

People v. Chance: Analyzing the Assault Statute’s “Present Ability” Requirement

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INTRODUCTION

Between 1997 and 2006 there were 5,045,904 felony arrests in California.¹ During that same time span there were 1,094,130 arrests for assault.² Indeed, in each of those years arrests for assault vastly outnumbered all other types of violent offenses combined.³ Arrests for assault also outnumbered every other specific type of felony arrest.⁴ In light of these statistics, the assault statute has the potential to affect more criminal defendants than any other section of the California Penal Code. It is hardly an overstatement, then, to suggest that the Supreme Court’s opinion in *People v. Chance* was the most important criminal case decided during the 2008 term.

Chance afforded the Court an opportunity to interpret section 240 of the Penal Code. That section provides that “[a]n assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” The Court considered the present ability requirement and held that sufficient evidence supported the assault conviction of a two-strike offender. Reversing the judgment of the Court of Appeal, the Court clarified its holdings in prior assault cases concerning the required mental state under section 240. It also—and more importantly—established a test to evaluate a defendant’s present ability to injure his intended victim.

The casenote proceeds in three parts. Part I discusses the factual background and procedural history of *Chance*. It also explores the reasoning of both Justice Corrigan’s majority opinion and Justice Kennard’s dissenting opinion. Part II considers prior decisions that influenced the reasoning in those opinions. In addition, this part briefly places California’s assault law in context

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1. Department of Justice, California Criminal Justice Profile 2006, Total Felony Arrests, available at http://stats.doj.ca.gov/cjsc_stats/prof06/00/3A.htm (last visited April 9, 2009).

2. *Id.*

3. *Id.*

4. *Id.*

with that in other states. Finally, Part III offers an analysis of *Chance*. It first suggests the majority correctly reinstated Chance's conviction for assault. In doing so, it takes issue with Justice Kennard's characterization of precedent, as well as her proposed solution to recognize assault as a crime of specific intent. It also proposes that an alternative mode of analysis—namely, one stemming from the appropriate standard of review—indicates that the conviction should have been affirmed, regardless of whether Justice Corrigan's or Justice Kennard's test is used. After discussing the Court's conception of immediacy, Part III next considers how jury instructions may change in light of *Chance*. Finally, it analyzes the potential influence of *Chance* on the investigation and prosecution of criminal defendants.

I. *PEOPLE V. CHANCE*

A. *Factual Background*

Kenneth Wayne Chance was not the most sympathetic of criminal defendants. Prior to November 29, 2003, he was a two-strike offender who had been convicted of first degree burglary with a firearm, illegal possession of a firearm, and battery with serious bodily injury.⁵ He also had a history of fleeing from peace officers.⁶ After two felony and two misdemeanor warrants were issued for his arrest, Chance expressed an intention to commit "suicide-by-cop."⁷ In addition, he had managed to acquire the nickname "Shotgun."⁸

Much more agreeable was the man pursuing Chance, Sergeant Tom Murdoch. Sergeant Murdoch was an eight-year veteran of the El Dorado County Sheriff's Department.⁹ He was part of the team that had been searching for Chance for approximately one month.¹⁰

On November 29, 2003, Sergeant Murdoch received information that Chance was at a house in Shingle Springs, El Dorado County, and was in possession of narcotics and a firearm.¹¹ Sergeant Murdoch and other members of the Sheriff's Department acted on the tip and drove toward the house.¹² Sergeant Murdoch stationed himself on a hill overlooking the house.¹³ From there he was able to see Chance working on a car with a belt sander while

5. Transcript of Clerk at 255-56, *People v. Chance*, 46 Cal. Rptr. 3d 235 (Cal. Dist. Ct. App. 2006) (No. C048825).

6. *Id.* at 340.

7. Transcript of Reporter at 48, *Chance*, 46 Cal. Rptr. 3d 235 (No. C048825); Transcript of Clerk, *supra* note 5, at 347, 350.

8. Transcript of Clerk, *supra* note 5, at 343.

9. Transcript of Reporter, *supra* note 7, at 46.

10. Transcript of Clerk, *supra* note 5, at 340.

11. *Id.*

12. *People v. Chance*, 44 Cal.4th 1164, 1168 (2008); Transcript of Clerk, *supra* note 5, at 340.

13. Transcript of Clerk, *supra* note 5, at 340.

listening to a police scanner.¹⁴ As Sergeant Murdoch testified, the scanner allowed Chance to become aware of law enforcement's presence, at which point he could "either take off running or take the time and the opportunity to arm [him]self."¹⁵ When Chance turned on the sander, Sergeant Murdoch advised the other deputies to approach.¹⁶ As the deputies crept toward the house, someone screamed and Chance fled.¹⁷

Sergeant Murdoch pursued Chance, yelling "Sheriff's Office, stop!"¹⁸ Chance looked back at Sergeant Murdoch but continued to flee.¹⁹ Sergeant Murdoch saw Chance drop a cellular phone, withdraw a Smith and Wesson nine-millimeter semi-automatic handgun, and run with it in his right hand.²⁰ Chance then disappeared around the front end of a twenty-foot trailer.²¹

Sergeant Murdoch suspected that Chance was lying in wait for him.²² He unsuccessfully attempted to locate Chance's position by watching the fence behind the trailer, peering through the windows, and checking below the trailer.²³ He decided to approach Chance from the opposite side with his gun drawn.²⁴ Sergeant Murdoch rounded the trailer and "saw [Chance] standing with his chest pressed against the side of the trailer, looking toward the front of the trailer, right arm extended holding the handgun in a shooting position, pointed toward the front of the trailer, left hand supporting the right hand."²⁵ Chance turned his head and looked at the sergeant, but did not reorient the barrel of his weapon.²⁶

Sergeant Murdoch repeatedly ordered Chance to drop his weapon, but Chance did not immediately comply.²⁷ Instead he brought the gun to the middle of his body and flipped the gun behind him.²⁸ Chance tried to flee again but fell.²⁹ Sergeant Murdoch placed Chance under arrest.³⁰ The deputy who recovered the gun discovered that the safety was in the off position.³¹ The

14. *Id.* at 341; Transcript of Reporter, *supra* note 7, at 64-65.

