

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT CALCRIM-2023-02

Title

Criminal Jury Instructions: Revisions

Proposed Rules, Forms, Standards, or Statutes

Revised Jury Instructions

Proposed by

Advisory Committee on Criminal Jury
Instructions
Hon. Jeffrey Ross, Chair

Action Requested

Review and submit comments by Monday,
November 27, 2023

Proposed Effective Date

March 15, 2024

Contact

Kara Portnow, 415-865-4961
kara.portnow@jud.ca.gov

Summary

Revisions to user guide and 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 Committee, or its Legislation Committee. It is circulated for comment purposes only.

CALCRIM Proposed Changes: Invitation to Comment October 13 – November 27, 2023

Instruction Number	Instruction Title
N/A	User Guide
240 & 520	Causation; First or Second Degree Murder With Malice Aforethought
571	Voluntary Manslaughter: Imperfect Self-Defense or Imperfect Defense of Another—Lesser Included Offense
600	Attempted Murder
968 & 969	Shooting From Motor Vehicle; Permitting Someone to Shoot From Vehicle
1201	Kidnapping: Child or Person Incapable of Consent
1244	Causing Minor to Engage in Commercial Sex Act
1250	Child Abduction: No Right to Custody
1500	Aggravated Arson
1551	Arson Enhancements
1800	Theft by Larceny
1807	Theft From Elder or Dependent Adult
2624	Threatening a Witness Before Testimony or Information Given
2722	Battery by Gassing
3160, 3161, 3162, 3163	Great Bodily Injury; Great Bodily Injury: Causing Victim to Become Comatose or Paralyzed; Great Bodily Injury: Age of Victim; Great Bodily Injury: Domestic Violence
3224–3234	Aggravating Factor Instructions
3517, 3518, 3519	Deliberations and Completion of Verdict Forms

Guide for Using Judicial Council of California Criminal Jury Instructions (CALCRIM)

The Judicial Council jury instructions are accurate, designed to be easy to understand, and easy to use. This guide provides an introduction to the instructions and explains conventions and features that will assist in their use.

In order to fulfill its mandate pursuant to rule 10.59 of the California Rules of Court¹ to maintain the criminal jury instructions, members of the advisory committee meet several times a year to consider changes in statutes, appellate opinions, and suggestions from practitioners. *It bears emphasis that when the committee proposes changing a jury instruction, that does not necessarily mean the previous version of the instruction was incorrect.* Often the committee proposes changes for reasons of style, consistency among similar instructions, and to improve clarity.

Judicial Council Instructions Endorsed by Rule of Court

Rule 2.1050 of the California Rules of Court provides:

The California jury instructions approved by the Judicial Council are the official instructions for use in the state of California ... [¶] The Judicial Council endorses these instructions for use and makes every effort to ensure that they accurately state existing law ... [¶] Use of the Judicial Council instructions is strongly encouraged.

The California Supreme Court acknowledged CALCRIM's status as the state's official pattern jury instructions in *People v. Ramirez* (2021) 10 Cal.5th 983, 1008, fn.5 [274 Cal.Rptr.3d 309, 479 P.3d 797].

Using the Instructions

Bench Notes

The text of each instruction is followed by a section in the Bench Notes titled “Instructional Duty,” which alerts the user to any *sua sponte* duties to instruct and special circumstances raised by the instruction. It may also include references to other instructions that should or should not be used. In some instances, the directions include suggestions for modification. In the “Authority” section, all of the pertinent sources for the instruction are listed. Some of the instructions also have sections containing “Related Issues” and “Commentary.” The Bench Notes also refer to any relevant lesser included offenses. Secondary sources appear at the end of instructions. The official publisher, and not the Judicial Council, is responsible for updating the citations for secondary sources. Users should consult the Bench Notes before using an instruction. Italicized notes between angle brackets in the language of the instruction itself signal important issues or choices. For example, in instruction 1750, Receiving Stolen Property, optional element 3 is introduced thus: *<Give element 3 when instructing on knowledge of presence of property; see Bench Notes>*.

Multiple-Defendant and Multiple-Count Cases

These instructions were drafted for the common case in which a single defendant is on trial. The HotDocs document assembly program from the Judicial Council’s official publisher, LexisNexis, will modify the instructions for use in multi-defendant cases. It will also allow the user to name the defendants charged in a particular instruction if the instruction applies only to some of the defendants on trial in the case. It is impossible to predict the possible fact combinations that may be present when a crime is charged multiple times or committed by different defendants against different victims involving different facts.

¹Rule 10.59(a) states: “The committee regularly reviews case law and statutes affecting jury instructions and makes recommendations to the Judicial Council for updating, amending, and adding topics to the council’s criminal jury instructions.”

Thus, when an instruction is being used for more than one count and the factual basis for the instruction is different for the different counts, the user will need to modify the instruction as appropriate.

Related California Jury Instructions, Criminal (CALJIC)

The CALJIC and CALCRIM instructions should *never* be used together. While the legal principles are obviously the same, the organization of concepts is approached differently. Mixing the two sets of instructions into a unified whole cannot be done and may result in omissions or confusion that could severely compromise clarity and accuracy. Nevertheless, for convenient reference this publication includes tables of related CALJIC instructions.

Titles and Definitions

The titles of the instructions are directed to lawyers and sometimes use words and phrases not used in the instructions themselves. The title is not a part of the instruction. The titles may be removed before presentation to the jury.

The instructions avoid separate definitions of legal terms whenever possible. Instead, definitions have been incorporated into the language of the instructions in which the terms appear. When a definition is lengthy, a cross-reference to that definition is provided.

Defined terms are printed in italics in the text of the definition.

Alternatives vs. Options

When the user must choose one of two or more options in order to complete the instruction, the choice of necessary alternatives is presented in parentheses thus: *When the defendant acted, George Jones was performing (his/her) duties as a school employee.*

The instructions use brackets to provide optional choices that may be necessary or appropriate, depending on the individual circumstances of the case: *[If you find that George Jones threatened or harmed the defendant [or others] in the past, you may consider that information in evaluating the defendant's beliefs.]*

Finally, both parentheses and brackets may appear in the same sentence to indicate options that arise depending on which necessary alternatives are selected: *[It is not required that the person killed be the (victim/intended victim) of the (felony/ [or] felonies).]*

General and Specific Intent

The instructions do not use the terms general and specific intent because while these terms are very familiar to judges and lawyers, they are novel and often confusing to many jurors. Instead, if the defendant must specifically intend to commit an act, the particular intent required is expressed without using the term of art “specific intent.” Instructions 250–254 provide jurors with additional guidance on specific vs. general intent crimes and the union of act and intent.

Organization of the Instructions

The instructions are organized into 24 series, which reflect broad categories of crime (e.g., Homicide) and other components of the trial (e.g., Evidence). The series, and the instructions within each series, are presented in the order in which they are likely to be given in an actual trial. As a result, greater offenses (like DUI with injury) come before lesser offenses (DUI). All of the defenses are grouped together at the end of the instructions, rather than dispersed throughout. The misdemeanors are placed within the category of instructions to which they belong, so simple battery is found with the other battery instructions rather than in a stand-alone misdemeanor section.

Lesser Included Offenses

Users may wish to modify instructions used to explain lesser included offenses by replacing the standard introductory sentence, “**The defendant is charged with _____**” with “**The crime of _____ (e.g., false imprisonment) is a lesser offense than the crime of _____ (e.g., kidnapping)**” to amplify the explanation provided in instructions 3517–3519: “_____ *<insert crime>* **is a lesser crime of _____ *<insert crime>* [charged in Count _____].**”

When giving the lesser included offense instructions 640 and 641 (homicide) or instructions 3517–3519 (non-homicide), no further modification of the corresponding instructions on lesser crimes is necessary to comply with the requirements of *People v. Dewberry* (1959) 51 Cal.2d 548.

Burden of Production/Burden of Proof

The instructions never refer to the “burden of producing evidence.” The drafters concluded that it is the court’s decision whether the party has met the burden of production. If the burden is not met, no further instruction is necessary. The question for the jury is whether a party has met its properly allocated burden based on the evidence received.

Instruction 103 on Reasonable Doubt states, “Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise].” Thus, when the concept of reasonable doubt is explained and defined, the jury is told that it is the standard that applies to every issue the People must prove, unless the court specifically informs the jury otherwise.

Sentencing Factors and Enhancements

Because the law is rapidly evolving regarding when sentencing factors and enhancements must be submitted to the jury, we have provided “template” instructions 3250 and 3251 so that the court may tailor an appropriate instruction that corresponds to this emerging body of law.

Personal Pronouns

Many instructions include an option to insert the personal pronouns "he/she," "his/her," or "him/her." The committee does not intend these options to be limiting. It is the policy of the State of California that nonbinary people are entitled to full legal recognition and equal treatment under the law. In accordance with this policy, attorneys and courts should ensure that they are using ~~preferred~~ an individual’s personal pronouns.

Revision Dates

In previous editions, the revision dates listed underneath the instructional language indicated when any text in the instruction had been updated, whether related to the instructional language or the bench notes and other commentaries. Beginning with the 2024 edition, an asterisk at the end of the revision date signifies that only the bench notes and other commentaries were updated during that publication cycle. A revision date without an asterisk indicates that the instructional text (as well as the bench notes and other commentaries, if applicable) were revised.

240. Causation

An act [or omission] causes (injury/ _____ <insert other description>) if the (injury/ _____ <insert other description>) is the direct, natural, and probable consequence of the act [or omission] and the (injury/ _____ <insert other description>) would not have happened without the act [or omission]. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.

<Give if multiple potential causes.>

[There may be more than one cause of (injury/ _____ <insert other description>). An act [or omission] causes (injury/ _____ <insert other description>), only if it is a substantial factor in causing the (injury/ _____ <insert other description>). A *substantial factor* is more than a trivial or remote factor. However, it does not have to be the only factor that causes the (injury/ _____ <insert other description>).]

*New January 2006, Revised February 2012, March 2024**

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401]; *People v. Cervantes* (2001) 26 Cal.4th 860, 866–874 [111 Cal.Rptr.2d 148, 29 P.3d 225].) The committee has addressed causation in those instructions where the issue is most likely to arise. If the particular facts of the case raise a causation issue and other instructions do not adequately cover the point, give this instruction.

If there is evidence of multiple potential causes, the court should also give the bracketed paragraph. (*People v. Sanchez* (2001) 26 Cal.4th 834, 845–849 [111 Cal.Rptr.2d 129, 29 P.3d 209]; *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135].)

AUTHORITY

- Proximate Cause. *People v. Carney* (2023) 14 Cal.5th 1130, 1137–1139 [310 Cal.Rptr.3d 685, 532 P.3d 696]; *People v. Cervantes*, *supra*, (2001) 26 Cal.4th at pp.860, 866–874 [111 Cal.Rptr.2d 148, 29 P.3d 225]; *People v. Roberts* (1992) 2 Cal.4th 271, 315–322 [6 Cal.Rptr.2d 276, 826 P.2d 274].
- Substantial Factor. *People v. Sanchez*, *supra*, (2001) 26 Cal.4th at pp.834, 845–849 [111 Cal.Rptr.2d 129, 29 P.3d 209]; *People v. Autry*, *supra*, (1995) 37 Cal.App.4th at p.351, 363 [43 Cal.Rptr.2d 135].
- Independent Intervening Cause. *People v. Cervantes*, *supra*, (2001) 26 Cal.4th 860, at pp. 856–874 [111 Cal.Rptr.2d 148, 29 P.3d 225].
- Causation Instructions. *People v. Sanchez*, *supra*, (2001) 26 Cal.4th at pp.834, 845–849 [111 Cal.Rptr.2d 129, 29 P.3d 209]; *People v. Roberts*, *supra*, (1992) 2 Cal.4th at pp.271, 311–322 [6 Cal.Rptr.2d 276, 826 P.2d 274]; *People v. Autry*, *supra*, (1995) 37 Cal.App.4th 351, at p. 363 [43 Cal.Rptr.2d 135].
- Instructional Duty. *People v. Bernhardt*, *supra*, (1963) 222 Cal.App.2d at pp.567, 590–591 [35 Cal.Rptr. 401].
- “Natural and Probable Consequences” Defined. 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.).
- Act or Omission. *People v. Cervantes*, *supra*, (2001) 26 Cal.4th at p.860, 866 [111 Cal.Rptr.2d 148, 29 P.3d 225].

SECONDARY SOURCES

- 1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Elements, §§ 37–46.
- 1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 99.
- 4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.02[1A][a] (Matthew Bender).
- 6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.04 (Matthew Bender).

241–249. Reserved for Future Use

Homicide

520. First or Second Degree Murder With Malice Aforethought (Pen. Code, § 187)

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

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

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

[OR]

[1B. The defendant had a legal duty to (help/care for/rescue/warn/maintain the property of/ _____ <insert other required action[s]>) _____ <insert description of decedent/person to whom duty is owed> and the defendant failed to perform that duty and that failure caused the death of (another person/ [or] a fetus);]

[AND]

2. When the defendant (acted/[or] failed to act), (he/she) had a state of mind called malice aforethought(;/.)

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

[AND]

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

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

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

The defendant had *implied malice* if:

1. (He/She) intentionally (committed the act/[or] failed to act);

2. The natural and probable consequences of the (act/[or] failure to act) were dangerous to human life in that the (act/ or] failure to act) involved a high degree of probability that it would result in death;
3. At the time (he/she) (acted/[or] failed to act), (he/she) knew (his/her) (act/[or] failure to act) was dangerous to human life;

AND

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

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

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

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

[(An act/[or] (A/a) failure to act) causes death if the death is the direct, natural, and probable consequence of the (act/[or] failure to act) and the death would not have happened without the (act/[or] failure to 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/[or] (A/a) failure to act) causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]

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

<Give the following bracketed paragraph if the second degree is the only possible degree of the crime for which the jury may return a verdict>

[If you find the defendant guilty of murder, it is murder of the second degree.]

<Give the following bracketed paragraph if there is substantial evidence of first degree murder>

[If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM No. ___ <insert number of appropriate first degree murder instruction>.]

New January 2006; Revised August 2009, October 2010, February 2013, August 2013, September 2017, March 2019, September 2019, March 2021, March 2024

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the first two elements of the crime. If there is sufficient evidence of excuse or justification, the court has a **sua sponte** duty to include the third, bracketed element in the instruction. (*People v. Frye* (1992) 7 Cal.App.4th 1148, 1155–1156 [10 Cal.Rptr.2d 217].) The court also has a **sua sponte** duty to give any other appropriate defense instructions. (See CALCRIM Nos. 505–627, and CALCRIM Nos. 3470–3477.)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court should give the “direct, natural, and probable” language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the “substantial factor” instruction and definition in the second bracketed causation paragraph. (See *People v. Carney* (2023) 14 Cal.5th 1130, 1138–1139 [310 Cal.Rptr.3d 685, 532 P.3d 696]; *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].) If there is an issue regarding a superseding or intervening cause, give the appropriate portion of CALCRIM No. 620, *Causation: Special Issues*.

If the prosecution’s theory of the case is that the defendant committed murder based on his or her failure to perform a legal duty, the court may give element 1B.

Review the Bench Notes to CALCRIM No. 582, *Involuntary Manslaughter: Failure to Perform Legal Duty—Murder Not Charged*.

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

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

AUTHORITY

- Elements. Pen. Code, § 187.
- Malice. Pen. Code, § 188; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1217–1222 [264 Cal.Rptr. 841, 783 P.2d 200]; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103–105 [13 Cal.Rptr.2d 864, 840 P.2d 969]; *People v. Blakeley* (2000) 23 Cal.4th 82, 87 [96 Cal.Rptr.2d 451, 999 P.2d 675].
- “Dangerous to Human Life” Defined. *People v. Reyes* (2023) 14 Cal.5th 981, 989 [309 Cal.Rptr.3d 832, 531 P.3d 357].
- Causation. *People v. Carney* (2023) 14 Cal.5th 1130, 1137–1139 [310 Cal.Rptr.3d 685, 532 P.3d 696] [concurrent causation]; *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274] [successive causation].
- “Fetus” Defined. *People v. Davis* (1994) 7 Cal.4th 797, 814–815 [30 Cal.Rptr.2d 50, 872 P.2d 591]; *People v. Taylor* (2004) 32 Cal.4th 863, 867 [11 Cal.Rptr.3d 510, 86 P.3d 881].
- Ill Will Not Required for Malice. *People v. Sedeno* (1974) 10 Cal.3d 703, 722 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Breverman* (1998) 19 Cal.4th 142, 163 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- Prior Version of This Instruction Upheld. *People v. Genovese* (2008) 168 Cal.App.4th 817, 831 [85 Cal.Rptr.3d 664].

