Judicial Council of California . Administrative Office of the Courts

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on February 28, 2012

Title
Jury Instructions: Additions and Revisions to Criminal Jury Instructions

Rules, Forms, Standards, or Statutes Affected
Judicial Council of California Criminal Jury Instructions (*CALCRIM*)

Recommended by
Advisory Committee on Criminal Jury Instructions
Hon. Sandy R. Kriegler, Chair

Agenda Item Type
Action Required

Effective Date
February 28, 2012

Date of Report
January 25, 2012

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Executive Summary

The Advisory Committee on Criminal Jury Instructions recommends approval of the proposed additions, revisions, and revocations to the *Judicial Council of California Criminal Jury Instructions (CALCRIM)*. These changes will keep *CALCRIM* current with statutory and case authority.

Recommendation

The Advisory Committee on Criminal Jury Instructions recommends that the Judicial Council, effective February 28, 2012, approve for publication under rule 2.1050 of the California Rules of Court the criminal jury instructions prepared by the committee. On Judicial Council approval, the new and revised instructions will be published in the 2012 edition of the *Judicial Council of California Criminal Jury Instructions (CALCRIM)*.

A table of contents and the proposed additions and revisions to the criminal jury instructions are attached.

Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted what is now rule 10.59 of the California Rules of Court, which established the advisory committee's charge.[1] At its August 2005 meeting, the council voted to approve the *CALCRIM* instructions under what is now rule 2.1050 of the California Rules of Court. Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CALCRIM*.

The council approved the last *CALCRIM* release at its April 2011 meeting.

Rationale for Recommendation

The committee recommends proposed additions and revisions to the following instructions: 101, 201, 222, 240, 301, 505, 507, 508, 604, 766, 1030, 1151, 1700, 1801-1803, 2514, 2681, 3454-3454A, 3470, 3518. It further recommends adoption of a new instruction, 3551.

The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 80 additional instructions under a delegation of authority from the council to RUPRO.[2]

The instructions were revised or added based on comments or suggestions from justices, judges, and attorneys; proposals by staff and committee members; and recent developments in the law. Below is a summary of the more significant actions proposed to the council.

Electronic communications and research—contempt of court

2011 legislation (Assembly Bill 141)[3] amended Code of Criminal Procedure section 1209(a) to define contempt of court as including "[w]illful disobedience by a juror of a court admonishment related to the prohibition on any form of communication or research about the case, including all forms of electronic or wireless communication or research."[4] CALCRIM No. 101, *Cautionary Admonitions: Jury Conduct (Before, During, or After Jury Is Selected)*, has been revised to

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[1] Rule 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."

[2] At its October 20, 2006, meeting, the Judicial Council delegated to RUPRO the final authority to approve nonsubstantive technical changes and corrections and minor substantive changes to jury instructions unlikely to create controversy. The council also gave RUPRO the authority to delegate to the jury instructions advisory committees the authority to review and approve nonsubstantive grammatical and typographical corrections and other similar changes to the jury instructions, which RUPRO has done.

Under the implementing guidelines that RUPRO approved on December 14, 2006, which were submitted to the council on February 15, 2007, RUPRO has the final authority to approve (among other things) additional cases and statutes cited in the Sources and Authority and additions or changes to the Directions for Use. RUPRO has already given final approval to 74 instructions that have only these changes. Further, under its delegation of authority from RUPRO, the advisory committee has made other nonsubstantive grammatical, typographical, and technical corrections.

[3] Stats. 2011, ch. 181.

[4] Code Civ. Proc., § 1209(a)(6).

admonish jurors not to violate the prohibitions on communications and research, including prohibitions on electronic communications and research. Optional bracketed language, to be used in the court's discretion, admonishes further that violations may result in jurors being held in contempt of court.

Instructions referencing variations on the term "great bodily injury"

A committee member who is a trial judge noticed that CALCRIM Nos. 505, 507, 508, 604, 2514, and 3470 use different terms for the same basic concept of "great bodily injury." Committee members did not find any valid reason to use different terms for the same concept and were concerned that using different terms could lead to juror confusion. It noted further that the United States Supreme Court case, *Tennessee v. Garner* (1985) 471 U.S. 1, used the following terms interchangeably throughout: serious bodily injury, serious bodily harm, serious physical harm, great bodily harm, great personal harm, and grievous bodily harm. The committee concluded that choosing one term and using it consistently was the better course.

Balconies and burglary

Supreme Court dictum suggests that an "unenclosed balcony" is not a residential structure under the "reasonable belief test" (*People v. Valencia* (2002) 28 Cal.4th 1, 11, fn. 5), but *People v. Jackson* (2010) 190 Cal.App.4th 918, 924, review denied March 16, 2011, controls. In *Jackson*, new committee member Justice Thomas Lyle Willhite, Jr. wrote that a balcony was "functionally interconnected to and immediately contiguous to . . . [part of] the apartment . . . used for 'residential activities.'" The issue is pending before the Supreme Court in *People v. Yarbrough,* S192751. The committee updated the bench notes to CALCRIM No. 1700, *Burglary*, to alert judges and attorneys of this precedent and the pending review.

Prostitutes and pandering

In *People v. Zambia* (2011) 51 Cal.4th 965, Supreme Court Justice and former committee chair Carol A. Corrigan answered the long open questions of (1) whether specific intent is required for the crime of pandering and (2) whether one can encourage another person to become a prostitute when one believes that the target in question is already a prostitute. The answer to both questions is now yes. The committee revised CALCRIM No. 1151, *Pandering*, accordingly. It updated the instruction further to reflect the ruling in *People v. Dixon* (2011) 191 Cal.App.4th 1154, that pandering requires services procured for someone other than the defendant. The committee added citations to both cases to the bench notes.

Deliberations and deadlocked juries

The committee drafted CALCRIM No. 3551, *Further Instruction About Deliberations,* at the suggestion of two council members who are former CALCRIM committee members, Judge Mary Ann O'Malley of Contra Costa County and Judge Teri Jackson of San Francisco. The judges expressed concern that without a CALCRIM instruction to give to deadlocked juries, the courts will be forced to either improvise or simply repeat the lengthy admonition approved in *People v. Moore* (2002) 96 Cal.App.4th 1105, 1118. The committee took care to avoid the

pitfalls mentioned in *People v. Gainer* (1977) 19 Cal.3d 835, 842, such as singling out minority jurors or admonishing them that "the case must at some time be decided."

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CALCRIM* circulated for comment from October 7 to November 30, 2011.

The committee is fortunate that it regularly receives comments from institutional commentators who take the time and effort to provide careful and often quite detailed comments. This time was no exception. The committee received comments from five institutional commentators and four individuals. The committee evaluated all comments and revised some of the instructions as a result. A chart with the text of all comments received and the committee's responses is attached.

Of the comments received, most addressed proposed new instruction CALCRIM No. 3551, *Further Instruction on Deliberations.* Some commentators thought judges should continue to recite the language directly out of the *Moore* case, while others merely wanted to tweak the proposed draft. CALCRIM No. 101, *Cautionary Admonitions: Jury Conduct (Before, During, or After Jury Is Selected),* and CALCRIM No. 1700, *Burglary,* discussed above, received five comments each.

Rule 2.1050 of the California Rules of Court requires the committee to update, amend, and add topics to *CALCRIM* on a regular basis and submit its recommendations to the council for approval. The proposed new and revised instructions are necessary to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee did not consider any alternative actions.

Implementation Requirements, Costs, and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will print a new edition and pay royalties to the Administrative Office of the Courts (AOC). Other licensing agreements with other publishers provide additional royalties.

The official publisher will also make the revised content available free of charge to all judicial officers in both print and HotDocs document assembly software. With respect to commercial publishers, the AOC will register the copyright in this work and continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the AOC provides a broad public license for their noncommercial use and reproduction.

Attachments

1. Full text of new and revised *CALCRIM* instructions
2. Chart of comments

Table of Contents for CALCRIM Instructions for Judicial Council Approval, February 28, 2012

3551. Further Instruction About Deliberations

Sometimes juries that have had difficulty reaching a verdict are able to resume deliberations and successfully reach a verdict [on one or more counts]. Please consider the following suggestions.

Do not hesitate to re-examine your own views. Fair and effective jury deliberations require a frank and forthright exchange of views.

Each of you must decide the case for yourself and form your individual opinion after you have fully and completely considered all of the evidence with your fellow jurors. It is your duty as jurors to deliberate with the goal of reaching a verdict if you can do so without surrendering your individual judgment. Do not change your position just because it differs from that of other jurors or just because you or others want to reach a verdict. Both the People and the Defendant are entitled to the individual judgment of each juror.

It is up to you to decide how to conduct your deliberations. You may want to consider new approaches in order to get a fresh perspective.

Let me know whether I can do anything to help you further, such as give additional instructions or clarify instructions I have already given you.

Please continue your deliberations at this time. If you wish to communicate with me further, please do so in writing [using the form my bailiff has given you].

New [insert date of council approval]

BENCH NOTES

Instructional Duty

There is no sua sponte duty to instruct a deadlocked jury on continuing its deliberations. Nevertheless, courts of review have approved instruction on the topics covered in this instruction (*See People v. Gainer* (1977) 19 Cal.3d 835, 856 [139 Cal.Rptr. 861, 566 P.2d 997]; *People v. Moore* (2002) 96 Cal.App.4th 1105, 1118 [117 Cal.Rptr 715].) The court may give this instruction if the jury announces that it is unable to reach a verdict. In case of an impasse, Penal Code Section 1140 vests the trial court with discretion to determine whether there is a

reasonable probability of agreement among jurors. California Rule of Court, Rule 2.1036 further explains the court's role in such a case.

AUTHORITY

- *Allen* Charge Disapproved ▸ *People v. Gainer* (1977) 19 Cal.3d 835, 842 [139 Cal.Rptr. 861, 566 P.2d 997].
- Duty to Deliberate ▸ *People v. Gainer* (1977) 19 Cal.3d 835, 856 [139 Cal.Rptr. 861, 566 P.2d 997].
- Keep an Open Mind ▸ *People v. Selby* (1926) 198 Cal. 426, 439 [245 P. 426].
- Alternate Methods of Deliberation ▸ *People v. Moore* (2002) 96 Cal.App.4th 1105, 1118 [117 Cal.Rptr 715].

Secondary Sources

6 Witkin & Epstein, California Criminal Law (3d ed. 2000), § 39.

3552–3574. Reserved for Future Use

If this instruction is adopted, delete reference to instruction numbers reserved for future use from CALCRIM No. 3550.

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

Our system of justice requires that trials be conducted in open court with the parties presenting evidence and the judge deciding the law that applies to the case. It is unfair to the parties if you receive additional information from any other source because that information may be unreliable or irrelevant. Your verdict must be based only on the evidence presented during trial in this court and the law as I provide it to you.

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

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

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

Do not use the Internet (, a dictionary/[, or _____<*insert other relevant source of information or means of communication*>]*)* in any way in connection with this case, either on your own or as a group. Do not investigate the facts or the law or do any research regarding this case. Do not conduct any tests or experiments, or visit the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate.

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

During the trial, do not speak to a defendant, witness, lawyer, or anyone associated with them. Do not listen to anyone who tries to talk to you about

the case or about any of the people or subjects involved in it. If someone asks you about the case, tell him or her that you cannot discuss it. If that person keeps talking to you about the case, you must end the conversation.

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

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

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

You must reach your verdict without any consideration of punishment.

I want to emphasize that you may not use any form of research or communication, including electronic or wireless research or communication, to research, share, communicate, or allow someone else to communicate with you regarding any subject of the trial. [If you violate this rule, you may be subject to jail time, a fine, or other punishment.]

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

New January 2006; Revised June 2007, April 2008, December 2008, April 2010, October 2010, April 2011

BENCH NOTES

Instructional Duty

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

Do not instruct a jury in the penalty phase of a capital case that they cannot consider sympathy. (*People v. Easley* (1982) 34 Cal.3d 858, 875–880 [196

Cal.Rptr. 309, 671 P.2d 813].) Instead of this instruction, CALCRIM 761 is the proper introductory instruction for the penalty phase of a capital case.

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

AUTHORITY

- Statutory Admonitions ▸ Pen. Code, § 1122.
- Avoid Discussing the Case ▸ *People v. Pierce* (1979) 24 Cal.3d 199 [155 Cal.Rptr. 657, 595 P.2d 91]; *In re Hitchings* (1993) 6 Cal.4th 97 [24 Cal.Rptr.2d 74, 860 P.2d 466]; *In re Carpenter* (1995) 9 Cal.4th 634, 646–658 [38 Cal.Rptr.2d 665, 889 P.2d 985].
- Avoid News Reports ▸ *People v. Holloway* (1990) 50 Cal.3d 1098, 1108–1111 [269 Cal.Rptr. 530, 790 P.2d 1327], disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830 [38 Cal.Rptr.2d. 394, 889 P.2d 588].
- Judge's Conduct as Indication of Verdict ▸ *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].
- No Bias, Sympathy, or Prejudice ▸ *People v. Hawthorne* (1992) 4 Cal.4th 43, 73 [14 Cal.Rptr.2d 133, 841 P.2d 118].
- No Independent Research ▸ *People v. Karis* (1988) 46 Cal.3d 612, 642 [250 Cal.Rptr. 659, 758 P.2d 1189]; *People v. Castro* (1986) 184 Cal.App.3d 849, 853 [229 Cal.Rptr. 280]; *People v. Sutter* (1982) 134 Cal.App.3d 806, 820 [184 Cal.Rptr. 829].
- This Instruction Upheld ▸ *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1182–1183 [67 Cal.Rptr.3d 871].
- Court's Contempt Power for Violations of Admonitions ▸ Pen. Code, § 1122(a)(1); Code Civ. Proc. § 1209(a)(6) (effective 1/1/12).

Secondary Sources

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

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

RELATED ISSUES

Admonition Not to Discuss Case With Anyone

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

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

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

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

Jury Misconduct

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

201. Do Not Investigate

~~**Do not do any research regarding this case on your own or as a group. Do not use a dictionary, the Internet, or other reference materials. Do not investigate the facts or law. Do not conduct any experiments, or visit the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate.**~~**Do not use the Internet (, a dictionary/[, or _____ <*insert other relevant source of information or means of communication*>]) in any way in connection with this case, either on your own or as a group. Do not investigate the facts or the law or do any research regarding this case, either on your own, or as a group. Do not conduct any tests or experiments, or visit the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate.**

New January 2006; Revised June 2007, April 2010

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jurors on how they must conduct themselves during trial. (Pen. Code, § 1122.)

AUTHORITY

- No Independent Research ▸ Pen. Code, § 1122; *People v. Karis* (1988) 46 Cal.3d 612, 642 [250 Cal.Rptr. 659, 758 P.2d 1189]; *People v. Castro* (1986) 184 Cal.App.3d 849, 853 [229 Cal.Rptr. 280]; *People v. Sutter* (1982) 134 Cal.App.3d 806, 820 [184 Cal.Rptr. 829].

Secondary Sources

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

222. Evidence

~~You must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom [or during a jury view].~~
"Evidence" is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence.

Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they helped you to understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asked a question that suggested it was true.

During the trial, the attorneys may have objected to questions or moved to strike answers given by the witnesses. I ruled on the objections according to the law. If I sustained an objection, you must ignore the question. If the witness was not permitted to answer, do not guess what the answer might have been or why I ruled as I did. If I ordered testimony stricken from the record you must disregard it and must not consider that testimony for any purpose.

You must disregard anything you saw or heard when the court was not in session, even if it was done or said by one of the parties or witnesses.

[During the trial, you were told that the People and the defense agreed, or stipulated, to certain facts. This means that they both accept those facts as true. Because there is no dispute about those facts you must also accept them as true.]

The court reporter has made a record of everything that was said during the trial. If you decide that it is necessary, you may ask that the court reporter's record be read to you. You must accept the court reporter's record as accurate.

New January 2006; Revised June 2007, August 2009

BENCH NOTES

Instructional Duty

There is no sua sponte duty to instruct on these evidentiary topics; however, instruction on these topics has been approved. (*People v. Barajas* (1983) 145 Cal.App.3d 804, 809 [193 Cal.Rptr. 750]; *People v. Samayoa* (1997) 15 Cal.4th 795, 843–844 [64 Cal.Rptr.2d 400, 938 P.2d 2]; *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [47 Cal.Rptr.2d 516, 906 P.2d 478].)

If the parties stipulated to one or more facts, give the bracketed paragraph that begins with "During the trial, you were told."

AUTHORITY

- Evidence Defined ▸ Evid. Code, § 140.
- Arguments Not Evidence ▸ *People v. Barajas* (1983) 145 Cal.App.3d 804, 809 [193 Cal.Rptr. 750].
- Questions Not Evidence ▸ *People v. Samayoa* (1997) 15 Cal.4th 795, 843–844 [64 Cal.Rptr.2d 400].
- Stipulations ▸ *Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141–142 [199 P.2d 952].
- Striking Testimony ▸ *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [47 Cal.Rptr.2d 516, 906 P.2d 478].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000), §§ 636, 643.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, §§ 83.01[1], 83.02[2] (Matthew Bender).

RELATED ISSUES

Non-Testifying Courtroom Conduct

There is authority for an instruction informing the jury to disregard defendant's in-court, but non-testifying behavior. (*People v. Garcia* (1984) 160 Cal.App.3d 82, 90 [206 Cal.Rptr. 468] [defendant was disruptive in court; court instructed jurors they should not consider this behavior in deciding guilt or innocence].) However, if the defendant has put his or her character in issue or another basis for relevance exists, such an instruction should not be given. (*People v. Garcia*, *supra*, 160 Cal.App.3d at p. 91, fn. 7; *People v. Foster* (1988) 201 Cal.App.3d 20, 25 [246 Cal.Rptr. 855].)

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

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. Cervantes* (2001) 26 Cal.4th 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* (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].
- Independent Intervening Cause ▸ *People v. Cervantes* (2001) 26 Cal.4th 860, 856–874 [111 Cal.Rptr.2d 148, 29 P.3d 225].
- Causation Instructions ▸ *People v. Sanchez* (2001) 26 Cal.4th 834, 845–849 [111 Cal.Rptr.2d 129, 29 P.3d 209]; *People v. Roberts* (1992) 2 Cal.4th 271, 311–322 [6 Cal.Rptr.2d 276, 826 P.2d 274]; *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135].
- Instructional Duty ▸ *People v. Bernhardt* (1963) 222 Cal.App.2d 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* (2001) 26 Cal.4th 860, 866 [111 Cal.Rptr.2d 148, 29 P.3d 225].

Secondary Sources

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

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

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

301. Single Witness's Testimony

[Except for the testimony of _____ *<insert witness's name>*, **which requires supporting evidence [if you decide (he/she) is an accomplice],] (the/The) testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.**

New January 2006; Revised April 2010

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction on this issue in every case. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884–885 [123 Cal.Rptr. 119, 538 P.2d 247].) Insert the bracketed language if the testimony of an accomplice or other witness requires corroboration. (*People v. Chavez* (1985) 39 Cal.3d 823, 831–832 [218 Cal.Rptr. 49, 705 P.2d 372].)

The following constitutional provisions and statutes require evidence that corroborates a witness's testimony: Cal. Const., art. I, § 18 [treason]; Pen. Code, §§ 1111 [accomplice testimony]; 653f [solicitation of felony]; 118 [perjury]; 1108 [abortion and seduction of minor]; 532 [obtaining property by false pretenses].

Give the bracketed phrase "if you decide (he/she) is an accomplice" and CALCRIM No. 334 if the jury must determine whether a witness is an accomplice.

AUTHORITY

- Instructional Requirements ▸ Evid. Code, § 411; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885 [123 Cal.Rptr. 119, 538 P.2d 247].
- Corroboration Required ▸ *People v. Chavez* (1985) 39 Cal.3d 823, 831–832 [218 Cal.Rptr. 49, 705 P.2d 372].

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation, § 111.

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

RELATED ISSUES

Uncorroborated Testimony of Defendant

The cautionary admonition regarding a single witness's testimony applies with equal force to uncorroborated testimony by a defendant. (*People v. Turner* (1990) 50 Cal.3d 668, 696, fn. 14 [268 Cal.Rptr. 706, 789 P.2d 887].)

Uncorroborated Testimony in Sex Offense Cases

In a prosecution for forcible rape, an instruction that the testimony of a single witness is sufficient may be given in conjunction with an instruction that there is no legal corroboration requirement in a sex offense case. Both instructions correctly state the law and because each focuses on a different legal point, there is no implication that the victim's testimony is more credible than the defendant's testimony. (*People v. Gammage* (1992) 2 Cal.4th 693, 700–702 [7 Cal.Rptr.2d 541, 828 P.2d 682] [resolving split of authority on whether the two instructions can be given together].)

