

RESPECTIVE DUTIES OF JUDGE AND JURY

Members of the Jury:

It is now my duty to instruct you on the law that applies to this case. The law requires that I read the instructions to you. You will have these instructions in written form in the jury room to refer to during your deliberations.

You must base your decision on the facts and the law.

You have two duties to perform. First, you must determine what facts have been proved from the evidence received in the trial and not from any other source. A "fact" is something proved by the evidence or by stipulation. A stipulation is an agreement between attorneys regarding the facts. Second, you must apply the law that I state to you, to the facts, as you determine them, and in this way arrive at your verdict and any finding you are instructed to include in your verdict.

You must accept and follow the law as I state it to you, regardless of whether you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.

You must not be influenced by pity for or prejudice against a defendant. You must not be biased against a defendant because he has been arrested for this offense, charged with a crime, or brought to trial. None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that a defendant is more likely to be guilty than not guilty. You must not be influenced by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and a defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences.

CALJIC 1.01

INSTRUCTIONS TO BE CONSIDERED AS A WHOLE

If any rule, direction or idea is repeated or stated in different ways in these instructions, no emphasis is intended and you must not draw any inference because of its repetition. Do not single out any particular sentence or any individual point or instruction and ignore the others. Consider the instructions as a whole and each in light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

CALJIC 1.02

STATEMENTS OF COUNSEL--EVIDENCE
STRICKEN OUT--INSINUATIONS OF
QUESTIONS--STIPULATED FACTS

Statements made by the attorneys during the trial are not evidence. However, if the attorneys have stipulated or agreed to a fact, you must regard that fact as proven.

If an objection was sustained to a question, do not guess what the answer might have been. Do not speculate as to the reason for the objection.

Do not assume to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it helps you to understand the answer.

Do not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken by the court; treat it as though you had never heard of it.

CALJIC 1.03 (1998 Revision)

**JUROR FORBIDDEN TO MAKE ANY
INDEPENDENT INVESTIGATION**

You must decide all questions of fact in this case from the evidence received in this trial and not from any other source. When a witness has testified through a certified court interpreter, you must accept the English interpretation of that testimony even if you would have translated the sign language differently.

You must not independently investigate the facts or the law or consider or discuss facts as to which there is no evidence. This means, for example, that you must not on your own visit the scene, conduct experiments, or consult reference works or persons for additional information.

You must not discuss this case with any other person except a fellow juror, and then only after the case is submitted to you for your decision and only when all twelve jurors are present in the jury room.

CALJIC 1.05

JUROR'S USE OF NOTES

You have been given notebooks and pencils. Leave them on your seat in the jury room when you leave each day and at each recess.

Notes are only an aid to memory and should not take precedence over recollection. A juror who does not take notes should rely on his or her recollection of the evidence and not be influenced by the fact that other jurors do take notes. Notes are for the note-taker's own personal use in refreshing his or her recollection of the evidence.

Finally, should any discrepancy exist between a juror's recollection of the evidence and a juror's notes, or between one juror's recollection and that of another, you may request that the reporter read back the relevant testimony which must prevail.

CALJC 2.00

DIRECT AND CIRCUMSTANTIAL
EVIDENCE--INFERENCES

Evidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or non-existence of a fact.

Evidence is either direct or circumstantial.

Direct evidence is evidence that directly proves a fact. It is evidence which by itself, if found to be true, establishes that fact.

Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct and circumstantial evidence. Both direct and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

CALJIC 2.01

SUFFICIENCY OF CIRCUMSTANTIAL
EVIDENCE--GENERALLY

However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which the inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt.

If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

CALJIC 2.03

CONSCIOUSNESS OF GUILT--FALSEHOOD

If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

Exact copy of CALJIC No. 2.03, except adaptations.

CALJIC 2.06

EFFORTS TO SUPPRESS EVIDENCE

If you find that a defendant attempted to suppress evidence against himself in any manner, such as by destroying evidence or by concealing evidence, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

CALJIC 2.09

EVIDENCE LIMITED AS TO PURPOSE

Certain evidence was admitted for a limited purpose.

At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted.

Do not consider this evidence for any purpose except the limited purpose for which it was admitted.

CALJC 2.11

PRODUCTION OF ALL AVAILABLE
EVIDENCE NOT REQUIRED

Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events. Neither side is required to produce all objects or documents mentioned or suggested by the evidence.