LESSER INCLUDED OFFENSES

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

- Sentence Enhancements and Special Circumstances Not Considered in Lesser Included Offense Analysis. *People v. Boswell* (2016) 4 Cal.App.5th 55, 59-60 [208 Cal.Rptr.3d 244].

Gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5(a)) and vehicular manslaughter (Pen. Code, § 192(c)) are not lesser included offenses of murder. (*People v. Sanchez* (2001) 24 Cal.4th 983, 988–992 [103 Cal.Rptr.2d 698, 16 P.3d 118]; *People v. Bettasso* (2020) 49 Cal.App.5th 1050, 1059 [263 Cal.Rptr.3d 563].) Similarly, child abuse homicide (Pen. Code, § 273ab) is not a necessarily included offense of murder. (*People v. Malfavon* (2002) 102 Cal.App.4th 727, 744 [125 Cal.Rptr.2d 618].)

RELATED ISSUES

Causation—Foreseeability

Authority is divided on whether a causation instruction should include the concept of foreseeability. (See *People v. Aury*, *supra*, ~~(1995)~~ 37 Cal.App.4th ~~at pp.351,~~ 362–363 [~~43 Cal.Rptr.2d 135~~]; *People v. Temple* (1993) 19 Cal.App.4th 1750, 1756 [24 Cal.Rptr.2d 228] [refusing defense-requested instruction on foreseeability in favor of standard causation instruction]; but see *People v. Gardner* (1995) 37 Cal.App.4th 473, 483 [43 Cal.Rptr.2d 603] [suggesting the following language be used in a causation instruction: “[t]he death of another person must be foreseeable in order to be the natural and probable consequence of the defendant’s act”].) It is clear, however, that it is error to instruct a jury that foreseeability is immaterial to causation. (*People v. Roberts*, *supra*, ~~(1992)~~ 2 Cal.4th ~~at p.271,~~ 315 [~~6 Cal.Rptr.2d 276, 826 P.2d 274~~] [error to instruct a jury that when deciding causation it “[w]as immaterial that the defendant could not reasonably have foreseen the harmful result”].)

Second Degree Murder of a Fetus

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

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 96-101, 112-113.

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

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

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

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

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

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

AND

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

BUT

3. At least one of those beliefs was unreasonable.

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

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

<The following definition may be given if requested>

[A danger is *imminent* if, when the fatal wound occurred, the danger actually existed or the defendant believed it existed. The danger must seem immediate and present, so that it must be instantly dealt with. It may not be merely prospective or in the near future.]

[Imperfect self-defense does not apply when the defendant, through (his/her) own wrongful conduct, has created circumstances that justify (his/her) adversary's use of force.]

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

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

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

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

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

*New January 2006; Revised August 2012, February 2015, September 2020, March 2022, September 2022, March 2024**

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

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

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].)

Related Instructions

CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

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

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

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

AUTHORITY

- Elements. Pen. Code, § 192(a).
- Imperfect Self-Defense Defined. *People v. Flannel* (1979) 25 Cal.3d 668, 680–683 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Barton, supra*, 12 Cal.4th at p. 201; *In re Christian S.* (1994) 7 Cal.4th 768, 773 [30 Cal.Rptr.2d 33, 872 P.2d 574]; see *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197–198 [272 Cal.Rptr. 693] [insufficient evidence to support defense of another person].
- Imperfect Defense of Others. *People v. Randle* (2005) 35 Cal.4th 987, 995–1000 [28 Cal.Rptr.3d 725, 111 P.3d 987], overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172 [91 Cal.Rptr.3d 106, 203 P.3d 425].
- ~~Availability of Imperfect Self-Defense May be Available When Defendant Set in Motion Chain of Events Leading to Victim’s Attack, but Not When Victim was Legally Justified in Resorting to Self-Defense.~~ *People v. Enraca* (2012) 53 Cal.4th 735, 761 [137 Cal.Rptr.3d 117, 269 P.3d 543] [~~not available~~]; *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179–1180 [39 Cal.Rptr.3d 433] [~~available~~].
- Imperfect Self-Defense Does Not Apply When Defendant’s Belief in Need for Self-Defense is Entirely Delusional. *People v. Elmore* (2014) 59 Cal.4th 121, 145 [172 Cal.Rptr.3d 413, 325 P.3d 951].
- This Instruction Upheld. *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1306 [132 Cal.Rptr.3d 248]; *People v. Genovese* (2008) 168 Cal.App.4th 817, 832 [85 Cal.Rptr.3d 664].
- Defendant Relying on Imperfect Self-Defense Must Actually, Although Not Reasonably, Associate Threat With Victim. *People v. Minifie* (1996) 13 Cal.4th 1055, 1069 [56 Cal.Rptr.2d 133, 920 P.2d 1337] [in dicta].

LESSER INCLUDED OFFENSES

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

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

RELATED ISSUES

Intimate Partner Battering and Its Effects

Evidence relating to intimate partner battering (formerly “battered women’s syndrome”) and its effects may be considered by the jury when deciding if the defendant actually feared the batterer and if that fear was reasonable. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082–1089 [56 Cal.Rptr.2d 142, 921 P.2d 1]; see also *In re Walker* (2007) 147 Cal.App.4th 533, 536, fn.1 [54 Cal.Rptr.3d 411].)

Blakeley Not Retroactive

The decision in *Blakeley*—that one who, acting with conscious disregard for life, unintentionally kills in imperfect self-defense is guilty of voluntary manslaughter—may not be applied to defendants whose offense occurred prior to *Blakeley*’s June 2, 2000, date of decision. (*People v. Blakeley* (2000) 23 Cal.4th 82, 91–93 [96 Cal.Rptr.2d 451, 999 P.2d 675].) If a defendant asserts a killing was done in an honest but mistaken belief in the need to act in self-defense and the offense occurred prior to June 2, 2000, the jury must be instructed that an unintentional killing in imperfect self-defense is involuntary manslaughter. (*People v. Johnson* (2002) 98 Cal.App.4th 566, 576–577 [119 Cal.Rptr.2d 802]; *People v. Blakeley, supra*, 23 Cal.4th at p. 93.)

Inapplicable to Felony Murder

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

Fetus

Manslaughter does not apply to the death of a fetus. (*People v. Carlson* (1974) 37 Cal.App.3d 349, 355 [112 Cal.Rptr. 321].) While the Legislature has included the

killing of a fetus, as well as a human being, within the definition of murder under Penal Code section 187, it has “left untouched the provisions of section 192, defining manslaughter [as] the ‘unlawful killing of a human being.’” (*Ibid.*)

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

Reasonable Person Standard Not Modified by Evidence of Mental Impairment

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

Reasonable Person Standard and Physical Limitations

A defendant’s physical limitations are relevant when deciding the reasonable person standard for self-defense. (*People v. Horn* (2021) 63 Cal.App.5th 672, 686 [277 Cal.Rptr.3d 901].) See also CALCRIM No. 3429, *Reasonable Person Standard for Physically Disabled Person*.

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 242–244.

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

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

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

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

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

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

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

AND

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

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

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

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

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

<Give when kill zone theory applies>

[A person may intend to kill a primary target and also [a] secondary target[s] within a zone of fatal harm or “kill zone.” A “kill zone” is an area in which

the defendant used lethal force that was designed and intended to kill everyone in the area around the primary target.

In order to convict the defendant of the attempted murder of _____ <insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>, the People must prove that the defendant not only intended to kill _____ <insert name of primary target alleged> but also either intended to kill _____ <insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>, or intended to kill everyone within the kill zone.

In determining whether the defendant intended to kill _____ <insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>, the People must prove that (1) the only reasonable conclusion from the defendant’s use of lethal force, is that the defendant intended to create a kill zone; and (2) _____ <insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory> was located within the kill zone.

In determining whether the defendant intended to create a “kill zone” and the scope of such a zone, you should consider all of the circumstances including, but not limited to, the following:

- [• The type of weapon used(;/.)]**
- [• The number of shots fired(;/.)]**
- [• The distance between the defendant and _____ <insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>(;/.)]**
- [• The distance between _____ <insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory> and the primary target.]**

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

*New January 2006; Revised December 2008, August 2009, April 2011, August 2013, September 2019, April 2020, September 2023, March 2024**

* Denotes changes only to bench notes and other commentaries.

BENCH NOTES

Instructional Duty

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

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

The *Bland* court stated that a special instruction on this issue was not required. (*Id.* at p. 331, fn.6.) The bracketed language is provided for the court to use **at its discretion when substantial evidence exists that: the defendant intended to kill a primary target; the defendant concurrently intended to achieve that goal by killing all others in the fatal zone created by the defendant; and the alleged attempted murder victim was in that zone.** (See *People v. Mumin* (2023) 15 Cal.5th 176, 203 [312 Cal.Rptr.3d 255, 534 P.3d 1]. “The use or attempted use of force that merely **endangered everyone in the area is insufficient to support a kill zone instruction.**” (*People v. Canizales* (2019) 7 Cal.5th 591, 608 [248 Cal.Rptr.3d 370, 442 P.3d 686].)

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

A verdict of attempted murder may not be based on the natural and probable consequences doctrine. (Pen. Code, § 188(a)(3); *People v. Sanchez* (2022) 75 Cal.App.5th 191, 196 [290 Cal.Rptr.3d 390].)

Related Instructions

CALCRIM Nos. 3470–3477, Defense Instructions.

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

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

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

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

AUTHORITY

- Attempt Defined. Pen. Code, §§ 21a, 663, 664.
- Murder Defined. Pen. Code, § 187.
- Specific Intent to Kill Required. *People v. Guerra* (1985) 40 Cal.3d 377, 386 [220 Cal.Rptr. 374, 708 P.2d 1252].
- Fetus Defined. *People v. Davis* (1994) 7 Cal.4th 797, 814–815 [30 Cal.Rptr.2d 50, 872 P.2d 591]; *People v. Taylor* (2004) 32 Cal.4th 863, 867 [11 Cal.Rptr.3d 510, 86 P.3d 881].
- Kill Zone Explained. *People v. Mumin, supra*, 15 Cal.5th at p. 193; *People v. Canizales, supra*, (2019) 7 Cal.5th at pp. 591, 607-608 [~~248 Cal.Rptr.3d 370, 442 P.3d 686~~]; *People v. Stone* (2009) 46 Cal.4th 131, 137–138 [92 Cal.Rptr.3d 362, 205 P.3d 272].
- This Instruction Correctly States the Law of Attempted Murder. *People v. Lawrence* (2009) 177 Cal.App.4th 547, 556-557 [99 Cal.Rptr.3d 324].

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Specific Intent Required

“[T]he crime of attempted murder requires a specific intent to kill” (*People v. Guerra, supra*, 40 Cal.3d at p. 386.)

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

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

Solicitation

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

Single Bullet, Two Victims

A shooter who fires a single bullet at two victims who are both in his line of fire can be found to have acted with express malice toward both victims. (*People v. Smith*) (2005) 37 Cal.4th 733, 744 [37 Cal.Rptr.3d 163, 124 P.3d 730]. See also *People v. Perez* (2010) 50 Cal.4th 222, 225 [112 Cal.Rptr.3d 310, 234 P.3d 557].)

No Attempted Involuntary Manslaughter

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

Transferred and Concurrent Intent

“[T]he doctrine of transferred intent does not apply to attempted murder.” (*People v. Bland, supra*, 28 Cal.4th at p. 331.) “[T]he defendant may be convicted of the attempted murders of any[one] within the kill zone, although on a concurrent, not transferred, intent theory.” (*Ibid.*)

Kill-Zone Theory

~~Give the kill zone instruction “only in those cases where the court concludes there is sufficient evidence to support a jury determination that the *only* reasonable inference from the circumstances of the offense is that a defendant intended to kill everyone in the zone of fatal harm. The use or attempted use of force that merely endangered everyone in the area is insufficient to support a kill zone instruction.” (*People v. Canizales, supra*, 7 Cal.5th at p. 608.)~~

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Elements, §§ 56–71.

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

968. Shooting From Motor Vehicle (Pen. Code, § 26100(c) & (d))

The defendant is charged [in Count __] with shooting from a motor vehicle [at another person] [in violation of Penal Code section 26100].

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

1. The defendant willfully and maliciously shot a firearm from a motor vehicle(;/.)

<Give element 2 when defendant charged with Pen. Code, § 26100(c).>
[AND]

2. The defendant shot the firearm at another person who was not in a motor vehicle(;/.)

<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.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to disturb, defraud, annoy, or injure someone else.

[A *motor vehicle* includes a (passenger vehicle/motorcycle/motor scooter/bus/school bus/commercial vehicle/truck tractor and trailer/ _____ <insert other type of motor vehicle>).]

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

[The term[s] (*firearm*/ _____ <insert other term>) (is/are) defined in another instruction to which you should refer.]

BENCH NOTES

Instructional Duty

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

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.)

Give the bracketed phrase “at another person” in the first sentence plus bracketed element 2 if the defendant is charged with shooting at someone who was not in a motor vehicle. (See Pen. Code, § 26100(c).) If the defendant is only charged with shooting from a motor vehicle (see Pen. Code, § 26100(d)), give element 1 but not element 2.

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

Related Instructions

CALCRIM No. 969, *Permitting Someone to Shoot From Vehicle*.

AUTHORITY

- Elements. Pen. Code, § 26100(c) & (d).
- “Firearm” Defined. Pen. Code, § 16520.
- “Malicious” Defined. Pen. Code, § 7(4).
- “Willful” Defined. Pen. Code, § 7(1); *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438 [35 Cal.Rptr.2d 155] [in context of Pen. Code, § 246].
- General Intent Crime. *People v. Laster* (1997) 52 Cal.App.4th 1450, 1468 [61 Cal.Rptr.2d 680] [dictum].
- Assault With a Firearm is not a Lesser Included Offense. *People v. Licas* (2007) 41 Cal.4th 362 [60 Cal.Rptr.3d 31].
- “From a Vehicle” Includes Standing at Open Door. *People v. Gaines* (2023) 93 Cal.App.5th 91, 120 [310 Cal.Rptr.3d 203].

RELATED ISSUES

Shooting at Animal

It is a separate crime to shoot from a motor vehicle at any game bird or mammal.
(See Fish & G. Code, § 3002.)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 51.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, §§ 144.01[1][i], 144.03[2], [4] (Matthew Bender).

969. Permitting Someone to Shoot From Vehicle (Pen. Code, § 26100(b))

The defendant is charged [in Count __] with permitting someone to shoot from a vehicle [in violation of Penal Code section 26100(b)].

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

1. The defendant was the (driver/ [or] owner) of a vehicle;
2. The defendant permitted someone to shoot a firearm from the vehicle;
3. The defendant knew that (he/she) was permitting someone to shoot a firearm from the vehicle;

AND

4. The other person shot the firearm from the vehicle.

[A vehicle owner who permits someone else to shoot a firearm from the vehicle is guilty even if the owner is not in the vehicle when the shooting happens.]

[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.]

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

[The term[s] (*firearm*/ _____ <insert other term>) (is/are) defined in another instruction to which you should refer.]

*New January 2006; Revised February 2012, March 2024**

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

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

Related Instructions

CALCRIM No. 968, *Shooting From Motor Vehicle*.

AUTHORITY

- Elements. Pen. Code, § 26100(b).
- “Firearm” Defined. Pen. Code, § 16520.
- General Intent Crime. *People v. Laster* (1997) 52 Cal.App.4th 1450, 1468 [61 Cal.Rptr.2d 680].
- “Vehicle” Defined. Veh. Code, § 670.
- “From a Vehicle” Includes Standing at Open Door. *People v. Gaines* (2023) 93 Cal.App.5th 91, 120 [310 Cal.Rptr.3d 203].

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 51.

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

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

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/fear) 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.

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

*New January 2006; Revised April 2008, April 2020, September 2020, October 2021, March 2022, March 2024**

** Denotes changes only to bench notes and other commentaries.*

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].)

There is no sua sponte duty to define “illegal intent” or “illegal purpose.” (*People v. Singh* (2019) 42 Cal.App.5th 175, 181-183 [254 Cal.Rptr.3d 871].)

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 Unable to Consent Due to Intoxication or Other Mental Condition. *People v. Lewis* (2023) 14 Cal.5th 876, 899 [309 Cal.Rptr.3d 699, 530 P.3d 1107] ~~*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 Alone Does Not Substitute for Force. *People v. Nieto* (2021) 62 Cal.App.5th 188, 195 [276 Cal.Rptr.3d 379].