505. Justifiable Homicide: Self-Defense or Defense of Another

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The defendant is not guilty of (murder/ [or] manslaughter/attempted murder/ [or] attempted voluntary manslaughter) if (he/she) was justified in (killing/attempting to kill) someone in (self-defense/ [or] defense of another). The defendant acted in lawful (self-defense/ [or] defense of another) if:

1. **The defendant reasonably believed that (he/she/ [or] someone else/ [or] _____ <*insert name or description of third party*>) was in imminent danger of being killed or suffering great bodily injury [or was in imminent danger of being (raped/maimed/robbed/ _____ <*insert other forcible and atrocious crime*>)];**

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

AND

3. **The defendant used no more force than was reasonably necessary to defend against that danger.**

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of death or great bodily injury to (himself/herself/ [or] someone else). Defendant's belief must have been reasonable and (he/she) must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the [attempted] killing was not justified.

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

[The defendant's belief that (he/she/ [or] someone else) was threatened may be reasonable even if (he/she) relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.]

[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 deciding whether the defendant's conduct and beliefs were reasonable.]**

[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 deciding whether the defendant's conduct and beliefs were reasonable.]**

[Someone who has been threatened or harmed by a person in the past, is justified in acting more quickly or taking greater self-defense measures against that person.]

[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with _____<*insert name of decedent/victim*>**, you may consider that threat in deciding whether the defendant was justified in acting in (self-defense/ [or] defense of another).]**

[A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of (death/great bodily injury/_____ <*insert forcible and atrocious crime*>**) has passed. This is so even if safety could have been achieved by retreating.]**

[*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 [attempted] killing was not justified. If the People have not met this burden, you must find the defendant not guilty of (murder/ [or] manslaughter/ attempted murder/ [or] attempted voluntary manslaughter).

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on self-defense when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rtpr.2d 870, 960 P.2d 1094] [addressing duty to instruct on voluntary

manslaughter as lesser included offense, but also discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [249 Cal.Rptr. 897] [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses].)

If there is substantial evidence of self-defense that is inconsistent with the defendant's testimony, the court must ascertain whether the defendant wants an instruction on self-defense. (*People v. Breverman, supra,* 19 Cal.4th at p. 156.) The court is then required to give the instruction if the defendant so requests. (*People v. Elize* (1999) 71 Cal.App.4th 605, 611–615 [84 Cal.Rptr.2d 35].)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of "antecedent threats and assaults against the defendant on the reasonableness of defendant's conduct." (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488 [1 Cal.Rptr.3d 774].) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475 [198 Cal.Rptr. 819]; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068 [56 Cal.Rptr.2d 133, 920 P.2d 1337].)

Forcible and atrocious crimes are generally those crimes whose character and manner reasonably create a fear of death or serious bodily harm. (*People v. Ceballos* (1974) 12 Cal.3d 470, 479 [116 Cal.Rptr. 233, 526 P.2d 241].) The following crimes have been deemed forcible and atrocious as a matter of law: murder, mayhem, rape, and robbery. (*Id.* at p. 478.) If the defendant is asserting that he or she was resisting the commission of one of these felonies or another specific felony, the court should include the bracketed language at the end of element 1 and select "raped," "maimed," or "robbed," or insert another appropriate forcible and atrocious crime. In all other cases involving death or great bodily injury, the court should use element 1 without the bracketed language.

Related Instructions

CALCRIM Nos. 506–511, Justifiable and Excusable Homicides.

CALCRIM Nos. 3470–3477, Defense Instructions: Defense of Self, Another, Property.

CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense–Lesser Included Offense*.

AUTHORITY

- Justifiable Homicide ▸ Pen. Code, §§ 197–199.

- Fear ‣ Pen. Code, § 198.
- Lawful Resistance ‣ Pen. Code, §§ 692–694.
- Burden of Proof ‣ Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements ‣ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Forcible and Atrocious Crimes ‣ *People v. Ceballos* (1974) 12 Cal.3d 470, 478–479 [116 Cal.Rptr. 233, 526 P.2d 241].
- Imminence ‣ *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167], overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- No Duty to Retreat ‣ *People v. Hughes* (1951) 107 Cal.App.2d 487, 493 [237 P.2d 64]; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22 [132 P.2d 51].
- Reasonable Belief ‣ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1]; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].
- Must Act Under Influence of Fear Alone ‣ Pen. Code, § 198.
- This Instruction Upheld ‣ *People v. Genovese* (2008) 168 Cal.App.4th 817, 832 [85 Cal.Rptr.3d 664].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 64–77.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.11, 73.12 (Matthew Bender).

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

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

COMMENTARY

Penal Code section 197, subdivision 1 provides that self-defense may be used in response to threats of death or great bodily injury, or to resist the commission of a felony. (Pen. Code, § 197, subd. 1.) However, in *People v. Ceballos* (1974) 12

Cal.3d 470, 477–479 [116 Cal.Rptr. 233, 526 P.2d 241], the court held that although the latter part of section 197 appears to apply when a person resists the commission of any felony, it should be read in light of common law principles that require the felony to be "some atrocious crime attempted to be committed by force." (*Id.* at p. 478.) This instruction is therefore written to provide that self-defense may be used in response to threats of great bodily injury or death or to resist the commission of forcible and atrocious crimes.

RELATED ISSUES

Imperfect Self-Defense

Most courts hold that an instruction on imperfect self-defense is required in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant's belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. (*People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86 [31 Cal.Rptr.2d 475], overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675]; *People v. De Leon* (1992) 10 Cal.App.4th 815, 824.) The court in *People v. Rodriguez* disagreed, however, and found that an imperfect self-defense instruction was not required sua sponte on the facts of the case where defendant's version of the crime "could only lead to an acquittal based on justifiable homicide," and when the prosecutor's version could only lead to a conviction of first degree murder. (*People v. Rodriguez* (1992) 53 Cal.App.4th 1250, 1275 [62 Cal.Rptr.2d 345]; see also *People v. Williams* (1997) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961] [in rape prosecution, no mistake-of-fact instruction was required when two sides gave wholly divergent accounts with no middle ground to support a mistake-of-fact instruction].)

No Defense for Initial Aggressor

An aggressor whose victim fights back in self-defense may not invoke the doctrine of self-defense against the victim's legally justified acts. (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1 [30 Cal.Rptr.2d 33, 872 P.2d 574].) If the aggressor attempts to break off the fight and communicates this to the victim, but the victim continues to attack, the aggressor may use self-defense against the victim to the same extent as if he or she had not been the initial aggressor. (Pen. Code, § 197, subd. 3; *People v. Trevino* (1988) 200 Cal.App.3d 874, 879 [246 Cal.Rptr. 357]; see CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.) In addition, if the victim responds with a sudden escalation of force, the aggressor may legally defend against the use of force. (*People v. Quach* (2004) 116 Cal.App.4th 294, 301–302 [10 Cal.Rptr.3d 196]; see CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.)

Transferred Intent Applies

"[T]he doctrine of self-defense is available to insulate one from criminal responsibility where his act, justifiably in self-defense, inadvertently results in the injury of an innocent bystander." (*People v. Mathews* (1979) 91 Cal.App.3d 1018, 1024 [154 Cal.Rptr. 628]; see also *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1357 [37 Cal.Rptr.2d 304].) There is no sua sponte duty to instruct on this principle, although such an instruction must be given on request when substantial evidence supports it. (*People v. Mathews*, *supra*, 91 Cal.App.3d at p. 1025; see also CALCRIM No. 562, *Transferred Intent*.)

Definition of "Imminent"

In *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167], overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [56 Cal.Rptr.2d 142, 921 P.2d 1], the jury requested clarification of the term "imminent." In response, the trial court instructed:

> "Imminent peril," as used in these instructions, means that the peril must have existed or appeared to the defendant to have existed at the very time the fatal shot was fired. In other words, the peril must appear to the defendant as immediate and present and not prospective or even in the near future. An imminent peril is one that, from appearances, must be instantly dealt with.

(Ibid.)

The Court of Appeal agreed with this definition of "imminent." (*Id.* at pp. 1187–1190 [citing *People* v. *Scoggins* (1869) 37 Cal. 676, 683–684].)

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.)

507. Justifiable Homicide: By Public Officer

The defendant is not guilty of (murder/ [or] manslaughter/attempted murder/ [or] attempted voluntary manslaughter) if (he/she) (attempted to kill/killed) someone while (acting as a public officer/obeying a public officer's command for aid and assistance). Such (a/an) [attempted] killing is justified, and therefore not unlawful, if:

1. **The defendant was (a public officer/obeying a public officer's command for aid and assistance);**

2. **The [attempted] killing was committed while (taking back into custody a convicted felon [or felons] who had escaped from prison or confinement[,]/ arresting a person [or persons] charged with a felony who (was/were) resisting arrest or fleeing from justice[,]/ overcoming actual resistance to some legal process[,]/ [or] while performing any [other] legal duty);**

3. **The [attempted] killing was necessary to accomplish (one of those/that) lawful purpose[s];**

AND

4. **The defendant had probable cause to believe that _____** *<insert name of decedent>* [**posed a threat of death or great bodily injury~~serious bodily harm~~, either to the defendant or to others]/[or] [that _____** *<insert name of decedent>* **had committed (_____***<insert forcible and atrocious crime>*/_____**<***insert crime decedent was suspected of committing, e.g.,* **burglary>, and that crime threatened the defendant or others with death or great bodily injury~~serious bodily harm~~].** *<See Bench Note discussing this element.>*

A person has *probable cause* to believe that someone poses a threat of death or ~~serious bodily harm~~great bodily injury when facts known to the person would persuade someone of reasonable caution that the other person is going to cause death or ~~serious bodily harm~~great bodily injury to another.

[An officer or employee of _____ *<insert name of state or local government agency that employs public officer>* **is a *public officer*.]**

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 [attempted] killing was not justified. If the People have not met this burden, you must find the defendant not guilty of [attempted] (murder/ [or] manslaughter).

New January 2006; Revised April 2011

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on justifiable homicide when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [addressing sua sponte duty to instruct on self-defense].)

In element 2, select the phrase appropriate for the facts of the case.

It is unclear whether the officer must always have probable cause to believe that the victim poses a threat of future harm or if it is sufficient if the officer has probable cause to believe that the victim committed a forcible and atrocious crime. In *Tennessee v. Garner* (1985) 471 U.S. 1, 3, 11 [105 S.Ct. 1694, 85 L.Ed.2d 1], the Supreme Court held that, under the Fourth Amendment, deadly force may not be used to prevent the escape of an apparently unarmed suspected felon unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. "*Garner* necessarily limits the scope of justification for homicide under section 197, subdivision 4, and other similar statutes from the date of that decision." (*People v. Martin* (1985) 168 Cal.App.3d 1111, 1124 [214 Cal.Rptr. 873].) In a footnote, *Garner*, *supra*, 471 U.S. 1, 16, fn. 15, noted that California law permits a killing in either situation, that is, when the suspect has committed an atrocious crime or when the suspect poses a threat of future harm. (See also *Long Beach Police Officers Assn v. City of Long Beach* (1976) 61 Cal.App.3d 364, 371-375 [132 Cal.Rptr. 348] [also stating the rule as "either" but quoting police regulations, which require that the officer always believe there is a risk of future harm.]) The committee has provided both options, but see *People v. Ceballos* (1974) 12 Cal.3d 470, 478-479 [116 Cal.Rptr. 233, 526 P.2d 241]. The court should review relevant case law before giving the bracketed language.

As with a peace officer, the jury must determine whether the defendant was a public 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 in the appropriate definition of "public officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are public officers"). *(Ibid.)* However, the court may not instruct the jury that the defendant was a public officer as a matter of law (e.g., "Officer Reed was a public officer"). *(Ibid.)*

Related Instructions
CALCRIM No. 508, *Justifiable Homicide: Citizen Arrest (Non-Peace Officer).*

CALCRIM No. 509, *Justifiable Homicide: Non-Peace Officer Preserving the Peace.*

AUTHORITY

- Justifiable Homicide by Public Officer ▸ Pen. Code, §§ 196, 199.
- Burden of Proof ▸ Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217]; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Public Officer ▸ See Pen. Code, §§ 831(a) [custodial officer], 831.4 [sheriff's or police security officer], 831.5 [custodial officer], 831.6 [transportation officer], 3089 [county parole officer]; *In re Frederick B.* (1987) 192 Cal.App.3d 79, 89–90 [237 Cal.Rptr. 338], disapproved on other grounds in *In re Randy G.* (2001) 26 Cal.4th 556, 567 fn. 2 [110 Cal.Rptr.2d 516, 28 P.3d 239] ["public officers" is broader category than "peace officers"]; see also Pen. Code, § 836.5(a) [authority to arrest without warrant].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 82, 85, 243.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.15[1], [2] (Matthew Bender).

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

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

RELATED ISSUES

Killing Committed in Obedience to Judgment
A homicide is also justifiable when committed by a public officer "in obedience to any judgment of a competent court." (Pen. Code, § 196, subd. 1.) There are no reported cases construing this subdivision. This provision appears to apply exclusively to lawful executions.

508. Justifiable Homicide: Citizen Arrest (Non-Peace Officer)

The defendant is not guilty of (murder/ [or] manslaughter/attempted murder/ [or] attempted voluntary manslaughter) if (he/she) (killed/attempted to kill) someone while trying to arrest him or her for a violent felony. Such (a/an) [attempted] killing is justified, and therefore not unlawful, if:

1. **The defendant committed the [attempted] killing while lawfully trying to arrest or detain _____** *<insert name of decedent>* **for committing (the crime of _____***<insert forcible and atrocious crime, i.e.,* **felony that threatened death or ~~serious bodily harm~~great bodily injury***>/_____<insert crime decedent was suspected of committing, e.g.,* **burglary***>***, and that crime threatened the defendant or others with death or ~~serious bodily harm~~great bodily injury);**

2. **_____** *<insert name of decedent>* **actually committed (the crime of _____***<insert forcible and atrocious crime, i.e., felony that threatened death or ~~serious bodily harm~~great bodily injury>/_____<insert crime decedent was suspected of committing, e.g.,* **burglary***>* **, and that crime threatened the defendant or others with death or ~~serious bodily harm~~great bodily injury);**

3. **The defendant *had reason to believe* that _____** *<insert name of decedent>* **had committed (the crime of _____***<insert forcible and atrocious crime, i.e., felony that threatened death or ~~serious bodily harm~~great bodily injury>/_____<insert crime decedent was suspected of committing, e.g.,* **burglary***>* **, and that crime threatened the defendant or others with death or ~~serious bodily harm~~great bodily injury);**

[4. The defendant *had reason to believe* that _____ ***<ins****ert name of decedent>* **posed a threat of death or ~~serious bodily harm~~great bodily injury, either to the defendant or to others];**

AND

5. **The [attempted] killing was necessary to prevent _____*'s*** *<insert name of dece****den****t>* **escape.**

A person has *reason to believe* that someone [poses a threat of death or great bodily injury~~serious bodily harm~~ or] committed (the crime of

_____<*insert forcible and atrocious crime, i.e., felony that threatened death or ~~serious bodily harm~~great bodily injury*>/_____<*insert crime decedent was suspected of committing, e.g., burglary*> **, and that crime threatened the defendant or others with death or ~~serious bodily harm~~great bodily injury) when facts known to the person would persuade someone of reasonable caution to have (that/those) belief[s].**

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 [attempted] killing was not justified. If the People have not met this burden, you must find the defendant not guilty of [attempted] (murder/ [or] manslaughter).

New January 2006; Revised April 2011

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on justifiable homicide when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [addressing sua sponte duty to instruct on self-defense].)

It is unclear whether the defendant must always have probable cause to believe that the victim poses a threat of future harm or if it is sufficient if the defendant knows that the victim committed a forcible and atrocious crime. In *Tennessee v. Garner* (1985) 471 U.S. 1, 3, 11 [105 S.Ct. 1694, 85 L.Ed.2d 1], the Supreme Court held that, under the Fourth Amendment, deadly force may not be used by a law enforcement officer to prevent the escape of an apparently unarmed suspected felon unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. "*Garner* necessarily limits the scope of justification for homicide under section 197, subdivision 4, and other similar statutes from the date of that decision." (*People v. Martin* (1985) 168 Cal.App.3d 1111, 1124 [214 Cal.Rptr. 873].) In a footnote, *Garner*, *supra*, 471 U.S. 1, 16, fn. 15, noted that California law permits a killing in either situation, that is either when the suspect has committed an atrocious crime or when the suspect poses a threat of future harm. (See also *Long Beach Police Officers Assn v. City of Long Beach* (1976) 61 Cal.App.3d 364, 371–375 [132 Cal.Rptr. 348] [also stating the rule as "either" but

quoting police regulations, which require that the officer always believe there is a risk of future harm].) The committee has provided both options. See *People v. Ceballos* (1974) 12 Cal.3d 470, 478-479 [116 Cal.Rptr. 233, 526 P.2d 241]. The court should review relevant case law before giving bracketed element 4.

Related Instructions
CALCRIM No. 507, *Justifiable Homicide: By Public Officer*.

CALCRIM No. 509, *Justifiable Homicide: Non-Peace Officer Preserving the Peace*.

AUTHORITY

- Justifiable Homicide to Preserve the Peace ▸ Pen. Code, §§ 197, subd. 4, 199.
- Lawful Resistance to Commission of Offense ▸ Pen. Code, §§ 692–694.
- Private Persons, Authority to Arrest ▸ Pen. Code, § 837.
- Burden of Proof ▸ Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217].
- Felony Must Threaten Death or Great Bodily Injury ▸ *People v. Piorkowski* (1974) 41 Cal.App.3d 324, 328–329 [115 Cal.Rptr. 830].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 80–86

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.15[1], [3] (Matthew Bender).

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

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

RELATED ISSUES

Felony Must Actually Be Committed

A private citizen may use deadly force to apprehend a fleeing felon only if the suspect in fact committed the felony and the person using deadly force had reasonable cause to believe so. (*People v. Lillard* (1912) 18 Cal.App. 343, 345 [123 P. 221].)

Felony Committed Must Threaten Death or Great Bodily Injury

Deadly force is permissible to apprehend a felon if "the felony committed is one which threatens death or great bodily injury. . . ." (*People v. Piorkowski* (1974) 41 Cal.App.3d 324, 328–329 [115 Cal.Rptr. 830]).

604. Attempted Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense (Pen. Code, §§ 21a, 192, 664)

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

1. **The defendant took at least one direct but ineffective step toward killing a person.**

2. **The defendant intended to kill when (he/she) acted.**

3. **The defendant 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

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

BUT

5. **At least one of the defendant's beliefs was unreasonable.**

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

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have actually believed there was imminent danger of death or great bodily injury ~~violence~~ to (himself/herself/ [or] someone else).

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

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

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

The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of attempted murder.

New January 2006; Revised August 2009, October 2010

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on attempted 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. (See *People v. Breverman* (1998) 19 Cal.4th 142, 153–163 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [discussing charge of completed murder]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531] [same].)

Perfect Self-Defense

Most courts hold that an instruction on imperfect self-defense **is required** in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant's belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. (See *People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86 [31 Cal.Rptr.2d 475], overruled in part in *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675]; see also *People v. De Leon* (1992) 10 Cal.App.4th 815, 824 [12 Cal.Rptr.2d 825].) The court in *People v. Rodriguez* disagreed, however, and found that an imperfect self-

defense instruction was not required sua sponte on the facts of the case where the defendant's version of the crime "could only lead to an acquittal based on justifiable homicide," and when the prosecutor's version of the crime could only lead to a conviction of first degree murder. (*People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1275 [62 Cal.Rptr.2d 345]; see also *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961] [in a rape prosecution, the court was not required to give a mistake-of-fact instruction where the two sides gave wholly divergent accounts with no middle ground to support a mistake-of-fact instruction].)

In evaluating whether the defendant actually believed in the need for self-defense, the jury may consider the effect of antecedent threats and assaults against the defendant, including threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1069 [56 Cal.Rptr.2d 133, 920 P.2d 1337].) If there is sufficient evidence, the court should give the bracketed paragraphs on prior threats or assaults on request.

Related Instructions
CALCRIM Nos. 3470–3477, *Defense instructions.*

CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense*.

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

AUTHORITY

- Attempt Defined ▸ Pen. Code, §§ 21a, 664.
- Manslaughter Defined ▸ Pen. Code, § 192.
- Attempted Voluntary Manslaughter ▸ *People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824–825 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].
- Imperfect Self-Defense Defined ▸ *People v. Flannel* (1979) 25 Cal.3d 668, 680–683 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531]; *In re Christian S.* (1994) 7 Cal.4th 768, 773 [30 Cal.Rptr.2d 33, 872 P.2d 574]; see *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197–198 [272 Cal.Rptr. 693] [insufficient evidence to support defense of another person].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 208.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt,* §§ 141.20[2], 141.21; Ch. 142, *Crimes Against the Person,* §§ 142.01[3][e], 142.02[2][a] (Matthew Bender).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 603, *Attempted Voluntary Manslaughter: Heat of Passion—Lesser Included Offense* and CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense*.

