

H. VIOLATION OF COURT ORDER

2700. Violation of Court Order (Pen. Code, § 166(a)(4) & (b)(1))

The defendant is charged [in Count _____] with violating a court order [in violation of Penal Code section 166].

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

1. A court [lawfully] **issued a written order** that the defendant _____ <insert description of order>;
2. The defendant **knew about the court order** its contents;
3. The defendant had the ability to follow the court order;

AND

4. The defendant willfully violated the court order.

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

[The People must prove that the defendant knew about the court order and that (he/she) had the **opportunity to read the order** or otherwise become familiar with what it said. But the People do not have to prove that the defendant actually read the court order.]

New January 2006

BENCH NOTES

Instructional Duty

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

In order for a defendant to be guilty of violating Penal Code section 166(a)(4), the court order must be “lawfully issued.” (Pen. Code, § 166(a)(4); *People v. Gonzalez* (1996) 12 Cal.4th 804, 816–817 [50 Cal.Rptr.2d 74, 910 P.2d 1366].) The defendant may not be convicted for violating an order that is **unconstitutional**, and the defendant may bring a collateral attack on the validity of the order as a defense to this charge. (*People v. Gonzalez, supra*,

12 Cal.4th at pp. 816–818; *In re Berry* (1968) 68 Cal.2d 137, 147 [65 Cal.Rptr. 273, 436 P.2d 273].) **The defendant may raise this issue on demurrer but is not required to.** (*People v. Gonzalez, supra*, 12 Cal.4th at pp. 821, 824; *In re Berry, supra*, 68 Cal.2d at p. 146.) The legal question of whether the order was lawfully issued is the type of question normally resolved by the court. (*People v. Gonzalez, supra*, 12 Cal.4th at pp. 816–820; *In re Berry, supra*, 68 Cal.2d at p. 147.) If, however, there is a factual issue regarding the lawfulness of the court order and the trial court concludes that the issue must be submitted to the jury, give the bracketed word “lawfully” in element 1. The court must also instruct on the facts that must be proved to establish that the order was lawfully issued.

Penal Code section 166(b)(1) provides for an increased sentence if the defendant was previously convicted of stalking and violated a court order “by willfully contacting a victim by phone or mail, or directly.” If the prosecution alleges this factor, in element 1, the court should state that the court ordered the defendant “not to contact _____ <insert name of victim in stalking case> directly, by phone, or by mail,” or something similar. The jury must also determine if the prior conviction has been proved unless the defendant stipulates to the truth of the prior. (See CALCRIM Nos. 3100–3103 on prior convictions.)

If the prosecution alleges that the defendant violated a protective order in a case involving domestic violence (Pen. Code, §§ 166(c)(1), 273.6), do not use this instruction. Give CALCRIM No. 2701, *Violation of Court Order: Protective Order or Stay Away*.

Give the bracketed paragraph that begins with “The People must prove that the defendant knew” on request. (*People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941 [47 Cal.Rptr. 670]; *People v. Brindley* (1965) 236 Cal.App.2d Supp. 925, 927–928 [47 Cal.Rptr. 668], both decisions *affd. sub nom. People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943 [47 Cal.Rptr. 679].)

AUTHORITY

- Elements. Pen. Code, § 166(a)(4) & (b)(1).
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Order Must Be Lawfully Issued. Pen. Code, § 166(a)(4); *People v. Gonzalez* (1996) 12 Cal.4th 804, 816–817 [50 Cal.Rptr.2d 74, 910 P.2d 1366; *In re Berry* (1968) 68 Cal.2d 137, 147 [65 Cal.Rptr. 273, 436 P.2d 273].
- **Knowledge of Order Required.** *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979 [168 P.2d 497].

- Proof of Service Not Required. *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979 [168 P.2d 497].
- **Must Have Opportunity to Read** but Need Not Actually Read Order. *People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941 [47 Cal.Rptr. 670]; *People v. Brindley* (1965) 236 Cal.App.2d Supp. 925, 927–928 [47 Cal.Rptr. 668], both decisions affd. *sub nom. People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943 [47 Cal.Rptr. 679].
- Ability to Comply With Order. *People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4 [184 Cal.Rptr. 604].
- **General-Intent** Offense. *People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4 [184 Cal.Rptr. 604].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 30.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 1, *The California Defense Advocate*, § 1.30 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.13[4]; Ch. 144, *Crimes Against Order*, § 144.10[1] (Matthew Bender).

RELATED ISSUES

Violation of Order to Pay Support—Court May Suspend Proceedings

If the defendant is charged with violating Penal Code section 166(a)(4) based on a failure to pay child, spousal, or family support, the court may suspend criminal proceedings if the defendant acknowledges his or her obligation to pay and posts a bond or other surety. (Pen. Code, § 166.5.)