15. Transcript of Reporter, *supra* note 7, at 64.

16. *Id.*

17. *Chance*, 44 Cal.4th at 1168; Transcript of Clerk, *supra* note 5, at 341-42; Transcript of Reporter, *supra* note 7, at 65, 71.

18. *Chance*, 44 Cal.4th at 1168.

19. *Id.*; Transcript of Clerk, *supra* note 5, at 341.

20. *Chance*, 44 Cal.4th at 1168; *People v. Chance*, 46 Cal. Rptr. 3d 141, 235, 237 (Cal. Ct. App. 2006); Transcript of Reporter, *supra* note 7, at 81.

21. *Chance*, 44 Cal.4th at 1168.

22. *Id.*

23. *Id.*; Transcript of Reporter, *supra* note 7, at 93-94.

24. *Chance*, 141 Cal.4th at 1168; *Chance*, 46 Cal. Rptr. 3d at 237.

25. *Chance*, 46 Cal. Rptr. 3d at 237; *see also Chance*, 44 Cal.4th at 1168.

26. *Chance*, 44 Cal.4th at 1168.

27. *Id.*; *Chance*, 46 Cal. Rptr. 3d at 237.

28. *Chance*, 44 Cal.4th at 1168-69; *Chance*, 46 Cal. Rptr. 3d at 237.

29. *Chance*, 44 Cal.4th at 1169; *Chance*, 46 Cal. Rptr. 3d at 237.

30. *Chance*, 44 Cal.4th at 1169; *Chance*, 46 Cal. Rptr. 3d at 237.

31. *Chance*, 44 Cal.4th at 1169; *Chance*, 46 Cal. Rptr. 3d at 237.

gun was loaded with fifteen rounds, but Chance had not transferred a bullet into the firing chamber.³²

B. Procedural History

A jury convicted Chance of attempted murder, assault with a firearm upon a police officer, possession of a firearm by a felon, and possession of ammunition.³³ Instructing the jury on the assault charge, the court stated in part:

To constitute an assault with a firearm, it is not necessary for the defendant to actually point a firearm directly at the other person. An assault criminalizes conduct based on what might have happened, not what actually happened. The pivotal question is whether the defendant intended to do an act likely to result in the application of physical force to another. An assault occurs whenever the next movement of the defendant, at least to all appearances, would be the application of physical force to another.³⁴

The court sentenced Chance to serve seventy years to life in prison.³⁵

In a split decision, the Court of Appeal affirmed Chance's conviction for attempted murder but reversed the conviction for assault, finding a lack of substantial evidence.³⁶ In reversing, the majority held that Chance's conduct did not constitute assault because he lacked the present ability to injure Sergeant Murdoch.³⁷ The court relied in part on *People v. Colantuono*³⁸ and *People v. Williams*,³⁹ both of which concerned the mental state required for assault. Those cases established that assault is a crime of general, not specific, intent.⁴⁰ Interpreting those cases, the Court of Appeal concluded that Chance's "act of pointing his firearm was not immediately antecedent to battery and did not immediately precede the battery."⁴¹ Justice Robie dissented with respect to the issue of assault.⁴²

The Supreme Court granted the People's petition for review. Justice Corrigan's opinion—joined by Chief Justice George, Justice Baxter, Justice Chin, and Justice Moreno—began by rejecting the Court of Appeal's reliance on *Colantuono* and *Williams* and concluded by reversing the Court of Appeal's holding regarding the assault conviction.⁴³ It held that "when a defendant

32. *Chance*, 44 Cal.4th at 1169; *Chance*, 46 Cal. Rptr. 3d at 237.

33. *Chance*, 46 Cal. Rptr. 3d at 237-38.

34. Transcript of Reporter, *supra* note 7, at 196.

35. *Chance*, 46 Cal. Rptr. 3d at 238.

36. *Id.*

37. *Id.* at 238-41.

38. *People v. Colantuono*, 865 P.2d 704 (Cal. 1994).

39. *People v. Williams*, 29 P.3d 197 (Cal. 2001).

40. *See Chance*, 44 Cal.4th at 1169.

41. *Chance*, 46 Cal. Rptr. 3d at 239 (internal quotation marks omitted).

42. *See id.* at 246 (Robie, J., dissenting).