605–619. Reserved for Future Use

2514. Possession of Firearm by Person Prohibited by Statute: Self–Defense

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The defendant is not guilty of unlawful possession of a firearm[, as charged in Count __,] if (he/she) temporarily possessed the firearm in (self-defense/ [or] defense of another). The defendant possessed the firearm in lawful (self-defense/ [or] defense of another) if:

1. **The defendant reasonably believed that (he/she/someone else/_____ <*insert name of third party*>) was in imminent danger of suffering ~~significant or substantial physical injury~~great bodily injury;**

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

3. **A firearm became available to the defendant without planning or preparation on (his/her) part;**

4. **The defendant possessed the firearm temporarily, that is, for a period no longer than was necessary [or reasonably appeared to have been necessary] for self-defense;**

5. **No other means of avoiding the danger of injury was available;**

AND

6. **The defendant's use of the firearm was reasonable under the circumstances.**

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of ~~violence~~ great bodily injury to (himself/herself/ [or] someone else). Defendant's belief must have been reasonable and (he/she) must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful (self-defense/ [or] defense of another).

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and

consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

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

[The defendant's belief that (he/she/someone else) was threatened may be reasonable even if (he/she) relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.]

[If you find that _____ *<insert name of person who allegedly threatened defendant>* **threatened or harmed the defendant [or others] in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]**

[If you find that the defendant knew that _____ *<insert name of person who allegedly threatened defendant>* **had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]**

[Someone who has been threatened or harmed by a person in the past, is justified in acting more quickly or taking greater self-defense measures against that person.]

[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with _____ *<insert name of person who was the alleged source of the threat>***, you may consider that threat in deciding whether the defendant was justified in acting in (self-defense/ [or] defense of another).]**

The People have the burden of proving beyond a reasonable doubt that the defendant did not temporarily possess the firearm in (self-defense/ [or] defense of another). If the People have not met this burden, you must find the defendant not guilty of this crime.

New January 2006; Revised December 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on self-defense when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (See *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [249 Cal.Rptr. 897] [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses]; *People v. King* (1978) 22 Cal.3d 12, 24 [148 Cal.Rptr. 409, 582 P.2d 1000] [self-defense applies to charge under Pen. Code, § 12021].)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of "antecedent threats or assaults against the defendant on the reasonableness of defendant's conduct." (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488 [1 Cal.Rptr.3d 774].) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475 [198 Cal.Rptr. 819]; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068 [56 Cal.Rptr.2d 133, 920 P.2d 1337]; see also CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.) If these instructions have already been given in CALCRIM No. 3470 or CALCRIM No. 505, the court may delete them here.

Related Instructions

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

AUTHORITY

- Temporary Possession of Firearm by Felon in Self-Defense ▸ *People v. King* (1978) 22 Cal.3d 12, 24 [148 Cal.Rptr. 409, 582 P.2d 1000].
- Duty to Retreat Limited to Felon in Possession Cases ▸ *People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1343–1346 [29 Cal.Rptr.3d 226].
- Possession Must Be Brief and Not Planned ▸ *People v. McClindon* (1980) 114 Cal.App.3d 336, 340 [170 Cal.Rptr. 492].

- Instructional Requirements ‣ *People v. Moody* (1943) 62 Cal.App.2d 18 [143 P.2d 978]; *People v. Myers* (1998) 61 Cal.App.4th 328, 335, 336 [71 Cal.Rptr.2d 518].
- Lawful Resistance ‣ Pen. Code, §§ 692, 693, 694; Civ. Code, § 50.
- Burden of Proof ‣ Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements ‣ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Imminence ‣ *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167], disapproved on other grounds by *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088–1089 [56 Cal.Rptr.2d 142, 921 P.2d 1].
- Reasonable Belief ‣ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1]; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 65, 66, 69, 70.

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 175.

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

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction,* § 93.06 (Matthew Bender).

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

2515–2519. Reserved for Future Use

3470. Right to Self-Defense or Defense of Another (Non-Homicide)

Self-defense is a defense to _____<*insert list of pertinent crimes charged*>. **The defendant is not guilty of (that/those crime[s]) if (he/she) used force against the other person in lawful (self-defense/ [or] defense of another). The defendant acted in lawful (self-defense/ [or] defense of another) if:**

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

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

AND

3. **The defendant used no more force than was reasonably necessary to defend against that danger.**

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of bodily injury to (himself/herself/ [or] someone else)/[or] an imminent danger that (he/she/[or] someone else would be touched unlawfully). Defendant's belief must have been reasonable and (he/she) must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful (self-defense/ [or] defense of another).

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

[The defendant's belief that (he/she/ [or] someone else) was threatened may be reasonable even if (he/she) relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.]

[If you find that _____ <*insert name of victim*> threatened or harmed the defendant [or others] in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

[If you find that the defendant knew that _____ <*insert name of victim*> had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

[Someone who has been threatened or harmed by a person in the past is justified in acting more quickly or taking greater self-defense measures against that person.]

[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with _____<*insert name of victim*>, you may consider that threat in deciding whether the defendant was justified in acting in (self-defense/ [or] defense of another).]

[A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of (death/bodily injury/_____ <*insert crime*>) has passed. This is so even if safety could have been achieved by retreating.]

The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful (self-defense/ [or] defense of another). If the People have not met this burden, you must find the defendant not guilty of _____ <*insert crime(s) charged*>.

New January 2006; Revised June 2007, April 2008, August 2009

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case.

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should

ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389–390 [88 Cal.Rptr.2d 111]; *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982–983 [38 Cal.Rptr.3d 624, 127 P.3d 40].)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of "antecedent threats and assaults against the defendant on the reasonableness of defendant's conduct." (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488 [1 Cal.Rptr.3d 774].) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475 [198 Cal.Rptr. 819]; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068 [56 Cal.Rptr.2d 133, 920 P.2d 1337]; see also CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.)

Related Instructions
CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.
CALCRIM Nos. 3471–3477, Defense Instructions: Defense of Self, Another, Property.
CALCRIM No. 851, *Testimony on Intimate Partner Battering and Its Effects: Offered by the Defense*.
CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute: Self–Defense*.

AUTHORITY

- Instructional Requirements ▸ *People v. Moody* (1943) 62 Cal.App.2d 18 [143 P.2d 978]; *People v. Myers* (1998) 61 Cal.App.4th 328, 335, 336 [71 Cal.Rptr.2d 518].
- Lawful Resistance ▸ Pen. Code, §§ 692, 693, 694; Civ. Code, § 50; see also *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518].
- Burden of Proof ▸ Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384 [137 Cal.Rptr. 652].
- Elements ▸ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1].

- Imminence ‣ *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [264 Cal.Rptr. 167] (overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [56 Cal.Rptr.2d 142, 921 P.2d 1]).
- No Duty to Retreat ‣ *People v. Hughes* (1951) 107 Cal.App.2d 487, 494 [237 P.2d 64]; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22 [132 P.2d 51].
- Temporary Possession of Firearm by Felon in Self-Defense ‣ *People v. King* (1978) 22 Cal.3d 12, 24 [148 Cal.Rptr. 409, 582 P.2d 1000].
- Duty to Retreat Limited to Felon in Possession Cases ‣ *People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1343–1346 [29 Cal.Rptr.3d 226].
- Inmate Self-Defense ‣ *People v. Saavedra* (2007) 156 Cal.App.4th 561 [67 Cal.Rptr.3d 403].
- Reasonable Belief ‣ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1]; *People v. Clark* (1982) 130 Cal.App.3d 371, 377 [181 Cal.Rptr. 682].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 65, 66, 69, 70.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.11, 73.12 (Matthew Bender).

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

RELATED ISSUES

Brandishing Weapon in Defense of Another
The defense of others is a defense to a charge of brandishing a weapon under Penal Code section 417(a)(2). (*People v. Kirk* (1986) 192 Cal.App.3d Supp. 15, 19 [238 Cal.Rptr. 42].)

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.)

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

766. Death Penalty: Weighing Process

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

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

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

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

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

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

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

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

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

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury on the weighing process in a capital case. (*People v. Brown* (1985) 40 Cal.3d 512, 544 [230 Cal.Rptr. 834, 726 P.2d 516]; *People v. Benson* (1990) 52 Cal.3d 754, 799 [276 Cal.Rptr. 827, 802 P.2d 330].)

Following this instruction, the court **must give** CA~~I~~LCRIM No. 3550, *Pre-Deliberation Instructions*, explaining how to proceed in deliberations.

On request, give the bracketed sentence that begins with "In making your decision about penalty." (*People v. Kipp* (1988) 18 Cal.4th 349, 378–379 [75 Cal.Rptr.2d 716, 956 P.2d 1169].)

Give CALCRIM No. 767, *Response to Juror Inquiry During Deliberations About Commutation of Sentence in Death Penalty Case*, if there is an inquiry from jurors or at the request of the defendant.

AUTHORITY

- Death Penalty Statute ▸ Pen. Code, § 190.3.
- Error to Instruct "Shall Impose Death" ▸ *People v. Brown* (1985) 40 Cal.3d 512, 544 [230 Cal.Rptr. 834, 726 P.2d 516].
- Must Instruct on Weighing Process ▸ *People v. Brown* (1985) 40 Cal.3d 512, 544 [230 Cal.Rptr. 834, 726 P.2d 516]; *People v. Benson* (1990) 52 Cal.3d 754, 799 [276 Cal.Rptr. 827, 802 P.2d 330]; *People v. Duncan* (1991) 53 Cal.3d 955, 977–979 [281 Cal.Rptr. 273, 810 P.2d 131].
- Aggravating Factors "So Substantial in Comparison to" Mitigating ▸ *People v. Duncan* (1991) 53 Cal.3d 955, 977–979 [281 Cal.Rptr. 273, 810 P.2d 131].
- Error to Instruct on Commutation ▸ *People v. Ramos* (1982) 37 Cal.3d 136, 159 [207 Cal.Rptr. 800, 689 P.2d 430].
- This Instruction Approved in Dicta ▸ *People v. Murtishaw* (2011) 51 Cal.4th 574, 588-589 [247 P.3d 941, 121 Cal.Rptr.3d 586].

- Responding to Juror Inquiry re Commutation of Sentence ‣ *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 204-207 [112 Cal.Rptr.3d 746, 235 P.3d 62].

Secondary Sources

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

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty*, §§ 87.23[2], 87.24[1] (Matthew Bender).

RELATED ISSUES

No Presumption of Life and No Reasonable Doubt Standard

The court is not required to instruct the jury that there is a presumption in favor of a life sentence; that the aggravating factors (other than prior crimes) must be found beyond a reasonable doubt; or that the jury must find beyond a reasonable doubt that the aggravating factors substantially outweigh the mitigating factors. (*People v. Benson* (1990) 52 Cal.3d 754, 800 [276 Cal.Rptr. 827, 802 P.2d 330]; *People v. Miranda* (1987) 44 Cal.3d 57, 107 [241 Cal.Rptr. 594, 744 P.2d 1127]; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777–779 [230 Cal.Rptr. 667, 726 P.2d 113].)

Unanimity on Factors Not Required

The court is not required to instruct the jury that they must unanimously agree on any aggravating circumstance. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 777–779 [230 Cal.Rtpr. 667, 726 P.2d 113].)

Commutation Power

~~It is error for the court to instruct on the Governor's commutation power unless specifically requested by the defense. (*People v. Ramos* (1982) 37 Cal.3d 136, 159 [207 Cal.Rptr. 800, 689 P.2d 430].) If the jury inquires about commutation, the court may inform the jury that the Governor has the power to commute either sentence, but the jury may not consider this in reaching its decision. (*Id*. at 159, fn. 12; see 3 Witkin & Epstein, Califronia Criminal Law (3d ed. 2000) Punishment, § 496 [collecting cases in which court required to respond to inquiries from jury regarding commutation].)~~ The court must not state or imply to the jury that the ultimate authority for selecting the sentence to be imposed lies elsewhere. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328–329 [105 S.Ct. 2633, 86 L.Ed.2d 231].)

Deadlock—No Duty to Inform Jury Not Required to Return Verdict

"[W]here, as here, there is no jury deadlock, a court is not required to instruct the jury that it has the choice not to deliver any verdict." (*People v. Miranda* (1987) 44 Cal.3d 57, 105 [241 Cal.Rptr. 594, 744 P.2d 1127].)

Deadlock—Questions From the Jury About What Will Happen

If the jury inquires about what will happen in the event of a deadlock, the court should instruct jurors: "[T]hat subject is not for the jury to consider or to concern itself with. You must make every effort to reach [a] unanimous decision if at all possible." *People v. Vigil*, 51 Cal. 4th 1210, 1280, 253 P.3d 553, ___ Cal.Rptr. ___, citing *People v. Thomas* (1992) 2 Cal.4th 489, 828 P.2d 101, 7 Cal.Rptr.2d 199.~~refuse to answer. (*People v. Bell* (1989) 49 Cal.3d 502, 553 [262 Cal.Rptr. 1, 778 P.2d 129].)~~

No Duty to Instruct Not to Consider Deterrence or Costs

"Questions of deterrence or cost in carrying out a capital sentence are for the Legislature, not for the jury considering a particular case." (*People v. Benson* (1990) 52 Cal.3d 754, 807 [276 Cal.Rptr. 827, 802 P.2d 330] [citation and internal quotation marks omitted].) Where "[t]he issue of deterrence or cost [is] not raised at trial, either expressly or by implication," the court need not instruct the jury to disregard these matters. *(Ibid.)*

767–774. Reserved for Future Use

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

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

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

1. **The defendant committed an act of sodomy with another person;**

2. **The other person did not consent to the act;**

AND

3. **The defendant accomplished the act:**

<Alternative 3A—force or fear>
[by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to another person.]

<Alternative 3B—future threats of bodily harm>
[by threatening to retaliate against someone when there was a reasonable possibility that the defendant would carry out the threat. A *threat to retaliate* is a threat to kidnap, unlawfully restrain or confine, or inflict extreme pain, serious bodily injury, or death.]

<Alternative 3C—threat of official action>
[by threatening to use the authority of a public office to incarcerate, arrest, or deport someone. A *public official* is a person employed by a government agency who has authority to incarcerate, arrest, or deport. The other person must have reasonably believed that the defendant was a public official even if (he/she) was not.]

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

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

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

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

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

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

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

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

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

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

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

New January 2006; Revised August 2006

BENCH NOTES

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

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

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

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

Defenses—Instructional Duty

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

AUTHORITY

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

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 25, 26, 28.

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

COMMENTARY

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

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

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

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

> Nor is there anything in the common usage definitions of the term "force," or in the express statutory language of section 261 itself, that suggests force in a forcible rape prosecution actually means force "*substantially* different from or *substantially* greater than" the physical force normally inherent in an act of consensual sexual intercourse. (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582].) To the contrary, it has long been recognized that "in order to establish force within the meaning of section 261, [former] subdivision (2), the prosecution need only show the defendant used

> physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim]." (*People v. Young* (1987) 190 Cal.App.3d 248, 257–258 [235 Cal.Rptr. 361].)

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

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

LESSER INCLUDED OFFENSES

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

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

RELATED ISSUES

Consent Obtained by Fraudulent Representation

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

Consent Withdrawn

A forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly

continues despite the objection. (*In re John Z.* (2003) 29 Cal.4th 756, 760 [128 Cal.Rptr.2d 783, 60 P.3d 183].) If there is an issue whether consent to sodomy was withdrawn, see CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*, for language that may be adapted for use in this instruction.

Victim Must Be Alive

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

Penetration May Be Through Victim's Clothing

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

1151. Pandering (Pen. Code, § 266i)

The defendant is charged [in Count _____] with pandering [in violation of Penal Code section 266i].

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

<Alternative 1A—persuaded/procured>

[1. The defendant (persuaded/procured) _____ *<insert name>* **to be a prostitute(;/.)]**

< Alternative 1B—promises/threats/violence used to cause person to become prostitute>

[1. The defendant used (promises[,]/ threats[,]/ violence[,]/ [or] any device or scheme) to (cause/persuade/encourage/induce) _____ *<insert name>* **to become a prostitute(;/.)]**

<Alternative 1C—arranged/procured a position>

[1. The defendant (arranged/procured a position) for _____ *<insert name>* **to be a prostitute in either a house of prostitution or any other place where prostitution is encouraged or allowed(;/.)]**

<Alternative 1D—promises/threats/violence used to cause person to remain>

[1. The defendant used (promises[,]/ threats[,]/ violence[,]/ [or] any device or scheme) to (cause/persuade/encourage/induce) _____ *<insert name>* **to remain as a prostitute in a house of prostitution or any other place where prostitution is encouraged or allowed(;/.)]**

<Alternative 1E—used fraud>

[1. The defendant used fraud, trickery, or duress [or abused a position of confidence or authority] to (persuade/procure) _____ *<insert name>* **to (be a prostitute/enter any place where prostitution is encouraged or allowed/enter or leave California for the purpose of prostitution)(;/.)]**

<Alternative 1F—received money>

[1. The defendant (received/gave/agreed to receive/agreed to give) money or something of value in exchange for (persuading/attempting to persuade/procuring/attempting to procure) _____ *<insert name>* **to (be a prostitute/enter or leave California for the purpose of prostitution)(;/.)]**

~~*<Give element 2 when instructing on specific intent; see Bench Notes.>*~~
~~[~~**AND**~~]~~

~~[~~**2. The defendant intended to influence _____** *<insert name>* **to be a prostitute(;/.)**~~]~~

<Give element 3 when defendant charged with pandering a minor.>
[AND

3. _____ *<insert name>* **was (over the age of 16 years old/under the age of 16) at the time the defendant acted.]**

[It does not matter whether _____ *<insert name>* **was (a prostitute already/ [or] an undercover police officer).]**

A *prostitute* is a person who engages in sexual intercourse or any lewd act with someone other than the defendant in exchange for money [or other compensation]. A *lewd act* means physical contact of the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification.

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

[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 2011

BENCH NOTES

Instructional Duty

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

In element 1, give the appropriate alternative A-F depending on the evidence in the case. (See *People v. Montgomery* (1941) 47 Cal.App.2d 1, 12, 24, 27–28 [117 P.2d 437] [statutory alternatives are not mutually exclusive], disapproved on other grounds in *People v. Dillon* (19830 34 Cal.3d 441, 454 fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697] and *Murgia v. Municipal Court* (19750 15 Cal.3d 286, 301 fn. 11 [124 Cal.Rtpr. 204, 540 P.2d 44].)

~~There is a conflict in the case law about the intent required to prove pandering. (See *People v. Mathis* (1985) 173 Cal.App.3d 1251, 1256 [219 Cal.Rptr. 693] [pandering under former § 266i(b) (now § 266i(a)(2)) requires a specific intent to influence a person to become a prostitute]; but see *People v. Montgomery, supra,* 47 Cal.App.2d at p. 16 [pandering does not necessarily involve specific intent].) The trial court must decide whether to give bracketed element 2 on specific intent.~~

The committee included "persuade" and "arrange" as options in element one because the statutory language, "procure," may be difficult for jurors to understand.

Give bracketed element 3 if it is alleged that the person procured, or otherwise caused to act, by the defendant was a minor "over" or "under" the age of 16 years. (Pen. Code, § 266i(b).)

Give the bracketed paragraph defining duress on request if there is sufficient evidence that duress was used to procure a person for prostitution. (Pen. Code, § 266i(a)(5); see *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071] [definition of "duress"].)

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].)

Defenses—Instructional Duty

If necessary for the jury's understanding of the case, the court must instruct **sua sponte** on a defense theory in evidence, for example, that nude modeling does not constitute an act of prostitution and that an act of procuring a person solely for the purpose of nude modeling does not violate either the pimping or pandering statute. (*People v. Hill* (1980) 103 Cal.App.3d 525, 536–537 [163 Cal.Rptr. 99].)