Person Not Directly Bound by Order

A person who is not directly bound by a court order may nevertheless violate Penal Code section 166(a)(4) if he or she acts in concert with a person who is directly bound by the order. (*People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 978–979 [168 P.2d 497]; *Berger v. Superior Court* (1917) 175 Cal. 719, 721 [167 P. 143].) “[A] nonparty to an injunction is subject to the contempt power of the court when, with knowledge of the injunction, the nonparty violates its terms *with or for* those who are restrained.” (*People v. Conrad* (1997) 55 Cal.App.4th 896, 903 [64 Cal.Rptr.2d 248] [italics in original].) The mere fact that the nonparty shares the same purpose as the restrained

party is not sufficient. (*Ibid.*) “An enjoined party . . . has to be demonstrably implicated in the nonparty’s activity.” (*Ibid.*)

Violating Condition of Probation

A defendant may not be prosecuted under Penal Code section 166(a)(4) for violating a condition of probation. (*People v. Johnson* (1993) 20 Cal.App.4th 106, 109 [24 Cal.Rptr.2d 628].)

**2701. Violation of Court Order: Protective Order or Stay
Away (Pen. Code, §§ 166(c)(1), 273.6)**

The defendant is charged [in Count _____] with violating a court order [in violation of _____ <insert appropriate code section[s]>].

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

1. A court [lawfully] issued a written order that the defendant _____ <insert description of content of order>;
2. The court order was a (protective order/stay-away court order/ _____ <insert description of other type of order>), issued under _____ <insert code section under which order made> [in a pending criminal proceeding involving domestic violence/as a condition of probation after a conviction for (domestic violence/elder abuse/dependent adult abuse)].
3. The defendant knew of the court order;
4. The defendant had the ability to follow the court order;

AND

<For violations of Pen. Code, § 166(c)(3), choose “willfully”; for violations of Pen. Code § 273.6(c), choose “intentionally” for the scienter requirement.>

5. The defendant (willfully/intentionally) violated the court order.

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

[The People must prove that the defendant knew of the court order and that (he/she) had the opportunity to read the order or to otherwise become familiar with what it said. But the People do not have to prove that the defendant actually read the court order.]

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

the defendant[,]/ [or] person who was or is engaged to the defendant).

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

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

[(*Elder/(D/d)dependent adult*) *abuse* means that under circumstances or conditions likely to produce great bodily harm or death, the defendant:

1. Willfully caused or permitted any (elder/dependent adult) to suffer;

OR

2. Inflicted on any (elder/dependent adult) unjustifiable physical pain or mental suffering;

OR

3. Having the care or custody of any (elder/dependent adult), willfully caused or permitted the person or health of the (elder/dependent adult) to be injured;

OR

4. Willfully caused or permitted the (elder/dependent adult) to be placed in a situation in which (his/her) person or health was endangered.

[An *elder* is someone who is at least 65 years old.]

[A *dependent adult* is someone who is between 18 and 64 years old and has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her

rights.] [This definition includes an adult who has physical or developmental disabilities or whose physical or mental abilities have decreased because of age.] [A *dependent adult* is also someone between 18 and 64 years old who is an inpatient in a (health facility/psychiatric health facility/ [or] chemical dependency recovery hospital).]]

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

BENCH NOTES

Instructional Duty

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

In order for a defendant to be guilty of violating Penal Code section 166(a)(4), the court order must be “lawfully issued.” (Pen. Code, § 166(a)(4); *People v. Gonzalez* (1996) 12 Cal.4th 804, 816–817 [50 Cal.Rptr.2d 74, 910 P.2d 1366].) The defendant may not be convicted for violating an order that is unconstitutional, and the defendant may bring a collateral attack on the validity of the order as a defense to this charge. (*People v. Gonzalez, supra*, 12 Cal.4th at pp. 816–818; *In re Berry* (1968) 68 Cal.2d 137, 147 [65 Cal.Rptr. 273, 436 P.2d 273].) The defendant may raise this issue on demurrer but is not required to. (*People v. Gonzalez, supra*, 12 Cal.4th at pp. 821, 824; *In re Berry, supra*, 68 Cal.2d at p. 146.) The legal question of whether the order was lawfully issued is the type of question normally resolved by the court. (*People v. Gonzalez, supra*, 12 Cal.4th at pp. 816–820; *In re Berry, supra*, 68 Cal.2d at p. 147.) If, however, there is a factual issue regarding the lawfulness of the court order and the trial court concludes that the issue must be submitted to the jury, give the bracketed word “lawfully” in element 1. The court must also instruct on the facts that must be proved to establish that the order was lawfully issued.

In element 2, give the bracketed phrase “in a criminal case involving domestic violence” if the defendant is charged with a violation of Penal Code section 166(c)(1). In such cases, also give the bracketed definition of “domestic violence” and the associated terms.

In element 2, if the order was not a “protective order” or “stay away order” but another type of qualifying order listed in Penal Code section 166(c)(3) or 273.6(c), insert a description of the type of order from the statute.