CALJIC 2.13

PRIOR CONSISTENT OR INCONSISTENT
STATEMENTS AS EVIDENCE

Evidence that at some other time a witness made a statement or statements that is or are inconsistent or consistent with his or her testimony in this trial, may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on that former occasion.

If you disbelieve a witness's testimony that he or she no longer remembers a certain event, that testimony is inconsistent with a prior statement or statements by him or her describing that event.

CALJC 2.16

DOG-TRACKING EVIDENCE

Evidence of dog tracking has been received for the purpose of showing, if it does, that the defendant is the perpetrator of the crimes of kidnapping and murder. This evidence is not by itself sufficient to permit an inference that the defendant is guilty of the crimes of kidnapping and murder. Before guilt may be inferred, there must be other evidence that supports the accuracy of the identification of the defendant as the perpetrator of the crimes of kidnapping and murder.

The corroborating evidence need not be evidence which independently links the defendant to the crime. It is sufficient if it supports the accuracy of the dog tracking.

In determining the weight to give to dog-tracking evidence, you should consider the training, proficiency, experience, and proven ability, if any, of the dog, its trainer, and its handler, together with all the circumstances surrounding the tracking in question.



CALJC 2.20 (2000 Revision)

BELIEVABILITY OF WITNESS

Every person who testifies under oath is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.

In determining the believability of a witness you may consider anything that has a tendency to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following:

The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness has testified;

The ability of the witness to remember or to communicate any matter about which the witness testified;

The character and quality of that testimony;

The demeanor and manner of the witness while testifying;

The existence or nonexistence of a bias, interest, or other motive;

The existence or nonexistence of any fact testified to by the witness;

The attitude of the witness toward this action or toward the giving of testimony;

A statement previously made by the witness that is consistent or inconsistent with his or her testimony;

An admission by the witness of untruthfulness.

CALJIC 2.21.1 (2001 Revision)

DISCREPANCIES IN TESTIMONY

Discrepancies in a witness's testimony or between a witness's testimony and that of other witnesses, if there were any, do not necessarily mean that any witness should be discredited. Failure of recollection is common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or a transaction often will see or hear it differently. You should consider whether a discrepancy relates to an important matter or only to something trivial.

CALJIC 2.21.2

WITNESS WILLFULLY FALSE

A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars.

CALJIC 2.22

WEIGHING CONFLICTING TESTIMONY

You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

CALJIC 2.27

SUFFICIENCY OF TESTIMONY
OF ONE WITNESS

You should give the testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends.

CALJIC 2.51

MOTIVE

Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

CALJIC 2.60**DEFENDANT NOT TESTIFYING--
NO INFERENCE OF GUILT MAY BE DRAWN**

A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way.

CALJIC 2.61

DEFENDANT MAY RELY ON
STATE OF EVIDENCE

In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him. No lack of testimony on defendant's part will make up for a failure of proof by the People so as to support a finding against him on any such essential element.

CALJIC 2.71

ADMISSION--DEFINED

An admission is a statement made by the defendant which does not by itself acknowledge his guilt of the crimes for which the defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence.

You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part.

Evidence of an oral admission of the defendant not made in court should be viewed with caution.

CALJIC 2.72

**CORPUS DELICTI MUST BE PROVED
INDEPENDENT OF ADMISSION**

No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any admission made by him outside of this trial.

The identity of the person who is alleged to have committed a crime is not an element of the crime. The identity may be established by an admission.

CALJIC 2.80

EXPERT TESTIMONY--
QUALIFICATIONS OF EXPERT

Witnesses who have special knowledge, skill, experience, training or education in a particular subject have testified to certain opinions. Any such witness is referred to as an expert witness. In determining what weight to give to any opinion expressed by an expert witness, you should consider the qualifications and believability of the witness, the facts or materials upon which each opinion is based, and the reasons for each opinion.

An opinion is only as good as the facts and reasons on which it is based. If you find that any fact has not been proved, or has been disproved, you must consider that in determining the value of the opinion. Likewise, you must consider the strengths and weaknesses of the reasons on which it is based.

You are not bound by an opinion. Give each opinion the weight you find it deserves. You may disregard any opinion if you find it to be unreasonable.

CALJIC 2.81**OPINION TESTIMONY OF LAY WITNESS**

In determining the weight to be given to an opinion expressed by any witness who did not testify as an expert witness, you should consider his or her believability, the extent of his or her opportunity to perceive the matters upon which his or her opinion is based and the reasons, if any, given for it. You are not required to accept such an opinion but should give it the weight, if any, to which you find it entitled.