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, but the jury may be instructed on attempted kidnapping if supported by the evidence. (*People v. Fontenot* (2019) 8 Cal.5th 57, 65-71 [251 Cal.Rptr.3d 341, 447 P.3d 252] [discussing Pen. Code, § 1159].)

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).

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

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 **that the minor 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.]

New February 2014; Revised March 2019, October 2021, March 2024

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.

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. *People v. Moses* (2020) 10 Cal.5th 893, 912–913 [272 Cal.Rptr.3d 862, 477 P.3d 579].
- Specific Intent for Attempt. *People v. Moses, supra*, 10 Cal.5th at pp. 912–913 [adult posing as minor]; *People v. Middleton* (2023) 91 Cal.App.5th 749, 767–768 [308 Cal.Rptr.3d 705] [actual minor].

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).

1250. Child Abduction: No Right to Custody (Pen. Code, §§ 277, 278)

The defendant is charged [in Count __] with child abduction without a right of custody [in violation of Penal Code section 278].

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

1. The defendant maliciously (took[,]/ [or] enticed away[,]/ [or] kept[,]/ [or] withheld[,]/ [or] concealed) a child from (his/her) lawful custodian;
2. The child was under the age of 18;
3. When the defendant acted, (he/she) did not have a right to custody of that child;

AND

4. When the defendant acted, (he/she) intended to detain or conceal the child from the child's lawful custodian.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to disturb, defraud, annoy, or injure someone else.

A *lawful custodian* is a person, guardian, or public agency having a right to custody of the child. The *right to custody* means the right to physical care, custody, and control of the child according to the law or because of a court order. [A public agency has the right to custody if it has been given protective custody or jurisdiction of the care, custody, control, or conduct of the child by statute or court order.]

[*Intending to detain* includes delaying or hindering. A person can detain someone without using force.]

[To *entice away* means to lure away by creating hope or desire.]

[The defendant can be guilty of child abduction whether or not the child resisted or objected, and even if the child consented to go with the defendant.]

[A parent has no right to physical custody if his or her parental rights were terminated by court order.]

[A parent loses his or her right to custody if he or she (is unable to take custody of the child[,]/ [or] refuses to take custody of the child[,]/ [or] abandons his or her family).]

[A parent *abandons* a child by actually deserting the child with the intent to cut off the relationship with the child and end all parental obligations. Intent to abandon can be shown in many ways, including, but not limited to:

1. Leaving the child without providing a way for the child to be identified;
2. Leaving the child with the other parent for at least one year without communicating with or supporting the child;

OR

3. Leaving the child with someone other than a parent for at least six months without communicating with or supporting the child.]

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

*New January 2006; Revised March 2024**

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

If requested, give the final bracketed sentence at the end of the paragraph defining “lawful custodian” if a public agency was the lawful custodian at the time of the alleged abduction. (See Pen. Code, § 277(e).)

If requested, give the bracketed sentences defining “intending to detain” (see *People v. Moore* (1945) 67 Cal.App.2d 789, 791 [155 P.2d 403]) or “entice away” (see *People v. Torres* (1920) 48 Cal.App. 606, 609 [192 P. 175]) depending on the evidence in the case.

If requested, give the bracketed paragraph about the child’s consent or lack of resistance if there is evidence the child did not resist or consented to go with the defendant. (*People v. Moore, supra*, 67 Cal.App.2d at p. 792 [child’s consent irrelevant]; *People v. Grever* (1989) 211 Cal.App.3d Supp. 1, 7 [259 Cal.Rptr. 469].)

Give on request the bracketed paragraph that begins with “A parent loses his or her right to custody . . .” if there is evidence the defendant lost his or her right to custody by being unable or refusing to take custody, or by abandoning his or her family. (See Pen. Code, § 277(f).)

If there is evidence of abandonment, give the bracketed paragraphs defining when a parent “abandons” a child. The trial court must define abandonment **sua sponte** when it is closely connected to the evidence presented on the right to custody. (*People v. Ryan* (1999) 76 Cal.App.4th 1304, 1319 [76 Cal.Rptr.2d 160].) If an Indian parent is involved, see Fam. Code, § 7822(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].)

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. 1215, *Kidnapping*.

AUTHORITY

- Elements. Pen. Code, §§ 277, 278.
- Abandonment Defined. Fam. Code, § 7822(a), (b); *People v. Ryan, supra, (1999)* 76 Cal.App.4th at pp.1304, 1315–1316, 1320 [~~76 Cal.Rptr.2d 160~~].
- Court Order or Custody Order Defined. Pen. Code, § 277(b).
- Custody Proceeding Defined. Pen. Code, § 277(c).
- Maliciously Defined. Pen. Code, § 7(4).
- Person Defined. Pen. Code, § 277(i) [includes parent or parent’s agent].
- Child’s Consent Irrelevant. *People v. Moore, supra, (1945)* 67 Cal.App.2d at pp.789, 791–792 [~~155 P.2d 403~~] [crime against parent]; *People v. Grever, supra, (1989)* 211 Cal.App.3d Supp. At p.1, 7 [~~259 Cal.Rptr. 469~~].

- Detain Defined. *People v. Moore*, ~~*supra*, (1945)~~ 67 Cal.App.2d ~~at p.789,-791~~ ~~[155 P.2d 403]~~ [includes delaying, hindering, or retarding but not necessarily the use of force].
- Entice Defined. *People v. Torres* (1920) 48 Cal.App. 606, 609 [192 P. 175].

LESSER INCLUDED OFFENSES

- Attempted Child Abduction. Pen. Code, §§ 664, 278.

RELATED ISSUES

Custody Placed With Other Parent

Penal Code section 278 applies to a parent of a minor child whose custody has been placed with the other parent by court order. (*People v. Hyatt* (1971) 18 Cal.App.3d 618, 622 [96 Cal.Rptr. 156].) A parent with bare legal custody does not have a “right of custody” under the statute. (*People v. Irwin* (1984) 155 Cal.App.3d 891, 897 [202 Cal.Rptr. 475] [father only had joint legal custody; physical custody was awarded to the mother].)

Intent to Detain or Conceal Not Required

Proof of violation of section 278 does not require the intent to detain or conceal the child in California. Proof of detention or concealment, however, supports an inference of an intention to detain or conceal. (*People v. Hyatt*, ~~*supra*, (1971)~~ 18 Cal.App.3d ~~at p.618,~~ 623 ~~[96 Cal.Rptr. 156]~~ [construing former section 278 that required intent to detain “and” conceal].)

Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)

Penal Code section 278 does not require the prosecution to prove that a foreign court order or custody order had previously been registered in California pursuant to the UCCJEA. (*People v. Coulthard* (2023) 90 Cal.App.5th 743, 758 [307 Cal.Rptr.3d 383].)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 318–327.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.14[2][b], [c], [3] (Matthew Bender).

1500. Aggravated Arson (Pen. Code, § 451.5)

If you find the defendant guilty of arson [as charged in Count[s] __], you must then decide whether[, for each crime of arson,] the People have proved the additional allegation that the arson was aggravated. [You must decide whether the People have proved this allegation for each crime of arson and return a separate finding for each crime of arson.]

To prove this allegation, the People must prove that:

1. The defendant acted willfully, maliciously, deliberately, and with premeditation;

~~[AND]~~

2. The defendant acted with intent to injure one or more persons, or to damage property under circumstances likely to injure one or more persons, or to damage one or more structures or inhabited dwellings(;/.)

~~[AND]~~

~~*<Alternative 3A—prior arson conviction(s) within 10 years>*~~

~~**[3A. The defendant was convicted of arson on** *<insert date of conviction>*. *<Repeat for each prior conviction alleged>*.]~~

~~[OR]~~

~~*<Alternative 3BA—loss exceeding \$10.18.3 million>*~~

~~**[3BA. The fire caused property damage and other losses exceeding \$10.18.3 million not including damage to, or destruction of, inhabited dwellings, including the cost of fire suppression].]**~~

~~[OR]~~

~~*<Alternative 3CB—destroyed five or more inhabited structures>*~~

~~**[3CB. The fire damaged or destroyed five or more inhabited structures~~dwellings.~~]**~~

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

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to disturb, defraud, annoy, or injure someone else.

The defendant acted *deliberately* if (he/she) carefully weighed the considerations for and against (his/her) choice and, knowing the consequences, decided to commit the arson. The defendant acted with *premeditation* if (he/she) decided to commit the arson before committing the act that caused the arson.

[The length of time the person spends considering whether to commit arson does not alone determine whether the arson is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to commit arson made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated. On the other hand, a cold, calculated decision to commit arson can be reached quickly. The test is the extent of the reflection, not the length of time.]

[A (dwelling/ [or] structure) is *inhabited* if someone lives there and either is present or has left but intends to return.]

[A (dwelling/ [or] structure) is *inhabited* if someone used it as a dwelling and left only because a natural or other disaster caused him or her to leave.]

[A (dwelling/ [or] structure) is not *inhabited* if the former residents have moved out and do not intend to return, even if some personal property remains inside.]

[A *dwelling* includes any (structure/garage/office/ _____) that is attached to the house and functionally connected with it.]

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

New January 2006; Revised August 2015, April 2020, March 2024

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the sentencing factor if the defendant is charged with aggravated arson.

If the prosecution alleges that the defendant was previously convicted of arson within ten years of the current offense, give alternative A in element 3. If the prosecution alleges that the fire caused more than 10.18.3 million dollars in damage exclusive of damage to, or destruction of, inhabited dwellings, give alternative BA in element 3. If the prosecution alleges that the fire damaged five or more inhabited dwellingsstructures, give alternative CB in element 3.

~~If the prosecution alleges that the defendant was previously convicted of arson within ten years of the current offense, give elements 1 and 2 only. The court must also give either CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant has stipulated to the truth of the prior conviction.~~

The definitions of “deliberation” and “premeditation” and the bracketed paragraph that begins with “The length of time” are derived from the first degree murder instruction because no recorded case construes their meaning in the context of Penal Code section 451.5. (See CALCRIM No. 521, *Murder: Degrees*.)

Give the bracketed definitions of inhabited dwelling or structure if relevant.

If there is an issue as to whether the fire *caused* the property damage, give CALCRIM No. 240, *Causation*.

AUTHORITY

- Enhancement. Pen. Code, § 451.5.
- Inhabitation Defined. Pen. Code, § 459.
- House Not Inhabited Means Former Residents Not Returning. *People v. Cardona* (1983) 142 Cal.App.3d 481, 483 [191 Cal.Rptr. 109].

LESSER INCLUDED OFFENSES

Arson under section 451 is not a lesser included offense of aggravated arson. (*People v. Shiga* (2019) 34 Cal.App.5th 466, 483 [246 Cal.Rptr.3d 198].)

RELATED ISSUES

See the Related Issues section to CALCRIM No. 1515, *Arson*.

SECONDARY SOURCES

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Property §§ 268-273.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

1551. Arson Enhancements (Pen. Code, §§ 451.1, 456(b))

If you find the defendant guilty of arson [as charged in Count[s] __], you must then decide whether[, for each crime of arson,] the People have proved (the additional allegation that/one or more of the following additional allegations):

<Alternative A—prior felony violation(s) of Pen. Code, §§ 451 or 452~~monetary gain~~>

- [The defendant was convicted of (felony arson/ [(and/or)] felony unlawfully causing a fire) on _____ <insert date of conviction>. <Repeat for each prior felony conviction alleged> **intended to obtain monetary gain when (he/she) committed the arson.**]

<Alternative B—*injury to firefighter, peace officer, or EMT*>

- [(A/An) (firefighter[,]/ peace officer[,]/ [or] emergency worker) suffered great bodily injury as a result of the arson.]

<Alternative C—*great bodily injury to more than one person*>

- [The defendant caused great bodily injury to more than one person during the commission of the arson.]

<Alternative D—*multiple structures burned*>

- [The defendant caused multiple structures to burn during the commission of the arson.]

<Alternative E—*device designed to accelerate fire*>

- [The arson (caused great bodily injury[,]/ [or] caused an inhabited structure or inhabited property to burn[,]/ [or] burned a structure or forest land), and was caused by use of a device designed to accelerate the fire or delay ignition.]

<Alternative F—monetary gain, Pen. Code, § 456(b)>

- [**The defendant committed the arson for monetary gain.**]

[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”>.]

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

[An **emergency worker** includes an emergency medical technician. An **emergency medical technician** is someone who holds a valid certificate under the Health and Safety Code as an emergency medical technician.]

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

[A (structure/ [or] property) is **inhabited** if someone lives there and either is present or has left but intends to return.]

[A (structure/ [or] property) is **inhabited** if someone used it as a dwelling and left only because a natural or other disaster caused him or her to leave.]

[A (structure/ [or] property) is **not inhabited** if the former residents have moved out and do not intend to return, even if some personal property remains inside.]

[A **device designed to accelerate the fire** means a piece of equipment or a mechanism intended, or devised, to hasten or increase the fire’s progress.]

[In order to prove that the defendant **caused** (great bodily injury to more than one person/ [or] more than one structure to burn), the People must prove that:

1. A reasonable person in the defendant’s position would have foreseen that committing arson could begin a chain of events likely to result in (great bodily injury to more than one person/ [or] the burning of more than one structure);
2. The commission of arson was a direct and substantial factor in causing (great bodily injury to more than one person/ [or] the burning of more than one structure);

AND

3. The (great bodily injury to more than one person/ [or the] burning of more than one structure) would not have happened if the defendant had not committed arson.]

[You must decide whether the People have proved this allegation for each crime of arson and return a separate finding for each crime of arson.]

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

New January 2006; Revised September 2020, March 2024

BENCH NOTES

Instructional Duty

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

The reference to “arson” in the first paragraph refers to all crimes charged under Penal Code section 451, including arson of a structure, forest land, or property (see CALCRIM No. 1515), arson causing great bodily injury (see CALCRIM No. 1501), and arson of an inhabited structure (see CALCRIM No. 1502). It does not refer to aggravated arson under Penal Code section 451.5 (see CALCRIM No. 1500).

Give one of the bracketed alternatives, A–E, depending on the enhancement alleged. Give all relevant bracketed definitions, based on the enhancement alleged.

Give Alternative F if monetary gain is alleged under Penal Code section 456(b). (See *Southern Union Co. v. U.S.* (2012) 567 U.S. 343 [132 S.Ct. 2344, 183 L.Ed.2d 318] [holding that the jury trial right prescribed by *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], applies to the imposition of criminal fines not statutorily authorized by the elements of the crime]; cf. *People v. Kramis* (2012) 209 Cal.App.4th 346, 351–352 [147 Cal.Rptr.3d 84] [*Apprendi* not implicated when trial court exercised discretion to impose fine within statutory range that did not require additional factual findings].)

~~If the defendant is charged with a qualifying prior conviction under Penal Code section 451.1(a)(1), give either CALCRIM No. 3100, *Prior Conviction*, or~~

~~CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant has stipulated to the truth of the prior conviction.
Give all relevant bracketed definitions, based on the enhancement alleged.~~

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.”

Give the bracketed paragraph that begins with “In order to prove that the defendant *caused*” if the prosecution alleges that the defendant caused great bodily injury to multiple people or caused multiple structures to burn. (Pen. Code, § 451.1(a)(5); see Pen. Code, § 451(a)–(c).)

Give the bracketed sentence that begins with “You must decide whether the People have proved” if the same enhancement is alleged for multiple counts of arson.

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].)

AUTHORITY

- Enhancements. Pen. Code, §§ 451.1, 456(b).
- “Device Designed to Accelerate Fire” Defined. [*People v. Johnson* \(2022\) 86 Cal.App.5th 258, 266–267 \[301 Cal.Rptr.3d 814\]](#); [*People v. Kurtenbach* \(2012\) 204 Cal.App.4th 1264, 1278–1280 \[139 Cal.Rptr.3d 637\]](#); [*People v. Andrade* \(2000\) 85 Cal.App.4th 579, 587 \[102 Cal.Rptr.2d 254\]](#).
- “Peace Officer” Defined. Pen. Code, § 830 et seq.
- “Firefighter” Defined. Pen. Code, § 245.1.

- “Emergency Medical Technician” Defined. Health & Saf. Code, §§ 1797.80–1797.84.
- Duty to Define Proximate Cause. See *People v. Bland* (2002) 28 Cal.4th 313, 334–335 [121 Cal.Rptr.2d 546, 48 P.3d 1107] [in context of firearm enhancement].

RELATED ISSUES

Discretion to Strike Enhancement

The trial court retains discretion under Penal Code section 1385 to strike an arson sentence enhancement. (*People v. Wilson* (2002) 95 Cal.App.4th 198, 203 [115 Cal.Rptr.2d 355] [enhancement for use of an accelerant under Pen. Code, § 451.1(a)(5)].)