43. *Chance*, 44 Cal.4th at 1168-71, 1176.

equips and positions himself to carry out a battery, he has the 'present ability' required by section 240 if he is capable of inflicting injury on the given occasion, even if some steps remain to be taken, and even if the victim or the surrounding circumstances thwart the infliction of injury."⁴⁴ The evidence demonstrated that Chance was sufficiently far enough along the "continuum of conduct toward battery."⁴⁵ Chance had the means and location to injure Sergeant Murdoch immediately.⁴⁶ Sergeant Murdoch's efforts to protect himself, including his decision to run around the opposite side of the trailer, had no bearing on the present ability analysis.⁴⁷

The Court began by taking issue with the Court of Appeal's reliance on *Williams* and, in turn, *Colantuono*. *Williams*, the Court explained, did not concern the present ability element of assault; rather, it involved only the mental state required for an assault.⁴⁸ According to the Supreme Court, the Court of Appeal misread *Williams* and erroneously concluded that, for a defendant to have present ability, the act must be immediately antecedent to a battery.⁴⁹ The language adopted by the Court of Appeal was originally found in the Supreme Court's discussion of the distinction between ordinary criminal attempt and unlawful criminal attempt.⁵⁰ The *Chance* majority quoted from *Williams* at length to provide the appropriate context for that language.⁵¹ Because, in context, the holdings in those cases applied only to the mental state required for an assault conviction, neither *Colantuono* nor *Williams* could offer guidance as to what constitutes present ability.⁵² The Court thus rejected the Court of Appeal's analysis.⁵³ It also rejected Chance's argument that, because he would have had to turn his body, reposition his gun, and transfer a bullet into the firing chamber, his next movement would not have completed a battery and so he did not have present ability.⁵⁴ The Court explained:

The holdings in *Williams* and *Colantuono* were not intended to and did not transform the traditional understanding of assault to insulate defendants from liability until the last instant before a battery is completed. Although temporal and spatial considerations are relevant to a defendant's 'present ability' under section 240, it is the ability to

44. *Id.* at 1172.

45. *Id.* at 1173.

46. *Id.* at 1175-76.

47. *Id.* at 1176.

48. *Id.* at 1167-8.

49. *Id.* at 1167.

50. *Id.*

51. *Id.* at 1170.

52. *Id.* at 1168-71; *see also id.* at 1175 ("Our references to the last proximate step, and to the next movement completing a battery, were for the purpose of explaining that assault occurs at a point closer to the infliction of injury than is required for crimes falling under the general doctrine of criminal attempt.") (citing *People v. Williams*, 29 P.3d 197, 202 (Cal. 2001)).

53. *Id.* at 1171.

54. *Id.*

inflict injury on the present occasion that is determinative, not whether injury will necessarily be the instantaneous result of the defendant's conduct.⁵⁵

After refuting the arguments of both the Court of Appeal and Chance, the majority went on to flesh out its account of present ability under section 240.

The Court agreed that there is a sense in which a temporal element restricts present ability, and it turned to this issue in the next part of its discussion. It began with a case from 1857, *People v. McMakin*.⁵⁶ This case illustrated that a defendant can have the present ability to inflict injury even if he is multiple steps removed from the completion of the battery and even if other circumstances delay the possibility of injury: "Thus, it is a defendant's action enabling him to inflict a present injury that constitutes the actus reus of assault. There is no requirement that the injury would necessarily occur as the very next step in the sequence of events, or without any delay."⁵⁷

The Court then established a test for present ability. It wrote that a defendant has present ability if he "equips and positions himself to carry out a battery" and "if he is capable of inflicting injury on the given occasion, even if some steps remain to be taken, and even if the victim or the surrounding circumstances thwart the infliction of injury."⁵⁸ Thus, three elements must be met for a defendant to have present ability. First, the defendant must equip himself with the means to carry out a battery. Second, he must position himself in a location such that he can utilize those means. Third, he must be able to inflict injury on that occasion. Moreover, two factors do not count toward calculating present ability: it does not matter if the next step would not result in a battery, and present ability analysis discounts external circumstances that hinder a defendant in his ability to inflict injury.

The Court spent the remainder of its opinion addressing the issue of impossibility. Chance argued that he did not have the present ability to injure Sergeant Murdoch because the latter had his gun trained on Chance and could have shot him first.⁵⁹ The Court responded to this argument by rolling out multiple cases demonstrating that "an assault may occur even when the infliction of injury is prevented by environmental conditions or by steps taken by victims to protect themselves."⁶⁰ In so doing the Court adopted language from *People v. Valdez*⁶¹ and discussed several cases to support its analysis.⁶²

Applying its conception of the law to the facts at hand, the Court concluded that Chance indeed had the present ability to injure Sergeant

55. *Id.*

56. *People v. McMakin*, 8 Cal. 547 (1857).

57. *Chance*, 44 Cal.4th at 1172.

58. *Id.*

59. *Id.* at 1173.

60. *Id.*

61. *People v. Valdez*, 200 Cal. Rptr. 538 (1985).

62. *Chance*, 44 Cal.4th at 1174-76. *See* Part II.B.

Murdoch. Chance was sufficiently far “along the continuum of conduct toward battery”—he needed only to turn his body, chamber a bullet, and pull the trigger.⁶³ Furthermore, the external circumstances did not preclude a finding of present ability.⁶⁴ Chance’s fortuitous mistake about the direction from which Sergeant Murdoch approached was “immaterial.”⁶⁵ “He attained the present ability to inflict injury by positioning himself to strike on the present occasion with a loaded weapon. This conduct was sufficient to establish the actus reus required for assault.”⁶⁶ Accordingly, the Court reversed the holding of the Court of Appeal.⁶⁷

Justice Kennard, joined by Justice Werdegar, wrote a dissenting opinion. She concurred with the *Colantuono* and *Williams* analysis of the Court of Appeal and would have affirmed its result: “[T]he pertinent inquiry is whether in this case defendant’s ‘next movement’ would have completed the battery.”⁶⁸ Justice Kennard believed that, based on the steps that Chance would have had to take to fire the gun, Chance did not assault Sergeant Murdoch under this test.⁶⁹ She conceded that that an assault “unquestionably” would have occurred if Chance were pointing his gun at the sergeant and if he had chambered a bullet.⁷⁰

Justice Kennard also attacked the majority’s reasoning because “the phrase ‘present occasion’ encompasses an act that goes beyond the test articulated in *Williams* and in *Colantuono*, unsettling the law of assault.”⁷¹ To remedy the “legal morass” created by the majority, she proposed recognizing assault as a crime of specific—not general—intent.⁷²

II. LEGAL BACKGROUND AND EXISTING LAW

A. Section 240

Section 240 of the California Penal Code, enacted in and unchanged since 1872, provides that “[a]n assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.”⁷³

B. Precedent

In this portion of the note, I explore the precedent on which the majority

63. *Id.* at 1173.