CALJIC 2.82

HYPOTHETICAL QUESTIONS

In examining an expert witness, counsel may ask a hypothetical question. This is a question in which the witness is asked to assume the truth of a set of facts, and to give an opinion based on that assumption.

In permitting such a question, the court does not rule, and does not necessarily find that all the assumed facts have been proved. It only determines that those assumed facts are within the possible range of the evidence. It is for you to decide from all the evidence whether or not the facts assumed in a hypothetical question have been proved. If you should decide that any assumption in a question has not been proved, you are to determine the effect of that failure of proof on the value and weight of the expert opinion based on the assumed facts.

CALJIC 2.83

RESOLUTION OF CONFLICTING
EXPERT TESTIMONY

In resolving any conflict that may exist in the testimony of expert witnesses, you should weigh the opinion of one expert against that of another. In doing this, you should consider the relative qualifications and believability of the expert witnesses, as well as the reasons for each opinion and the facts and other matters upon which it was based.

CALJIC 2.90

PRESUMPTION OF INNOCENCE--
REASONABLE DOUBT--BURDEN OF PROOF

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

CALJIC 3.30

CONCURRENCE OF ACT AND
GENERAL CRIMINAL INTENT

In the crimes charged in Counts Two and Three, namely, Kidnapping Child Under Age of Fourteen, and Possessing Matter Depicting Sexual Conduct of a Person Under 18, there must exist a union or joint operation of act or conduct and general criminal intent. General intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent, even though he may not know that his act or conduct is unlawful.

CALJIC 3.31

CONCURRENCE OF ACT AND SPECIFIC INTENT

In the crime charged in Count One, namely, Murder, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless this specific intent exists the crime to which it relates is not true.

The crime of Murder requires the specific intent to commit kidnapping.

CALJIC 2.02 (1999 Revision)

SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE
TO PROVE SPECIFIC INTENT

The specific intent with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crime charged in Count 1, Murder, unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required specific intent to kidnap, but (2) cannot be reconciled with any other rational conclusion.

Also, if the evidence as to specific intent permits two reasonable interpretations, one of which points to the existence of the specific intent and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the specific intent appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

CALJIC 4.21.1

VOLUNTARY INTOXICATION--TRIAL WITH
GENERAL AND SPECIFIC INTENT CRIMES

It is the general rule that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of this condition.

Thus, in the crimes of Kidnapping Child Under Age of Fourteen, and Possession of Matter Depicting Sexual Conduct of a Person Under 18, charged in Counts Two and Three, the fact that the defendant was voluntarily intoxicated is not a defense and does not relieve defendant of responsibility for those crimes.

However, there is an exception to this general rule, namely, where a specific intent is an essential element of a crime. In that event, you should consider the defendant's voluntary intoxication in deciding whether the defendant possessed the required specific intent at the time of the commission of the alleged crime.

Thus, in the crime of Murder, charged in Count One, a necessary element is the existence in the mind of the defendant of a certain specific intent which is included in the definition of the crime set forth elsewhere in these instructions.

If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether or not the defendant had the required specific intent.

If from all the evidence you have a reasonable doubt whether the defendant had that specific intent, you must find that defendant did not have that specific intent.

CALJC 4.22

VOLUNTARY INTOXICATION--DEFINED

Intoxication of a person is voluntary if it results from the willing use of any intoxicating liquor, drug or other substance, knowing that it is capable of an intoxicating effect or when he willingly assumes the risk of that effect.

Voluntary intoxication includes the voluntary ingestion, injecting or taking by any other means of any intoxicating liquor, drug or other substance.

CALJIC 4.50**ALIBI**

The defendant in this case has introduced evidence for the purpose of showing that he was not present at the time and place of the commission of the alleged crime for which he is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time the crime was committed, you must find him not guilty.

CALJIC 8.10

MURDER--DEFINED

(Pen. Code, § 187)

Defendant is accused in Count One of having committed the crime of Murder, a violation of Penal Code section 187.

Every person who kills a human being during the commission or attempted commission of kidnapping is guilty of the crime of murder in violation of section 187 of the Penal Code.