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 372.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.47 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11[3] (Matthew Bender).

1552–1599. Reserved for Future Use

1800. Theft by Larceny (Pen. Code, § 484)

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

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

1. The defendant took possession of property owned by someone else;
2. The defendant took the property without the owner's [or owner's agent's] consent;
3. When the defendant took the property (he/she) intended (to deprive the owner of it permanently/ [or] to remove it from the owner's [or owner's agent's] possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property);

AND

4. The defendant moved the property, even a small distance, and kept it for any period of time, however brief.

[The taking of property can include its consumption or the use of utilities.]

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

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

New January 2006; Revised August 2016, March 2024

BENCH NOTES

Instructional Duty

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

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

Related Instructions

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

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

If a different theory of theft is presented, see CALCRIM No. 1804, *Theft by False Pretense*, CALCRIM No. 1805, *Theft by Trick*, CALCRIM No. 1806, *Theft by Embezzlement*. See also CALCRIM No. 1861, *Jury Does Not Need to Agree on Form of Theft*. The court may also wish to instruct with the bracketed “[by larceny]” in the first sentence to distinguish this theory of theft from the others.

For theft of real property, use CALCRIM No. 1804, *Theft by False Pretense*. (See *People v. Sanders* (1998) 67 Cal.App.4th 1403, 1413–1417 [79 Cal.Rptr.2d 806].)

AUTHORITY

- Elements. Pen. Code, § 484; *People v. Williams* (1946) 73 Cal.App.2d 154, 157 [166 P.2d 63]; *People v. Edwards* (1925) 72 Cal.App. 102, 112–117 [236 P. 944], disapproved on other grounds in *In re Estrada* (1965) 63 Cal.2d 740, 748 [48 Cal.Rptr. 172, 408 P.2d 948].
- Intent to Deprive Owner of Main Value. *People v. Avery*, *supra*, (2002) 27 Cal.4th at pp.49, 57–59 [115 Cal.Rptr.2d 403, 38 P.3d 1], disapproving, to extent it is inconsistent, People v. Marquez (1993) 16 Cal.App.4th 115, 123 [20 Cal.Rptr.2d 365]; People v. Zangari (2001) 89 Cal.App.4th 1436, 1447 [108 Cal.Rptr.2d 250].
- Unauthorized Use of Utilities. *People v. Myles (2023) 89 Cal.App.5th 711, 731 [306 Cal.Rptr.3d 288].*

COMMENTARY

Asportation

To constitute a completed theft, the property must be asported or carried away. (*People v. Shannon* (1998) 66 Cal.App.4th 649, 654 [78 Cal.Rptr.2d 177].)

Asportation requires three things: (1) the goods are severed from the possession or custody of the owner, (2) the goods are in the complete possession of the thief or

thieves, and (3) the property is moved, however slightly. (*Ibid.*; *People v. Edwards* (1925) 72 Cal.App. 102, 114–115 [236 P. 944], disapproved on other grounds in *In re Estrada* (1965) 63 Cal.2d 740 [48 Cal.Rptr. 172, 408 P.2d 948]; *People v. Collins* (1959) 172 Cal.App.2d 295, 299 [342 P.2d 370] [joint possession of property by more than one thief].) Asportation is fulfilled by wrongful removal of property from the owner or possessor, against his or her will with the intent to steal it, even though the property is retained by the thief but a moment. (*People v. Quiel* (1945) 68 Cal.App.2d 674, 679 [157 P.2d 446].) Paragraph 4 sets forth the asportation element.

Value

The property taken must have some intrinsic value, however slight. (*People v. Franco* (1970) 4 Cal.App.3d 535, 542 [84 Cal.Rptr. 513]; *People v. Martinez* (2002) 95 Cal.App.4th 581, 585 [115 Cal.Rptr.2d 574].) The final bracketed paragraph may be given on request if the property in question was of slight value.

LESSER INCLUDED OFFENSES

- Petty Theft. Pen. Code, § 486.
- Attempted Theft. Pen. Code, §§ 664, 484.
- Taking an Automobile Without Consent. Veh. Code, § 10851; *People v. Pater* (1968) 267 Cal.App.2d 921, 926 [73 Cal.Rptr. 823].
- Auto Tampering. Veh. Code, § 10852; *People v. Anderson* (1975) 15 Cal.3d 806, 810–811 [126 Cal.Rptr. 235, 543 P.2d 603].
- Misdemeanor Joyriding. Pen. Code, § 499b [of bicycle, motorboat, or vessel].

Petty theft is a not lesser-included offense of grand theft when the charge of grand theft is based on the type of property taken. (*People v. Thomas* (1974) 43 Cal.App.3d 862, 870 [118 Cal.Rptr. 226].)

RELATED ISSUES

Claim of Right

If a person actually believes that he or she has a right to the property even if that belief is mistaken or unreasonable, such belief is a defense to theft. (*People v. Romo* (1990) 220 Cal.App.3d 514, 518 [269 Cal.Rptr. 440]; see also *People v. Devine* (1892) 95 Cal. 227, 229 [30 P. 378] [“[i]t is clear that a charge of larceny, which requires an intent to steal, could not be founded on a mere careless taking away of another’s goods”]; *In re Bayles* (1920) 47 Cal.App. 517, 519–521 [190 P. 1034] [larceny conviction reversed where landlady actually believed she was entitled to take tenant’s property for cleaning fees incurred even if her belief was

unreasonable]; *People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, 4–6, 10–11 [160 Cal.Rptr. 692]; see CALCRIM No. 1863, *Defense to Theft or Robbery: Claim of Right*.)

Community Property

A person may be found guilty of theft of community property, but only if he or she has the intent to deprive the other owner of the property permanently. (*People v. Llamas* (1997) 51 Cal.App.4th 1729, 1738–1740 [60 Cal.Rptr.2d 357].)

Fraudulent Refunds

A person who takes property while in a store and presents it for a refund is guilty of theft. (*People v. Davis* (1998) 19 Cal.4th 301 [79 Cal.Rptr.2d 295, 965 P.2d 1165].) The Supreme Court held that taking with the intent to fraudulently obtain a refund constitutes both an intent to permanently deprive the store of property and a trespassory taking within the meaning of larceny. (*Id.* at pp. 317–318; see also *People v. Shannon* (1998) 66 Cal.App.4th 649 [78 Cal.Rptr.2d 177].)

Multiple or Single Conviction of Theft—Overall Plan or Scheme

If multiple items are stolen ~~from a single victim~~ over a period of time and the takings are part of one intention, one general impulse, and one plan~~one intent, plan, or impulse, only one theft occurs and the value of the items is aggregated when determining the degree of theft.~~ (*People v. Bailey* (1961) 55 Cal.2d 514, 518–519 [11 Cal.Rptr. 543, 360 P.2d 39]; accord *People v. Sullivan* (1978) 80 Cal.App.3d 16, 19–21 [145 Cal.Rptr. 313]; see CALCRIM No. 1802, *Theft: As Part of Overall Plan*.)

~~A serial thief “may be convicted of multiple counts of grand theft based on separate and distinct acts of theft, even if committed pursuant to a single overarching scheme.” [disapproving any interpretation of *People v. Bailey* (1961) 55 Cal.2d 514 [11 Cal.Rptr. 543, 360 P.2d 39] inconsistent with this conclusion.] *People v. Whitmer* (2014) 59 Cal.4th 733, 740–741 [174 Cal.Rptr.3d 594, 329 P.3d 154].~~

No Need to Use or Benefit From the Property Taken

It does not matter that the person taking the property does not intend to use the property or benefit from it; he or she is guilty of theft if there is intent to permanently deprive the other person of the property. (*People v. Kunkin* (1973) 9 Cal.3d 245, 251 [107 Cal.Rptr. 184, 507 P.2d 1392]; *People v. Green* (1980) 27 Cal.3d 1, 57–58 [164 Cal.Rptr. 1, 609 P.2d 468] [defendant intended to destroy the property], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99]; *People v. Pierce* (1952) 110 Cal.App.2d 598, 609 [243 P.2d 585] [irrelevant that defendant did not personally benefit from embezzled funds]; see also *People v. Avery* (2002) 27 Cal.4th 49, 57–

58 [115 Cal.Rptr.2d 403, 38 P.3d 1] [intent to deprive owner of major value or enjoyment].)

Possession

The victim of a theft does not have to be the owner of property, only in possession of it. (*People v. Edwards* (1925) 72 Cal.App. 102, 116 [236 P. 944], disapproved on other grounds in *In re Estrada* (1965) 63 Cal.2d 740, 748 [48 Cal.Rptr. 172, 408 P.2d 948].) “Considered as an element of larceny, ‘ownership’ and ‘possession’ may be regarded as synonymous terms; for one who has the right of possession as against the thief is, so far as the latter is concerned, the owner.” (*Ibid*; see also *People v. Davis* (1893) 97 Cal. 194, 195 [31 P. 1109] [fact that property in possession of victim sufficient to show ownership].)

Unanimity of Theft Theory Not Required

If multiple theories of theft have been presented, the jury does not need to agree on which form of theft was committed. All the jury must agree on is that an unlawful taking of property occurred. (*People v. Counts* (1995) 31 Cal.App.4th 785, 792–793 [37 Cal.Rptr.2d 425]; *People v. Failla* (1966) 64 Cal.2d 560, 567–569 [51 Cal.Rptr. 103, 414 P.2d 39] [burglary case]; *People v. Nor Woods* (1951) 37 Cal.2d 584, 586 [233 P.2d 897] [addressing the issue for theft].) See CALCRIM No. 1861, *Jury Does Not Need to Agree on Form of Theft*.

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, §§ 14-17.

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

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

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 & Saf. 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.]

*New January 2006; Revised February 2012, February 2013, October 2021, March 2024**

** Denotes changes only to bench notes and other commentaries.*

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].
- *Noncaretaker Status Not an Element of Pen. Code, § 368(d). People v. Marquez* (2023) 89 Cal.App.5th 1212, 1221–1222 [306 Cal.Rptr.3d 664].

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

**2624. Threatening a Witness After Testimony or Information Given
(Pen. Code, § 140(a))**

The defendant is charged [in Count __] with (using force/ [or] threatening to use force) against a witness [in violation of Penal Code section 140(a)].

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

1. _____ <insert name/description of person allegedly targeted> gave (assistance/ [or] information) to a (law enforcement officer/public prosecutor) in a (criminal case/juvenile court case);

[AND]

2. The defendant willfully (used force/ [or] threatened to use force or violence against _____ <insert name/description of person allegedly targeted>/ [or] threatened to take, damage, or destroy the property of _____ <insert name/description of person allegedly targeted>) because (he/she) had given that (assistance/[or] information)(;/.)

<Give the following language if the violation is based on a threat.>

~~[AND]~~

~~[3. The defendant consciously disregarded a substantial risk that (his/her) conduct would be understood as [a] threat[s]A reasonable listener in a similar situation with similar knowledge would interpret the threat, in light of the context and surrounding circumstances, as a serious expression of intent to commit an act of unlawful force or violence(;/.)]~~

~~[ANDOR]~~

~~[(3./4.) A reasonable personlistener in a similar situation with similar knowledge would interpret the threat, in light of the context and surrounding circumstances, as a serious expression of intent to commit an act of unlawful (force or violence/taking, damage or destruction of property).]~~

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

[An officer or employee of (a/an) (local police department[,]/ [or] sheriff's office[,]/ [or] _____ <insert title of agency of peace officer enumerated in Pen. Code, § 13519(b)>) is a *law enforcement officer*.]

[A lawyer employed by (a/an/the) (district attorney's office[,]/ [or] Attorney General's office[,]/ [or] city (prosecutor's/attorney's) office) to prosecute cases is a *public prosecutor*.]

[The People do not need to prove that the threat was communicated to _____ <insert name/description of person allegedly targeted> or that (he/she) was aware of the threat.]

New January 2006; Revised August 2012, March 2021, March 2024

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, § 140(a).
- “Witness” Defined. Pen. Code, § 136(2).
- “Victim” Defined. Pen. Code, § 136(3).
- “Public Prosecutor” Defined. Gov. Code, §§ 26500, 12550, 41803.
- “Law Enforcement Officer” Defined. Pen. Code, § 13519(b).
- ~~General Intent Offense. *People v. McDaniel* (1994) 22 Cal.App.4th 278, 283 [27 Cal.Rptr.2d 306].~~
- Threat Need Not Be Communicated to Target. *People v. McLaughlin* (1996) 46 Cal.App.4th 836, 842 [54 Cal.Rptr.2d 4].
- Reasonable Person~~Listener~~ Standard. *People v. Lowery* (2011) 52 Cal.4th 419, 422~~7~~ [128 Cal.Rptr.3d 648, 257 P.3d 72].
- First Amendment Requires Recklessness as to Threat. *Counterman v. Colorado* (2023) 600 U.S. 66, 69 [143 S.Ct. 2106, 216 L.Ed.2d 775].

COMMENTARY

~~Penal Code section 140 does not define “threat.” (Cf. Pen. Code, §§ 137(b), 76 [both statutes containing definition of threat].) In *People v. McDaniel* (1994) 22 Cal.App.4th 278, 283 [27 Cal.Rptr.2d 306], the Court of Appeal held that threatening a witness under Penal Code section 140 is a general intent crime. According to the holding of *People v. McDaniel, supra*, 22 Cal.App.4th at p. 284, there is no requirement that the defendant intend to cause fear to the victim or intend to affect the victim’s conduct in any manner. In *People v. McLaughlin* (1996) 46 Cal.App.4th 836, 842 [54 Cal.Rptr.2d 4], the court held that the threat does not need to be communicated to the intended target in any manner. The committee has drafted this instruction in accordance with these holdings. However, the court may wish to consider whether the facts in the case before it demonstrate a sufficiently “genuine threat” to withstand First Amendment scrutiny. (See *In re George T.* (2004) 33 Cal.4th 620, 637–638 [16 Cal.Rptr.3d 61, 93 P.3d 1007]; *People v. Gudger* (1994) 29 Cal.App.4th 310, 320–321 [34 Cal.Rptr.2d 510]; *Watts v. United States* (1969) 394 U.S. 705, 707 [89 S.Ct. 1399, 22 L.Ed.2d 664]; *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, 1027.)~~

SECONDARY SOURCES

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, § 9.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02; Ch. 142, *Crimes Against the Person*, § 142.11A[1][a] (Matthew Bender).

2625–2629. Reserved for Future Use

2722. Battery by Gassing (Pen. Code, §§ 243.9, 4501.1)

The defendant is charged [in Count __] with battery by gassing [in violation of _____ <insert appropriate code section[s]>].

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

1. The defendant was (serving a sentence in a [California] state prison/confined in a local detention facility);
2. While so confined, the defendant intentionally committed an act of gassing, that is, (he/she) (placed[,]/ [or] threw[,]/ [or] caused to be placed or thrown) (human excrement/human urine/human bodily fluids or substances/a mixture containing human bodily substances) on the body of (a peace officer/an employee of a (state prison/local detention facility));

AND

3. The (excrement/urine/bodily fluids or substances/mixture) actually made contact with the skin [or membranes] of (a peace officer/an employee of a (state prison/local detention facility)).

[A person is *serving a sentence in a state prison* if he or she is (confined in _____ <insert name of institution from Pen. Code, § 5003>/committed to the Department of Corrections and Rehabilitation[, Division of Juvenile Justice,]) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *serving a sentence in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is not *serving a sentence in a state prison*.]]

[A (county jail/city jail/_____ <insert description>) is a *local detention facility*.]

[A sworn member of _____ <insert name of agency that employs peace officer>, authorized by _____ <insert appropriate section from Pen. Code, § 830 et seq.> to _____ <describe statutory authority>, is a peace officer.]

New January 2006; Revised August 2016, March 2017, March 2024*

* Denotes changes only to bench notes and other commentaries.

BENCH NOTES

Instructional Duty

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

If the battery is charged under Penal Code section 4501.1, in element 1, use the phrase “serving a sentence in state prison” and the bracketed definition of this phrase. If the battery is charged under Penal Code section 243.9, in element 1, give the language referencing a “local detention facility” and the bracketed definition of local detention facility.

When giving the definition of “serving a sentence in a state prison,” give the bracketed portion that begins “regardless of the purpose,” or the bracketed second or third sentence, if requested and relevant based on the evidence.

