [173 Cal.Rptr. 663].) On request, the court must instruct that the 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 [175 Cal.Rptr. 651].)

If lawful performance is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. When giving the portion of CALCRIM No. 2670 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 [108 Cal.Rptr. 338].) Give CALCRIM No. 3500, *Unanimity*, if needed.

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

The court may give the bracketed sentence that begins 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 [275 Cal.Rptr. 729, 800 P.2d 1159].)

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 [49 Cal.Rptr. 322].)

There is a split in authority over the knowledge requirement in Penal Code section 148(a). (Compare *People v. MacKreth* (2020) 58 Cal.App.5th 317, 334 [272 Cal.Rptr.3d 498] [actual knowledge that person is an officer not required] with *In re A.L.* (2019) 38 Cal.App.5th 15, 22 [250 Cal.Rptr.3d 572] [defendant must have actual knowledge he or she is resisting an officer in the performance of duty].) If the trial court agrees with *MacKreth*, give the instruction as written. If the trial court agrees with *A.L.*, modify the instruction.

## AUTHORITY

- Elements ▶ Pen. Code, § 148(a); see *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [116 Cal.Rptr.2d 21].
- General-Intent Crime ▶ *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [116 Cal.Rptr.2d 21].
- Knowledge Required ▶ *People v. Lopez* (1986) 188 Cal.App.3d 592, 599–600 [233 Cal.Rptr. 207].
- 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 [167 Cal.Rptr. 502].
- Verbal Resistance or Obstruction ▶ *People v. Quiroga* (1993) 16 Cal.App.4th 961, 968, 970–972 [20 Cal.Rptr.2d 446] [nondisclosure of identity following arrest for felony, not misdemeanor]; *People v. Green* (1997) 51 Cal.App.4th 1433, 1438 [59 Cal.Rptr.2d 913] [attempt to intimidate suspected victim into denying offense].
- Passive Resistance to Arrest ▶ *In re Bacon* (1966) 240 Cal.App.2d 34, 53 [49 Cal.Rptr. 322].

- Unanimity ▶ *People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 9 [108 Cal.Rptr. 338].
- Merely Photographing or Recording Officers Not a Crime ▶ Pen. Code, § 148(g).

## SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Governmental Authority, §§ 18–19.

1 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 11, *Arrest*, § 11.06[3][b] (Matthew Bender).



**3185. Sex Offenses: Sentencing Factor—Using Force or Fear Against Minor Under 14 Years/14 Years or Older (Pen. Code, §§ 264.1(b), 286(c)(2)(B)-(C), 286(d)(2)-(3), 287(c)(2)(B)-(C), 287(d)(2)-(3), 289(a)(1)(B)-(C))**

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**If you find the defendant guilty of the crime[s] charged in Count[s] \_\_\_\_\_[,]  
[or of attempting to commit (that/those) crime[s]], you must then decide  
whether[, for each crime,] the People have proved the additional allegation  
that when the defendant committed (that/those) crime[s], the defendant used**

*<Violations of Penal Code sections 286(c)(2)(B)-(C), 287(c)(2)(B)-(C),  
289(a)(1)(B)-(C)>*

**[(force[,]/[or] violence[,]/[or] duress[,]/[or] menace[,]/[or] fear of immediate  
and unlawful bodily injury [to another person]) on]**

*<Violations of Penal Code section 264.1(b)>*

**[(force/[or] violence) and against the will of]**

*<Violations of Penal Code sections 286(d)(2)-(3) and 287(d)(2)-(3)>*

**[(force/[or] fear of immediate and unlawful bodily injury [to another person])  
on]**

**a minor who was (under the age of 14 years/14 years of age or older).**

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

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

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

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*New October 2021*

**BENCH NOTES**

### ***Instructional Duty***

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

### **AUTHORITY**

- Elements and Definitions ▶ Pen. Code, §§ 264.1(b), 286(c)-(d), 287(c)-(d), 289(a)(1).
- Calculating Age ▶ Fam. Code, § 6500; *People v. Cornett* (2012) 53 Cal.4th 1261, 1264, 1275 [139 Cal.Rptr.3d 837, 274 P.3d 456] [“10 years of age or younger” means “under 11 years of age”]; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].