In element 2, in all cases, insert the statutory authority under which the order was issued. (See Pen. Code, §§ 166(c)(1) & (3), 273.6(a) & (c).)

Give the bracketed paragraph that begins with “The People must prove that the defendant knew” on request. (*People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941 [47 Cal.Rptr. 670]; *People v. Brindley* (1965) 236 Cal.App.2d Supp. 925, 927–928 [47 Cal.Rptr. 668], both decisions *affd. sub nom. People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943 [47 Cal.Rptr. 679].)

If the prosecution alleges that physical injury resulted from the defendant’s conduct, in addition to this instruction, give CALCRIM No. 2702, *Violation of Court Order: Protective Order or Stay Away—Physical Injury*. (Pen. Code, §§ 166(c)(2), 273.6(b).)

If the prosecution charges the defendant with a felony based on a prior conviction and a current offense involving an act of violence or credible threat of violence, in addition to this instruction, give CALCRIM No. 2703, *Violation of Court Order: Protective Order or Stay Away—Act of Violence*. (Pen. Code, §§ 166(c)(4), 273.6(d).) The jury also must determine if the prior conviction has been proved unless the defendant stipulates to the truth of the prior. (See CALCRIM Nos. 3100–3103 on prior convictions.)

Related Instruction

CALCRIM No. 831, *Abuse of Elder or Dependent Adult* (Pen. Code, § 368(c)).

AUTHORITY

- Elements. Pen. Code, §§ 166(c)(1), 273.6.
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Order Must Be Lawfully Issued. Pen. Code, § 166(a)(4); *People v. Gonzalez* (1996) 12 Cal.4th 804, 816–817 [50 Cal.Rptr.2d 74, 910 P.2d 1366]; *In re Berry* (1968) 68 Cal.2d 137, 147 [65 Cal.Rptr. 273, 436 P.2d 273].
- Knowledge of Order Required. *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979 [168 P.2d 497].
- Proof of Service Not Required. *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979 [168 P.2d 497].
- Must Have Opportunity to Read but Need Not Actually Read Order. *People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941 [47 Cal.Rptr. 670]; *People v. Brindley* (1965) 236 Cal.App.2d Supp. 925, 927–928 [47 Cal.Rptr. 668], both decisions *affd. sub nom. People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943 [47 Cal.Rptr. 679].
- Ability to Comply With Order. *People v. Greenfield* (1982) 134

Cal.App.3d Supp. 1, 4 [184 Cal.Rptr. 604].

- General-Intent Offense. *People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4 [184 Cal.Rptr. 604].
- Abuse Defined. Pen. Code, § 13700(a).
- Cohabitant Defined. Pen. Code, § 13700(b).
- Domestic Violence Defined. Evid. Code, § 1109(d)(3); Pen. Code, § 13700(b); see *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1139 [83 Cal.Rptr.2d 320] [spousal rape is higher level of domestic violence].
- Abuse of Elder or Dependent Adult Defined. Pen. Code, § 368.

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Governmental Authority, § 30.

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, § 63.

1 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 11, *Arrest*, § 11.02[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.13[4] (Matthew Bender).

COMMENTARY

Penal Code section 166(c)(1) also includes protective orders and stay aways “issued as a condition of probation after a conviction in a criminal proceeding involving domestic violence . . .” However, in *People v. Johnson* (1993) 20 Cal.App.4th 106, 109 [24 Cal.Rptr.2d 628], the court held that a defendant cannot be prosecuted for contempt of court under Penal Code section 166 for violating a condition of probation. Thus, the committee has not included this option in the instruction.

LESSER INCLUDED OFFENSES

If the defendant is charged with a felony based on a prior conviction and the allegation that the current offense involved an act of violence or credible threat of violence (Pen. Code, §§ 166(c)(4), 273.6(d)), then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the additional allegations have or have not been proved. If the jury finds that the either allegation was not proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

See the Related Issues section of CALCRIM No. 2700, *Violation of Court Order*.

2702. Violation of Court Order: Protective Order or Stay Away—Physical Injury (Pen. Code, §§ 166(c)(2), 273.6(b))

If you find the defendant guilty of violating a court order, you must then decide whether the People have proved that the defendant’s conduct resulted in physical injury to another person.

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

New January 2006

BENCH NOTES

Instructional Duty

If the prosecution alleges that the defendant’s violation of the court order resulted in physical injury, the court has a **sua sponte** duty to instruct on this sentencing factor.

This instruction **must** be given with CALCRIM No. 2701, *Violation of Court Order: Protective Order or Stay Away*.

The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has or has not been proved the allegation.

AUTHORITY

- Enhancements. Pen. Code, §§ 166(c)(2), 273.6(b).

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Governmental Authority, § 30.

1 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 11, *Arrest*, § 11.02[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.13[4] (Matthew Bender).