The jury must determine whether the alleged victim was a peace officer. (*People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].) The court must instruct the jury in the appropriate definition of “peace officer” from the statute. (*Ibid.*) It is error for the court to instruct that the witness is a peace officer as a matter of law. (*Ibid.* [instruction that “Officer Bridgeman and Officer Gurney are peace officers” was error].)

AUTHORITY

- Elements. Pen. Code, §§ 242, 243.9, 4501.1.
- “Confined in State Prison” Defined. Pen. Code, § 4504.
- “Local Detention Facility” Defined. Pen. Code, § 6031.4.
- Employee of Local Detention Facility Includes County Employee Assigned to Work in County Jail. *People v. Tice* (2023) 89 Cal.App.5th 246, 255 [305 Cal.Rptr.3d 794].

LESSER INCLUDED OFFENSES

- Battery by Prisoner on Non-Prisoner. *People v. Flores* (2009) 176 Cal.App.4th 924, 929 [97 Cal.Rptr.3d 924].

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 13-15, 62.

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

**3160. Great Bodily Injury (Pen. Code, §§ 667.5(c)(8), 667.61(d)(6),
1192.7(c)(8), 12022.7, 12022.8)**

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

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

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

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

<Group Assault>

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

1. Two or more people, acting at the same time, assaulted _____ <insert name of injured person> and inflicted great bodily injury on (him/her);
2. The defendant personally used physical force on _____ <insert name of injured person> during the group assault;

AND

[3A. The amount or type of physical force the defendant used on _____ <insert name of injured person> was enough that it alone

could have caused _____ <insert name of injured person> to suffer great bodily injury(;/.)]

[OR]

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

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

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

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

AND

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

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

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

*New January 2006; Revised June 2007, February 2015, September 2020, March 2022, March 2024**

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

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

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

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

The jury must determine whether an injury constitutes “great bodily injury.” (*People v. Escobar*, *supra*, (1992) 3 Cal.4th at p.740, 750 [~~12 Cal.Rptr.2d 586, 837 P.2d 1100~~]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].) A jury’s finding of serious bodily injury is not equivalent to a finding of great bodily injury. (*In re Cabrera* (2023) 14 Cal.5th 476, 491 [304 Cal.Rptr.3d 798, 524 P.3d 784].)

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

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].)

AUTHORITY

- Enhancements. Pen. Code, §§ 667.5(c)(8), 667.61(d)(6), 12022.7, 12022.8.
- Great Bodily Injury Enhancements Do Not Apply to Conviction for Murder or Manslaughter. *People v. Cook* (2015) 60 Cal.4th 922, 924 [183 Cal.Rptr.3d 502].
- “Great Bodily Injury” Defined. Pen. Code, § 12022.7(f); *In re Cabrera, supra*, 14 Cal.5th at p. 484 [not equivalent to serious bodily injury]; *People v. Escobar, supra*, (1992) 3 Cal.4th at pp.740, 749–750 [~~12 Cal.Rptr.2d 586, 837 P.2d 1100~~] [greater than minor or moderate harm].
- Great Bodily Injury May Be Established by Pregnancy or Abortion. *People v. Cross* (2008) 45 Cal.4th 58, 68 [82 Cal.Rptr.3d 373, 190 P.3d 706].
- Must Personally Inflict Injury. *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Sex Offenses—Injury Must Be More Than Incidental to Offense. *People v. Escobar, supra*, (1992) 3 Cal.4th at p.740, 746 [~~12 Cal.Rptr.2d 586, 837 P.2d 1100~~].
- Group Beating Instruction. *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762, 139 P.3d 136].
- This Instruction Is Correct In Defining Group Beating. *People v. Dunkerson* (2007) 155 Cal.App.4th 1413, 1418 [66 Cal.Rptr.3d 795].
- “Accomplice” Defined. See Pen. Code, § 1111; *People v. Verlinde, supra*, (2002) 100 Cal.App.4th at pp.1146, 1167–1168 [~~123 Cal.Rptr.2d 322~~]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- “During Commission of” Felony. *People v. Jones, supra*, (2001) 25 Cal.4th at pp.98, 109–110 [~~104 Cal.Rptr.2d 753, 18 P.3d 674~~]; *People v. Masbruch, supra*, (1996) 13 Cal.4th at p.1001, 1014 [~~55 Cal.Rptr.2d 760, 920 P.2d 705~~]; *People v. Taylor, supra*, (1995) 32 Cal.App.4th at p.578, 582 [~~38 Cal.Rptr.2d 127~~].
- This Instruction Correctly Omits Requirement Of Intent to Inflict GBI. *People v. Poroj* (2010) 190 Cal.App.4th 165, 176 [117 Cal.Rptr.3d 884].

RELATED ISSUES

Specific Intent Not Required

Penal Code section 12022.7 was amended in 1995, deleting the requirement that the defendant act with “the intent to inflict such injury.” (Stats. 1995, ch. 341, § 1; see also *People v. Carter* (1998) 60 Cal.App.4th 752, 756 [70 Cal.Rptr.2d 569] [noting amendment].)

Instructions on Aiding and Abetting

In *People v. Magana* (1993) 17 Cal.App.4th 1371, 1378–1379 [22 Cal.Rptr.2d 59], the evidence indicated that the defendant and another person both shot at the victims. The jury asked for clarification of whether the evidence must establish that the bullet from the defendant’s gun struck the victim in order to find the enhancement for personally inflicting great bodily injury true. (*Id.* at p. 1379.) The trial court responded by giving the instructions on aiding and abetting. (*Ibid.*) The Court of Appeal reversed, finding the instructions erroneous in light of the requirement that the defendant must personally inflict the injury for the enhancement to be found true. (*Id.* at p. 1381.)

Sex Offenses—Examples of Great Bodily Injury

The following have been held to be sufficient to support a finding of great bodily injury: transmission of a venereal disease (*People v. Johnson* (1986) 181 Cal.App.3d 1137, 1140 [225 Cal.Rptr. 251]); pregnancy (*People v. Sargent* (1978) 86 Cal.App.3d 148, 151 [150 Cal.Rptr. 113]); and a torn hymen (*People v. Williams* (1981) 115 Cal.App.3d 446, 454 [171 Cal.Rptr. 401]).

Enhancement May be Applied Once Per Victim

The court may impose one enhancement under Penal Code section 12022.7 for each injured victim. (Pen. Code, § 12022.7(h); *People v. Ausbie* (2004) 123 Cal.App.4th 855, 864 [20 Cal.Rptr.3d 371].)

Furnishing Drugs

In *People v. Ollo* (2021) 11 Cal.5th 682 [279 Cal.Rptr.3d 668, 487 P.3d 981], the defendant was charged with personally inflicting great bodily injury on a victim who had voluntarily ingested the drugs furnished by the defendant. The court held: “[T]he act of furnishing is not by itself sufficient to establish personal infliction. Whether a defendant who furnishes drugs personally inflicts such injury depends on the facts of the particular case. To determine whether a defendant personally inflicts such injury, fact finders and courts must examine the circumstances of the underlying offense and the defendant’s role in causing the injury that followed.” (11 Cal.5th at p. 685.)

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 350-351.

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

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

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

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

To prove this allegation, the People must prove that:

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

[AND]

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

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

[AND]

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

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

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

<Group Assault>

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

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

- 1. Two or more people, acting at the same time, assaulted _____ <insert name of injured person> and inflicted great bodily injury on (him/her);**
- 2. The defendant personally used physical force on _____ <insert name of injured person> during the group assault;**

AND

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

[OR]

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

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

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

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

AND

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

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

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

New January 2006; Revised June 2007, December 2008, September 2020, March 2024*

* Denotes changes only to bench notes and other commentaries.

BENCH NOTES

Instructional Duty

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

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

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

The jury must determine whether an injury constitutes “great bodily injury.” (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].) A jury’s finding of serious bodily injury is not equivalent to a finding of great bodily injury. (*In re Cabrera* (2023) 14 Cal.5th 476, 491 [304 Cal.Rptr.3d 798, 524 P.3d 784].)

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

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].)

AUTHORITY

- Enhancement. Pen. Code, § 12022.7(b).
- “Great Bodily Injury” Defined. Pen. Code, § 12022.7(f); *In re Cabrera, supra*, 14 Cal.5th at p. 484 [not equivalent to serious bodily injury]; *People v. Escobar, supra*, (1992) 3 Cal.4th at pp.740, 749–750 [~~12 Cal.Rptr.2d 586, 837 P.2d 1100~~] [greater than minor or moderate harm].
- Must Personally Inflict Injury. *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Group Beating Instruction. *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762].
- “Accomplice” Defined. See Pen. Code, § 1111; *People v. Verlinde, supra*, (2002) 100 Cal.App.4th at pp.1146, 1167–1168 [~~123 Cal.Rptr.2d 322~~]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- “During Commission of” Felony. *People v. Jones, supra*, (2001) 25 Cal.4th at pp.98, 109–110 [~~104 Cal.Rptr.2d 753, 18 P.3d 674~~]; *People v. Masbruch, supra*, (1996) 13 Cal.4th at p.1001, 1014 [~~55 Cal.Rptr.2d 760, 920 P.2d 705~~]; *People v. Taylor, supra*, (1995) 32 Cal.App.4th at p.578, 582 [~~38 Cal.Rptr.2d 127~~].

RELATED ISSUES

Coma Need Not Be Permanent

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

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

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 350–354.

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

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

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

To prove this allegation, the People must prove that:

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

[AND]

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

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

[AND]

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

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

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

<Group Assault>

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

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

- 1. Two or more people, acting at the same time, assaulted _____ <insert name of injured person> and inflicted great bodily injury on (him/her);**
- 2. The defendant personally used physical force on _____ <insert name of injured person> during the group assault;**

AND

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

[OR]

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

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

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

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

AND

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

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

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

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

New January 2006; Revised June 2007, December 2008, September 2020, March 2024*

* Denotes changes only to bench notes and other commentaries.

BENCH NOTES

Instructional Duty

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

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

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

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

The jury must determine whether an injury constitutes “great bodily injury.” (*People v. Escobar*, *supra.* ~~(1992)~~ 3 Cal.4th at p.740, 750 ~~[12 Cal.Rptr.2d 586, 837 P.2d 1100]~~; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].) A jury’s finding of serious bodily injury is not equivalent to a finding of

great bodily injury. (*In re Cabrera* (2023) 14 Cal.5th 476, 491 [304 Cal.Rptr.3d 798, 524 P.3d 784].)

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

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].)

AUTHORITY

- Enhancements. Pen. Code, § 12022.7(c) & (d).
- “Great Bodily Injury” Defined. Pen. Code, § 12022.7(f); *In re Cabrera, supra*, 14 Cal.5th at p. 484 [not equivalent to serious bodily injury]; *People v. Escobar, supra*, (1992) 3 Cal.4th at pp.740, 749–750 [~~12 Cal.Rptr.2d 586, 837 P.2d 1100~~] [greater than minor or moderate harm].
- Must Personally Inflict Injury. *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Sex Offenses—Injury Must Be More Than Incidental to Offense. *People v. Escobar, supra*, (1992) 3 Cal.4th at p.740, 746 [~~12 Cal.Rptr.2d 586, 837 P.2d 1100~~].
- Group Beating Instruction. *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762].
- “Accomplice” Defined. See Pen. Code, § 1111; *People v. Verlinde, supra*, (2002) 100 Cal.App.4th at pp.1146, 1167–1168 [~~123 Cal.Rptr.2d 322~~]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- “During Commission of” Felony. *People v. Jones, supra*, (2001) 25 Cal.4th at pp.98, 109–110 [~~104 Cal.Rptr.2d 753, 18 P.3d 674~~]; *People v. Masbruch, supra*, (1996) 13 Cal.4th at p.1001, 1014 [~~55 Cal.Rptr.2d 760, 920 P.2d 705~~];

People v. Taylor, supra, ~~(1995)~~ 32 Cal.App.4th at p.578, 582 [~~38 Cal.Rptr.2d 127~~].

RELATED ISSUES

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

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 350–354.

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

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

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

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

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

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

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

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

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

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

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

<Group Assault>

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

1. Two or more people, acting at the same time, assaulted _____ <insert name of injured person> and inflicted great bodily injury on (him/her);
2. The defendant personally used physical force on _____ <insert name of injured person> during the group assault;

AND

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

[OR]

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

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

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

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

AND

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

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

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

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

*New January 2006; Revised June 2007, December 2008, September 2020, March 2024**

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

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

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

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

The jury must determine whether an injury constitutes “great bodily injury.” (*People v. Escobar, supra, (1992)* 3 Cal.4th at p.740, 750 [~~12 Cal.Rptr.2d 586, 837 P.2d 1100~~]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].) A jury’s finding of serious bodily injury is not equivalent to a finding of

great bodily injury. (*In re Cabrera* (2023) 14 Cal.5th 476, 491 [304 Cal.Rptr.3d 798, 524 P.3d 784].)

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

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].)

AUTHORITY

- Enhancement. Pen. Code, § 12022.7(e).
- “Great Bodily Injury” Defined. Pen. Code, § 12022.7(f); *In re Cabrera, supra*, 14 Cal.5th at p. 484 [not equivalent to serious bodily injury]; *People v. Escobar, supra*, (1992) 3 Cal.4th at pp.740, 749–750 [~~12 Cal.Rptr.2d 586, 837 P.2d 1100~~] [greater than minor or moderate harm].
- “Dating Relationship” Defined. Fam. Code, § 6210; Pen. Code, § 243(f)(10).
- Must Personally Inflict Injury. *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- General Intent Only Required. *People v. Carter* (1998) 60 Cal.App.4th 752, 755–756 [70 Cal.Rptr.2d 569].
- Sex Offenses—Injury Must Be More Than Incidental to Offense. *People v. Escobar, supra*, (1992) 3 Cal.4th at p.740, 746 [~~12 Cal.Rptr.2d 586, 837 P.2d 1100~~].
- Group Beating Instruction. *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762].
- “During Commission of” Felony. *People v. Jones, supra*, (2001) 25 Cal.4th at pp.98, 109–110 [~~104 Cal.Rptr.2d 753, 18 P.3d 674~~]; *People v. Masbruch, supra*, (1996) 13 Cal.4th at p.1001, 1014 [~~55 Cal.Rptr.2d 760, 920 P.2d 705~~];

People v. Taylor, ~~*supra*, (1995)~~ 32 Cal.App.4th at p.578, 582 [~~38 Cal.Rptr.2d 127~~].

RELATED ISSUES

Person Who Suffers Injury Need Not Be “Victim” of Domestic Abuse

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

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

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 350–354.

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

3164–3174. Reserved for Future Use

3224. Aggravating Factor: Great Violence, Great Bodily Harm, or High Degree of Cruelty, Viciousness, or Callousness

<Introductory paragraph for nonbifurcated trial>

[If you find the defendant guilty of the crime[s] charged [in Count[s] __[,]] or of attempting to commit (that/those) crime[s]] or the lesser crimes[s] of _____ *<insert lesser offense[s]>*, you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the crime[s] in Count[s] __ involved (great violence[,/ or]great bodily harm[,/ or]threat[s] of great bodily harm[,/ or][(other/an)] act[s] revealing a high degree of cruelty, viciousness, or callousness).]

<Introductory paragraph for bifurcated trial>

[The People have alleged that the crime[s] in Count[s] __ involved (great violence[,/ or]great bodily harm[,/ or]threat[s] of great bodily harm[,/ or][(other/an)] act[s] revealing a high degree of cruelty, viciousness, or callousness).]

To prove this allegation, the People must prove that:

- 1. During the commission of the crime[s], the defendant (used great violence[,/ or]inflicted great bodily harm[,/ or]threatened to inflict great bodily harm[,/ or]committed (other/an) act[s] showing a high degree of cruelty, viciousness, or callousness);**

AND

- 2. The (type/level) of (violence[,/ or]bodily harm[,/ or]threat of bodily harm[,/ or]cruelty, viciousness, or callousness) was distinctively worse than what was necessary to commit the crime[s].**

[For the crime to have been committed with (great violence[,/ or]cruelty[,/ or]viciousness[,/ or]callousness), no one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed the crime with (great violence[,/ or]cruelty[,/ or]viciousness[,/ or]callousness).]

[*Great bodily harm* means significant or substantial physical injury, as opposed to minor or moderate harm.]

[*Threat of great bodily harm* means the threat of significant or substantial physical injury. It is a threatened injury that would result in greater than minor or moderate harm.]

[*Viciousness* means dangerously aggressive or marked by violence or ferocity. *Viciousness* is not the same as violence. For example, some acts which may be described as vicious do not involve violence at all, but rather involve acts such as deceit and slander. On the other hand, many violent acts do not indicate viciousness, but instead show frustration, justifiable rage, or self-defense.]