AUTHORITY

- Elements ▸ Pen. Code, § 266i.
- Prostitution Defined ▸ Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535 [163 Cal.Rptr. 99]; *People v. Romo* (1962) 200 Cal.App.2d 83, 90–91 [19 Cal.Rptr. 179]; *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433] [lewd act requires touching between prostitute and customer].
- Procurement Defined ▸ *People v. Montgomery* (1941) 47 Cal.App.2d 1, 12 [117 P.2d 437], disapproved on other grounds in *People v. Dillon* (1983) 34 Cal.3d 441, 454 fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697] and *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301 fn. 11 [124 Cal.Rtpr. 204, 540 P.2d 44].
- Proof of Actual Prostitution Not Required ▸ *People v. Osuna* (1967) 251 Cal.App.2d 528, 531–532 [59 Cal.Rptr. 559].
- Duress Defined ▸ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]; *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416].
- Good Faith Belief That Minor Is 18 No Defense to Pimping and Pandering. ▸ *People v. Branch* (2010) 184 Cal.App.4th 516, 521-522 [109 Cal.Rptr.3d 412].
- Specific Intent Crime ▸ *People v. Zambia* (2011) 51 Cal.4th 965, 980.
- Victim May [Appear to] Be a Prostitute Already ▸ *People v. Zambia* (2011) 51 Cal.4th 965, 981.
- Pandering Requires Services Procured for Person Other Than Defendant ▸ *People v. Dixon* (2011) 191 Cal.App.4th 1154, 1159-1160.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 70–78.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.11[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Pandering ▸ Pen. Code, §§ 664, 266i; *People v. Charles* (1963) 218 Cal.App.2d 812, 819 [32 Cal.Rptr. 653]; *People v. Benenato* (1946) 77 Cal.App.2d 350, 366–367 [175 P.2d 296], disapproved on other grounds in *In re Wright* (1967) 65 Cal.2d 650, 654–655, fn. 3 [56 Cal.Rptr. 110, 422 P.2d

998].

There is no crime of aiding and abetting prostitution. (*People v. Gibson* (2001) 90 Cal.App.4th 371, 385 [108 Cal.Rptr.2d 809].)

RELATED ISSUES

See Related Issues section to CALCRIM No. 1150, *Pimping.*

1700. Burglary (Pen. Code, § 459)

The defendant is charged [in Count __] with burglary [in violation of Penal Code section 459].

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

1. **The defendant entered (a/an) (building/room within a building/locked vehicle/_____** <*insert other statutory target*>**);**

AND

2. **When (he/she) entered (a/an) (building/room within the building/locked vehicle/_____** <*insert other statutory target*>**), (he/she) intended to commit (theft/ [or] _____** <*insert one or more felonies*>**.**

To decide whether the defendant intended to commit (theft/ [or]_____ <*insert one or more felonies*>**), please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].**

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

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

A burglary was committed if the defendant entered with the intent to commit (theft/ [or] _____ <*insert one or more felonies*>**. The defendant does not need to have actually committed (theft/ [or] _____** <*insert one or more felonies*>**) as long as (he/she) entered with the intent to do so. [The People do not have to prove that the defendant actually committed (theft/ [or] _____** <*insert one or more felonies*>**).]**

[Under the law of burglary, a person *enters a building* if some part of his or her body [or some object under his or her control] penetrates the area inside the building's outer boundary.]

[A building's *outer boundary* includes the area inside a window screen.]

[The People allege that the defendant intended to commit (theft/ [or] _____ <*insert one or more felonies*>). You may not find the defendant guilty of burglary unless you all agree that (he/she) intended to commit one of those crimes at the time of the entry. You do not all have to agree on which one of those crimes (he/she) intended.]

New January 2006; Revised October 2010

BENCH NOTES

Instructional Duty

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

If second degree burglary is the only possible degree of burglary that the jury may return as their verdict, do not give CALCRIM No. 1701, *Burglary: Degrees.*

Although actual commission of the underlying theft or felony is not an element of burglary (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041–1042 [31 Cal.Rptr.2d 128, 874 P.2d 903]), the court has a **sua sponte** duty to instruct that the defendant must have intended to commit a felony and has a **sua sponte** duty to define the elements of the underlying felony. (*People v. Smith* (1978) 78 Cal.App.3d 698, 706 [144 Cal.Rptr. 330]; see also *People v. Hughes* (2002) 27 Cal.4th 287, 349 [116 Cal.Rptr.2d 401, 39 P.3d 432].) Give all appropriate instructions on theft or the felony alleged.

If the area alleged to have been entered is something other than a building or locked vehicle, insert the appropriate statutory target in the blanks in elements 1 and 2. Penal Code section 459 specifies the structures and places that may be the targets of burglary. The list includes a house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, floating home as defined in Health and Safety Code section 18075.55(d), railroad car, locked or sealed cargo container whether or not mounted on a vehicle, trailer coach as defined in Vehicle Code section 635, house car as defined in Vehicle Code section 362, inhabited camper as defined in Vehicle Code section 243, locked vehicle as defined by the Vehicle Code, aircraft as defined in Public Utilities Code section 21012, or mine or any underground portion thereof. (See Pen. Code, § 459.)

On request, give the bracketed paragraph that begins with "Under the law of burglary," if there is evidence that only a portion of the defendant's body, or an

instrument, tool, or other object under his or control, entered the building. (See *People v. Valencia* (2002) 28 Cal.4th 1, 7–8 [120 Cal.Rptr.2d 131, 46 P.3d 920]; *People v. Davis* (1998) 18 Cal.4th 712, 717–722 [76 Cal.Rptr.2d 770, 958 P.2d 1083].)

On request, give the bracketed sentence defining "outer boundary" if there is evidence that the outer boundary of a building for purposes of burglary was a window screen. (See *People v. Valencia* (2002) 28 Cal.4th 1, 12–13 [120 Cal.Rptr.2d 131, 46 P.3d 920].)

If multiple underlying felonies are charged, give the bracketed paragraph that begins with "The People allege that the defendant intended to commit either." (*People v. Failla* (1966) 64 Cal.2d 560, 569 [51 Cal.Rptr. 103, 414 P.2d 39]; *People v. Griffin* (2001) 90 Cal.App.4th 741, 750 [109 Cal.Rptr.2d 273].)

If the defendant is charged with first degree burglary, give CALCRIM No. 1701, *Burglary: Degrees*.

AUTHORITY

- Elements ▸ Pen. Code, § 459.
- Instructional Requirements ▸ *People v. Failla* (1966) 64 Cal.2d 560, 564, 568–569 [51 Cal.Rptr. 103, 414 P.2d 39]; *People v. Smith* (1978) 78 Cal.App.3d 698, 706–711 [144 Cal.Rptr. 330]; *People v. Montoya* (1994) 7 Cal.4th 1027, 1041–1042 [31 Cal.Rptr.2d 128, 874 P.2d 903].
- Burden for Consent Defense Is to Raise Reasonable Doubt ▸ *People v. Sherow* (2011) 196 Cal.App.4th 1296, 1308-1309 [128 Cal.Rptr.3d 255].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 113, 115.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.10 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Burglary ▸ Pen. Code, §§ 663, 459.
- Tampering With a Vehicle ▸ Veh. Code, § 10852; *People v. Mooney* (1983) 145 Cal.App.3d 502, 504–507 [193 Cal.Rptr. 381] [if burglary of automobile charged].

RELATED ISSUES

Auto Burglary–Entry of Locked Vehicle

Under Penal Code section 459, forced entry of a locked vehicle constitutes burglary. (*People v. Young K.* (1996) 49 Cal.App.4th 861, 863 [57 Cal.Rptr.2d 12].) However, there must be evidence of forced entry. (See *People v. Woods* (1980) 112 Cal.App.3d 226, 228–231 [169 Cal.Rptr. 179] [if entry occurs through window deliberately left open, some evidence of forced entry must exist for burglary conviction]; *People v. Malcolm* (1975) 47 Cal.App.3d 217, 220–223 [120 Cal.Rptr. 667] [pushing open broken wing lock on window, reaching one's arm inside vehicle, and unlocking car door evidence of forced entry].) Opening an unlocked passenger door and lifting a trunk latch to gain access to the trunk is not an auto burglary. (*People v. Allen* (2001) 86 Cal.App.4th 909, 917–918 [103 Cal.Rptr.2d 626].)

Auto Burglary–Definition of Locked

To lock, for purposes of auto burglary, is "to make fast by interlinking or interlacing of parts … [such that] some force [is] required to break the seal to permit entry . . . ." (*In re Lamont R.* (1988) 200 Cal.App.3d 244, 247 [245 Cal.Rptr. 870], quoting *People v. Massie* (1966) 241 Cal.App.2d 812, 817 [51 Cal.Rptr. 18] [vehicle was not locked where chains were wrapped around the doors and hooked together]; compare *People v. Malcolm* (1975) 47 Cal.App.3d 217, 220–223 [120 Cal.Rptr. 667] [vehicle with locked doors but broken wing lock that prevented window from being locked, was for all intents and purposes a locked vehicle].)

Auto Burglary–Intent to Steal

Breaking into a locked car with the intent to steal the vehicle constitutes auto burglary. (*People v. Teamer* (1993) 20 Cal.App.4th 1454, 1457–1461 [25 Cal.Rptr.2d 296]; see also *People v. Blalock* (1971) 20 Cal.App.3d 1078, 1082 [98 Cal.Rptr. 231] [auto burglary includes entry into locked trunk of vehicle].) However, breaking into the headlamp housings of an automobile with the intent to steal the headlamps is not auto burglary. (*People v. Young K.* (1996) 49 Cal.App.4th 861, 864 [57 Cal.Rptr.2d 12] [stealing headlamps, windshield wipers, or hubcaps are thefts, or attempted thefts, auto tampering, or acts of vandalism, not burglaries].)

Building

A building has been defined for purposes of burglary as "any structure which has walls on all sides and is covered by a roof." (*In re Amber S.* (1995) 33 Cal.App.4th 185, 187 [39 Cal.Rptr.2d 672].) Courts have construed "building" broadly and found the following structures sufficient for purposes of burglary: a telephone booth, a popcorn stand on wheels, a powder magazine dug out of a hillside, a wire chicken coop, and a loading dock constructed of chain link fence. (*People v. Brooks* (1982) 133 Cal.App.3d 200, 204–205 [183 Cal.Rptr. 773].) However, the

definition of building is not without limits and courts have focused on "whether the nature of a structure's composition is such that a reasonable person would expect some protection from unauthorized intrusions." (*In re Amber S.* (1995) 33 Cal.App.4th 185, 187 [39 Cal.Rptr.2d 672] [open pole barn is not a building]; see *People v. Knight* (1988) 204 Cal.App.3d 1420, 1423–1424 [252 Cal.Rptr. 17] [electric company's "gang box," a container large enough to hold people, is not a building; such property is protected by Penal Code sections governing theft].)

Outer Boundary

A building's outer boundary includes any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization. Under this test, a window screen is part of the outer boundary of a building for purposes of burglary. (*People v. Valencia* (2002) 28 Cal.4th 1, 12–13 [120 Cal.Rptr.2d 131, 46 P.3d 920].) Whether penetration into an area behind a window screen amounts to an entry of a building within the meaning of the burglary statute is a question of law. The instructions must resolve such a legal issue for the jury. (*Id.* at p. 16.)

Attached Residential Balconies

An attached residential balcony is part of an inhabited dwelling. (*People v. Jackson* (2010) 190 Cal.App.4th 918 [924-925, 118 Cal.Rptr.3d 623] [balcony was "functionally interconnected to and immediately contiguous to . . . [part of] the apartment . . . used for 'residential activities.'], but see dictum in *People v. Valencia* (2002) 28 Cal.4th 1, 11, fn. 5 that an "unenclosed balcony" is not a structure satisfying the "reasonable belief test."])

Theft

Any one of the different theories of theft will satisfy the larcenous intent required for burglary. (*People v. Dingle* (1985) 174 Cal.App.3d 21, 29–30 [219 Cal.Rptr. 707] [entry into building to use person's telephone fraudulently]; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 30–31 [46 Cal.Rptr.2d 840].)

Burglarizing One's Own Home—Possessory Interest

A person cannot burglarize his or her own home as long as he or she has an unconditional possessory right of entry. (*People v. Gauze* (1975) 15 Cal.3d 709, 714 [125 Cal.Rptr. 773, 542 P.2d 1365].) However, a family member who has moved out of the family home commits burglary if he or she makes an unauthorized entry with a felonious intent, since he or she has no claim of a right to enter that residence. (*In re Richard M.* (1988) 205 Cal.App.3d 7, 15–16 [252 Cal.Rptr. 36] [defendant, who lived at youth rehabilitation center, properly convicted of burglary for entering his parent's home and taking property]; *People v. Davenport* (1990) 219 Cal.App.3d 885, 889–893 [268 Cal.Rptr. 501] [defendant convicted of burglarizing cabin owned and occupied by his estranged wife and her parents]; *People v. Sears* (1965) 62 Cal.2d 737, 746 [44 Cal.Rptr. 330, 401 P.2d 938], overruled on other grounds by *People v. Cahill* (1993) 5 Cal.4th 478, 494, 510 [20 Cal.Rptr.2d 582, 853 P.2d 1037] [burglary conviction proper where

husband had moved out of family home three weeks before and had no right to enter without permission]; compare *Fortes v. Municipal Court* (1980) 113 Cal.App.3d 704, 712–714 [170 Cal.Rptr. 292] [husband had unconditional possessory interest in jointly owned home; his access to the house was not limited and strictly permissive, as in *Sears*].)

Consent

While lack of consent is not an element of burglary, consent by the owner or occupant of property may constitute a defense to burglary. (*People v. Sherow* (2011) 196 Cal.App.4th 1296, 1302 [128 Cal.Rptr.3d 255]; *People v. Felix* (1994) 23 Cal.App.4th 1385, 1397–1398 [28 Cal.Rptr.2d 860]; *People v. Superior Court (Granillo)* (1988) 205 Cal.App.3d 1478, 1485 [253 Cal.Rptr. 316] [when an undercover officer invites a potential buyer of stolen property into his warehouse of stolen goods, in order to catch would-be buyers, no burglary occurred].) The consent must be express and clear; the owner/occupant must both expressly permit the person to enter and know of the felonious or larcenous intent of the invitee. (*People v. Felix* (1994) 23 Cal.App.4th 1385, 1397–1398 [28 Cal.Rptr.2d 860].) A person who enters for a felonious purpose, however, may be found guilty of burglary even if he or she enters with the owner's or occupant's consent. (*People v. Frye* (1998) 18 Cal.4th 894, 954 [77 Cal.Rptr.2d 25, 959 P.2d 183] [no evidence of unconditional possessory right to enter].) A joint property owner/occupant cannot give consent to a third party to enter and commit a felony on the other owner/occupant. (*People v. Clayton* (1998) 65 Cal.App.4th 418, 420–423 [76 Cal.Rptr.2d 536] [husband's consent did not preclude a burglary conviction based upon defendant's entry of premises with the intent to murder wife].) The defense of consent is established when the evidence raises a reasonable doubt of consent by the owner or occupant. (*People v. Sherow* (2011) 196 Cal.App.4th 1296, 1309 [128 Cal.Rptr.3d 255]).

Entry by Instrument

When an entry is made by an instrument, a burglary occurs if the instrument passes the boundary of the building and if the entry is the type that the burglary statute intended to prohibit. (*People v. Davis* (1998) 18 Cal.4th 712, 717–722 [76 Cal.Rptr.2d 770, 958 P.2d 1083] [placing forged check in chute of walk-up window of check-cashing facility was not entry for purposes of burglary] disapproving of *People v. Ravenscroft* (1988) 198 Cal.App.3d 639, 643–644 [243 Cal.Rptr. 827] [insertion of ATM card into machine was burglary].)

Multiple Convictions

Courts have adopted different tests for multi-entry burglary cases. In *In re William S.* (1989) 208 Cal.App.3d 313, 316–318 [256 Cal.Rptr. 64], the court analogized burglary to sex crimes and adopted the following test formulated in *People v. Hammon* (1987) 191 Cal.App.3d 1084, 1099 [236 Cal.Rptr. 822] [multiple penetration case]: " '[W]hen there is a pause . . . sufficient to give defendant a reasonable opportunity to reflect upon his conduct, and the [action by the defendant] is nevertheless renewed, a new and separate crime is committed.' " (*In*

re William S., supra, 208 Cal.App.3d at p. 317.) The court in *In re William S.* adopted this test because it was concerned that under certain circumstances, allowing separate convictions for every entry could produce "absurd results." The court gave this example: where "a thief reaches into a window twice attempting, unsuccessfully, to steal the same potted geranium, he could potentially be convicted of two separate counts." (*Ibid*.) The *In re William S.* test has been called into serious doubt by *People v. Harrison* (1989) 48 Cal.3d 321, 332–334 [256 Cal.Rptr. 401, 768 P.2d 1078], which disapproved of *Hammon*. *Harrison* held that for sex crimes each penetration equals a new offense. (*People v. Harrison, supra,* 48 Cal.3d at p. 329.)

The court in *People v. Washington* (1996) 50 Cal.App.4th 568 [57 Cal.Rptr.2d 774], a burglary case, agreed with *In re William S.* to the extent that burglary is analogous to crimes of sexual penetration. Following *Harrison*, the court held that each separate entry into a building or structure with the requisite intent is a burglary even if multiple entries are made into the same building or as part of the same plan. (*People v. Washington*, *supra*, 50 Cal.App.4th at pp. 574–579; see also 2 Witkin and Epstein, Cal. Criminal Law (2d. ed. 1999 Supp.) "Multiple Entries," § 662A, p. 38.) The court further stated that any "concern about absurd results are [sic] better resolved under [Penal Code] section 654, which limits the punishment for separate offenses committed during a single transaction, than by [adopting] a rule that, in effect, creates the new crime of continuous burglary." (*People v. Washington, supra,* 50 Cal.App.4th at p. 578.)

Room

Penal Code section 459 includes "room" as one of the areas that may be entered for purposes of burglary. (Pen. Code, § 459.) An area within a building or structure is considered a room if there is some designated boundary, such as a partition or counter, separating it from the rest of the building. It is not necessary for the walls or partition to touch the ceiling of the building. (*People v. Mackabee* (1989) 214 Cal.App.3d 1250, 1257–1258 [263 Cal.Rptr. 183] [office area set off by counters was a room for purposes of burglary].) Each unit within a structure may constitute a separate "room" for which a defendant can be convicted on separate counts of burglary. (*People v. O'Keefe* (1990) 222 Cal.App.3d 517, 521 [271 Cal.Rptr. 769] [individual dormitory rooms]; *People v. Church* (1989) 215 Cal.App.3d 1151, 1159 [264 Cal.Rptr. 49] [separate business offices in same building].)

Entry into a bedroom within a single-family house with the requisite intent can support a burglary conviction if that intent was formed only after entry into the house. (*People v. Sparks* (2002) 28 Cal.4th 71, 86–87 [120 Cal.Rptr.2d 508, 47 P.3d 289] ["the unadorned word 'room' in section 459 reasonably must be given its ordinary meaning"]; see *People v. McCormack* (1991) 234 Cal.App.3d 253, 255–257 [285 Cal.Rptr. 504]; *People v. Young* (1884) 65 Cal. 225, 226 [3 P. 813].) However, entry into multiple rooms within one apartment or house cannot support multiple burglary convictions unless it is established that each room is a

separate dwelling space, whose occupant has a separate, reasonable expectation of privacy. (*People v. Richardson* (2004) 117 Cal.App.4th 570, 575 [11 Cal.Rptr.3d 802]; see also *People v. Thomas* (1991) 235 Cal.App.3d 899, 906, fn. 2 [1 Cal.Rptr.2d 434].)

Temporal or Physical Proximity—Intent to Commit the Felony

According to some cases, a burglary occurs "if the intent at the time of entry is to commit the offense in the immediate vicinity of the place entered by defendant; if the entry is made as a means of facilitating the commission of the theft or felony; and if the two places are so closely connected that intent and consummation of the crime would constitute a single and practically continuous transaction." (*People v. Wright* (1962) 206 Cal.App.2d 184, 191 [23 Cal.Rptr. 734] [defendant entered office with intent to steal tires from attached open-air shed].) This test was followed in *People v. Nance* (1972) 25 Cal.App.3d 925, 931–932 [102 Cal.Rptr. 266] [defendant entered a gas station to turn on outside pumps in order to steal gas]; *People v. Nunley* (1985) 168 Cal.App.3d 225, 230–232 [214 Cal.Rptr. 82] [defendant entered lobby of apartment building, intending to burglarize one of the units]; and *People v. Ortega* (1992) 11 Cal.App.4th 691, 695–696 [14 Cal.Rptr.2d 246] [defendant entered a home to facilitate the crime of extortion].

However, in *People v. Kwok* (1998) 63 Cal.App.4th 1236 [75 Cal.Rptr.2d 40], the court applied a less restrictive test, focusing on just the facilitation factor. A burglary is committed if the defendant enters a building in order to facilitate commission of theft or a felony. The defendant need not intend to commit the target crime in the same building or on the same occasion as the entry. (*People v. Kwok*, *supra*, 63 Cal.App.4th at pp. 1246–1248 [defendant entered building to copy a key in order to facilitate later assault on victim].) The court commented that "the 'continuous transaction test' and the 'immediate vicinity test' . . . are artifacts of the particular factual contexts of *Wright*, *Nance*, and *Nunley*." (*Id*. at p. 1247.) With regards to the *Ortega* case, the *Kwok* court noted that even though the *Ortega* court "purported to rely on the 'continuous transaction' factor of *Wright*, [the decision] rested principally on the 'facilitation' factor." (*Id*. at pp. 1247–1248.) While *Kwok* and *Ortega* dispensed with the elemental requirements of spatial and temporal proximity, they did so only where the subject entry is "closely connected" with, and is made in order to facilitate, the intended crime. (*People v. Griffin* (2001) 90 Cal.App.4th 741, 749 [109 Cal.Rptr.2d 273].)