In order to prove this crime, each of the following elements must be proved:

1. A human being was killed; and
2. The killing occurred during the commission of kidnapping.

CALJIC 8.21

FIRST DEGREE FELONY-MURDER

(Pen. Code, § 189)

The killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission of a kidnapping is murder of the first degree when the perpetrator had the specific intent to commit that crime.

The specific intent to commit kidnapping and the commission of such crime must be proved beyond a reasonable doubt.

CALJIC 8.80.1 (1997 Revision)

POST JUNE 5, 1990 SPECIAL CIRCUMSTANCES--
INTRODUCTORY

(Pen. Code, § 190.2)

If you find the defendant in this case guilty of murder of the first degree, you must then determine if the following special circumstance is true or not true: The murder of DANIELLE VAN DAM was committed by defendant DAVID ALAN WESTERFIELD while the said defendant was engaged in the commission of the crime of Kidnapping, in violation of Penal Code Section 207.

The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.

If you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true.

In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously.

You will state your special finding as to whether this special circumstance is or is not true on the form that will be supplied.

CALJC 8.81.17

SPECIAL CIRCUMSTANCES--MURDER IN
COMMISSION OF KIDNAPPING

(Pen. Code, § 190.2, subd. (a)(17))

To find that the special circumstance, referred to in these instructions as murder in the commission of kidnapping, is true, it must be proved:

1a. The murder was committed while the defendant was engaged in the commission of a kidnapping; or

1b. The murder was committed during the immediate flight after the commission of a kidnapping by the defendant; and

2. The murder was committed in order to carry out or advance the commission of the crime of kidnapping or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the kidnapping was merely incidental to the commission of the murder.

For the purposes of determining whether a killing has occurred during the commission of a kidnapping, the commission of the crime of kidnapping is not confined to a fixed place or a limited period of time.

Kidnapping is a continuous offense. A kidnapping is still in progress after the original taking of the person. The crime of kidnapping continues as long as the detention of the victim continues.

CALJIC 8.83

SPECIAL CIRCUMSTANCES--SUFFICIENCY OF
CIRCUMSTANTIAL EVIDENCE--GENERALLY

You are not permitted to find a special circumstance alleged in this case to be true based on circumstantial evidence unless the proved circumstance is not only (1) consistent with the theory that a special circumstance is true, but (2) cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the truth of a special circumstance must be proved beyond a reasonable doubt.

In other words, before an inference essential to establish a special circumstance may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which that inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence is susceptible of two reasonable interpretations, one of which points to the truth of a special circumstance and the other to its untruth, you must adopt the interpretation which points to its untruth, and reject the interpretation which points to its truth.

If, on the other hand, one interpretation of that evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

CALJC 8.83.1

**SPECIAL CIRCUMSTANCES—SUFFICIENCY
OF CIRCUMSTANTIAL EVIDENCE
TO PROVE REQUIRED SPECIFIC INTENT**

The specific intent with which an act is done may be shown by the circumstances surrounding its commission. But you may not find a special circumstance alleged in this case to be true unless the proved surrounding circumstances are not only (1) consistent with the theory that the defendant had the required specific intent, but (2) cannot be reconciled with any other rational conclusion.

Also, if the evidence as to specific intent is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent and the other to the absence of the specific intent, you must adopt that interpretation which points to the absence of the specific intent.

If, on the other hand, one interpretation of the evidence as to the specific intent appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

CALJC 8.83.2

**SPECIAL CIRCUMSTANCE--
JURY MUST NOT CONSIDER PENALTY**

In your deliberations the subject of penalty or punishment is not to be discussed or considered by you. That is a matter which must not in any way affect your verdict or affect your finding as to the special circumstance alleged in this case.

CALJIC 9.50 (1999 Revision)

KIDNAPPING--NO OTHER UNDERLYING CRIME

(Pen. Code, § 207, subd. (a))

Defendant is accused in Count Two of having committed the crime of Kidnapping, a violation of section 207, subdivision (a) of the Penal Code.

Every person who unlawfully and with physical force or by any other means of instilling fear, steals or takes, or holds, detains, or arrests another person and carries that person without her consent for a distance that is substantial in character, is guilty of the crime of kidnapping in violation of Penal Code section 207, subdivision (a).

A movement that is only for a slight or trivial distance is not substantial in character. In determining whether a distance that is more than slight or trivial is substantial in character, you should consider the totality of the circumstances attending the movement, including, but not limited to, the actual distance moved, whether the movement increased the risk of harm above that which existed prior to the movement, decreased the likelihood of detection, or increased both the danger inherent in a victim's foreseeable attempt to escape and the attacker's enhanced opportunity to commit additional crimes.