[An act discloses *cruelty* when it demonstrates the deliberate infliction of physical or mental suffering.]

[An act discloses *callousness* when it demonstrates a lack of sympathy for the suffering of, or harm to, the victim[s].]

You may not find the allegation true unless all of you agree that the People have proved at least one of the following: that the defendant (used great violence[,]/ [or]inflicted great bodily harm[,]/ [or]threatened to inflict great bodily harm[,]/ [or]committed[other] acts showing a high degree of cruelty, viciousness, or callousness). However, you need not all agree on the act[s] or conduct that [constitutes the (use of great violence[,]/ [or]infliction of great bodily harm[,]/ [or]threat to inflict great bodily harm)][or][show a high degree of cruelty, viciousness, or callousness.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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

*New March 2023; Revised March 2024**

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request except where the evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(1).
- “Aggravating Fact” Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] [“The essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary”].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Force, Violence, or Threat Beyond What is Necessary to Accomplish Criminal Purpose. *People v. Karsai* (1982) 131 Cal.App.3d 224, 239 [182 Cal.Rptr. 406]; see also *People v. Cortez* (1980) 103 Cal.App.3d 491, 496 [163 Cal.Rptr. 1]; *People v. Harvey* (1984) 163 Cal.App.3d 90, 116 [208 Cal.Rptr. 910]; *People v. Garcia* (1989) 209 Cal.App.3d 790, 793–794 [257 Cal.Rptr. 495].
- Viciousness Not Equivalent To Violence. *People v. Reed* (1984) 157 Cal.App.3d 489, 492 [203 Cal.Rptr. 659].
- Actual Bodily Harm Not Required. *People v. Duran* (1982) 130 Cal.App.3d 987, 990 [182 Cal.Rptr. 17].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an “ordinary” violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra*, 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant’s conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3225. Aggravating Factor: Armed or Used Weapon

<Introductory paragraph for nonbifurcated trial>

[If you find the defendant guilty of the crime[s] charged [in Count[s] __[,]] or of attempting to commit (that/those) crime[s]] or the lesser crimes[s] of _____ *<insert lesser offense[s]>*, you must then decide whether, for each crime,] the People have proved the additional allegation[s] that the defendant was armed with or used a weapon, to wit: _____ *<insert description of weapon>*, during commission of the crime[s] in Count[s] _____.]

<Introductory paragraph for bifurcated trial>

[The People have alleged that the defendant was armed with or used a weapon, to wit: _____ *<insert description of weapon>*, during commission of the crime[s] in Count[s] _____.]

To prove this allegation, the People must prove that the defendant, while committing the crime[s] in Count[s] __ (knowingly carried a weapon[,/ [or]knowingly had a weapon available for use[,/ [or]intentionally displayed a weapon in a menacing manner[,/ [or]intentionally (fired/ [or]attempted to fire) a weapon[,/ [or]intentionally (struck[,/ [or]stabbed[,/ [or]slashed[,/ [or]hit)[,] [or]attempted to (strike[,/ [or]stab[,/ [or]slash[,/ [or]hit) another person with a weapon).]

[A device, instrument, or object that is capable of being used to inflict injury or death may be a *weapon*. In determining whether _____ *<insert description>* was a *weapon*, you may consider the totality of circumstances, including the manner in which it was used or possessed.]

You may not find the allegation true unless all of you agree that the People have proved that the defendant was either armed or used a weapon. However, all of you do not need to agree on which act[s] or conduct constitutes the arming or use of a weapon.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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

*New March 2023; Revised March 2024**

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S.270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court must bifurcate the jury’s determination of the aggravating factors on the defendant’s request except where the evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

Give the bracketed portion that defines weapon if the object is not a weapon as a matter of law and is capable of innocent uses.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(2).
- “Aggravating Fact” Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] [“The essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary”].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Arming Includes Available for Use. *People v. Garcia* (1986) 183 Cal.App.3d 335, 350 [228 Cal.Rptr. 87].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an “ordinary” violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra*, 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant’s conduct was distinctively worse than an ordinary commission of the underlying crime.

Penal Code section 12022

Consistent with the language of rule 4.421(a)(2), the instruction has been drafted with the assumption that the defendant is personally armed. The armed enhancement contained in Penal Code section 12022(a)(1) provides: “This additional term shall apply to a person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm.” Whether there is a relationship between the rule of court and Penal Code section 12022(a)(1) has not been addressed by case law.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3226. Aggravating Factor: Particularly Vulnerable Victim

<Introductory paragraph for nonbifurcated trial>

[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]] or of attempting to commit (that/those) crime[s]] or the lesser crimes[s] of _____ *<insert lesser offense[s]>*, you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that _____ *<insert name of victim>* was a particularly vulnerable victim.]

<Introductory paragraph for bifurcated trial>

[The People have alleged[in Count[s] __] that _____ *<insert name of victim>* was a particularly vulnerable victim.]

To prove this allegation, the People must prove that:

1. _____ *<insert name of victim>* suffered/ [or]was threatened with suffering) a loss, injury, or harm as the result of the crime[s];

AND

2. _____ *<insert name of victim>* was particularly vulnerable.

***Particularly vulnerable* includes being defenseless, unguarded, unprotected, or otherwise susceptible to the defendant's criminal act to a special or unusual degree.**

In determining whether _____ *<insert name of victim>* was *particularly vulnerable*, you should consider all of the circumstances surrounding the commission of the crime, including the characteristics of _____ *<insert name of victim>* and the manner and setting in which the crime was committed.

[You may not find vulnerability based solely on _____ *<insert element of the offense>*, which is an element of _____ *<insert offense>*.]

You may not find the allegation true unless all of you agree that the People have proved that the victim was particularly vulnerable. However, you do not have to agree on which facts show that the victim was particularly vulnerable.

You may not find the allegation true unless all of you agree that the People have proved that the defendant’s conduct was distinctively worse than an ordinary commission of the underlying crime.

You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime[and for each victim].

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

*New March 2023; Revised March 2024**

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Pen. Code section 1170.85(b) states: “Upon conviction of any felony it shall be considered a circumstance in aggravation in imposing a term under subdivision (b) of Section 1170 if the victim of an offense is particularly vulnerable, or unable to defend himself or herself, due to age or significant disability.” If this section is applicable, the instruction should be modified to reflect the victim’s alleged inability to defend himself or herself based on age or significant disability.

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crime and victim the aggravating factor pertains to if it applies to one or more specific counts or victims.

The court must bifurcate the jury’s determination of the aggravating factors on the defendant’s request except where the evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(3).

- “Aggravating Fact” Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] [“The essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary”].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- “Victim” Defined. *People v. Simon* (1983) 144 Cal.App.3d 761, 765 [193 Cal.Rptr. 28].
- “Particularly Vulnerable” Defined. *People v. DeHoyos* (2013) 57 Cal.4th 79, 154–155 [158 Cal.Rptr.3d 797, 303 P.3d 1]; *People v. Spencer* (1996) 51 Cal.App.4th 1208, 1223 [59 Cal.Rptr.2d 627]; *People v. Price* (1984) 151 Cal.App.3d 803, 814 [199 Cal.Rptr. 99]; *People v. Ramos* (1980) 106 Cal.App.3d 591, 607 [165 Cal.Rptr. 179]; *People v. Smith* (1979) 94 Cal.App.3d 433, 436 [156 Cal.Rptr. 502].
- Vulnerability Cannot Be Based Solely on Age if Age Is Element of Offense. *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1693–1694 [53 Cal.Rptr.2d 282], disapproved on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123 [65 Cal.Rptr.2d 1, 938 P.2d 986]; *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1159 [249 Cal.Rptr. 435], disapproved on other grounds in *People v. Soto* (2011) 51 Cal.4th 229, 244–245 [119 Cal.Rptr.3d 775, 245 P.3d 410]; *People v. Ginese* (1981) 121 Cal.App.3d 468, 476–477 [175 Cal.Rptr. 383]; *People v. Flores* (1981) 115 Cal.App.3d 924, 927 [171 Cal.Rptr. 777].
- Factor Did Not Apply in Vehicular Manslaughter. *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1358–1359 [241 Cal.Rptr. 391].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an “ordinary” violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra*, 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless

the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3227. Aggravating Factor: Induced Others to Participate or Occupied Position of Leadership or Dominance

<Introductory paragraph for nonbifurcated trial>

[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]] [or of attempting to commit (that/those) crime[s]] [or the lesser crimes[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant induced others to participate in committing the crime[s] or occupied a position of leadership or dominance of other participants in the commission of the crime[s].]

<Introductory paragraph for bifurcated trial>

[The People have alleged[in Count[s] ___] that the defendant induced others to participate in committing the crime[s] or occupied a position of leadership or dominance of other participants in the commission of the crime[s].]

To prove this allegation, the People must prove that:

- 1. The defendant induced others to participate in the commission of the crime[s];**

OR

- 2. The defendant occupied a position of leadership or dominance over other participants during commission of the crime[s].**

***Induced* means persuaded, convinced, influenced, or instructed.**

You may not find the allegation true unless all of you agree that the People have proved that the defendant either induced others to participate or occupied a position of leadership or dominance. However, all of you do not need to agree on which act[s] or conduct constitutes inducing others to participate or occupying a position of leadership or dominance.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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

*New March 2023; Revised March 2024**

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request except where the evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(4).
- “Aggravating Fact” Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] [“The essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary”].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- More Than One Participant Required. *People v. Berry* (1981) 117 Cal.App.3d 184, 198 [172 Cal.Rptr. 756, 763–764].

- Leadership Not Equivalent to Dominance. *People v. Kellett* (1982) 134 Cal.App.3d 949, 961 [185 Cal.Rptr. 1].
- Factor Requires More Than Being Willing Participant. *People v. Searle* (1989) 213 Cal.App.3d 1091, 1097 [261 Cal.Rptr. 898].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an “ordinary” violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra*, 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant’s conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3228. Aggravating Factor: Induced Minor to Commit or Assist

<Introductory paragraph for nonbifurcated trial>

[If you find the defendant guilty of the crime[s] charged [in Count[s] __[,]] or of attempting to commit (that/those) crime[s]] or the lesser crimes[s] of _____ *<insert lesser offense[s]>*, you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the defendant induced a minor to commit or assist in the commission of the crime[s] [in Count[s] __].]

<Introductory paragraph for bifurcated trial>

[The People have alleged [in Count[s] __] that the defendant induced a minor to commit or assist in the commission of the crime[s].]

To prove this allegation, the People must prove that:

1. The defendant induced a minor to commit the crime[s];

OR

2. The defendant induced a minor to assist in the commission of the crime[s].

***Induced* means persuaded, convinced, influenced, or instructed.**

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

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

You may not find the allegation true unless all of you agree that the People have proved that the defendant induced a minor either to commit the crime or to assist in the commission of the crime. However, all of you do not need to agree on which act[s] or conduct constitutes the inducement.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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

*New March 2023; Revised March 2024**

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request except where the evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(5).
- “Aggravating Fact” Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] [“The essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary”].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an “ordinary” violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra*, 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant’s conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3229. Aggravating Factor: Threatened, Prevented, Dissuaded, Etc. Witnesses

<Introductory paragraph for nonbifurcated trial>

[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]] [or of attempting to commit (that/those) crime[s]] [or the lesser crimes[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the defendant[in Count[s] __] (threatened witnesses[,/ [or]unlawfully prevented or dissuaded witnesses from testifying[,/ [or]suborned perjury[,/ [or] _____ *<insert other illegal activity that interfered with the judicial process>*).]

<Introductory paragraph for bifurcated trial>

[The People have alleged that the defendant[in Count[s] __] (threatened witnesses[,/ [or]unlawfully prevented or dissuaded witnesses from testifying[,/ [or]suborned perjury[,/ [or] _____ *<insert other illegal activity that interfered with the judicial process>*).]

To prove this allegation, the People must prove that the defendant (threatened [a]witness[es]/ [or]prevented [a]witness[es] from testifying/ [or]dissuaded [a]witness[es] from testifying/ [or]suborned perjury/[or] _____ *<insert other illegal activity that interfered with the judicial process>*).

[As used here, *witness* means someone[or a person the defendant reasonably believed to be someone]:

<Give the appropriate bracketed paragraph[s].>

- **[Who knows about the existence or nonexistence of facts relating to a crime(;/.)]**

[OR]

- **[Whose declaration under oath has been or may be received as evidence(;/.)]**

[OR]

- [Who has reported a crime to a (peace officer[,]/ [or] prosecutor[,]/ [or] probation or parole officer[,]/ [or] correctional officer[,]/ [or] judicial officer)(;/.)]

[OR

- Who has been served with a subpoena issued under the authority of any state or federal court.]]

[A threat may be oral or written and may be implied by a pattern of conduct or a combination of statements and conduct.]

[The defendant does not have to communicate the threat directly to the intended victim, but may do so through someone else.]

[Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act [or intend to have someone else do so].]

[*Dissuaded* means persuaded or advised not to do something.]

[*Suborned perjury* means encouraged, induced, or assisted witnesses to willfully make [a]false statement[s] under oath. In order to find that the defendant suborned perjury, the People must prove, beyond a reasonable doubt, not only that the sworn statement was actually false, but also that the defendant, at the time (he/she) encouraged, induced, or assisted the witness(es) to make the statement, knew that it was false.]

[*Induced* means persuaded, convinced, influenced, or instructed.]

You may not find the allegation true unless all of you agree that the People have proved that the defendant (threatened [a]witness[es]/ [or] prevented [a]witness[es] from testifying/ [or] dissuaded [a]witness[es] from testifying/ [or] suborned perjury/ [or] _____ <insert other illegal activity that interfered with the judicial process>). However, all of you do not need to agree on which act[s] or conduct constitutes (threatening [a]witness[es]/ [or] preventing [a]witness[es] from testifying/ [or] dissuading [a]witness[es] from testifying/ [or] suborning perjury/ [or] _____ <insert other illegal activity that interfered with the judicial process>).

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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

*New March 2023; Revised March 2024**

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Penal Code section 1170.85(a) states: “Upon conviction of any felony assault or battery offense, it shall be considered a circumstance in aggravation of the crime in imposing a term under subdivision (b) of Section 1170 if the offense was committed to prevent or dissuade a person who is or may become a witness from attending upon or testifying at any trial, proceeding, or inquiry authorized by law, or if the offense was committed because the person provided assistance or information to a law enforcement officer, or to a public prosecutor in a criminal or juvenile court proceeding.” If this section is applicable, the bracketed catch-all provision of the instruction related to other illegal activity should be modified to reflect the defendant’s alleged conduct.

If it is alleged the defendant interfered with the judicial process by committing perjury, the bracketed catch-all provision for other illegal activity should be modified and the trial court should also instruct with CALCRIM No. 2640, *Perjury*. (See *People v. Howard* (1993) 17 Cal.App.4th 999, 1002–1004 [21 Cal.Rptr.2d 676].)

The catch-all provision of other illegal activity can include attempts to dissuade or prevent a witness from testifying. (See *People v. Lewis* (1991) 229 Cal.App.3d 259, 266–267 [280 Cal.Rptr. 128].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury’s determination of the aggravating factors on the defendant’s request except where the evidence supporting an aggravating

circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(6).
- “Aggravating Fact” Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] [“The essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary”].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- “Witness” Defined. Pen. Code, § 136(2).
- “Threat” Defined. Pen. Code, § 76(5).
- Attempted Subornation of Perjury. *People v. Lewis* (1991) 229 Cal.App.3d 259, 266–267 [280 Cal.Rptr. 128].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an “ordinary” violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra*, 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant’s conduct was distinctively worse than an ordinary commission of the underlying crime.

Perjury

Perjury committed by the defendant can constitute “an illegal activity that interfered with the judicial process.” (See *People v. Howard* (1993) 17 Cal.App.4th 999, 1002 [21 Cal.Rptr.2d 676].) If it is alleged that the defendant

committed perjury, the jury must find all the elements of a perjury violation. *Id.* at p. 1004 [holding that the court is constitutionally required to make findings encompassing the elements of perjury: “a willful statement, under oath, of any material matter which the witness knows to be false.”]; see also *United States v. Dunnigan* (1993) 507 U.S. 87, 96 [113 S.Ct. 1111, 122 L.Ed.2d 445].) The concern, essentially, is that a sentence may be aggravated if the defendant actually committed perjury by being untruthful, but not if the defendant merely gave inaccurate testimony because of confusion, mistake, faulty memory, or some other reason besides a willful attempt to impede justice. (*Howard, supra*, 17 Cal.App.4th at p.1005; *Dunnigan, supra*, 507 U.S. at pp. 95–96.)