1801. Theft: Degrees (Pen. Code, §§ 486, 487–488, 491)

If you conclude that the defendant committed a theft, you must decide whether the crime was grand theft or petty theft.

[The defendant committed grand theft if (he/she) stole property [or services] worth more than $~~400~~950.]

[Theft of property from the person is grand theft, no matter how much the property is worth. Theft is *from the person* if the property taken was in the clothing of, on the body of, or in a container held or carried by, that person.]

[Theft of (an automobile/a firearm/a horse/_____<*insert other item listed in statute*>**) is grand theft.]**

[Theft of (fruit/nuts/_____<*insert other item listed in statute*>**) worth more than $~~100~~ 250 is grand theft.]**

[Theft of (fish/shellfish/aquacultural products/_____<*insert other item listed in statute*>**) worth more than $~~100~~ -250 is grand theft if (it/they) (is/are) taken from a (commercial fishery/research operation).]**

[The value of ~~avocados or citrus fruits~~_____<*insert relevant item enumerated in Pen. Code, § 487(b)(1)(B)*>**~~-~~may be established by evidence proving that on the day of the theft, ~~avocados or citrus fruits~~the same items of the same variety and weight as those stolen had a wholesale value of more than $~~100~~250.]**

[The value of (property/services) is the fair (market value of the property/market wage for the services performed).]

<*Fair Market Value—Generally*>
[*Fair market value* is the highest price the property would reasonably have been sold for in the open market at the time of, and in the general location of, the theft.]

<*Fair Market Value—Urgent Sale*>
[*Fair market value* is the price a reasonable buyer and seller would agree on if the buyer wanted to buy the property and the seller wanted to sell it, but neither was under an urgent need to buy or sell.]

All other theft is petty theft.

The People have the burden of proving beyond a reasonable doubt that the theft was grand theft rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of grand theft.

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction if grand theft has been charged.

If the evidence raises an issue that the value of the property may be inflated or deflated because of some urgency on the part of either the buyer or seller, the second bracketed paragraph on fair market value should be given.

AUTHORITY

- Determination of Degrees ▸ Pen. Code, §§ 486, 487–488, 491.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property § 4.

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

RELATED ISSUES

Taking From the Person

To constitute a taking from the person, the property must, in some way, be physically attached to the person. (*People v. Williams* (1992) 9 Cal.App.4th 1465, 1472 [12 Cal.Rptr.2d 243].) Applying this rule, the court in *Williams* held that a purse taken from the passenger seat next to the driver was not a taking from the person. (*Ibid.* [see generally for court's discussion of origins of this rule].) *Williams* was distinguished by the court in *People v. Huggins* (1997) 51 Cal.App.4th 1654, 1656–1657 [60 Cal.Rptr.2d 177], where evidence that the defendant took a purse placed on the floor next to and touching the victim's foot

was held sufficient to establish a taking from the person. The victim intentionally placed her foot next to her purse, physically touching it and thereby maintaining dominion and control over it.

Theft of Fish, Shellfish, or Aquacultural Products

If fish, shellfish, mollusks, crustaceans, kelp, algae, or other aquacultural products are taken from a commercial or research operation producing such products, it is grand theft if the value of the fish or other products exceeds $~~100~~250. (Pen. Code, § 487(b)(2).) Fish taken from public waters are not "property of another" within the meaning of Penal Code section 484 and 487; only the Fish and Game Code applies to such takings. (*People v. Brady* (1991) 234 Cal.App.3d 954, 959, 961–962 [286 Cal.Rptr. 19]; see, e.g., Fish & Game Code, § 12006.6 [unlawful taking of abalone].) If the fish are taken from any other private waters or from someone else's possession, the taking falls within the general theft provisions and must exceed $~~400~~ 950 in value to be grand theft. (See Pen. Code, § 487(a).)

Value of Written Instrument

If the thing stolen is evidence of a debt or some other written instrument, its value is (1) the amount due or secured that is unpaid, or that might be collected in any contingency, (2) the value of the property, title to which is shown in the instrument, or (3) or the sum that might be recovered in the instrument's absence. (Pen. Code, § 492; see *Buck v. Superior Court* (1966) 245 Cal.App.2d 431, 438 [54 Cal.Rptr. 282] [trust deed securing debt]; *People v. Frankfort* (1952) 114 Cal.App.2d 680, 703 [251 P.2d 401] [promissory notes and contracts securing debt]; *People v. Quiel* (1945) 68 Cal.App.2d 674, 678 [157 P.2d 446] [unpaid bank checks]; see also Pen. Code, §§ 493 [value of stolen passage tickets], 494 [completed written instrument need not be issued or delivered].) If evidence of a debt or right of action is embezzled, its value is the sum due on or secured by the instrument. (Pen. Code, § 514.) Section 492 only applies if the written instrument has value and is taken from a victim. (See *People v. Sanders* (1998) 67 Cal.App.4th 1403, 1414, fn. 16 [79 Cal.Rptr.2d 806].)

1802. Theft: As Part of Overall Plan

If you conclude that the defendant committed more than one theft, you must then decide if the defendant committed multiple petty thefts or a single grand theft. To prove that the defendant is guilty of a single grand theft, the People must prove that:

1. **The defendant committed theft of property from the same owner or possessor on more than one occasion;**

2. **The combined value of the property was over ($~~400~~950/$~~100~~250);**

   AND

3. **The defendant obtained the property as part of a single, overall plan or objective.**

If you conclude that the People have failed to prove grand theft, any multiple thefts you have found proven are petty thefts.

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aggregating the value of the property or services taken if grand theft is charged on that theory.

The total value of the property taken usually must exceed $~~400~~ 950 to be grand theft. (See Pen. Code, § 487(a).) For some types of property, however, the property taken need only exceed $~~100~~ 250 in value to constitute grand theft. (See, e.g., Pen. Code, § 487(b)(1) [farm products] & (2) [commercially grown fish, shellfish, or aquacultural products]; see also CALCRIM No. 1801, *Theft: Degrees*.) In element 2, select the appropriate value depending on what type of property was taken.

AUTHORITY

- Aggregating Value of Property Taken According to Overall Plan or General Intent ▸ *People v. Bailey* (1961) 55 Cal.2d 514, 518–519 [11 Cal.Rptr. 543, 360 P.2d 39].
- Grand Theft of Property or Services ▸ Pen. Code, § 487(a) [property or services exceeding $~~400~~ 950 in value].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 11, 12.

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

RELATED ISSUES

Multiple Victims

Where multiple victims are involved, there is disagreement about applying the *Bailey* doctrine and cumulating the charges even if a single plan or intent is demonstrated. (See *People v. Brooks* (1985) 166 Cal.App.3d 24, 30 [210 Cal.Rptr. 90] [auctioneer stole proceeds from property belonging to several people during a single auction; conviction for multiple counts of theft was error]; *People v. Columbia Research Corp.* (1980) 103 Cal.App.3d Supp. 33 [163 Cal.Rptr. 455] [series of petty thefts from numerous victims occurring over 10-month period properly consolidated into single grand theft conviction where defendant employed same scheme to defraud victims of money]; but see *People v. Garcia* (1990) 224 Cal.App.3d 297, 307–309 [273 Cal.Rptr. 666] [defendant filed fraudulent bonds at different times involving different victims; multiple convictions proper]; *In re David D.* (1997) 52 Cal.App.4th 304, 309 [60 Cal.Rptr.2d 552] [stating that *Garcia* "articulately criticized" *Brooks* and *Columbia Research*; declined to apply *Bailey* to multiple acts of vandalism].)

Combining Grand Thefts

The *Bailey* doctrine can be asserted by the *defendant* to combine multiple grand thefts committed as part of an overall scheme into a single offense. (See *People v. Brooks* (1985) 166 Cal.App.3d 24, 31 [210 Cal.Rptr. 90] [multiple grand thefts from single auction fund]; *People v. Gardner* (1979) 90 Cal.App.3d 42, 47–48 [153 Cal.Rptr. 160] [multiple grand theft of hog carcasses]; *People v. Richardson* (1978) 83 Cal.App.3d 853, 866 [148 Cal.Rptr. 120] [multiple attempted grand thefts], disapproved on other grounds in *People v. Saddler* (1979) 24 Cal.3d 671, 682, fn. 8 [156 Cal.Rptr. 871, 597 P.2d 130]; see also *People v. Sullivan* (1978) 80

Cal.App.3d 16, 19 [145 Cal.Rptr. 313] [error to refuse defense instruction about aggregating thefts].)

Theft Enhancement

If there are multiple charges of theft, whether grand or petty theft, the aggregate loss exceeds any of the statutory minimums in Penal Code section 12022.6(a), and the thefts arise from a common scheme or plan, an additional prison term may be imposed. (Pen. Code, § 12022.6(b).) If the aggregate loss exceeds statutory amounts ranging from $50,000 to $2.5 million, an additional term of one to four years may be imposed. (Pen. Code, § 12022.6(a)(1)–(4); see *People v. Daniel* (1983) 145 Cal.App.3d 168, 174–175 [193 Cal.Rptr. 277] [no error in refusing to give unanimity instruction].)

1803. Theft: By Employee or Agent (Pen. Code, § 487(b)(3))

If you conclude that the defendant committed more than one theft, you must decide whether the defendant committed multiple petty thefts or a single grand theft. To prove that the defendant is guilty of a single grand theft, the People must prove that:

1. **The defendant was an (employee/agent) of _____** <*insert name of employer/principal*>**;**

2. **The defendant committed theft of property [or services] from _____** <*insert name of employer/principal*>**;**

AND

3. **The combined value of the property [or services] that the defendant obtained during a period of 12 consecutive months was $~~400~~ 950 or more.**

If you conclude that the People have failed to prove grand theft, any multiple thefts you have found proven are petty thefts.

[An *agent* is a person who represents someone else in dealing with other people, corporations, or entities.]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aggregating the value of the property or services taken by an employee or agent if grand theft is charged on that theory.

AUTHORITY

- Aggregating Value of Property Taken by Employee or Agent ▸ Pen. Code, § 487(b)(3); *People v. Packard* (1982) 131 Cal.App.3d 622, 626–627 [182 Cal.Rptr. 576].
- Agent Defined ▸ Civ. Code, § 2295.

- Employee Defined ▸ Lab. Code, § 2750.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 11, 12.

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

COMMENTARY

Penal Code section 487(b)(3) allows the prosecutor, under specified conditions, to cumulate a series of petty thefts into a grand theft, without having to prove a single intent or scheme. (*People v. Packard* (1982) 131 Cal.App.3d 622, 626 [182 Cal.Rptr. 576].) Therefore, this instruction does not include a single intent or scheme as an element. (Compare *People v. Daniel* (1983) 145 Cal.App.3d 168, 175 [193 Cal.Rptr. 277] [theft pursuant to overall plan and single fraudulent intent], and CALCRIM No. 1802, *Theft: As Part of Overall Plan*.) Under the appropriate circumstances, however, a *defendant* may assert that grand thefts committed against his or her employer over a period greater than 12 consecutive months should be combined into a single grand theft in the absence of evidence of separate intents or plans. (See *People v. Packard, supra,* 131 Cal.App.3d at pp. 626–627 [thefts over three-year period].)

RELATED ISSUES

See the Related Issues section to CALCRIM No. 1802, *Theft: As Part of Overall Plan*.

2681. Disturbance of Public Meeting (Pen. Code, § 403)

The defendant is charged [in Count __] with (disturbing/ [or] breaking up) a public meeting [in violation of Penal Code section 403].

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

1. **The defendant intentionally committed acts that violated (implicit customs or usages of/ [or] explicit rules for governing) a public meeting ~~that was not religious or political in nature~~;**

2. **The defendant knew or reasonably should have known that (his/her) acts violated those (customs[,]/ [or] usages[,]/ [or] rules);**

AND

3. **The defendant's acts substantially [and unlawfully] interfered with the conduct of the meeting.**

You may not find the defendant guilty of this crime unless you find that the defendant's acts themselves, not the message or expressive content of the acts, substantially interfered with the conduct of the meeting.

[When deciding whether the defendant knew or reasonably should have known that (his/her) acts violated the (implicit customs or usages of/ [or] explicit rules for governing) the meeting, you may consider whether someone warned or requested the defendant to stop (his/her) activities.]

New January 2006

BENCH NOTES

Instructional Duty

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

On request, give the bracketed sentence that begins with "When deciding whether," if the meeting did not have explicit rules of governance. (*In re Kay* (1970) 1 Cal.3d 930, 945 [83 Cal.Rptr. 686, 464 P.2d 142].)

Do not give this instruction if the disturbance occurs at a religious meeting covered by Pen. Code, § 302 or at a meeting where "electors" are "assembling." Pursuant to Elec. Code, § 18340. The court will need to draft separate instructions for those offenses.

AUTHORITY

- Elements ▸ Pen. Code, § 403; *In re Kay* (1970) 1 Cal.3d 930, 941–943 [83 Cal.Rptr. 686, 464 P.2d 142].
- First Amendment Limitations on Statute ▸ *In re Kay* (1970) 1 Cal.3d 930, 941–942 [83 Cal.Rptr. 686, 464 P.2d 142].
- Must Be Public Meeting ▸ *Farraher v. Superior Court* (1919) 45 Cal.App. 4, 6 [187 P. 72].
- No Clear and Present Danger Requirement ▸ *McMahon v. Albany Unified School Dist.* (2002) 104 Cal.App.4th 1275, 1287–1288 [129 Cal.Rptr.2d 184].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 16.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.21 (Matthew Bender).

3454. Initial Commitment as Sexually Violent Predator (Welf. & Inst. Code, §§ 6600, 6600.1)

The petition alleges that _____ <*insert name of respondent*> is a sexually violent predator.

To prove this allegation, the People must prove beyond a reasonable doubt that:

1. **(He/She) has been convicted of committing sexually violent offenses against one or more victims;**

2. **(He/She) has a diagnosed mental disorder;**

[AND]

3. **As a result of that diagnosed mental disorder, (he/she) is a danger to the health and safety of others because it is likely that (he/she) will engage in sexually violent predatory criminal behavior(;/.)**

<Give element 4 when evidence has been introduced at trial on the issue of amenability to voluntary treatment in the community.>

[AND

4. **It is necessary to keep (him/her) in custody in a secure facility to ensure the health and safety of others.]**

The term *diagnosed mental disorder* includes conditions either existing at birth or acquired after birth that affect a person's ability to control emotions and behavior and predispose that person to commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others.

A person is *likely to engage in sexually violent predatory criminal behavior* if there is a substantial danger, that is, a serious, and well-founded risk that the person will engage in such conduct if released in the community.
The likelihood that the person will engage in such conduct does not have to be greater than 50 percent.

Sexually violent criminal behavior is *predatory* if it is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or a person with whom a relationship has been established or promoted for the primary purpose of victimization.

_____ *<Insert name[s] of crime[s] enumerated in Welf. & Inst. Code, § 6600(b)>* **(is/are) [a] *sexually violent offense[s]* when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the victim or another person or threatening to retaliate in the future against the victim or any other person.**

[_____ *<Insert name[s] of crime[s] enumerated in Welf. & Inst. Code, § 6600(b)>* **(is/are) also [a] *sexually violent offense[s]* when the offense[s] (is/are) committed on a child under 14 years old.]**

As used here, a *conviction* for committing a sexually violent offense is one of the following:

<Give the appropriate bracketed description[s] below.>

<A. Conviction With Fixed Sentence>
[A prior [or current] conviction for one of the offenses I have just described to you that resulted in a prison sentence for a fixed period of time.]

<B. Conviction With Indeterminate Sentence>
[A conviction for an offense that I have just described to you that resulted in an indeterminate sentence.]

<C. Conviction in Another Jurisdiction>
[A prior conviction in another jurisdiction for an offense that includes all of the same elements of one of the offenses that I have just described to you.]

<D. Conviction Under Previous Statute>
[A conviction for an offense under a previous statute that includes all of the elements of one of the offenses that I have just described to you.]

<E. Conviction With Probation>
[A prior conviction for one of the offenses that I have just described to you for which the respondent received probation.]

<F. Acquittal Based on Insanity Defense>

[A prior finding of not guilty by reason of insanity for one of the offenses that I have just described to you.]

<G. Conviction as Mentally Disordered Sex Offender>
[A conviction resulting in a finding that the respondent was a mentally disordered sex offender.]

<H. Conviction Resulting in Commitment to Department of Youth Authority Pursuant to Welfare and Institutions Code section 1731.5 >
[A prior conviction for one of the offenses that I have just described to you for which the respondent was committed to the Department of Youth Authority pursuant to Welfare and Institutions Code section 1731.5.]

You may not conclude that _____ *<insert name of respondent>* **is a sexually violent predator based solely on (his/her) alleged prior conviction[s] without additional evidence that (he/she) currently has such a diagnosed mental disorder.**

In order to prove that _____ *<insert name of respondent>* **is a danger to the health and safety of others, the People do not need to prove a recent overt act committed while (he/she) was in custody. A *recent overt act* is a criminal act that shows a likelihood that the actor may engage in sexually violent predatory criminal behavior.**

New January 2006; Revised August 2006, June 2007, August 2009, April 2011

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a respondent is a sexually violent predator.

Do not use this instruction for extension or status proceedings. Use instead CALCRIM No. 3454A, *Hearing to Determine Current Status Under Sexually Violent Predator Act.*

If evidence is presented about amenability to voluntary treatment, the court has a **sua sponte** duty to give bracketed element 4. (*People v. Grassini* (2003) 113 Cal.App.4th 765, 777 [6 Cal.Rptr.3d 662]; *People v. Calderon* (2004) 124 Cal.App.4th 80, 93 [21 Cal.Rptr.3d 92].) Evidence of involuntary treatment in the community is inadmissible at trial because it is not relevant to any of the SVP requirements. (*People v. Calderon, supra,* 124 Cal.App.4th at 93.)

The court also **must give** CALCRIM No. 219, *Reasonable Doubt in Civil Proceedings*; 222, *Evidence*; 226, *Witnesses*; 3550, *Pre-Deliberation Instructions*; and any other relevant post-trial instructions. These instructions may need to be modified.

Jurors instructed in these terms must necessarily understand that one is not eligible for commitment under the SVPA unless his or her capacity or ability to control violent criminal sexual behavior is seriously and dangerously impaired. No additional instructions or findings are necessary. *People v. Williams* (2003) 31 Cal.4th 757, 776–777 [3 Cal.Rptr.3d 684, 74 P.3d 779] (interpreting Welfare and Institutions Code section 6600, the same statute at issue here).

But see *In re Howard N.* (2005) 35 Cal.4th 117, 137-138 [24 Cal.Rptr.3d 866, 106 P.3d 305], which found in a commitment proceeding under a different code section, i.e., Welfare and Institutions Code section 1800, that when evidence of inability to control behavior was insufficient, the absence of a specific "control" instruction was not harmless beyond a reasonable doubt. Moreover, *In re Howard N.* discusses *Williams* extensively without suggesting that it intended to overrule *Williams*. *Williams* therefore appears to be good law in proceedings under section 6600.

AUTHORITY

- Elements and Definitions ▸ Welf. & Inst. Code, §§ 6600, 6600.1.
- Unanimous Verdict, Burden of Proof ▸ *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Likely Defined ▸ *People v. Roberge* (2003) 29 Cal.4th 979, 988 [129 Cal.Rptr.2d 861, 62 P.3d 97].
- Predatory Acts Defined ▸ *People v. Hurtado* (2002) 28 Cal.4th 1179, 1183 [124 Cal.Rptr.2d 186, 52 P.3d 116].
- Must Instruct on Necessity for Confinement in Secure Facility ▸ *People v. Grassini* (2003) 113 Cal.App.4th 765, 777 [6 Cal.Rptr.3d 662].
- Determinate Sentence Defined ▸ Pen. Code, § 1170.
- Impairment of Control ▸ *In re Howard N.* (2005) 35 Cal.4th 117, 128–130 [24 Cal.Rptr.3d 866, 106 P.3d 305].

- Amenability to Voluntary Treatment ▸ *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 256 [127 Cal.Rptr.2d 177, 57 P.3d 654].
- Need for Treatment and Need for Custody Not the Same ▸ *People v. Ghilotti* (2002) 27 Cal.4th 888, 927 [119 Cal.Rptr.2d 1, 44 P.3d 949].
- Substantial Danger ▸ *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 922 [119 Cal.Rptr.2d 1, 44 P.3d 949].