In order to prove this crime, each of the following elements must be proved:

1. A person was unlawfully moved by the use of physical force, or by any other means of instilling fear;

2. The movement of the other person was without her consent; and
3. The movement of the other person was for a substantial distance, that is, a distance more than slight or trivial.
4. The movement must have commenced at a time when the person was still alive.

CALJIC 9.52 (2000 Revision)

KIDNAPPING--VICTIM UNDER FOURTEEN

(Pen. Code, § 208, subd. (b))

In addition to charging the crime of kidnapping, the information also alleges that the person kidnapped was under 14 years of age at the time of the commission of the crime. If you find the defendant guilty of kidnapping, you must then determine whether this additional allegation has been proved.

The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.

You will include a special finding on that question in your verdict, using a form that will be supplied for that purpose.

POSSESSION OR CONTROL OF MATTER
DEPICTING SEXUAL CONDUCT OF A PERSON
UNDER THE AGE OF 18

(Pen. Code, § 311.11(a))

Every person who knowingly possesses or controls any matter, the production of which involves the use of a person under the age of 18 years, knowing that the matter depicts a person under the age of 18 years personally engaging in or simulating sexual conduct is guilty of section 3.11.11, subdivision (a), of the Penal Code.

In order to prove this crime, each of the following elements must be proved:

1. Defendant knowingly possessed matter, the production of which involved the use of a person under the age of 18 years;
2. Defendant knew the person so depicted was under the age of 18 years.
3. The person depicted in the matter is engaged in, or is simulating, sexual conduct.

There are two kinds of "possession": actual possession and constructive possession. Actual possession requires that a person knowingly exercise direct physical control over a thing. Constructive possession does not require actual possession but does require that a person knowingly exercise control over or the right to control a thing, either directly or through another person or persons.

As used in this case, "matter" is defined as photographs or computer images.

"Sexual conduct" is defined as sexual intercourse, oral copulation, anal intercourse, anal oral copulation, masturbation, sexual sadism, penetration of the vagina

or rectum by any object in a lewd or lascivious manner, or exhibition of the genitals, pubic or rectal area for the purpose of sexual stimulation of the viewer.

The mere exhibition of the genitals, pubic or rectal area does not constitute unlawful possession of matter depicting sexual conduct of a person under the age of 18. To determine whether there has been a prohibited exhibition of a minor child's genitals, pubic or rectal area, you should consider factors, including but not limited to:

1. Whether the focal point is on the child's genitalia, pubic or rectal area;
 2. Whether the setting is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
 3. Whether the child is in an unnatural pose, or in inappropriate attire, considering the age of the child;
 4. Whether the child is fully or partially clothed, or nude;
 5. Whether the child's conduct suggests a willingness to engage in sexual activity;
- and
6. Whether the conduct is intended or designed to elicit a sexual response in the viewer.

Simple, straightforward nude photographs of minor children, without more, are not unlawful. Such photographs, even if they depict the pubic or rectal areas of minor children, may not have been taken for the purpose of sexual stimulation of the viewer, and if so, do not constitute unlawful images.

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"Virtual" depictions of children engaged in sexual conduct do not constitute prohibited images within the meaning of Penal Code section 311.11, as charged in Count Three. "Virtual" depictions include any images created without using an actual child, such as cartoons, computer-modified images, or anime.

The defendant is accused of having committed the crime of possessing matter depicting minor children engaged in sexual conduct in Count Three. The prosecution has introduced evidence for the purpose of showing that there is more than one image upon which a conviction on Count Three may be based. The defendant may be found guilty if the proof shows beyond a reasonable doubt that he possessed any one or more of the images if those images meet the definition of prohibited matter depicting sexual conduct as I have given it to you. However, in order to return a verdict of guilty on Count Three, all jurors must agree that he possessed the same image or images and the same image or images constitute prohibited matter depicting sexual conduct. It is not necessary that the particular image or images agreed upon be stated in your verdict.

CALJIC 1.21

"KNOWINGLY"--DEFINED

The word "knowingly" means with knowledge of the existence of the facts in question. Knowledge of the unlawfulness of any act or omission is not required.

[A requirement of knowledge does not mean that the act must be done with any specific intent.]

Exact copy of CALJIC No. 1.21, except adaptations.