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3230. Aggravating Factor: Planning, Sophistication, or Professionalism

<Introductory paragraph for nonbifurcated trial>

[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]] [or of attempting to commit (that/those) crime[s]] [or the lesser crimes[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the offense was carried out with planning, sophistication, or professionalism.]

<Introductory paragraph for bifurcated trial>

[The People have alleged[in Count[s] __] that the offense was carried out with planning, sophistication, or professionalism.]

To prove this allegation, the People must prove that the defendant's manner of committing the crime involved planning, sophistication, or professionalism.

Whether the manner of committing the crime involves *planning, sophistication, or professionalism* depends on the totality of the circumstances surrounding the offense.

***Planning* refers to conduct before the crime, preparing for its commission.**

***Sophistication* refers to conduct demonstrating knowledge or awareness of the complexities or details involved in committing the crime.**

***Professionalism* refers to conduct demonstrating particular experience or expertise.**

You may not find the allegation true unless all of you agree that the People have proved that the defendant's manner of committing the crime involved planning, sophistication, or professionalism. However, all of you do not need to agree on which act[s] or conduct demonstrates that the manner of committing the crime involves planning, sophistication, or professionalism.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved (this/these) allegation[s] for each crime and return a separate finding for each crime.]

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

*New March 2023; Revised March 2024**

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request except where the evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factors. California Rules of Court, rule 4.421(a)(8).
- “Aggravating Fact” Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] [“The essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary”].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- “Planning, Sophistication, Professionalism” Defined. *People v. Mathews* (1980) 102 Cal.App.3d 704, 710 [162 Cal.Rptr. 615]; *People v. Stewart* (1983) 140 Cal.App.3d 11, 17 [189 Cal.Rptr. 141]; *People v. Charron* (1987) 193

Cal.App.3d 981, 994–995 [238 Cal.Rptr. 660]; *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1695 [53 Cal.Rptr.2d 282], disapproved on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123 [65 Cal.Rptr.2d 1, 938 P.2d 986].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an “ordinary” violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra*, 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant’s conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3231. Aggravating Factor: Great Monetary Value

<Introductory paragraph for nonbifurcated trial>

[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]] [or of attempting to commit (that/those) crime[s]] [or the lesser crimes[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the crime[s][in Count[s] __] involved [(a/an)] [attempted] [or] [actual] (taking/ [or] damage) of great monetary value.]

<Introductory paragraph for bifurcated trial>

[The People have alleged that the crime[s][in Count[s] __] involved[(a/an)][attempted][or][actual] (taking/ [or] damage) of great monetary value.]

To prove this allegation, the People must prove that:

1. During the commission of the crime[s], the defendant (attempted to take/ [or] actually took/damaged) _____ *<insert description of item>*;

AND

2. The monetary value of the _____ *<insert description of item or damage to item>* was great.

[In determining whether the *monetary value* was *great*, you may consider all evidence presented on the issue of value.]

You may not find the allegation true unless all of you agree that the People have proved that the (item/damage) that the defendant (attempted to take/took / [or] caused) was of great monetary value. However, all of you do not need to agree on a specific monetary value.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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

*New March 2023; Revised March 2024**

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request except where the evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(9).
- “Aggravating Fact” Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] [“The essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary”].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Great Monetary Value. *People v. Wright* (1982) 30 Cal.3d 705, 707 & 714 [180 Cal.Rptr. 196, 639 P.2d 267] [losses of \$2,300 and \$3,250 qualified]; *People v. Berry* (1981) 117 Cal.App.3d 184, 197 [172 Cal.Rptr. 756] [damage

of \$450 did not qualify]; *People v. Bejarano* (1981) 114 Cal.App.3d 693, 705–706 [173 Cal.Rptr. 71] [loss of rifle, shotgun, and television did not qualify].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an “ordinary” violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra*, 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant’s conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3232. Aggravating Factor: Large Quantity of Contraband

<Introductory paragraph for nonbifurcated trial>

[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]] [or of attempting to commit (that/those) crime[s]] [or the lesser crimes[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the crime[s][in Count[s] __] involved a large quantity of contraband.]

<Introductory paragraph for bifurcated trial>

[The People have alleged that the crime[s][in Count[s] __] involved a large quantity of contraband.]

To prove this allegation, the People must prove that:

- 1. The _____ *<insert description of contraband>* was contraband;**

AND

- 2. The quantity of _____ *<insert description of contraband>* was large.**

[*Contraband* means illegal or prohibited items.]

In determining whether the quantity was *large*, you may consider all evidence presented on the issue of amount.

You may not find the allegation true unless all of you agree that the People have proved that the quantity of contraband was large. However, all of you do not need to agree on the specific quantity.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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

*New March 2023; Revised March 2024**

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury’s determination of the aggravating factors on the defendant’s request except where the evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(10).
- “Aggravating Fact” Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] [“The essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary”].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an “ordinary” violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra*, 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant’s conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3233. Aggravating Factor: Position of Trust or Confidence

<Introductory paragraph for nonbifurcated trial>

[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]] or of attempting to commit (that/those) crime[s]] or the lesser crimes[s] of _____ *<insert lesser offense[s]>*], you must then decide whether[, for each crime,] the People have proved the additional allegation[s] that the defendant took advantage of a position of trust or confidence to commit the crime.]

<Introductory paragraph for bifurcated trial>

[The People have alleged[in Count[s]__] that the defendant took advantage of a position of trust or confidence to commit the crime.]

To prove this allegation, the People must prove that:

1. (Prior to/During) the commission of the crime, the defendant (had/developed) a relationship with _____ *<insert name of victim or other person>*;
2. This relationship allowed the defendant to occupy a position of trust or caused _____ *<insert name of victim or other person>* to have confidence in the defendant;

AND

3. The defendant took advantage of this position of trust or confidence to commit the crime.

You may not find the allegation true unless all of you agree that the People have proved that the defendant took advantage of a position of trust or confidence with the victim to commit the crime. However, all of you do not need to agree on which act[s] or conduct constitutes the taking advantage of a position of trust or confidence to commit the crime.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's conduct was distinctively worse than an ordinary commission of the underlying crime.

[You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

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

*New March 2023; Revised March 2024**

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BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify which crimes the aggravating factor pertains to if it applies to one or more specific counts.

The court must bifurcate the jury's determination of the aggravating factors on the defendant's request except where the evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factor. California Rules of Court, rule 4.421(a)(11).
- “Aggravating Fact” Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] [“The essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary”].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Factor Focuses on Special Status to Victim. *People v. DeHoyos* (2013) 57 Cal.4th 79, 155 [158 Cal.Rptr.3d 797, 303 P.3d 1]; *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1262–1263 [131 Cal.Rptr.2d 628] [quasi-paternal

relationship]; *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1694–1695 [53 Cal.Rptr.2d 282] [defendant intentionally cultivated friendship], disapproved on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123 [65 Cal.Rptr.2d 1, 938 P.2d 986]; *People v. Franklin* (1994) 25 Cal.App.4th 328, 337–338 [30 Cal.Rptr.2d 376] [stepfather entrusted with care]; *People v. Clark* (1992) 12 Cal.App.4th 663, 666 [15 Cal.Rptr.2d 709] [stepfather entrusted with care]; *People v. Jones* (1992) 10 Cal.App.4th 1566, 1577 [14 Cal.Rptr.2d 9] [legal parent].

COMMENTARY

Distinctively Worse Than The Ordinary

The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an “ordinary” violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra*, 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant’s conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3234. Aggravating Factor: Serious Danger to Society

<Introductory paragraph for nonbifurcated trial>

[If you find the defendant guilty of the crime[s] charged[in Count[s] __[,]] or of attempting to commit (that/those) crime[s]] or the lesser crimes[s] of _____ *<insert lesser offense[s]>*, you must then decide whether the People have proved the additional allegation that _____ *<insert name of defendant>* has engaged in violent conduct, to wit: _____ *<insert description of conduct>*, which indicates (he/she) is a serious danger to society.]

<Introductory paragraph for bifurcated trial>

[The People have alleged that _____ *<insert name of defendant>* has engaged in violent conduct, to wit: _____ *<insert description of conduct>*, which indicates (he/she) is a serious danger to society.]

To prove this allegation, the People must prove that:

- 1. The defendant has engaged in violent conduct;**

AND

- 2. The violent conduct, considered in light of all the evidence presented[and the defendant's background], shows that the defendant is a serious danger to society.**

[To determine whether the defendant is a serious danger to society, you may consider the defendant's conduct before or after commission of the crime[as well as evidence about the defendant's background].]

You may not find the allegation true unless all of you agree that the People have proved that the defendant engaged in violent conduct that shows (he/she) is a serious danger to society. However, all of you do not need to agree on which violent conduct shows that the defendant is a serious danger to society.

You may not find the allegation true unless all of you agree that the People have proved that the defendant's violent conduct was distinctively worse than that posed by an ordinary commission of the underlying crime and that the violent conduct, considered in light of all the evidence presented[and the

defendant’s background], shows that the defendant is a serious danger to society.

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

*New March 2023; Revised March 2024**

** Denotes changes only to bench notes and other commentaries.*

BENCH NOTES

Instructional Duty

This instruction is provided for the court to use for an aggravating factor as stated in California Rules of Court, rule 4.421. (See Pen. Code, §§ 1170, 1170.1; see also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

Do not give an aggravating factor that is an element of the convicted offense. (Pen. Code, § 1170(b)(5).)

The court should specify the crime(s) to which the aggravating factor pertains.

The court must bifurcate the jury’s determination of the aggravating factors on the defendant’s request except where the evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law. (Pen. Code, § 1170(b)(2).) For a bifurcated trial, the court must also give CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

AUTHORITY

- Aggravating Factors. California Rules of Court, rule 4.421(b)(1).
- “Aggravating Fact” Defined. *People v. Black* (2007) 41 Cal.4th 799, 817 [62 Cal.Rptr.3d 569, 161 P.3d 1130]; *People v. Hicks* (2017) 17 Cal.App.5th 496, 512 [225 Cal.Rptr.3d 682]; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872 [36 Cal.Rptr.2d 17]; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879] [“The essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary”].
- Unanimity Not Required Regarding Facts Underlying the Aggravating Factor. *People v. McDaniel* (2021) 12 Cal.5th 97, 142–148 [283 Cal.Rptr.3d 32, 493 P.3d 815].
- Danger to Society: Subsequent Conduct Can Be Considered. *People v. Gonzales* (1989) 208 Cal.App.3d 1170, 1173 [256 Cal.Rptr. 669].

COMMENTARY

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The committee is aware of *Johnson v. United States* (2015) 576 U.S. 591, 597–598 [135 S.Ct. 2551, 192 L.Ed.2d 569], in which the United States Supreme Court held that determining what constitutes an “ordinary” violation of a criminal statute may create a constitutional vagueness problem. Nevertheless, in light of California case law that has never been disapproved (see, e.g., *People v. Moreno, supra*, 128 Cal.App.3d at p.110), the committee has elected to include in the instruction the state law requirement that an aggravating factor may not be found to be true unless the defendant’s conduct was distinctively worse than an ordinary commission of the underlying crime.

RELATED ISSUES

Prohibition Against Dual Use of Facts at Sentencing

The jury may find true multiple aggravating factors based on the same underlying fact. However, at sentencing, a single underlying fact may not support more than one aggravating factor. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [276 Cal.Rptr. 631].)

3517. Deliberations and Completion of Verdict Forms: For Use When Lesser Included Offenses and Greater Crimes Are Not Separately Charged and the Jury Receives Guilty and Not Guilty Verdict Forms for Greater and Lesser Offenses (Non-Homicide)

If all of you find that the defendant is not guilty of a greater charged crime, you may find (him/her) guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and lesser crime for the same conduct.

[Now I will explain to you the crimes affected by this instruction [including lesser crimes of the lesser crimes]:]

[_____ <insert crime> is a lesser crime of
_____ <insert crime> [charged in Count ____].]
[_____ <insert crime> is a lesser crime of
_____ <insert crime> [charged in Count ____].]
[_____ <insert crime> is a lesser crime of
_____ <insert crime> [charged in Count ____].]

It is up to you to decide the order in which you consider the greater and lesser each crimes and the relevant evidence, ~~but~~ You do not have to unanimously agree on the greater crime before considering a lesser crime. However, I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime.

<Give the following paragraphs if the jury has separate guilty and not guilty forms for both greater and lesser offenses pursuant to Stone v. Superior Court. >

[[For (the/any) count in which a greater and lesser crime is charged,] (Y/y)ou will receive verdict forms of guilty and not guilty for the greater crime and also verdict forms of guilty and not guilty for the lesser crime. Follow these directions before you give me any completed and signed, final verdict form. Return any unused verdict forms to me, unsigned.

- 1. If all of you agree the People have proved that the defendant is guilty of the greater crime, complete and sign the verdict form for guilty of that crime. Do not complete or sign any other verdict form [for that count].**
- 2. If all of you cannot agree whether the People have proved that the defendant is guilty of the greater crime, inform me only that you cannot reach an agreement and do not complete or sign any verdict form [for that count].**
- 3. If all of you agree that the People have not proved that the defendant is guilty of the greater crime and you also agree that the People have proved that (he/she) is guilty of the lesser crime, complete and sign the verdict form for not guilty of the greater crime and the verdict form for guilty of the lesser crime.**
- 4. If all of you agree the People have not proved that the defendant is guilty of the greater or lesser crime, complete and sign the verdict form for not guilty of the greater crime and the verdict form for not guilty of the lesser crime.**
- 5. If all of you agree the People have not proved that the defendant is guilty of the greater crime, but all of you cannot agree on a verdict for the lesser crime, complete and sign the verdict form for not guilty of the greater crime and inform me only that you cannot reach an agreement about the lesser crime.]**

<Give the following paragraphs if the jury has a combined verdict form for both greater and lesser offenses.>

[[For (the/any) charge with a lesser crime,] (Y/y)ou will receive a form for indicating your verdict on both the greater crime and the lesser crime. The greater crime is listed first. When you have reached a verdict, have the foreperson complete the form, sign, and date it. Follow these directions before writing anything on the form.

- 1. If all of you agree that the People have proved that the defendant is guilty of the greater crime as charged, (write “guilty” in the blank/circle the word “guilty”/check the box for “guilty”) for that crime, then sign, date, and return the form. Do not (write/circle/check) anything for the lesser crime.**

2. If all of you cannot agree whether the People have proved that the defendant is guilty of the greater crime as charged, inform me only that you cannot reach an agreement and do not write anything on the verdict form.
3. If all of you agree that the People have not proved that the defendant is guilty of the greater crime and you also agree that the People have proved that (he/she) is guilty of the lesser crime, (write “not guilty” in the blank/circle the words “not guilty”/check the box for “not guilty”) for the greater crime and (write “guilty” in the blank/circle the word “guilty”/check the box for “guilty”) for the lesser crime. You must not (write/circle/check) anything for the lesser crime unless you have (written/circled/checked) “not guilty” for the greater crime.
4. If all of you agree that the People have not proved that the defendant is guilty of either the greater or the lesser crime, (write “not guilty” in the blank/circle the words “not guilty”/check the box for “not guilty”) for both the greater crime and the lesser crime.
5. If all of you agree that the People have not proved that the defendant is guilty of the greater crime, but all of you cannot agree on a verdict for the lesser crime, (write “not guilty” in the blank/circle the words “not guilty”/check the box for “not guilty”) for the greater crime, then sign, date, and return the form. Do not (write/circle/check) anything for the lesser crime, and inform me only that you cannot reach an agreement about that crime.]

Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise].

New January 2006; Revised August 2006, June 2007, February 2012, August 2012, February 2015, March 2024

BENCH NOTES

Instructional Duty

If lesser included crimes are not charged separately and the jury receives only one verdict form for each count, the court should use CALCRIM 3518 instead of this instruction. For separately charged greater and lesser included offenses, use CALCRIM 3519.

In all cases in which one or more lesser included offenses are submitted to the jury, whether charged or not, the court has a **sua sponte** duty to instruct on the applicable procedures. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555-557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of greater offense, must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309-310 [52 Cal.Rptr.2d 282, 914 P.2d 832] [duty to instruct that jury cannot convict of a lesser included offense unless it has concluded that defendant is not guilty of the greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809] [duty to give jury opportunity to render a verdict of partial acquittal on a greater offense], clarified in *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [no duty to inquire about partial acquittal in absence of indication jury may have found defendant not guilty of greater offense].)