64. *Id.* at 1175-76.

65. *Id.* at 1176.

66. *Id.*

67. *Id.*

68. *Id.* at 1177 (Kennard, J., dissenting).

69. *Id.*

70. *Id.* at 1177-78.

71. *Id.* at 1178.

72. *Id.* at 1178-79.

73. CAL. PENAL CODE § 240 (Deering 2008).

and dissenting opinions relied. With the exception of *Colantuono* and *Williams*—which receive a more detailed treatment in Part III—I briefly mention how the *Chance* majority relied on these cases in its analysis. Aside from *Colantuono* and *Williams*, the cases are considered in chronological order.

1. *People v. McMakin*

The *Chance* majority relied on *McMakin* to illustrate “the sense in which the present ability element contemplates ‘immediate’ injury.”⁷⁴ In *McMakin*, the Supreme Court in 1857 upheld an assault conviction. McMakin drew a revolver and threatened to shoot a man riding on horseback.⁷⁵ But McMakin pointed the gun at such an angle that, had he pulled the trigger, the bullet would not have struck his intended victim.⁷⁶ The Court determined that this circumstance did not preclude a finding of assault. In doing so, it stated that “[t]he ability to commit the offense was clear. Holding up a fist in a menacing manner, drawing a sword or bayonet, presenting a gun at a person who is within its range, have been held to constitute an assault.”⁷⁷

2. *People v. Yslas*

*Yslas*⁷⁸ supports the *Chance* majority’s conclusion that Sergeant Murdoch’s efforts to protect himself did not preclude a jury from convicting *Chance* for assault.⁷⁹ In that case, the Supreme Court in 1865 affirmed an assault conviction. The Court did not provide much in the way of factual background, though it is clear that the case involved an allegation that the defendant rushed toward his victim with an axe or hatchet in hand.⁸⁰ He did so in a way that “threatened immediate violence.”⁸¹ The intended victim was able to escape to another room and lock the door behind her.⁸² The Court concluded that external circumstances hindering a defendant do not preclude a finding of assault.⁸³ According to the Court, “where there is a clear intent to commit violence accompanied by acts which if not interrupted will be followed by personal injury, the violence is commenced and the assault is complete.”⁸⁴

74. *Chance*, 44 Cal.4th at 1171; *see also id.* at 1171-72.

75. *People v. McMakin*, 8 Cal. 547 (1857).

76. *Id.* at 548.

77. *Id.*

78. *People v. Yslas*, 27 Cal. 630 (1865).

79. *See Chance*, 44 Cal.4th at 1174.

80. *Yslas*, 27 Cal. at 634.

81. *Id.*

82. *Id.* at 630.

83. *Id.*

84. *Id.* at 633.

3. *People v. Lee Kong*

*Lee Kong*⁸⁵ is consistent with the analysis in *Chance* that Chance's "mistake as to the officer's location was immaterial."⁸⁶ In *Lee Kong*, a case decided in 1892, the Supreme Court held that the defendant had the present ability to injure an officer standing on a roof, even though the defendant did not point his gun where the officer actually stood. A policeman drilled a hole in Lee Kong's roof to observe his behavior.⁸⁷ One night, mistakenly believing that the policeman was standing at the site of the hole, Lee Kong drew his gun and fired.⁸⁸ The Court held that Lee Kong's knowledge of the officer's general location and his firing the gun from such a close distance were sufficient to establish present ability.⁸⁹ As to the officer's precise location, the Court stated that Lee Kong's "mistake . . . affords no excuse for his act, and causes the act to be no less an assault."⁹⁰

4. *People v. Hunter*

*Hunter*⁹¹ provides support for two premises that ground *Chance*.⁹² First, a defendant can be guilty of assault even if his intended victim attempts to avoid injury. Second, a defendant can be guilty of assault even if he is several steps removed from completing the battery. In 1925, the court in *Hunter* upheld the defendant's conviction for assault with a deadly weapon.⁹³ After his wife commenced divorce proceedings against him, Hunter told his wife that he was going to kill her and then commit suicide.⁹⁴ The next day he went to his wife's apartment, threatened his wife once again, and attempted to remove a gun from his sock.⁹⁵ He had difficulty extracting it, however, and in the meanwhile his wife escaped through a window.⁹⁶ The court concluded that there was "ample" evidence that Hunter had both the intention and the present ability to injure his wife.⁹⁷

5. *People v. Simpson*

Simpson,⁹⁸ decided in 1933, contributed to the *Chance* majority's

85. *People v. Lee Kong*, 30 P. 800 (Cal. 1892).

86. *See Chance*, 44 Cal.4th at 1176.

87. *Lee Kong*, 30 P. at 800.

88. *Id.*

89. *Id.* at 801.

90. *Id.*

91. *People v. Hunter*, 235 P. 67 (Cal. Ct. App. 1925).

92. *See Chance*, 44 Cal.4th at 1174-75.

93. *Hunter*, 235 P. at 68.