CALJIC 17.02

SEVERAL COUNTS--DIFFERENT
OCCURRENCES--JURY MUST FIND ON EACH

Each Count charges a distinct crime. You must decide each Count separately.
The defendant may be found guilty or not guilty of any or all of the crimes charged.
Your finding as to each Count must be stated in a separate verdict.

CALJC 17.30

JURY NOT TO TAKE CUE FROM THE JUDGE

I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness.

If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion.

CALJIC 17.31

ALL INSTRUCTIONS NOT
NECESSARILY APPLICABLE

The purpose of the court's instructions is to provide you with the applicable law so that you may arrive at a just and lawful verdict. Whether some instructions apply will depend upon what you find to be the facts. Disregard any instruction which applies to facts determined by you not to exist. Do not conclude that because an instruction has been given I am expressing an opinion as to the facts.

CALJIC 17.40

INDIVIDUAL OPINION REQUIRED--
DUTY TO DELIBERATE

The People and the defendant are entitled to the individual opinion of each juror.

Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors.

Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision.

Do not decide any issue in this case by the flip of a coin, or by any other chance determination.

CALJIC 17.41

HOW JURORS SHOULD APPROACH THEIR TASK

The attitude and conduct of jurors at all times are very important. It is rarely helpful for a juror at the beginning of deliberations to express an emphatic opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, a sense of pride may be aroused, and one may hesitate to change a position even if shown it is wrong. Remember that you are not partisans or advocates in this matter. You are impartial judges of the facts.

CALJIC 17.42

JURY MUST NOT CONSIDER PENALTY

In your deliberations do not discuss or consider the subject of penalty or punishment. That subject must not in any way affect your verdict.

CALJC 17.43

JURY DELIBERATIONS

During deliberations, any question or request the jury may have should be addressed to the Court in writing. Please understand that counsel must first be contacted before a response can be formulated. If a readback of testimony is requested, the reporter will delete objections, rulings, and sidebar conferences so that you will hear only the evidence that was actually presented. Please understand that it may take time to provide a response. Continue deliberating until you are called back into the courtroom.

CALJIC 17.45

MANNER OF RECORDING INSTRUCTION OF NO
SIGNIFICANCE--CONTENT ONLY GOVERNS

The instructions which I am now giving to you will be made available in written form for your deliberations. They must not be defaced in any way.

You will find that the instructions may be typed, printed or handwritten. Portions may have been added or deleted. You must disregard any deleted part of an instruction and not speculate as to what it was or as to the reason for its deletion. You are not to be concerned with the reasons for any modification.

Every part of the text of an instruction, whether typed, printed or handwritten, is of equal importance. You are to be governed only by the instruction in its final wording.

CALJIC 17.47

ADMONITION AGAINST DISCLOSURE
OF JURY BALLOTING

Do not disclose to anyone outside the jury, not even to me or any member of my staff, either orally or in writing, how you may be divided numerically in your balloting as to any issue, unless I specifically direct otherwise.

Exact copy of CALJIC No. 17.47.

CALJIC 17.52

SEPARATION ADMONITION

You will be permitted to separate at the [noon]
[and] [evening] recess[es]. [During your absence the
JURY ROOM will be locked. [REDACTED]

[REDACTED] During periods of recess,
you must not discuss with anyone any subject connected
with this trial, and you must not deliberate further upon
the case until all 12 of you are together and reassembled
in the jury room. [REDACTED]

Exact copy of CALJIC No. 17.52, except adaptations.

CALJIC 17.50 (1997 Revision)

CONCLUDING INSTRUCTION

You shall now retire and select one of your number to act as foreperson. He or she will preside over your deliberations. In order to reach verdicts, all twelve jurors must agree to the decision and to any finding you have been instructed to include in your verdict. As soon as you have agreed upon a verdict, so that when polled each may state truthfully that the verdicts express his or her vote, have them dated and signed by your foreperson and then return with them to this courtroom. Return any unsigned verdict forms.

CALJC 17.53

ADMONITION TO ALTERNATE JURORS

As for the Alternate Jurors, you are still bound by the admonition that you are not to converse among yourselves or with anyone else on any subject connected with the trial, or to form or express any opinion on it until the case is submitted to you, which means until such time as you are substituted in for one of the 12 jurors now deliberating on the case. This also means that you are not to decide how you would vote if you were deliberating with the other jurors.