Secondary Sources

*5 Witkin & Epstein, California Crim*inal Law (3d ed. 2000) Crimin***al Trial, § 193.***

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 104, *Parole*, § 104.06 (Matthew Bender).

RELATED ISSUES

Different Proof Requirements at Different Stages of the Proceedings
Even though two concurring experts must testify to commence the petition process under Welfare and Institutions Code section 6001, the same requirement does not apply to the trial. (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1064 [123 Cal.Rptr.2d 253].)

Masturbation Does Not Require Skin-to-Skin Contact
Substantial sexual conduct with a child under 14 years old includes masturbation when the touching of the minor's genitals is accomplished through his or her clothing. (*People v. Lopez* (2004) 123 Cal.App.4th 1306, 1312 [20 Cal.Rptr.3d 801]; *People v. Whitlock* (2003) 113 Cal.App.4th 456, 463 [6 Cal.Rptr.3d 389].) "[T]he trial court properly instructed the jury when it told the jury that '[t]o constitute masturbation, it is not necessary that the bare skin be touched. The touching may be through the clothing of the child.' " (*People v. Lopez, supra,* 123 Cal.App.4th at p. 1312.)

3454A. Hearing to Determine Current Status Under Sexually Violent Predator Act (Welf. & Inst. Code, § 6605)

The People allege that _____ *<insert name of petitioner>* **currently is a sexually violent predator.**

To prove this allegation, the People must prove beyond a reasonable doubt that:

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

[AND]

2. **As a result of that diagnosed mental disorder, (he/she) is a danger to the health and safety of others because it is likely that (he/she) will engage in sexually violent predatory criminal behavior(;/.)**

<Give element 3 when evidence has been introduced at trial on the issue of amenability to voluntary treatment in the community>

[AND

3. **It is necessary to keep (him/her) in (custody in a secure facility/ [or] a state-operated conditional release program) to ensure the health and safety of others.]**

The term *diagnosed mental disorder* includes conditions either existing at birth or acquired after birth that affect a person's ability to control emotions and behavior and predispose that person to commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others.

A person is *likely to engage in sexually violent predatory criminal behavior* if there is a substantial danger, that is, a serious, and well-founded risk that the person will engage in such conduct if released in the community.
The likelihood that the person will engage in such conduct does not have to be greater than 50 percent.

Sexually violent criminal behavior is *predatory* if it is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or a person with whom a relationship has been established or promoted for the primary purpose of victimization.

<Give the following paragraph if evidence of the petitioner's failure to participate in or complete treatment is offered as proof that petitioner's condition has not changed>

[You may consider evidence that _____<*insert name of petitioner*> **failed to participate in or complete the State Department of Mental Health Sex Offender Commitment Program as an indication that (his/her) condition as a sexually violent predator has not changed. The meaning and importance of that evidence is for you to decide.]**

<Give the following paragraph if the jury has been told about the petitioner's underlying conviction>

[You may not conclude that _____<*insert name of petitioner*> **is currently a sexually violent predator based solely on (his/her) prior conviction[s] without additional evidence that (he/she) currently has such a diagnosed mental disorder.]**

In order to prove that _____ <*insert name of petitioner*> **is a danger to the health and safety of others, the People do not need to prove a recent overt act committed while (he/she) was in custody. A *recent overt act* is a criminal act that shows a likelihood that the actor may engage in sexually violent predatory criminal behavior.**

New April 2011

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a petitioner is currently a sexually violent predator.

If evidence is presented about amenability to voluntary treatment, the court has a **sua sponte** duty to give bracketed element 3. (*People v. Grassini* (2003) 113 Cal.App.4th 765, 777 [6 Cal.Rptr.3d 662]; *People v. Calderon* (2004) 124 Cal.App.4th 80, 93 [21 Cal.Rptr.3d 92].) Evidence of involuntary treatment in the community is inadmissible at trial because it is not relevant to any of the SVP requirements. (*People v. Calderon, supra,* 124 Cal.App.4th at 93.)

The court also **must give** CALCRIM No. 219, *Reasonable Doubt in Civil Proceedings*; 222, *Evidence*; 226, *Witnesses*; 3550, *Pre-Deliberation Instructions*; and any other relevant post-trial instructions. These instructions may need to be modified.

AUTHORITY

- Elements and Definitions ▸ Welf. & Inst. Code, §§ 6600, 6605.
- Unanimous Verdict, Burden of Proof ▸ *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Likely Defined ▸ *People v. Roberge* (2003) 29 Cal.4th 979, 988 [129 Cal.Rptr.2d 861, 62 P.3d 97].
- Predatory Acts Defined ▸ *People v. Hurtado* (2002) 28 Cal.4th 1179, 1183 [124 Cal.Rptr.2d 186, 52 P.3d 116].
- Must Instruct on Necessity for Confinement in Secure Facility ▸ *People v. Grassini* (2003) 113 Cal.App.4th 765, 777 [6 Cal.Rptr.3d 662].
- Impairment of Control ▸ *In re Howard N.* (2005) 35 Cal.4th 117, 128–130 [24 Cal.Rptr.3d 866, 106 P.3d 305].
- Amenability to Voluntary Treatment ▸ *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 256 [127 Cal.Rptr.2d 177, 57 P.3d 654].
- Need for Treatment and Need for Custody Not the Same ▸ *People v. Ghilotti* (2002) 27 Cal.4th 888, 927 [119 Cal.Rptr.2d 1, 44 P.3d 949].
- State-Operated Conditional Release Program ▸ *People v. Superior Court (George)* (2008) 164 Cal.App.4th 183, 196-197 [78 Cal.Rptr.3d 711].
- Substantial Danger ▸ *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 922 [119 Cal.Rptr.2d 1, 44 P.3d 949].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 1993.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 104, *Parole*, § 104.06 (Matthew Bender).

3518. Deliberations and Completion of Verdict Forms: For Use When Lesser Included Offenses and Greater Crimes Are Not Separately Charged and the 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 which charges are affected by this instruction:]

[_____ <*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 each crime and the relevant evidence, 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]. ~~[[For (the/any) count in which a greater and lesser crime is charged_____<*insert number of count that includes a lesser offense*>,] (Y/y)ou will receive three verdict forms—one for guilty of the greater crime, for guilty of only the lesser crime, and one for not guilty of either the greater or 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 beyond a reasonable doubt 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 beyond a reasonable doubt that the defendant is guilty of the greater crime and also agree**

the People have proved beyond a reasonable doubt 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 beyond a reasonable doubt 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 beyond a reasonable doubt 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].]

<Give the following paragraph if the court is instructing on a lesser included offense within another lesser included offense.>

[Follow these directions when you decide whether a defendant is guilty or not guilty of _____<*insert crime*>, which is a lesser crime of _____<*insert crime*>.]

New January 2006; Revised August 2006, June 2007, April 2010

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].**)**
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, 329 [250 Cal.Rptr. 244, 758 P.2d 572].) However, this is not a mandatory procedure. *(Ibid.)* If the court chooses to follow the procedure suggested in *Stone,* the court should give CALCRIM No. 3517 in place of this instruction.

Do not give this instruction for charges of murder or voluntary manslaughter; give CALCRIM No. 640, *Deliberations and Completion of Verdict Forms: For Use When Jury Is Given Not Guilty Forms for Each Level of Homicide,* or CALCRIM No. 641, *Deliberations and Completion of Verdict Forms: For Use When Jury Is Given Only One Not Guilty Verdict Form for Each Count (Homicide).*

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* (1996) 13 Cal.4th 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* (1996) 13 Cal.4th 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].

Secondary Sources

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

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

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).

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* (1998) 19 Cal.4th 142, 154–155 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Acquittal of Greater Does Not Bar Retrial of Lesser

When 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.)*

CALCRIM Autumn 2011 Invitation to Comment
New and Revised CALCRIM Instructions
All comments are verbatim.

Instruction	Commentator	Comment	Response
101	Elaine A. Alexander Appellate Defenders, Inc. Michael G. Millman, Executive Director California Appellate Project, San Francisco	The proposal adds to CALCRIM No. 101 a statement that forbids various forms of research and also threatens jurors with punishment if they violate the instruction (emphasis added): You must reach your verdict without any consideration of punishment. I want to emphasize that you may not use any form of research or communication, including electronic or wireless research or communication, to research, share, communicate, or allow someone else to communicate with you regarding any subject of the trial. *[If you violate this rule, you may be subject to jail time, a fine, or other punishment.]* The second sentence is required by Assembly Bill No. 141 (2011-2012 Reg. Session), which added that provision to Penal Code section 1122, subdivision (a)(1) on jury instructions.[1] The bill did not mandate the	The Judicial Council has already approved a revision to CACI No. 100 as follows: **[If you violate any of these prohibitions on communications and research, including prohibitions on electronic communications and research, you may be held in contempt of court or face other sanctions. That means that you may have to serve time in jail, pay a fine, or face other punishment for that violation.]** The CALCRIM version may actually be somewhat milder. The language about which the commentator expresses concern is optional and in brackets in both CACI and CALCRIM, so the committee believes this is a decision that can be left to the sound discretion of the trial court.

[1]The amendment requires the court to instruct the jury: "That the jurors shall not converse among themselves, or with anyone else, conduct research, or disseminate information on any subject connected with the trial. The court shall clearly explain, as part of the admonishment, that the prohibition on conversation, research, and dissemination of information applies to all forms of electronic and wireless communication." (Pen. Code, § 1122, subd.(a)(1), eff. 2012, Ass. Bill No. 141 (2011-2012 Reg. Sess), Cal. Legis. Serv. Ch. 181 (A.B. 141); see also Code Civ. Proc, § 1209, subd. (a)(6).)

Instruction	Commentator	Comment	Response
		emphasized bracketed sentence. A.B. 141 did add subdivision (a)(6) to Penal Code section 166, making violation of this admonition a misdemeanor.[2] We are concerned about the emphasized sentence in brackets. It comes across as harsh and possibly threatening. It could prove to be an undesirable deterrent to reporting to the court an inadvertent violation. Note that the statute punishes only "willful" violations of the instruction. We recognize, on the other hand, that jurors may well need and want to know about such a serious potential consequence as criminal punishment, given the widespread habit of communicating thoughts and experiences almost reflexively by electronic means. To accommodate these conflicting interests, we suggest the language be softened by deleting the "you" and including the requirement of willfulness: **[Willful disobedience of this rule is unlawful.]** For the same reasons, we recommend that a bench note be added stating:	

[2]Penal Code section 166, subdivision (a) makes certain kinds of contempt a misdemeanor. A.B. 141 adds to those: "(6) Willful disobedience by a juror of a court admonishment related to the prohibition on any form of communication or research about the case, including all forms of electronic or wireless communication or research."

Instruction	Commentator	Comment	Response
		The bracketed language starting with "[Willful violation of this rule . . .] should be given only upon a showing of demonstrated need.	
101	Jordan Posamentier, Esq. Legislative Counsel California Judges Association	This proposed revision attempts to conform to AB 141, which becomes effective January 1, 2012. AB 141 expands existing jury admonishments that proscribe electronic or wireless communication during jury service by explicating that a juror who violates the admonishment may be held in contempt. CJA supports this proposal in part and opposes it in part. Changes to the instruction are acceptable to the extent they include conforming language regarding electronic communications. But the portion about possible punishments for failing to comply with the court's instructions, even though discretionary, is inappropriate. Jurors are presumed to follow jury instructions, and warning them with punishment could be construed as hostile and threatening. Other admonishments do not include language about punishments for violating instructions. This instruction should be no different from those. The court has the inherent power to impose sanctions when appropriate; AB 141 did not add anything to the court's powers in this regard. Proposed references to punishing jurors should	See response above regarding the admonition on electronic communications.

Instruction	Commentator	Comment	Response
		therefore be eliminated.	
101	Los Angeles County Superior Court	101 One of the unchanged portions of 101 (the second sentence in the first paragraph) instructs that jurors should not review information they have obtained outside of court because it may be "unreliable or irrelevant." This does not go far enough and in fact, this is not always the case and jurors may feel strongly that the information is reliable and highly relevant for their purposes. Often the information is totally accurate, just not available for consideration. A sample of an admonition is attached that is sometimes given to jurors, with the point being that all evidence is basically presented to each side in order to prevent sandbagging, to allow either side to object/create a context/or defend it. The bottom line is that finding independent information is completely and absolutely UNFAIR and subverts the whole concept of a trial under the law. That message must be given to jurors. The message of basic unfairness is critical to establish, not just the potential for unreliability or relevance. It is also critical that we let judges and parties know that the admonition must be given initially before the first recess when jurors are most likely to contact friends/family/coworkers about their jury trial. Example of instruction used in Los Angeles:	See response above regarding the admonition on electronic communications. The comment regarding adding the word "fair" goes beyond the scope of the current invitation to comment, but the committee will consider it at its next meeting.

Instruction	Commentator	Comment	Response
		JURY INSTRUCTION INTERNET USE (BEFORE JURORS SELECTED) Ladies and gentlemen, we are going to start the process of choosing jurors. You will be the judges of the evidence in this trial. In getting this case ready for you today, each side has had the opportunity over the last several months, to make sure that only legally admissible evidence is given to you and that any evidence offered to you as judges, is done having had the chance to challenge or support it. It is and has been my role, as the judge of the law, to make decisions on what evidence is admissible and can be presented to you, and what cannot. The reason I am telling you this is because it means that while serving, you cannot, you may not and you must not use any form of electronic communication or research on your own. It includes looking up information, even the definition of a word used, as well as simply talking about the case before it is over. There are very good and powerful reasons why our courts are set up in this way and why the Constitution guarantees this protection. Before you came into this courtroom, evidence that either side wanted to present could be tested. It could be shown to be right or wrong. It could be investigated,	

Instruction	Commentator	Comment	Response
		questioned, contradicted or supported. Just as neither side is allowed to "sandbag" the other with secret or surprise evidence, neither can jurors "sandbag" the people who have come into court seeking justice. Having even one juror make a decision from information gathered in secret violates the rights of both sides, and undermines the public process guaranteed by our Constitution. A violation of this order can result in an unjust verdict or a mistrial, causing everyone to start the trial again from the beginning. This is not just, and can be very expensive financially and emotionally for the parties and for the taxpayers, namely you and your neighbors. It can also lead to a finding of contempt of court. Besides being a violation of important guarantees of our Constitution, it would be completely and terribly unfair to the very people coming to our courts for justice. I need to emphasize that this restriction not to look things up or talk about the case, is not limited to face to face conversations, written dialogues or monologues. It includes every form of electronic communication. While you are here as a potential or selected juror, do not use any electronic device, or media, including cell phones, internet chatrooms, blogs or websites, any social networking sites or online diaries, to send, post, text, twitter or	

Instruction	Commentator	Comment	Response
		receive any information about this case to or from anyone. This includes an order not to go to internet maps or mapping programs or any other way to search for or view places discussed in the trial. It also includes an order not to photograph or videotape any person or events involved in this trial, in the courtroom or outside hallways. As all of you already know, some of what is available on the internet is inaccurate, misleading or presented in unrelated contexts. Information, even if accurate, can be inflammatory, prejudicial or unrelated to the issues you are here to decide as neutral, dispassionate judges. Also, some information may simply not be legally permitted on the issues you will be deciding. It is simply not fair to the parties and to the system, to have even one juror making a decision based on something discovered or communicated outside of this courtroom that the parties never even knew was deciding or influencing the fate of their case. I realize, especially for some of you who have grown up with the internet, that searching the internet and doing instant research is easy and as routine as breathing. This jury service may be the only place and time in your lives when you must not access the net while you are doing something. It is available when you are in schools, businesses, social occasions…anywhere and	

Instruction	Commentator	Comment	Response
		everywhere. I also know from many years on the bench that jurors are more determined than I have ever seen before, to make sure that they get it right. The right thing in this courtroom is to make sure that all jurors see and hear all the evidence, at the same time. This is the way to keep this trial fair. I also am guessing that a number of you have already posted something on the net about being here on jury service today. That must be your last posting or comment until you are released from this trial. Does anyone have any questions about this?	
101	John C. Hueston, President Orange County Bar Association	It is suggested that the last sentence of the proposed language, to wit, … "If you violate this rule, you may be subject to jail time, a fine, or other punishment," should be removed from the brackets, indicating its use should not be optional.	Not all judges are comfortable with threatening jurors with contempt before the trial begins. The committee believes that the language should be optional in deference to that view.
101	Sharon Petrosino Senior Assistant Public Defender Orange County Public Defender's Office	Under the "authority" section, the "Court's Contempt Power for Violations of Admonitions" is not limited to Penal Code § 1122(a)(1), but includes each of the admonitions in Penal Code §§ 1122(a)(1)-(5).	No response necessary.
201	Los Angeles County Superior Court	201 A blank should not be left when listing a potential misconduct that can occur when jurors use cyberspace. The language should include all of it, since experience shows that jurors go online, for example, thinking blogging is ok because it is not necessarily a dialogue and is different than "researching".... Include "blogging, tweeting, posting, texting,	The committee prefers that the trial court be able to fill in the blank with the necessary and appropriate language, which is subject to change and may even vary among jurisdictions.

Instruction	Commentator	Comment	Response
		sending, receiving" etc....	
201	Sharon Petrosino Senior Assistant Public Defender Orange County Public Defender's Office	If the goal is to emphasize that jurors should not use electronic or wireless research, the instruction should state: "Do not use any electronic or wireless research (, a dictionary/[, or…)" For example, the "Siri" function on the Apple 4S phone is one method of electronic or wireless research that does not directly involve internet research. If the changes proposed for CALCRIM 201 are made, the same changes should be made to paragraph 5 of CALCRIM 101 ("Do not use the Internet…).	The current proposed revision appears to cover the scenario raised by the commentator by providing the blank: **_____**<*insert other relevant source of information or means of communication*>**]).**
222	Jordan Posamentier, Esq. Legislative Counsel California Judges Association	This proposed revision needlessly eliminates the first two sentences giving context for the definition of evidence. CJA recommends keeping the language in, as it can be useful and is not much of a burden to read.	The committee deleted the language in question because it duplicates the second paragraph of CALCRIM No. 200 and a trial judge complained about the redundancy.
222	Hon. Joyce Allegro Santa Clara County Superior Court	I do not understand the reason for deleting the first two sentences of 222. I think they should be kept.	See response above.
222	John C. Hueston, President Orange County Bar Association	The proposed deletion of the first sentence **"You must decide what the facts are in this case."** is not warranted and not supported by the law. It is imperative that the jury know and understand that they are the fact finders in the case, not the judge or the lawyers trying the case. This is a simple but critical sentence introducing this basic instruction on the role the jury plays in assessing what the evidence is as they apply the instructions and it should remain. The second sentence should	See response above.

Instruction	Commentator	Comment	Response
		also remain as a correct statement of fundamental practice. Striking the two introductory sentences does not clarify this instruction for lay jurors. While their retention may arguably be somewhat redundant, the instruction as presently drafted best assists the jurors in ascertaining its meaning. No benefit is to be gained by changing this instruction	
222	Sharon Petrosino Senior Assistant Public Defender Orange County Public Defender's Office	There is no legal justification for changing the instruction. Furthermore, the two sentences proposed for deletion state fundamental tenets of trial practice and should not be deleted.	See response above.
240	Elaine A. Alexander Appellate Defenders, Inc. Michael G. Millman, Executive Director California Appellate Project, San Francisco	The revised instruction includes "[or omission]" along with "act" in describing what may be a "cause." The "Authority" section should make it clear that the bracketed language tracks the language of *People v. Cervantes* (2001) 26 Cal.4th 860, 866: > In homicide cases, a "cause of the death of [the decedent] is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the death of [the decedent] and without which the death would not occur."	The committee agrees with this comment and has revised the instruction accordingly.