94. *Id.* at 67.

95. *Id.* at 68.

96. *Id.* at 67-68.

97. *Id.* at 68.

98. *People v. Simpson*, 25 P.2d 1008, 1010 (Cal. Ct. App. 1933).

understanding of the temporal component of present ability.⁹⁹ Specifically, it grounded the Court's proposition that a defendant can be sufficiently far along the continuum of conduct to be guilty of assault if "he needed only to transfer a shell to the firing chamber."¹⁰⁰ In *Simpson*, the court affirmed an order granting a new trial due to a substantial conflict of evidence. At trial there was testimony that, during an argument, Simpson pressed a gun against her intended victim's stomach and threatened to shoot him.¹⁰¹ The magazine contained ammunition, but there was no ammunition in the chamber and "[t]he lever which transfers the cartridges from the magazine to the barrel had been thrown down to an angle of about forty-five degrees."¹⁰² Analyzing Simpson's present ability, the court stated that "[a]n automatic repeating rifle may not be termed an unloaded gun when its magazine contains loaded cartridges which may be instantly transferred to the firing chamber by the mere operation of a lever."¹⁰³ The trial court erred in assuming that Simpson lacked present ability because she had not yet chambered a bullet.¹⁰⁴

6. *People v. Thompson*

The *Chance* majority noted that *Thompson*,¹⁰⁵ decided in 1949, "is a case like *McMakin*, in which the defendant confronted the victims with a loaded gun but never pointed it directly at them."¹⁰⁶ In *Thompson*, the court affirmed the defendant's convictions for assault with a deadly weapon. Two officers entered Thompson's house after his wife reported that he had struck her in the head with a shoe.¹⁰⁷ When the officers came into the bedroom, Thompson removed a loaded revolver from a chest of drawers.¹⁰⁸ He then "pointed the revolver toward the officers, aimed between them and pointed downward."¹⁰⁹ Thompson ordered the officers to raise their hands, but one of the officers was able to draw his gun while Thompson momentarily looked away.¹¹⁰ Upholding the convictions, the court stated that "[w]hile he did not point the gun directly at [the officers] or either of them, it was in a position to be used instantly."¹¹¹

99. *Chance*, 44 Cal.4th at 1172.

100. *Id.* at 1173.

101. *Simpson*, 25 P.2d at 1009.

102. *Id.*

103. *Id.* at 1010.

104. *Id.*

105. *People v. Thompson*, 209 P.2d 819 (Cal. Ct. App. 1949).

106. *Chance*, 44 Cal.4th at 1175, n.12.

107. *Thompson*, 209 P.2d at 819.

108. *Id.* at 819-20.

109. *Id.* at 820.

110. *Id.*

111. *Id.*

7. *People v. Ranson*

*Ranson*¹¹² is a 1974 case that the *Chance* majority found to be “particularly instructive” for the general proposition that a defendant has present ability if he “equips and positions himself to carry out a battery” and “if he is capable of inflicting injury on the given occasion.”¹¹³ The *Ranson* court held that the defendant’s conduct constituted assault, even though firing his rifle would have required taking off the magazine, reinserting it, pulling the lever back, letting the lever slide forward, and pulling the trigger.¹¹⁴ *Ranson* took a “combat-stance position” with a .22 caliber rifle and pointed it directly at an officer.¹¹⁵ The chamber of the rifle was empty and the rifle would not work properly.¹¹⁶ In its analysis of *Ranson*’s present ability, the court noted first that “pointing an unloaded shotgun does not constitute ‘present ability.’”¹¹⁷ However, a shotgun is not unloaded if the defendant can instantaneously transfer a bullet into an empty chamber.¹¹⁸ It continued:

[T]ime is a continuum of which ‘present’ is a part. ‘Present’ can denote ‘immediate’ or a point near ‘immediate.’ . . . We are slightly removed from immediately in the instant case; however, we hold that the conduct of appellant is near enough to constitute ‘present’ ability for the purpose of an assault.¹¹⁹

According to the reviewing court, the trial court could also reasonably conclude that *Ranson* knew how to transfer quickly into the chamber.¹²⁰ Because *Ranson* could have transferred a bullet into the firing chamber quickly enough to inflict injury, he met the present ability requirement.¹²¹

8. *People v. Valdez*

The Supreme Court in *Chance* drew heavily on the 1985 *Valdez*¹²² decision, adopting that case’s test for present ability.¹²³ Although the *Chance* majority declined to adopt the analysis of *Valdez* in its entirety, the Court described as “sound” *Valdez*’s discussion of the unimportance of an intended victim’s efforts to avoid injury.¹²⁴ In *Valdez*, the court affirmed the defendant’s conviction for assault with a firearm.¹²⁵ *Valdez* argued with an

112. *People v. Ranson*, 114 Cal. Rptr. 874 (Cal. Ct. App. 1974).

113. *Chance*, 44 Cal.4th at 1172.

114. *Ranson*, 114 Cal. Rptr. at 876-77.

115. *Id.* at 876.

116. *Id.*

117. *Id.* at 877.

118. *Id.* (citing *Simpson*, 25 P.2d at 1008).

119. *Id.*

120. *Id.*

121. *See id.*

122. *People v. Valdez*, 220 Cal. Rptr. 538 (Cal. Ct. App. 1985).

123. *Chance*, 44 Cal.4th at 1168.

124. *Id.* at 1173-74.