**3186–3199. Reserved for Future Use**

### 3411. Mistake of Law As a Defense

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[I have already explained that it is not a defense to the crime[s] of \_\_\_\_\_ <insert crime[s]> that the defendant did not know (he/she) was breaking the law or that (he/she) believed (his/her) act was lawful. But when you consider the crime[s] of \_\_\_\_\_ <insert crime[s]>, a different rule applies.]

\_\_\_\_\_ <insert crime[s]> require[s] that a defendant act with a specific (intent/ [and/or] mental state). The act and the specific (intent/ [and/or] mental state) required are explained in the instruction for (that/those) crime[s].

The defendant is not guilty of \_\_\_\_\_ <insert crime[s]> if (he/she) made an honest or good faith mistake about the law, if that mistake shows that (he/she) did not have the specific (intent/ [and/or] mental state) required for the crime[s] of \_\_\_\_\_ <insert crime[s]>.

If you have a reasonable doubt about whether the defendant had the specific (intent/ [and/or] mental state) required for \_\_\_\_\_ <insert crime[s]>, you must find (him/her) not guilty of (that/those) crime[s].

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*New August 2013; Revised October 2021*

### BENCH NOTES

#### ***Instructional Duty***

The court has a **sua sponte** duty to give this instruction if a defendant charged with a specific intent crime is appropriately relying on this defense or there is substantial evidence that a defendant's good faith mistake of law provides a valid defense to a specific intent crime and the defense is not inconsistent with the defendant's theory of the case. (*People v. Urziceanu* (2005) 132 Cal.App.4th 747, 774-780 [33 Cal.Rptr.3d 859]).

Many defendants seek to rely on the defense of mistake of law, but few are successful, because it is limited to crimes in which a specific intent or mental state is negated by the mistake. (*People v. Koenig* (2020) 58 Cal.App.5th 771, 809 [272 Cal.Rptr.3d 732] [instruction appropriate where defendant relied on advice of counsel to establish mistake of law related to omission of material fact in sale of security]; *People v. Cole* (2007) 156 Cal.App.4th 452, 483-484 [67 Cal.Rptr.3d 526] [no error in instructing jury that mistake of law is no defense when defendant was charged with a general intent crime]; *People v. Vineberg* (1981) 125

Cal.App.3d 127, 137 [177 Cal.Rptr. 819] [defendants' belief that they had a legal right to use clients' gold reserves to buy future contracts could be a defense if held in good faith]; *People v. Stewart* (1976) 16 Cal.3d 133, 140 [127 Cal.Rptr. 117, 544 P.2d 1317] [defendant's good faith belief that he was legally authorized to use property could be defense to embezzlement]; *People v. Flora* (1991) 228 Cal.App.3d 662, 669–670 [279 Cal.Rptr. 17] [defendant's belief, if held in good faith, that out-of-state custody order was not enforceable in California could have been basis for defense to violating a child custody order]).

Although concerned with knowledge of the law, a mistake about legal status or rights is a mistake of fact, not a mistake of law. (See CALCRIM No. 3406, *Mistake of Fact*.) If the defendant is charged with a general intent crime and raises a mistake of law defense, give instead CALCRIM No. 3407, *Defenses: Mistake of Law*. If both general and specific intent crimes are charged, use the bracketed first paragraph of this instruction as necessary.

### **AUTHORITY**

- Instructional Requirements ▶ *People v. Cole* (2007) 156 Cal.App.4th 452, 483-484 [67 Cal.Rptr.3d 526]; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 585-587, 592 [35 Cal.Rptr. 401].

### **RELATED ISSUES**

#### ***Good Faith Reliance on Statute or Regulation***

Good faith reliance on a facially valid statute or administrative regulation (which turns out to be void) may be considered an excusable mistake of law. Additionally, a good faith mistake-of-law defense may be established by special statute. (See 1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, § 46.)

### **SECONDARY SOURCES**

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, §§ 44-45.