Instruction	Commentator	Comment	Response
		(See CALJIC No. 3.40.)	
240	Jordan Posamentier, Esq. Legislative Counsel California Judges Association	This proposal revision changes the instruction on proximate causes to account for omissions (whereas the current instruction accounts only for actions) that cause injury. CJA supports the revision, as it is appropriate modification.	No response required.
240	John C. Hueston, President Orange County Bar Association	The proposed amendment (adding that the charged injury can be caused by an omission to act) is a truncated and therefore, inaccurate response to the legal principle which recognizes that criminal liability only attaches to an omission where the person first, has an affirmative legal duty act, but then failed to do so. If language concerning omission to act is to be included, the instruction would need to be expanded to explain and clarify this additional element.	The committee will consider explaining and clarifying the optional term "omission" at its next meeting. In the mean time, it believes that trial judges and attorneys will be able to provide the necessary language, if any, to explain the meaning of "omission."
301	Hon. William Froeberg Orange County Superior Court	I have given a modified instruction that says the same thing only in a little more direct manner. "Except for the testimony of John Doe, which if you find him to be an accomplice requires supporting evidence, the testimony of only one witness can prove any fact."	The committee prefers the currently proposed formulation.
505, 507, 508, 604, 2514, 3470	Elaine A. Alexander Appellate Defenders, Inc. Michael G. Millman, Executive Director California Appellate Project, San Francisco	We have comments on two of these instructions: • **2514. Possession of Firearm by Person Prohibited by Statute: Self-Defense.** We agree that the proposed new language,	The committee disagrees with the first comment, but agrees with the second one and has made a corresponding revision to the proposed changes in the instruction. It will consider the suggestion to add a definition of "unlawful touching" at its next meeting, because that goes beyond the scope

Instruction	Commentator	Comment	Response
		"great bodily injury," more accurately reflects the threat of harm required to justify possession of a firearm by a felon in self-defense. (*People v. King* (1978) 22 Cal.3d 12, 24.) We suggest, however, that instead of replacing the current language with "great bodily injury," replacement with the phrase "**death or** great bodily injury" would make the instruction more complete and consistent with other instructions. • **3470. Right to Self-Defense or Defense of Another (Non-Homicide)** We agree that it is appropriate to add more specificity to the second sentence in the fifth paragraph: "The defendant must have believed there was imminent danger of bodily injury to (himself/herself/ [or] someone else)." However, we recommend two changes: (1) Imminent danger of unlawful touching The proposed addition to the imminent danger requirement is incomplete, results in an incorrect statement of the law, and is inconsistent with an earlier portion of the instruction, because self-defense also includes the right to resist an unlawful touching that does *not* result in bodily injury. Under *People v. Myers* (1998) 61 Cal.App.4th 328, 334, cited in the	of the invitation to comment.

Instruction	Commentator	Comment	Response
		"Authority" section, the right to resist a battery or assault is not dependent on whether a battery poses an imminent danger of *bodily injury*: [A]n offensive touching, although it inflicts no bodily harm, may nonetheless constitute a battery, which the victim is privileged to resist with such force as is reasonable under the circumstances. The same may be said of an assault insofar as it is an attempt to commit such a battery. To hold otherwise would lead to the ludicrous result of a person not being able to lawfully resist or defend against a continuing assault or battery, such as the act defendant alleged here. Indeed, the first numbered section of the instruction currently recognizes the right to self-defense against a simple assault or battery if (emphasis added): 1. The defendant reasonably believed that (he/she/ [or] someone else/ [or] <insert name of third party>) was in imminent danger of suffering	

Instruction	Commentator	Comment	Response
		bodily injury *[or was in imminent danger of being touched unlawfully]*; To make the proposed addition consistent with the law and the rest of the instruction, we propose that the second sentence in the fifth paragraph state: "The defendant must have believed there was **(**an imminent danger of bodily injury to (himself/herself/ [or] someone else) **/[or] an imminent danger that (he/she/[or] someone else would be touched unlawfully).**" (2) Meaning of unlawful touching We recommend that a bracketed paragraph describing unlawful touching, i.e., simple battery, be added to CALCRIM No. 3470. Language similar to that in CALCRIM No. 960 could be used. We suggest the following language be added: **[The slightest touching can be unlawful if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]**	

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505, 507, 508, 604, 2514, 3470	Jordan Posamentier, Esq. Legislative Counsel California Judges Association	Revisions to CALCRIMS 505, 507, 508, and 604 would make the phraseology in the instructions more consistent. CJA supports these revisions but cautions that changing some phrases might inadvertently raise the standard of proof in some instances. For example, in CALCRIMS 507 and 508, there could be a difference between "great bodily injury" and "serious bodily injury," at least in theory. More significantly, the proposed revision to CALCRIM 604 substitutes "death or great bodily injury" for "violence." This appears to be a substantive change and arguably raises the standard for what the defendant must subjectively believe can be claimed as an important self-defense. The same is true of the revision to CALCRIM 2514, which substitutes "great bodily injury" for "significant or substantial physical injury" in one place and for "violence" in another place. Nevertheless, the revisions would make the instructions more consistent. Lastly, the proposed revision to CALCRIM 3470 adds "of bodily injury" behind "danger." To be consistent, the added phrase should be "death or great bodily injury" if the goal is to make the instructions' phraseology more consistent.	The committee disagrees with these comments. The committee considered the United States Supreme Court case of *Tennessee v. Garner* (1985) 471 U.S. 1, when it conformed the language. In that case, the court used the following terms interchangeably throughout: serious bodily injury, serious bodily harm, serious physical harm, great bodily harm, great personal harm, and grievous bodily harm. The committee concluded that it was important to use consistent language to avoid confusing jurors and found no authority to suggest that the different terms had legally different meanings.
507	Sharon Petrosino Senior Assistant Public Defender	Penal Code § 196 does not on its face require the inclusion of element 4. If element 4 remains, the "authority" for its inclusion	The committee agrees to add a definition of "great bodily injury" to the instruction. It will consider adding case authority for

Instruction	Commentator	Comment	Response
	Orange County Public Defender's Office	should be cited in the use notes. (See, for example, *Kortum v. Alkire* (1977) 69 Cal. App. 3d 325, 332.) In addition, the instruction should include a definition of "great bodily injury" (like the one included in CALCRIM 604).	element 4 at its next meeting.
507	Riverside County Superior Court	**Agree as Modified:** Since CALCRIM No. 507 is being modified to include references to ***"great bodily injury,"*** a paragraph should be added defining ***"great bodily injury"*** with the instruction: ***"Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm."**	The committee agrees to add a definition of "great bodily injury" to the instruction.
508	Sharon Petrosino Senior Assistant Public Defender Orange County Public Defender's Office	Penal Code § 197(4) does not on its face require the inclusion of element 4. (However, see *People v. Piorkowski* (1974) 41Cal.App.3d 324, 328–329.) In addition, the instruction should include a definition of "great bodily injury" (like the one included in CALCRIM 604).	The committee agrees to add a definition of "great bodily injury" to the instruction. It will consider adding case authority for element 4 at its next meeting.
508	Riverside County Superior Court	**Agree as Modified:** Since CALCRIM No. 508 is being modified to include references to ***"great bodily injury,"*** in the alternative, a ***bracketed*** paragraph should be added defining ***"great bodily injury"*** with the instruction: ***["Great bodily injury means significant or***	The committee agrees to add a definition of "great bodily injury" to the instruction.

Instruction	Commentator	Comment	Response
		substantial physical injury. It is an injury that is greater than minor or moderate harm."]	
604	Sharon Petrosino Senior Assistant Public Defender Orange County Public Defender's Office	There is no material recent case law that requires the proposed changes.	The committee agrees that the changes may not be required, but notes that they serve the goals of consistency and clarity across sets of instructions dealing with the same subject matter.
766	Elaine A. Alexander Appellate Defenders, Inc. Michael G. Millman, Executive Director California Appellate Project, San Francisco	The proposed changes to the bench notes appear to reflect recent case law correctly. We note a small typographical problem in the text of the instruction – an extraneous comma in the second sentence of the fifth paragraph: "Even without mitigating circumstances, you may decide that the aggravating circumstances, are not substantial enough to warrant death." The second comma should be deleted.	The committee agrees with this comment and has made the suggested correction.
766	Hon. William Froeberg Orange County Superior Court	In *P v. Vigil*, 51 C 4th 1210 @ 1280 the Supreme Court approved the trial judge's response, which was "That subject is not for the jury to consider or concern itself. You must make every effort to reach a unanimous decision if at all possible." To state in the Related Issues section that the court should refuse to answer is misleading. The proper response is as stated above.	The committee agrees to update the bench note with the suggested case cite.
766	John C. Hueston, President Orange County Bar Association	The proposed language changes in the Bench Notes Comments portion that delete the current explanation of the legal minefield involved in instruction discussing the	The bench notes to CALCRIM are not intended to be a legal treatise with a "complete or effective response to this issue."

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		Governor's Commutation Power should not be adopted. This area is so dangerous and ripe for misleading the jury that clear explanation of the legal principles involved is a critical component of any effort to observe fair application of the Death Penalty. Simple reference to Cal Crim 767 does not adequately redress this issue, particularly as the Bench Notes under 767 do not express the importance of the Court's response in language that is as strong or clear as it is here. Unless the paragraph slotted for elimination under the heading 'Commutation Power' is included as worded in the Bench Notes for 767, the relevant Bench Notes to these two instructions will not be a complete or effective response to this issue.	
766	Sharon Petrosino Senior Assistant Public Defender Orange County Public Defender's Office	Comments (1): The "bench notes" should indicate that CALCRIM 767 should be given "if there is an inquiry from jurors or at the request of the defendant." Comments (2): The reference to *People v. Murtishaw* (2011) 51 Cal.4th 574, 588-589, should not be added to the "authority" section. The California Supreme Court's comment on CALCRIM 766 was limited to instructing the jury not to count factors in mitigation and aggravation to reach a verdict. The court did not comment on the propriety of the instruction as a whole. Comments (3): Under the "related issues" section, the last two lines of the section entitled "Commutation Power" should not be deleted since they are an accurate statement	(1)CALCRIM No. 767 already contains that language with the appropriate authority in the "Instructional Duty" section, but the committee will add the additional requested language about "at the request of the defendant" to the bench note of CALCRIM No. 766. (2)The current reference to the *Murtishaw* case explains the instruction was just approved in dicta and does not suggest the instruction has blanket approval by any means. (3)The committee agrees to retain the last two lines of the paragraph entitled "Commutation Power."

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		of the law and they are not included in the use notes for CALCRIM 767.	
1030	Jordan Posamentier, Esq. Legislative Counsel California Judges Association	*Ramirez* (1990) 50 Cal.3d 1158. It is an appropriate change, The proposal adds only a paragraph that the victim must be alive. This is pursuant to the case of *People v.* and CJA supports it.	No response required.
1030	John C. Hueston, President Orange County Bar Association	The proposed bracketed portion should read: 'The other person must be alive at *the moment of penetration* for the crime of sodomy to occur.' (rather than 'at the time of the act' to avoid confusion and vagueness. The risk is that the language 'at the time of the act' might be seen to include steps preparatory to the act of sodomy. The court in *People v. Ramirez* (1990) 50 Cal. 3d 1158, at 1175-1177 concluded that 'sodomy requires that the victim be alive at the time of the penetration', basing its reasoning on analogizing the issue to the crime of rape, which has the same requirement of being alive at the time of penetration. For the same reason, the proposed comment in the Bench Notes should reflect the more precise language of *Ramirez*.	Sodomy is defined as "any penetration, no matter how slight." The proposed new language states that "The other person must be alive at the time of the act for the crime of sodomy to occur." Element 1 refers to "an act of sodomy." Accordingly, the committee believes that the current language is correct and clear.
1030	Sharon Petrosino Senior Assistant Public Defender Orange County Public Defender's Office	In *People v. Ramirez* (1990) 50 Cal. 3d 1158, 1175-1177, the court concluded that "sodomy requires that the victim be alive at the time of penetration." Therefore, the definition of sodomy should state: "*Sodomy* is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.] [The other	See response above.

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		person must be alive at the time of the sodomy.]" In the alternative, the added provision should state: "The other person must be alive at the time of the penetration, no matter how slight, of the anus of the other person by the penis of another person."	
1151	Elaine A. Alexander Appellate Defenders, Inc. Michael G. Millman, Executive Director California Appellate Project, San Francisco	We have two suggestions here. (1) <u>*People v. Zambia* (2011) 51 Cal.4th 965 and specific intent</u> The proposal includes amending the instruction to add "[It does not matter whether ____<*insert name*> was (a prostitute already/ [or] an undercover police officer)." The proposal includes a related amendment to the "Authority" section to add a citation to *People v. Zambia* (2011) 51 Cal.4th 965. We agree with these amendments. However, *Zambia* also resolved the specific intent question, which a current bench note (see page 57 of proposal) states is the subject of conflict: > There is a conflict in the case law about the intent required to prove pandering. [Citations.] The trial court must decide whether to give bracketed element 2 on specific intent.	The committee agrees with the suggestions concerning *Zambia* and has revised the instruction accordingly. The committee will consider the second suggestion for a new definition at its next meeting.

Instruction	Commentator	Comment	Response
		The court in *Zambia* decided that pandering is a specific intent crime: > We clarify here that pandering is a specific intent crime. Its commission requires that a defendant intends to persuade or otherwise influence the target "to become a prostitute" as that phrase has been interpreted here. This construction of section 266i, subdivision (a)(2) effectuates the purpose and intent of the pandering statute, which is to criminalize the knowing and purposeful conduct of any person seeking to encourage "another person" to work with the panderer or another pimp in plying the prostitution trade. The long-standing	

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		and broader construction of the phrase "encourages another person to become a prostitute " places the focus on the defendant's unlawful actions and intent, rather than making the targeted victim's character or occupation the determinative factors for conviction. (*People v. Zambia*, *supra*, 51 Cal.4th at p. 980**.)** Accordingly, element 2 of the instruction should be made mandatory by deleting the brackets and deleting the italicized direction preceding it. In addition, the bench note on intent should also be modified. (2) Definition of prostitute The proposal also modifies the definition of a prostitute, replacing "another person" with "someone other than the defendant": "A prostitute is a person who engages in sexual intercourse or any lewd act with ~~another person~~ someone other than the defendant in exchange for money [or other compensation]." The aim was to follow *People v. Dixon* (2011) 191 Cal.App.4th	

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		1154, 1159, which held that pandering requires that the defendant induce the person to perform a sexual act with a person other than the defendant. The proposed change could be confusing because the common understanding of the term "prostitute" is not so limited. And it could be problematic if the defendant is also charged with soliciting an act of prostitution for himself. It would be clearer to add the qualification to the description of pandering, rather than the definition of a prostitute. We suggest adding a sentence: **"The acts of prostitution the defendant sought to (cause/ persuade/ encourage/ induce) must have been with an individual other than the defendant."**	
1151	John C. Hueston, President Orange County Bar Association	The legal statement is accurate, but the final citations under 'Authority' should reflect that *People v. Zambia* (2011) is 51 Cal.4th 965, 981 and *People v. Dixon* (2011) 191 Cal.App.4th 1154, 1159-1160.	The committee agrees to update the case citations.
1151	Sharon Petrosino Senior Assistant Public Defender Orange County Public Defender's Office	The pinpoint cites should be *People v. Zambia* (2011) 51 Cal.4th 965, 981, and People *v. Dixon* (2011) 191 Cal.App.4th 1154, 1159-1160.	The committee agrees to update the case citations.
1700	Elaine A. Alexander Appellate Defenders, Inc. Michael G. Millman, Executive Director	The proposal to change the bench notes to cite *People v. Sherow* is appropriate, although the correct citation is *People v. Sherow* (2011) 196 Cal.App.4th 1296, 1308-1309	The committee prefers the current language in the bench note because *Jackson* is the existing binding authority that the trial court must follow. At a future meeting the

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	California Appellate Project, San Francisco	[128 Cal.Rptr.3d 255]. (The original opinion was superseded by grant of rehearing.) We do have three suggestions: (1) Statement of law in "Attached Residential Balconies" section The new section, "Attached Residential Balconies," misstates the law by saying unequivocally: *An attached residential balcony is part of an inhabited dwelling*. (*People v. Jackson* (2010) 190 Cal.App.4th 918, 924-925; but see dictum in *People v. Valencia* (2002) 28 Cal.4th 1, 11, fn. 5 that an "unenclosed balcony" is not a structure satisfying the "reasonable belief test." (Emphasis added.) The emphasized sentence is inaccurate, because the law is unsettled. One Court of Appeal case, *Jackson*, held an attached residential balcony *is* part of an inhabited dwelling, but another held it was *not – People v. Yarbrough*, previously published at 193 Cal.App.4th 921 and superseded by grant of review, S192751. *Yarbrough* currently is pending before the California Supreme Court. The issue is	committee will consider adding bracketed language to the instruction on consent, to be used when the defendant presents a defense of consent.

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		described on the court website as: "Did the Court of Appeal err in determining that an unenclosed second floor balcony 'is not part of a building' such that entry onto the balcony could not constitute burglary?" The Court of Appeal decision in *Yarbrough* was consistent with the *Valencia* dictum quoted in the bench notes. The current state of the law thus hardly supports the unequivocal statement that a balcony "is" part of a dwelling. A more accurate statement would be: The law is unsettled whether an attached residential balcony is part of an inhabited dwelling. *People v. Jackson* (2010) 190 Cal.App.4th 918, 924-925, held it is; dictum in *People v. Valencia* (2002) 28 Cal.4th 1, 11, fn. 5, suggested it is not; and the issue is pending before the California Supreme Court in *People v. Yarbrough*, S192751. (2) <u>Addition to "Related Issues" section</u> We recommend adding *Sherow* to the "Related Issues" paragraph on *Consent*, both as a more recent authority that consent is a	

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		defense and that the burden is to raise a reasonable doubt: *Consent* While lack of consent is not an element of burglary, consent by the owner or occupant of property may constitute a defense to burglary**. (*People v. Sherow* (2011) 196 Cal.App.4th 1296, 1302 [128 Cal.Rptr.3d 255];** *People v. Felix* (1994) 23 Cal.App.4th 1385, 1397-1398 [28 Cal.Rptr.2d 860]; *People v. Superior Court (Granillo)* (1988) 205 Cal.App.3d 1478, 1485 [253 Cal.Rptr. 316] [when an undercover officer invites a potential buyer of stolen property into his warehouse of stolen goods, in order to catch would-be	

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		buyers, no burglary occurred].) . . . A joint property owner/occupant cannot give consent to a third party to enter and commit a felony on the other owner/occupant. (*People v. Clayton* (1998) 65 Cal.App.4th 418, 420-423 [76 Cal.Rptr.2d 536] [husband's consent did not preclude a burglary conviction based upon defendant's entry of premises with the intent to murder wife].) **The defense of consent is established when the evidence raises a reasonable doubt of consent by the owner or occupant. (*People v. Sherow* (2011) 196 Cal.App.4th 1296, 1309).** (3) Instructional language on consent	

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		Finally, we suggest that consideration could be given in a future cycle to adding bracketed language to the instruction itself, to be used when the defendant presents a defense of consent.	
1700	Jordan Posamentier, Esq. Legislative Counsel California Judges Association	The proposed revision to CALCRIM 1700 adds in the authority section a new case, *People v. Sherow* (2011) 195 Cal.App.4th 228, which indicates that the burden for a consent defense is to raise a reasonable doubt, and the section deletes references to *People v. Yarbrough* (2011) 193 Cal.App.4th 921, which was overturned and may no longer be cited. Further, in the related issues section of the instruction, the section related to "Attached Residential Balconies" has been modified and clarified. These are appropriate changes and CJA supports them.	No response required.
1700	John C. Hueston, President Orange County Bar Association	Under Authority, *Sherow* case was granted a rehearing and then certified for publication; correct citation is : *People v. Sherow*(2011) 196 Cal. App. 4th 1296, 123 Cal. Rptr.3d 880.	The committee has updated the citation.
1700	Sharon Petrosino Senior Assistant Public Defender Orange County Public Defender's Office	The correct cite is *People v. Sherow* (2011) 196 Cal. App. 4th 1296.	The committee has updated the citation.
1700	Riverside County Superior Court	**Agree as Modified:** 1. In the ***Authority*** section, the new citation to *People v. Sherow* is to an earlier, vacated opinion. Thus, the reference to 195 Cal.	The committee has updated the citation and fixed the bracket.

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		App.4th 228 is incorrect as is the reference to 123 Cal.Rptr.3d 880. The citation should read: ***"People v. Sherow (2011) 196 Cal.App.4th 1296 [128 Cal.Rptr.3d 255]."*** 2. Under ***Related Issues***, the section on ***Attached Residential Balconies***, there is a misplaced opening bracket in the new citation to ***People v. Jackson***, mistakenly including the pincite within the parallel citation.	
1801-1803	Elaine A. Alexander Appellate Defenders, Inc. Michael G. Millman, Executive Director California Appellate Project, San Francisco	We agree with the proposed amendments that reflect the statutory changes increasing the amounts for grand theft. We note that similar amendments should be made to other instructions in light of either cross references to grand theft or similar amendments to the dollar amounts in other statutes, such as Penal Code sections 368, subdivisions (d) and (e), and 550, subdivision (c)(2)(A) and (B). We noted these corrections in a brief review: • CALCRIM No. 1355. Hate Crime Allegation: Misdemeanor (Pen. Code, § 422.7): alternative element 3B and bench notes, "Instructional Duty"; • CALCRIM No. 1807. Theft From Elder or Dependent Adult (Pen. Code, § 368(d), (e)): element 3 and bench notes, "Instructional Duty";	The committee has made the proposed changes and will consider further changes at its next meeting.