125. *Valdez*, 220 Cal. Rptr. at 544.

employee at a self-serve gasoline station.¹²⁶ Valdez pointed a firearm at the employee, who was sitting behind bullet-resistant glass.¹²⁷ The employee telephoned the police, at which point Valdez fired the gun multiple times into the glass.¹²⁸ The Court of Appeal concluded that Valdez had the present ability to injure the employee, even though the employee was sitting behind bullet-resistant glass.¹²⁹ It began by defining “ability” in terms of “a personal attribute—what a given individual has the capacity to do in contrast with those who lack this quality—not an environmental factor.”¹³⁰ In light of this definition, external circumstances that render injury impossible do not preclude a finding of present ability.¹³¹ It went on:

Nothing suggests this ‘present ability’ element was incorporated into the common law to excuse defendants from the crime of assault where they have acquired the means to inflict serious injury and positioned themselves within striking distance merely because, unknown to them, external circumstances doom their attack to failure. This proposition would make even less sense where a defendant has actually launched his attack—as in the present case—but failed only because of some unforeseen circumstance which made success impossible.¹³²

Because Valdez had acquired the means and location to injure the employee immediately, he satisfied the present ability requirement.¹³³ It made no difference that the employee was sitting behind bullet-resistant glass.¹³⁴

9. *People v. Raviart*

The *Chance* majority discussed *Raviart*¹³⁵ for its correct interpretation of both *Valdez* and *Williams*.¹³⁶ In 2001, the *Raviart* court upheld the defendant’s convictions for assault with a firearm. Two law enforcement officers attempted to arrest Raviart as he and a companion were leaving a motel.¹³⁷ When the officers approached, Raviart pointed a gun at one of them.¹³⁸ A jury convicted him for assaulting both police officers.¹³⁹ The appellate court upheld the convictions; regarding the assault on the officer at whom Raviart did not point

126. *Id.* at 539.

127. *Id.*

128. *Id.*

129. *Id.* at 544.

130. *Id.* at 542.

131. *See id.*

132. *Id.* at 543; *see also Chance*, 44 Cal.4th at 1174 (agreeing with this passage). *But see Chance*, 44 Cal.4th at 1174, n.11 (disagreeing with the *Valdez* court’s characterization of the function of the present ability requirement).

133. *Valdez*, 220 Cal. Rptr. at 543-44.

134. *Id.*

135. *People v. Raviart*, 112 Cal. Rptr. 2d 850 (Cal. Ct. App. 2001).

136. *Chance*, 44 Cal.4th at 1174-75.

137. *Raviart*, 112 Cal. Rptr. 2d at 852.

138. *Id.* at 855.

139. *Id.* at 852.

his gun, the court held that “[i]t was enough that defendant brought the gun into a position where he could have used it.”¹⁴⁰ Additionally, any effort that the officers made to protect themselves did not disturb this finding.¹⁴¹

10. *People v. Colantuono*

In *Colantuono*, the Supreme Court in 1994 affirmed an assault conviction.¹⁴² Colantuono drew a gun, pointed it at one of his friends, and fired.¹⁴³ At trial, Colantuono testified that the gun fired accidentally.¹⁴⁴ The trial court instructed the jury using CALJIC Nos. 9.00 and 9.02.¹⁴⁵ It augmented those instructions in part with the following: “The requisite intent for the commission of an assault with a deadly weapon is the intent to commit a battery.”¹⁴⁶ The issue on appeal involved the instruction on the requisite intent for assault. The Supreme Court determined that “the necessary mental state is ‘an intent merely to do a violent act.’”¹⁴⁷ It concluded that the jury instructions did not create an impermissible presumption and was in any event harmless beyond a reasonable doubt.¹⁴⁸

11. *People v. Williams*

In *Williams*, the Supreme Court in 2001 clarified the mental state required for an assault conviction.¹⁴⁹ Claiming it was merely a “warning shot,” Williams fired a shotgun into the wheel well of another man’s truck.¹⁵⁰ Williams admitted that he saw the truck owner crouching near the truck’s rear fender well.¹⁵¹ A jury convicted Williams for assaulting the truck owner.¹⁵² The Court of Appeal reversed the assault conviction, concluding that the trial court gave an erroneous instruction.¹⁵³ Reversing the judgment of the Court of Appeal, the Supreme Court held that assault is a general intent crime that “requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.”¹⁵⁴

140. *Id.* at 856.

141. *See id.* at 857.

142. *Colantuono*, 865 P.2d at 715.

143. *Id.* at 706.

144. *Id.* at 707.

145. *Id.* at 707, n.1.

146. *Id.* at 707.

147. *Id.* at 712.

148. *Id.* at 714-15.

149. *Williams*, 29 P.3d at 199.

150. *Id.*

151. *Id.*

152. *Id.* at 199-200.

153. *Id.* at 200.

154. *Id.* at 204.

III. DISCUSSION

A. *The Merits Of The Opinions*

This casenote would be remiss if it did not consider whether Justice Corrigan's majority opinion or Justice Kennard's dissenting opinion won the day. With whom one agrees seems to depend on one's interpretation of *Colantuono* and *Williams*.¹⁵⁵ I suggest that the majority opinion is most faithful to those cases. I also suggest that an alternative lens through which to view the case—standard of review—favors affirmation of Chance's conviction.