In *Stone v. Superior Court*, *supra*, 31 Cal.3d at p. 519, the Supreme Court suggested that the trial court provide the jury with verdict forms of guilty/not guilty on each of the charged and lesser included offenses. The court later referred to this “as a judicially declared rule of criminal procedure.” (*People v. Kurtzman* (1988) 46 Cal.3d 322, 328 [250 Cal.Rptr. 244, 758 P.2d 572].) However, this is not a mandatory procedure. (*Ibid.*) If the court chooses not to follow the procedure suggested in *Stone*, the court may give CALCRIM No. 3518 in place of this instruction.

Do not give this instruction for charges of murder or manslaughter; instead give the appropriate homicide instruction for lesser included offenses: CALCRIM No. 640, *Deliberations and Completion of Verdict Forms: For Use When Defendant is Charged With First Degree Murder and Jury Is Given Not Guilty Forms for Each Level of Homicide*, CALCRIM No. 641, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With First Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count; Not to Be Used When Both Voluntary and Involuntary Manslaughter Are Lesser Included Offenses*, CALCRIM No. 642, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Not Guilty Forms for Each Level of Homicide*, or CALCRIM No. 643, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count; Not to Be Used When Both Voluntary and Involuntary Manslaughter Are Lesser Included Offenses*.

The court should tell the jury it may not return a guilty verdict on a lesser included offense unless it has found the defendant not guilty of the greater offense. (*People v. Fields*, *supra*, 13 Cal.4th at pp. 310–311.) If the jury announces that it is deadlocked on the greater offense but, despite the court’s instructions, has returned a guilty verdict on the lesser included offense, the court should again instruct the jury that it may not convict

of the lesser included offense unless it has found the defendant not guilty of the greater offense. (*Ibid.*) The court should direct the jury to reconsider the “lone verdict of conviction of the lesser included offense” in light of this instruction. (*Ibid.*; Pen. Code, § 1161.) If the jury is deadlocked on the greater offense but the court nevertheless records a guilty verdict on the lesser included offense and then discharges the jury, retrial on the greater offense will be barred. (*People v. Fields, supra*, 13 Cal.4th at p. 307; Pen. Code, § 1023.)

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

AUTHORITY

- Lesser Included Offenses—Duty to Instruct. Pen. Code, § 1159; *People v. Breverman, supra*, (1998) 19 Cal.4th at p.142, 162 [~~77 Cal.Rptr.2d 870, 960 P.2d 1094~~].
- Lesser Included Offenses—Standard. *People v. Birks* (1998) 19 Cal.4th 108, 117 [77 Cal.Rptr.2d 848, 960 P.2d 1073].
- Reasonable Doubt as to Degree or Level of Offense. Pen. Code, § 1097; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d 852].
- Conviction of Lesser Precludes Retrial on Greater. Pen. Code, § 1023; *People v. Fields, supra*, (1996) 13 Cal.4th at pp.289, 309–310 [~~52 Cal.Rptr.2d 282, 914 P.2d 832~~]; *People v. Kurtzman, supra*, (1988) 46 Cal.3d at p.322, 329 [~~250 Cal.Rptr. 244, 758 P.2d 572~~].
- Court May Ask Jury to Reconsider Conviction on Lesser If Jury Deadlocked on Greater. Pen. Code, § 1161; *People v. Fields, supra*, (1996) 13 Cal.4th at p.289, 310 [~~52 Cal.Rptr.2d 282, 914 P.2d 832~~].
- Must Permit Partial Verdict of Acquittal on Greater. *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].

RELATED ISSUES

Duty to Instruct on Lesser

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

when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.] Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. [Citations.]” (*People v. Breverman*, supra, ~~(1998)~~ 19 Cal.4th at pp.142, 154–155 [~~77 Cal.Rptr.2d 870, 960 P.2d 1094~~].)

Acquittal of Greater Does Not Bar Retrial of Lesser

Where the jury acquits of a greater offense but deadlocks on the lesser, retrial of the lesser is not barred. (*People v. Smith* (1983) 33 Cal.3d 596, 602 [189 Cal.Rptr. 862, 659 P.2d 1152].)

Lesser Included Offenses Barred by Statute of Limitations

The defendant may waive the statute of limitations to obtain a jury instruction on a lesser offense that would otherwise be time-barred. (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 373 [58 Cal.Rptr.2d 458, 926 P.2d 438].) However, the court has no sua sponte duty to instruct on a lesser that is time-barred. (*People v. Diedrich* (1982) 31 Cal.3d 263, 283 [182 Cal.Rptr. 354, 643 P.2d 971].) If the court instructs on an uncharged lesser offense that is time-barred without obtaining an explicit waiver from the defendant, it is unclear if the defendant must object at that time in order to raise the issue on appeal or if the defendant may raise the issue for the first time on appeal. (See *People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1145–1151 [90 Cal.Rptr.2d 885] [reasoning criticized in *People v. Smith* (2002) 98 Cal.App.4th 1182, 1193–1194 [120 Cal.Rptr.2d 185]].) The better practice is to obtain an explicit waiver on the statute of limitations when instructing on a time-barred lesser.

Conviction of Greater and Lesser

The defendant cannot be convicted of a greater and a lesser included offense. (*People v. Moran* (1970) 1 Cal.3d 755, 763 [83 Cal.Rptr. 411, 463 P.2d 763].) If the evidence supports the conviction on the greater offense, the conviction on the lesser included offense should be set aside. (*Ibid.*)

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, §§ 708-712.

6 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Judgment, § 70.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.03[2][g], 85.05, 85.20 (Matthew Bender).

3518. Deliberations and Completion of Verdict Forms: For Use When Lesser Included Offenses and Greater Crimes Are Not Separately Charged and Jury Is Given Only One Not Guilty Verdict Form for Each Count (Non-Homicide)

If all of you find that the defendant is not guilty of a greater charged crime, you may find (him/her) guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and lesser crime for the same conduct.

[Now I will explain to you the crimes affected by this instruction [including lesser crimes of the lesser crimes]:]

[_____ <insert crime> is a lesser crime of
_____ <insert crime> [charged in Count ____.]
[_____ <insert crime> is a lesser crime of
_____ <insert crime> [charged in Count ____.]
[_____ <insert crime> is a lesser crime of
_____ <insert crime> [charged in Count ____.]

It is up to you to decide the order in which you consider the greater and lessereach crimes and the relevant evidence. You do not have to unanimously agree on the greater crime before considering a lesser crime. However,~~but~~ I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime.

[For count[s] , you will receive (a/multiple) verdict form[s]. Follow these directions before you give me any completed and signed final verdict form. Return any unused verdict forms to me, unsigned.

1. If all of you agree the People have proved that the defendant is guilty of the greater crime, complete and sign the verdict form for guilty of that crime. Do not complete or sign any other verdict form [for that count].
2. If all of you agree the People have not proved that the defendant is guilty of the greater crime and also agree the People have proved that (he/she) is guilty of (the/a) lesser crime, complete and sign the verdict

form for guilty of the lesser crime. Do not complete or sign any other verdict form[s] [for that count].

3. If all of you agree the People have not proved that the defendant is guilty of the greater or lesser crime, complete and sign the verdict form for not guilty.
4. If all of you cannot agree whether the People have proved that the defendant is guilty of a charged or lesser crime, inform me only that you cannot reach agreement [as to that count] and do not complete or sign any verdict form [for that count].

Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise].

New January 2006; Revised August 2006, June 2007, April 2010, February 2012, August 2012, February 2015, March 2024

BENCH NOTES

Instructional Duty

If lesser crimes are not charged separately and the jury receives separate not guilty and guilty verdict forms for each count, the court should use CALCRIM 3517 instead of this instruction. For separately charged greater and lesser included offenses, use CALCRIM 3519.

In all cases in which one or more lesser included offenses are submitted to the jury, whether charged or not, the court has a **sua sponte** duty to instruct on the applicable procedures. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555-557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of greater offense, must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309-310 [52 Cal.Rptr.2d 282, 914 P.2d 832] [duty to instruct that jury cannot convict of lesser included offense unless it has concluded that defendant is not guilty of greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809] [duty to give jury opportunity to render verdict of partial acquittal on greater offense], clarified in *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [no duty to inquire about partial acquittal in absence of indication jury may have found defendant not guilty of greater offense].)

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- Must Permit Partial Verdict of Acquittal on Greater. *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].

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Smith (2002) 98 Cal.App.4th 1182, 1193–1194 [120 Cal.Rptr.2d 185].) The better practice is to obtain an explicit waiver on the statute of limitations when instructing on a time-barred lesser.

Conviction of Greater and Lesser

The defendant cannot be convicted of a greater and a lesser included offense. (*People v. Moran* (1970) 1 Cal.3d 755, 763 [83 Cal.Rptr. 411, 463 P.2d 763].) If the evidence supports the conviction on the greater offense, the conviction on the lesser included offense should be set aside. (*Ibid.*)

SECONDARY SOURCES

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, §§ 708–712.

6 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Judgment, § 70.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.03[2][g], 85.05, 85.20 (Matthew Bender).

**3519. Deliberations and Completion of Verdict Forms: Lesser Offenses—
For Use When Lesser Included Offenses and Greater Crimes Are
Separately Charged (Non-Homicide)**

If all of you find that the defendant is not guilty of a greater charged crime, you may find (him/her) guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and lesser crime for the same conduct.

[Now I will explain to you the crimes affected by this instruction [including lesser crimes of the lesser crimes]:]

[_____ <insert crime>, as charged in Count ____, is a lesser crime to _____ <insert crime> [as charged in Count ____].]
[_____ <insert crime>, as charged in Count ____, is a lesser crime to _____ <insert crime> [as charged in Count ____].]
[_____ <insert crime>, as charged in Count ____, is a lesser crime to _____ <insert crime> [as charged in Count ____].]

It is up to you to decide the order in which you consider ~~the each~~ greater and lesser crimes and the relevant evidence. **You do not have to unanimously agree on the greater crime before considering a lesser crime. However,** ~~but~~ I can accept a verdict of guilty of the lesser crime only if you have found the defendant not guilty of the greater crime.

[[For (the/any) count in which a greater and lesser crime is charged,] (Y/y)ou will receive verdict forms of guilty and not guilty for [each/the] greater crime and lesser crime. Follow these directions before you give me any completed and signed, final verdict form. Return any unused verdict forms to me, unsigned.

1. If all of you agree the People have proved that the defendant is guilty of the greater crime, complete and sign the verdict form for guilty of that crime. Do not complete or sign any verdict form for the [corresponding] lesser crime.
2. If all of you cannot agree whether the People have proved that the defendant is guilty of the greater crime, inform me of your disagreement and do not complete or sign any verdict form for that

crime or the [corresponding] lesser crime.

3. **If all of you agree the People have not proved that the defendant is guilty of the greater crime and also agree the People have proved that (he/she) is guilty of the lesser crime, complete and sign the verdict form for not guilty of the greater crime and the verdict form for guilty of the [corresponding] lesser crime. Do not complete or sign any other verdict forms [for those charges].**
4. **If all of you agree the People have not proved that the defendant is guilty of the greater or lesser crime, complete and sign the verdict form for not guilty of the greater crime and the verdict form for not guilty of the [corresponding] lesser crime.**
5. **If all of you agree the People have not proved that the defendant is guilty of the greater crime, but all of you cannot agree on a verdict for the lesser crime, complete and sign the verdict form for not guilty of the greater crime and inform me about your disagreement on the lesser crime.]**

Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise].

New June 2007, Revised August 2012, February 2015, March 2024

BENCH NOTES

Instructional Duty

In all cases in which one or more lesser included offenses are submitted to the jury, whether charged or not, the court has a sua sponte duty to instruct on the applicable procedures. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555-557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of greater offense, must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309-310 [52 Cal.Rptr.2d 282, 914 P.2d 832] [duty to instruct that jury cannot convict of a lesser included offense unless it has concluded that defendant is not guilty of the greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809] [duty to give jury opportunity to render a verdict of partial acquittal on a greater offense], clarified in *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [no duty to inquire about partial acquittal in absence of indication jury may have found defendant not guilty of greater offense]).

Whenever greater and lesser included crimes are separately charged the court must use this instruction instead of CALCRIM No. 3517 or CALCRIM No. 3518.

Do not give this instruction for charges of murder or manslaughter; instead give the appropriate homicide instruction for lesser included offenses: CALCRIM No. 640, *Deliberations and Completion of Verdict Forms: For Use When Defendant is Charged With First Degree Murder and Jury Is Given Not Guilty Forms for Each Level of Homicide*, CALCRIM No. 641, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With First Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count; Not to Be Used When Both Voluntary and Involuntary Manslaughter Are Lesser Included Offenses*, CALCRIM No. 642, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Not Guilty Forms for Each Level of Homicide*, or CALCRIM No. 643, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count; Not to Be Used When Both Voluntary and Involuntary Manslaughter Are Lesser Included Offenses*.

The court should tell the jury it may not return a guilty verdict on a lesser included offense unless it has found the defendant not guilty of the greater offense. (*People v. Fields, supra*, 13 Cal.4th at pp. 310–311.) If the jury announces that it is deadlocked on the greater offense but, despite the court’s instructions, has returned a guilty verdict on the lesser included offense, the court should again instruct the jury that it may not convict of the lesser included offense unless it has found the defendant not guilty of the greater offense. (*Ibid.*) The court should direct the jury to reconsider the “lone verdict of conviction of the lesser included offense” in light of this instruction. (*Ibid.*; Pen. Code, § 1161.) If the jury is deadlocked on the greater offense but the court nevertheless records a guilty verdict on the lesser included offense and then discharges the jury, retrial on the greater offense will be barred. (*People v. Fields, supra*, 13 Cal.4th at p. 307; Pen. Code, § 1023.)

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

AUTHORITY

- Lesser Included Offenses—Duty to Instruct. Pen. Code, § 1159; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- Lesser Included Offenses—Standard. *People v. Birks* (1998) 19 Cal.4th 108, 117 [77 Cal.Rptr.2d 848, 960 P.2d 1073].
- Reasonable Doubt as to Degree or Level of Offense. Pen. Code, § 1097; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d 852].

- Conviction of Lesser Precludes Retrial on Greater. Pen. Code, § 1023; *People v. Fields*, supra, ~~(1996)~~ 13 Cal.4th at pp.289, 309–310 [~~52 Cal.Rptr.2d 282, 914 P.2d 832~~]; *People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].
- Court May Ask Jury to Reconsider Conviction on Lesser If Jury Deadlocked on Greater. Pen. Code, § 1161; *People v. Fields*, supra, ~~(1996)~~ 13 Cal.4th at p.289, 310 [~~52 Cal.Rptr.2d 282, 914 P.2d 832~~].
- Must Permit Partial Verdict of Acquittal on Greater. *People v. Marshall*, supra, ~~(1996)~~ 13 Cal.4th at p.799, 826 [~~55 Cal.Rptr.2d 347, 919 P.2d 1280~~]; *Stone v. Superior Court*, supra, ~~(1982)~~ 31 Cal.3d at p.503, 519 [~~183 Cal.Rptr. 647, 646 P.2d 809~~].

RELATED ISSUES

Duty to Instruct on Lesser

The court has a **sua sponte** duty to instruct “on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation] but not when there is no evidence that the offense was less than that charged. [Citations.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.] Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. [Citations.]” (*People v. Breverman*, supra, ~~(1998)~~ 19 Cal.4th 142 at p. ___ [~~77 Cal.Rptr.2d 870, 960 P.2d 1094~~].)

Acquittal of Greater Does Not Bar Retrial of Lesser

Where the jury acquits of a greater offense but deadlocks on the lesser, retrial of the lesser is not barred. (*People v. Smith* (1983) 33 Cal.3d 596, 602 [189 Cal.Rptr. 862, 659 P.2d 1152].)

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The defendant may waive the statute of limitations to obtain a jury instruction on a lesser offense that would otherwise be time-barred. (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 373 [58 Cal.Rptr.2d 458, 926 P.2d 438].) However, the court has no sua sponte duty to instruct on a lesser that is time-barred. (*People v. Diedrich* (1982) 31 Cal.3d 263, 283 [182 Cal.Rptr. 354, 643 P.2d 971].) If the court instructs on an uncharged lesser offense that is time-barred without obtaining an explicit waiver from the defendant, it is unclear if the defendant must object at that time in order to raise the issue on appeal or if the defendant may raise the issue for the first time on appeal. (See *People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1145–1151 [90 Cal.Rptr.2d 885] [reasoning criticized in *People v. Smith* (2002) 98 Cal.App.4th 1182, 1193–1194 [120 Cal.Rptr.2d 185]].) The better

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