### 3451. Present Mental Competence of Defendant

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**You must decide whether the defendant is mentally competent to stand trial. That is the only purpose of this proceeding. Do not consider whether the defendant is guilty or not guilty of any crime or whether (he/she) was sane or insane at the time that any alleged crime was committed.**

**The defendant is mentally competent to stand trial if (he/she) can do all of the following:**

- 1. Understand the nature and purpose of the criminal proceedings against (him/her);**
- 2. Assist, in a rational manner, (his/her) attorney in presenting (his/her) defense;**

**AND**

- 3. Understand (his/her) own status and condition in the criminal proceedings.**

**The law presumes that a defendant is mentally competent. In order to overcome this presumption, ((the defendant/the People) must prove/it must be proved) that it is more likely than not that the defendant is now mentally incompetent because of a (mental disorder/developmental disability).**

**[A *developmental disability* is a disability that begins before a person is 18 years old and continues, or is expected to continue, for an indefinite period of time. It must be a substantial handicap and does not include other handicapping conditions that are solely physical in nature. Examples of developmental disabilities include intellectual disability~~mental retardation~~, cerebral palsy, epilepsy, autism, and conditions closely related to intellectual disability~~mental retardation~~ or requiring treatment similar to that required for intellectually disabled~~mentally retarded~~ individuals.]**

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*New January 2006; Revised October 2021*

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to instruct the jury on the standard for competence.

The party that seeks a finding of incompetence bears the burden of proof. If the court raises the issue, neither party bears that burden. Choose the appropriate language regarding which party bears the burden of proof in the paragraph that begins with “The law presumes that . . . .” (*People v. Skeirik* (1991) 229 Cal.App.3d 444, 459–460 [280 Cal.Rptr. 175].)

Give CALCRIM No. 3550, *Pre-Deliberation Instructions*, and any other relevant post-trial instructions, such as CALCRIM No. 222, *Evidence*, or CALCRIM No. 226, *Witnesses*.

Do **not** give CALCRIM No. 224, *Circumstantial Evidence: Sufficiency of Evidence*, or CALCRIM No. 225, *Circumstantial Evidence: Intent or Mental State*. These instructions have “no application when the standard of proof is preponderance of the evidence.” (*People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1274 [18 Cal.Rptr.3d 286]).

## AUTHORITY

- Instructional Requirements ▶ Pen. Code, §§ 1367–1370.
- Developmental Disability Defined ▶ Pen. Code, § 1370.1(a)(1)(H).
- Presumption of Competence ▶ Pen. Code, § 1369(f).
- Unanimous Verdict ▶ Pen. Code, § 1369(f).
- Mental Competence Defined ▶ Pen. Code, § 1367(a); *Dusky v. United States* (1960) 362 U.S. 402, 402 [80 S.Ct. 788, 4 L.Ed.2d 824]; *People v. Jablonski* (2006) 37 Cal.4th 774, 807–808 [38 Cal.Rptr.3d 98, 126 P.3d 938].

## RELATED ISSUES

### *Threshold for Section 1368 Hearing*

A trial court must conduct a section 1368 hearing when there is substantial evidence of incompetence. (*People v. Cox* (1978) 82 Cal.App.3d 221, 225–226 [147 Cal.Rptr. 73].) Substantial evidence raises a reasonable doubt about the defendant’s competence to stand trial. (*People v. Frye* (1998) 18 Cal.4th 894, 951–952 [77 Cal.Rptr.2d 25, 959 P.2d 183].)

***Defense Counsel May Seek Finding Contrary to Client's Wishes***

A section 1368 hearing is civil in nature. Since neither guilt nor innocence is at issue, defense counsel must “advocate the position counsel perceives to be in the client’s best interests even when that interest conflicts with the client’s stated position [citation].” (*People v. Stanley* (1995) 10 Cal.4th 764, 804 [42 Cal.Rptr.2d 543, 897 P.2d 481].)

**SECONDARY SOURCES**

5 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Criminal Trial, § 824.

3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 64, *Suspension of Criminal Proceedings*, §§ 64.01, 64.02 (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 124, *Jurisdiction and Disposition Hearings*, § 124.04 (Matthew Bender).