1. *The Requisite Intent*

Justice Kennard asserted in her dissent that, under *Colantuono* and *Williams*, "the pertinent inquiry is whether in this case defendant's 'next movement' would have completed the battery."¹⁵⁶ She answered that question in the negative because Chance "did not commit an act that would have directly and immediately resulted in injury."¹⁵⁷

One response to this claim, which the majority indeed adopted, is that Justice Kennard mischaracterized the test under *Colantuono* and *Williams*. Those cases concerned the mental state required for assault—and not present ability.¹⁵⁸ Justice Kennard contended this distinction is illusory "because under this court's decisions the requisite act and intent are *inseparable*."¹⁵⁹

This contention is unconvincing, because it does not recognize the structure of section 240. As evidenced by the separate phrase "and coupled with a present ability," that section is divided into two distinct prongs: unlawful attempt and present ability.¹⁶⁰ Intent factors only into the first prong, namely the requirement of unlawful attempt; it plays no role in present ability. As the *Valdez* court noted, the word "ability" concerns "a personal attribute—what a

155. For articles considering or mentioning *Colantuono*, see, e.g., Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and Under the Model Penal Code*, 18 GA. ST. U. L. REV. 341, 356 (2001); Allison L. Hurst, *California Supreme Court Survey*, PEPP. L. REV. 783, 822-29 (1995); Miguel A. Mendez, Essay, *A Sisyphean Task: The Common Law Approach to Mens Rea*, 28 U.C. DAVIS L. REV. 407 (1995). Academics have not written expansively on *Williams*.

156. *Chance*, 44 Cal.4th at 1177 (Kennard, J., dissenting).

157. *Id.* at 1178.

158. See *Chance*, 44 Cal.4th at 1170-71 ("[T]he discussion of the proximity between assault and battery in *Williams* and *Colantuono* was confined to the intent requirement for assault, and did not mention or change the well-established understanding of the 'present ability' element of section 240."); *Colantuono*, 865 P.2d at 406 (stating that, in order to evaluate a jury instruction on assault, the Court must "again analyze the intent or mental state necessary to establish these offenses. . . ."); *Williams*, 29 P.3d at 787 ("Recognizing that *Colantuono*'s language may have been confusing, we now clarify the mental state for assault.").

159. *Chance*, 44 Cal.4th at 1178.

160. See CAL. PENAL CODE § 240 ("An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.").

given individual has the capacity to do in contrast with those who lack this quality.”¹⁶¹ In other words, intent is excluded from the analysis of ability, because ability concerns only one’s capacity. An individual armed with a loaded gun has the capacity—and hence the ability—to shoot another person whether or not that individual intends to do so. By contrast, intent is inextricably bound to analysis of unlawful attempt. To speak meaningfully about an individual’s unlawful attempt to shoot another person, we must consider the shooter’s intent. In sum, then, intent only applies to unlawful attempt, and analysis of unlawful attempt is distinct from analysis of present ability; consequently, present ability must be analyzed separately from intent.

Thus Justice Kennard correctly asserted that the requisite act and intent are inseparable; but she was incorrect in extending this assertion to the analysis of present ability. *Colantuono* and *Williams* pertain only to analysis of intent and by extension unlawful attempt. They do not affect the analysis of present ability. Contrary to Justice Kennard’s conclusion, then, the majority does not “have it both ways.”¹⁶²

The language that Justice Kennard quoted from *Williams* and paraphrased from *Colantuono* is consistent with this interpretation. First, she supported her position with language from *Williams* that “a specific intent to injure is not an element of assault because the assaultive act, by its nature, subsumes such an intent.”¹⁶³ But the assaultive act subsumes the intent only with respect to the element of unlawful attempt. Nothing in the *Williams* analysis indicates otherwise. Second, Justice Kennard characterized *Colantuono* as determining that “the intent of committing a battery is subsumed in an act that by its nature will likely result in physical force on another.”¹⁶⁴ Justice Kennard was presumably referring to *Colantuono*’s reasoning that “[i]f one commits an act that by its nature will likely result in physical force on another, the particular intention of committing a battery is thereby subsumed.”¹⁶⁵ Again, this language is entirely consistent with the *Chance* majority’s analysis, so long as it is understood to refer solely to the unlawful attempt requirement of section 240.

This interpretation also counters Justice Kennard’s second point that “the phrase ‘present occasion’ encompasses an act that goes beyond the test articulated in *Williams* and in *Colantuono*, unsettling the law of assault.”¹⁶⁶ The present occasion requirement is located in the present ability prong of section 240. For the reasons stated, *Williams* and *Colantuono* apply to the

161. *Valdez*, 220 Cal. Rptr. at 542.

162. *Chance*, 44 Cal.4th at 1178 (Kennard, J., dissenting).

163. *Id.* (quoting *People v. Williams*, 29 P.3d 197,202 (Cal. 2001)).

164. *Chance*, 44 Cal.4th at 1178 (Kennard, J., dissenting) (citing *Colantuono*, 7 Cal.4th at 217 [865 P.2d at 710-12]).

165. *Colantuono*, 865 P.2d at 711.

166. *Chance*, 44 Cal.4th at 1178 (Kennard, J., dissenting).

unlawful attempt prong. Because these requirements are separate, the majority's analysis does not unsettle the Court's section 240 jurisprudence.