Instruction	Commentator	Comment	Response
		• CALCRIM No. 2000. Insurance Fraud: Fraudulent Claims (Pen. Code, § 550(a)(1), (4)-(7), (9)): "Lesser Included Offenses" section; • CALCRIM No. 2001. Insurance Fraud: Multiple Claims (Pen. Code, § 550(a)(2) & (8)): "Lesser Included Offenses" section; • CALCRIM No. 2003. Insurance Fraud: Health-Care Claims – Total Value (Pen. Code, § 550(c)(2)): first paragraph of instruction and bench note on "Instructional Duty"; • CALCRIM No. 2601. Giving or Offering a Bribe to a Ministerial Officer (Pen. Code, § 67.5): "Lesser Included Offenses" section; • CALCRIM No. 2602. Giving or Offering a Bribe to a Ministerial Officer: Value of Thing Offered (Pen. Code, § 67.5(b)): first paragraph of instruction. This list is not necessarily exhaustive. We suggest the committee review the numerous changes made to threshold amounts in Assembly Bill No. 8 (2009-2010 1st Ext. Session), Senate Bill No. 18 (2009-2010 3d Ext. Session), and other legislative	

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		enactments in order to determine whether it is necessary to modify other CALCRIM instructions.	
1801-1803	Jordan Posamentier, Esq. Legislative Counsel California Judges Association	CJA supports the proposed revisions to CALCRIM 1801-1803, as the revisions appropriately conform to new statutory amounts.	No response necessary.
2514	Offices of the Los Angeles Public Defender and the Alternate Public Defender	The proposed revision would unfairly help the prosecution to prove that a person who is statutorily prohibited from possession of a firearm did not do so in lawful self-defense or in defense of another. The proposed change is unnecessary because the existing version is essentially legally accurate. Existing CALCRIM No. 2514 covers the self-defense and defense-of-others exception to the firearm possession bans which statutes impose upon persons who have been convicted of felonies or of certain misdemeanors, and upon persons who are addicted to narcotics, or who are subject to a court order prohibiting firearm possession. The proposal is to revise the instruction's two definitions of the peril which a firearm-disfranchised person must face in order to qualify for the exception to the possession ban. The first, imminent danger of suffering "significant or substantial injury" would be replaced with imminent danger of "great bodily injury." The second, imminent danger of "violence," also would be replaced with "great bodily injury." No change in case or statutory law compels	The committee disagrees with this comment because the proposed new language has no impact on the burden of proof and using consistent language improves clarity and juror comprehension.

Instruction	Commentator	Comment	Response
		or advises the proposed changes to the instruction. The basis for No. 2514 remains the case cited in the instructions bench note, *People* v. *King* (1978) 22 Cal.3d 12. The proposed revision does not include any amendment to the use note. And there has been no decision or statutory enactment impugning the authority of *King*. Although revision is not indicated by any change in law, the present language of No. 2514 does differ from *King*'s relevant language. The existing significant or substantial injury is not in *King*. Rather this phrase is the definition of great bodily injury of, inter alia, Penal Code section 12022.7, subdivision (f). However, *King* also does not use the proposed term "great bodily injury" in its holding. Rather it uses "great bodily harm": '[W]hen a member of one of the affected classes is in imminent peril of *great bodily harm* or reasonably believes himself or others to be in such danger, and without preconceived design on his part a firearm is made available to him, his temporary possession of that weapon for a period no longer than that in which the necessity or apparent necessity to use it in self-defense continues, does not violate section 12021." (*People* v. *King* (1978) 22 Cal.3d 12, 24, emphasis added.) Apparently, by "great bodily harm" the *King* court meant "great bodily injury" because it quoted a paragraph of and partly relied upon Penal Code section 197, which contains the term "great bodily	

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		injury" in defining one form of justifiable homicide. (*Ibid*. at p. 26.) With respect to the second proposed revision, it is unclear from where No. 2514's existing "imminent danger of violence" derives. That phrase is not in *King* nor in any case applying *King*. We thus oppose the proposed changes to 2514.	
2514	Sharon Petrosino Senior Assistant Public Defender Orange County Public Defender's Office	There is no material recent case law that requires the proposed changes. If the changes are made despite our objection, the word "violence" should be replaced with the phrase "death or great bodily injury." In addition, the instruction should include a definition of "great bodily injury" (like the one included in CALCRIM 604).	The committee agrees to define "great bodily injury" but disagrees with the rest of this comment.
2514	Riverside County Superior Court	**Agree as Modified:** Since CALCRIM No. 2514 is being modified to include references to ***"great bodily injury,"*** a paragraph should be added defining ***"great bodily injury"*** with the instruction: ***"Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm."***	The committee agrees to define "great bodily injury."
2681	Elaine A. Alexander Appellate Defenders, Inc. Michael G. Millman, Executive Director California Appellate Project, San Francisco	We agree with the amendment, directing the court not to give this instruction if the disturbance is of specified meetings explicitly excluded by Penal Code section 403. We do suggest, however, a slight modification. Section 403 excludes	The committee prefers the current revision to the change proposed in the comment.

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		disturbances of "an assembly or meeting referred to in Section 302 of the Penal Code or Section 18340 of the Election Code." The proposed bench note uses the shorthand of "a religious meeting covered by Pen. Code § 302." We suggest that the bench note use the more specific statutory language of section 302 and say, **"any assemblage of people met for religious worship at a tax-exempt place of worship."** While the reference to a meeting "covered by" section 302 should suggest that reading section 302 is essential to understand section 403, providing the statutory language will add clarity and ease of use.	
3454-3454A	Jordan Posamentier, Esq. Legislative Counsel California Judges Association	The proposed revisions to CALCRIM 3454 and 3454A concern the requisite burden of proof and suggest modifying the existing language to more clearly require proof of a "substantial danger" of the offense (as defined), rather than a "substantial risk." CJA supports these revisions, as they modify the applicable instruction to mirror the language set forth in the guiding caselaw, *People v. Williams* (2003) 31 Cal.4th 757, 776-77; *People v. Roberge* (2003) 29 Cal.4th 979, 988; *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 822, which carry forward the "danger" standard set forth in Welfare & Institutions Code section 6600.	No response required.
3454	Sharon Petrosino Senior Assistant Public Defender Orange County Public	The authority for the "substantial danger" language should be included in the use notes. (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 922.)	The committee agrees to add this authority to the bench notes.

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	Defender's Office		
3454A	Sharon Petrosino Senior Assistant Public Defender Orange County Public Defender's Office	The authority for the "substantial danger" language should be included in the use notes. (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 922.)	The committee agrees to add this authority to the bench notes.
3470	Sharon Petrosino Senior Assistant Public Defender Orange County Public Defender's Office	There is no material recent case law that requires the proposed changes. If the changes are made despite our objection, the phrase "imminent danger of violence" should be replaced with the phrase "imminent danger of bodily injury or imminent danger of being touched unlawfully." (See, for example, *People v. Myers* (1998) 61 Cal.App.4th 328.)	The committee has made the suggested revision.
3518	John C. Hueston, President Orange County Bar Association	The existing instruction as currently worded is clear and appropriate. There is no reason to change the language, and in fact the proposed deletions remove helpful clarifying information for the jury to understand the reason for multiple verdict forms where lesser crimes are alleged. In an effort to clarify the instruction even further, the following language is offered in place of the proposed revision: For count , you will receive (a/multiple) verdict form[s]. You will receive three verdict forms: (1) one for guilty of the greater crime; (2) one for guilty of only the lesser crime; and (3) one for not guilty of either the greater or lesser crime.	The committee disagrees with this comment.

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3518	Sharon Petrosino Senior Assistant Public Defender Orange County Public Defender's Office	There is no material recent case law that requires the proposed changes.	The committee often makes changes to improve clarity and juror comprehension without being compelled to do so by changes in case law.
3518	Riverside County Superior Court	**Agreed as Modified:** In CALCRIM No. 3518, the beginning of the modified paragraph probably should read: "For count***[s]*** . . . ." There is what looks to be a missing bracketed "s" as currently written.	The committee has corrected the bracketed "s."
3518	Elaine A. Alexander Appellate Defenders, Inc. Michael G. Millman, Executive Director California Appellate Project, San Francisco	Under the proposed revision, instead of saying the jury will receive verdict forms for guilty of the greater, guilty of the lesser, and not guilty for any count involving a lesser included offense, the instruction now would say "For count ____, you will receive (a/multiple) verdict form(s)." We have two comments: (1) Same change to CALCRIM Nos. 3517 and 3519 We agree it is clearer to specify the counts by number and suggest the same change be made to CALCRIM Nos. 3517 and 3519, as well. (2) Verdict forms	The committee will consider making corresponding changes to CALCRIM Nos. 3517 and 3519 at its next meeting. The committee will consider the second suggestion at its next meeting as well.

Instruction	Commentator	Comment	Response
		The first sentence of the revised paragraph is potentially confusing. It says: "For count ___, you will receive (a/multiple) verdict form[s]." Giving the option of "a verdict form" implies that sometimes the jury may receive only one form. This is inconsistent with numbered paragraphs 1-4, which assume multiple forms (at least three – guilty of greater, guilty of lesser, and not guilty). For example, those paragraphs tell the jury some variation of: "If all of you agree the defendant is (guilty/not guilty) of ____<*specify offense(s)*>, complete and sign the verdict form for (guilty/not guilty) of ____ <*specify offense(s)*>. Do not complete or sign any other verdict form." These provisions would be confusing if a single form were used. We recognize that counties and perhaps individual judges within a county may use different kinds of verdict forms. Some may have a separate form for each possible verdict, while others may use a single piece of paper with multiple choices (and even then the method of indicating the choice may vary, with check boxes, circles, filling in the blanks, etc.). The CALCRIM instructions probably cannot accommodate every local variation, and so some modification at the trial level may be unavoidable. We suggest the instructions either offer consistent alternatives throughout or use a	

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		single model, such as a separate form for each possible verdict, with directions to the judge to adapt the language if necessary.	
3551	Elaine A. Alexander Appellate Defenders, Inc. Michael G. Millman, Executive Director California Appellate Project, San Francisco	Proposed new CALCRIM No. 3551 is intended to assist trial courts in the difficult situation when a jury reports it is unable to reach a verdict. It is an abbreviated and less specific version of an instruction approved in *People v. Moore* (2002) 96 Cal.App.4th 1105, 1118. We think the draft instruction will be helpful to trial courts. It seems consistent with the instructions approved in *People v. Gainer* (1977) 19 Cal.3d 835, 856, and the restrictions laid out in that opinion: "It is error for a trial court to give an instruction which either (1) encourages jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them; or (2) states or implies that if the jury fails to agree the case will necessarily be retried." (*Id.* at p. 852.) We do have a few suggestions: (1) Admonition to minority jurors One change may help avoid future challenges. We find potentially confusing the admonition in the third paragraph: "Do not change your position just because the majority is in favor of one result and you favor another."	The committee agrees with these suggestions (although it selected a different revision for the title of the instruction) and has revised the instruction accordingly.

Instruction	Commentator	Comment	Response
		Gainer found the "most questionable feature" of the so-called *Allen*[3] or "dynamite" charge is the "discriminatory admonition directed to minority jurors to rethink their position in light of the majority's views." (*People v. Gainer*, *supra*, 19 Cal.3d at p. 845.) While draft CALCRIM No. 3551 does not have the same objectionable language and indeed tells minority jurors *not* to change just because the majority favors another result, the singling out of minority jurors in that sentence may suggest to them that the entire instruction is targeting them. Thus, for example, they may conclude that *they*, and not majority jurors, are being told, "Do not hesitate to re-examine your own views." Such a misinterpretation would come perilously close to the admonition condemned in *Gainer*. Although the instruction as a whole properly encourages independent thought, it would be clearer and less susceptible to misunderstanding if each sentence were directed to the same audience, the entire jury, rather than one or more sentences directed to a singled-out segment of the jury. The sentence under discussion would be more consistent with the overall tone of the instruction and less vulnerable to appellate challenge if it read: **"Do not change your position just because it differs from that of other jurors or just because you or others**	

[3] *Allen v. United States* (1896) 164 U.S. 492, 501-502.

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		want to reach a verdict." After all, majority jurors, as well, should not change their position just to "get along" or reach a verdict. (2) New approaches Paragraph four tells the jury: "It is up to you to decide how to conduct your deliberations. You may want to consider new approaches." In the sentence "You may want to consider new approaches," the phrase "new approaches" is somewhat ambiguous. We feel that a little more direction would be helpful. While it would not entirely remove the ambiguity, we recommend that the sentence be revised to read: It is up to you to decide how to conduct your deliberations. You may want to consider new approaches **in order to get a fresh perspective.** (3) Title of instruction The title "Alternate Methods for Reaching a Verdict" is not descriptive of the content of the instruction when examples are not given. A simple **"Difficulty in Reaching a Verdict"** or something similar would be more reflective of what the instruction is saying.	

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3551	Jordan Posamentier, Esq. Legislative Counsel California Judges Association	This proposed revision allows the court to instruct a deadlocked jury to continue deliberations. While the instruction might be useful, the introductory language is unnecessary and should be eliminated. Also, the sentence beginning with "Do not hesitate…" should be moved to become the second sentence of the following paragraph. It should read: "Fair and effective jury deliberations require a frank and forthright exchange of views. Do not hesitate to re-examine your own views. Each of you must decide…" This change orders the ideas in a more intuitive way	The committee disagrees with this comment.
3551	Los Angeles County Superior Court	3551. This instruction should include the options that have been provided since 2007 by California Court Rule 2.1036 that permits, upon the potential for a deadlock, the opportunity for the attorneys to address the jurors and make additional closing argument.	The committee does not believe it is necessary to instruct the jury about other options available to the attorneys.
3551	Offices of the Los Angeles Public Defender and the Alternate Public Defender	We oppose the adoption of the proposed new CalCrim 3551, which is unacceptable in its present form. The instruction seems to be taken from *People v. Moore* (2002) 96 Cal.App.4th 1105; however, as drafted, it leaves out key portions of the admonition as given by the trial court in the *Moore* case. In addition the instruction improperly encourages jurors to change their minds without telling them that it is a juror's duty and obligation *not* to surrender his or her strongly held beliefs.	The committee disagrees with this comment.

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		As drafted, the instruction undoubtedly violates *People v. Gainer* (1977) 19 Cal.3d 835, wherein the Supreme Court disapproved the use of the "blockbuster" jury instruction derived from *Allen v. United States* (1896) 164 U.S. 492. It is also inconsistent with CALCRIM 3550, which correctly cautions each juror not to "hesitate to change your mind if you become convinced that you are wrong. But do not change your mind just because other jurors disagree with you." Any instruction that fails to tell jurors that they should not change their minds just because other jurors disagree with them is wrong. Any instruction that does not tell jurors they should stick to their beliefs after they have fairly and sufficiently deliberated on the issues is wrong and should not be allowed. Proposed instruction 3551 would state: Do not hesitate to re-examine your own views. Fair and effective jury deliberations require a frank and forthright exchange of views. Each of you must decide the case for yourself and form your individual opinion after you have fully and completely considered all of the evidence with your fellow jurors. It is your duty as jurors to deliberate with	

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		the goal of reaching a verdict if you can do so without surrendering your individual judgment. Do not change your position just because the majority is in favor of one result and you favor another. Both the People and the Defendant are entitled to the individual judgment of each juror. *People v. Moore* does not support this instruction. In *Moore,* the trial judge gave an instruction with several critical sentences that have been omitted from proposed instruction 3551. Here is the instruction from *Moore*: It is your duty as jurors to carefully consider, weigh and evaluate all of the evidence presented at the trial, to discuss your views regarding the evidence, and to listen to and consider the views of your fellow jurors. In the course of your further deliberations, you should not hesitate to re-examine your own views or to request your fellow jurors to re-examine theirs. You should not hesitate to change a view you once held if you are	

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		convinced it is wrong or to suggest other jurors change their views if you are convinced they are wrong. Fair and effective jury deliberations require a frank and forthright exchange of views. As I previously instructed you, each of you must decide the case for yourself, and you should do so only after a full and complete consideration of all of the evidence with your fellow jurors. It is your duty as jurors to deliberate with the goal of arriving at a verdict on the charge if you can do so without violence to your individual judgment. Both the People and the defendant are entitled to the individual judgment of each juror. In *Moore*, the trial court was very careful to instruct the jurors that they should not change their views unless they could do so without doing violence to their individual judgment. The proposed instruction leaves that out. The jury instruction in *Moore* carefully instructed the jurors they could change their views *if they were convinced they were*	

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		wrong or to convince *other jurors* to change their views. The proposed instruction leaves this out too. Jurors cannot legally be told to change their views once there has been full and fair deliberation, which is what this proposed instruction does. Once the jurors have deliberated and made up their own minds, they cannot be required or even encouraged to change their views nor should they, which is why this instruction is unconstitutional. The Ninth Circuit has explained that the proposed instruction cannot withstand constitutional scrutiny. In such a case "the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved." *Burton v. U.S.*, 196 U.S. 283, 307, 49 L. Ed. 482, 25 S. Ct. 243 (1905). The trial court's failure to counterbalance the implication of its questions and comments by instructing the hold-out juror not to surrender his or her sincere convictions strongly supports the conclusion that the jury was impermissibly coerced to render a unanimous verdict. [Citation.] n5 n5 When a trial court	

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		gives an *Allen* charge, it Ais essential in almost all cases to remind jurors of their duty and obligation not to surrender conscientiously held beliefs simply to secure a verdict for either party. *United States v. Mason*, 658 F.2d 1263, 1268 (9th Cir. 1981). A trial court's failure to give such a cautionary instruction weighs heavily in favor of the conclusion that the defendant's right to a fair trial and impartial jury has been violated. See *United States v. Bonam*, 772 F.2d 1449, 1450 (9th Cir. 1985); *Mason*, 658 F.2d at 1268. (*Jiminez v. Myers* (9th Cir. 1993) 40 F.3d 976, 981.) In *People v. Whaley* (2007) 152 Cal.App.4th 968, the Court of Appeal recognized the persuasive value of *Jiminez* and ultimately held that the supplemental jury instruction given by the trial court was constitutional because "the court also emphasized that the jurors should arrive at a verdict only if they could do so without violence to their individual judgment." It makes sense that if the proposed instruction is based on the *Moore* case, then it follows	

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		that the instruction should include the language from that case.	
3551	Sharon Petrosino Senior Assistant Public Defender Orange County Public Defender's Office	**Comments (1):** We object to the following sentence in proposed CALCRIM instruction 3551: "Do not hesitate to re-examine your own views." (The first sentence of the second paragraph) We acknowledge that there is support in *People v. Moore* (2002) 96 Cal.App.4th 1105 for the use of this language. However, it contradicts the Supreme Court's description of what constitutes jury deliberation. In *People v. Cleveland* (2001) 25 Cal.4th 466, the Court stated: "A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury. The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner	The committee disagrees with the first comment, and notes that the bench notes already refer to Penal Code section 1140.

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		in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge. **A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views**. [Citation omitted]" (*supra* at 485; emphasis supplied). The Court thus recognizes that deliberation involves the interaction of jurors expressing their views. It also, however, recognizes, that a juror may appropriately determine at a certain point in the process that his opinion cannot be affected by further discussion. An instruction commanding a juror not to "hesitate to re-examine your own views" contradicts this legal principle, and invites a juror to violate the deliberative process by abandoning a considered opinion not because of evidence adduced or arguments made, but because of the court's order. We have no objection to an instruction telling jurors to continue to discuss the case with fellow jurors, to listen to the views of fellow jurors, and to express their own views. We have no objection to an instruction telling jurors to reach their decisions based on their assessment of both the evidence and of the opinions and analyses expressed by other jurors. We do, however, object to an	

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		instruction that falsely informs jurors that they have an obligation to change an opinion that has been reached after fair and reasonable deliberation. The sentence: "Do not hesitate to re-examine your own views" does exactly that. **Comments** (2): The "bench notes" should state that the judge may give this instruction only if the judge first ascertains that there is a reasonable probability that the jurors can agree on a verdict. (Penal Code § 1140.)	
3551	Craig Fisher District Attorney San Diego County	On new CALCRIM 3551, our office would recommend including in the fourth paragraph regarding "new approaches" the following additional language similar to that approved in *People v. Whaley* (2007) 152 Cal.App.4th 968, at page 981: "May I suggest that since you've been unable to arrive at a verdict using the methods that you have chosen, that you consider to change the methods you have been following, at least temporarily and try new methods. For example, you may wish to consider having different jurors lead the discussions for a period of time. You also may wish to experiment with reverse role-playing by having those on one side of the issue present and argue the other side's positions and vice versa. This might enable you to better understand the other's positions."	The committee disagrees with this suggestion.