An additional point should be made concerning Justice Kennard's proposed solution. Justice Kennard wrote "[t]he way out of this legal morass is easy. Simply recognize that assault is a specific intent crime, as I advocated in my dissents in *Colantuono* . . . and in *Williams*."¹⁶⁷ Yet recognizing assault to be a specific intent crime is not as simple as Justice Kennard indicated. Strong public policy reasons support the general intent requirement for assault. As the Supreme Court in *People v. Hood* explained:

The distinction between specific and general intent crimes evolved as a judicial response to the problem of the intoxicated offender. That problem is to reconcile two competing theories of what is just in the treatment of those who commit crimes while intoxicated. On the other [sic] hand, the moral culpability of a drunken criminal is frequently less than that of a sober person effecting a like injury. On the other hand, it is commonly felt that a person who voluntarily gets drunk and while in that state commits a crime should not escape the consequences.¹⁶⁸

If courts began to recognize assault as a specific intent crime, as Justice Kennard suggested, intoxication would likely be a prevalent defense under Penal Code section 22(b), which provides that "[e]vidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent."¹⁶⁹ For reasons of public policy, courts are wary of allowing such a defense to a crime that is often committed while the offender is intoxicated.¹⁷⁰ Justice Kennard's dissents in *Chance*, *Williams*, and *Colantuono* did not address what the courts have long considered to be an undesirable consequence of recognizing assault as a specific intent crime.¹⁷¹ Without such an account, "the way out of this legal morass" may not be as "easy" as Justice Kennard purported.

167. *Id.*

168. *People v. Hood*, 462 P.2d 370, 377 (Cal. 1969) (citation omitted); *see also id.* at 378 ("Therefore, whatever reality the distinction between specific and general intent may have in other contexts, the difference is chimerical in the case of assault with a deadly weapon or simple assault. Since the definitions of both specific intent and general intent cover the requisite intent to commit a battery, the decision whether or not to give effect to evidence of intoxication must rest on other considerations."); *People v. Rocha*, 479 P.2d 372, 374-77 (Cal. 1971); *Mendez*, *supra* note 155, at 414-18.

169. CAL. PENAL CODE § 22(b).

170. *See Hood*, 462 P.2d at 379.

171. For a critique, *see Mendez*, *supra* note 155, at 418 ("The *Hood* court acknowledged that the inordinate difficulty in distinguishing specific from general intent offenses had led a number of commentators to urge abandoning the classification. But the court justified its use on the ground that its application depended not so much on the definition of offenses as on the wisdom of allowing a defendant to offer intoxication evidence in a given case. Policy as determined by judges, not the parsing of statutes, was to be the guide.") (footnotes omitted).

2. *Standard of Review*

Yet another mode of analysis—namely, the appropriate standard of review for assault convictions—indicates the majority correctly affirmed Chance’s conviction for assault. Since the end of the 1800s, the California Supreme Court and various California Courts of Appeal have employed a sufficiency of the evidence test to evaluate challenges to convictions for assault.¹⁷² But even when courts employ a standard other than sufficiency of the evidence they still defer greatly to the determinations at trial. For example, *Ranson*, which the Supreme Court cited in *Chance*, evaluated the claim under an abuse of discretion standard.¹⁷³

Raviart nicely summarized the test under the sufficiency of the evidence standard:

When a defendant challenges the sufficiency of the evidence to support a criminal conviction, [t]he test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. The court must view the entire record in the light most favorable to the judgment (order) to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the [defendant] guilty beyond a reasonable doubt. In making such a determination we must view the evidence in a light most favorable to respondent and presume in support of the judgment (order) the existence of every fact the trier could reasonably deduce from the evidence.¹⁷⁴

Justice Corrigan and Justice Kennard appeared to agree that sufficiency of the evidence provided the appropriate test to evaluate the case. Justice Corrigan’s use of the standard is most noticeable toward the end of the opinion.¹⁷⁵ Justice Kennard’s use of the standard, however, is less pronounced. She broached the topic only once. While discussing the posture of the case, she wrote that “the Court of Appeal held that because defendant did not point the gun at Sergeant Murdoch, no reasonable person could conclude that defendant’s conduct would directly and immediately result in the unlawful use

172. See, e.g., *People v. Lee Kong*, 30 P. 800 (Cal. 1892); *People v. Hunter*, 235 P. 67, 68 (Cal. Ct. App. 1925); *People v. Thompson*, 209 P.2d 819, 820 (Cal. Ct. App. 1949); *People v. Valdez*, 220 Cal. Rptr. 538, 539; *People v. Raviart*, 112 Cal. Rptr. 2d 850, 853 (Cal. Ct. App. 2001).

173. See *People v. Ranson*, 114 Cal. Rptr. 874, 877 (“We hold that it was not an abuse of discretion under these facts for the trial court to find that appellant had the present ability to commit a violent injury in that he could have adjusted the misplaced cartridge and fired very quickly.”).

174. *Raviart*, 112 Cal. Rptr. 2d at 850 (internal quotation marks omitted).

175. See *People v. Chance*, 44 Cal. 4th 1164, 1176 (2008) (concluding that “[t]his conduct was sufficient to establish the actus reus required for assault” and “[w]e reverse the Court of Appeal’s judgment, insofar as it held the evidence insufficient to support a conviction for assault with a firearm on a peace officer”).

of force upon another.”¹⁷⁶ The “no reasonable person” language indicates that she was employing the same standard as the Court of Appeal, which was sufficiency of the evidence.

If both opinions agreed that this was the correct standard to evaluate the judgment, it seems appropriate to consider how well they utilized this standard. With this in mind, it appears that Justice Corrigan’s opinion has the upper hand. It is unclear why, even under Justice Kennard’s proposed test, the evidence in this case was not sufficient. Remember that Justice Kennard interpreted *Colantuono* and *Williams* to require that the “defendant’s ‘next movement’ would have completed the battery.”¹⁷⁷ Applying that principle, she determined that, based on the evidence, no rational trier of fact could conclude that Chance’s next movement would have completed the battery.¹⁷⁸ But there are two problems with this conclusion. First, it construes “movement” so narrowly that it cannot be reconciled with precedent. In *Thompson*, for example, the defendant could complete his battery only if he were to point his gun at one officer, pull the trigger, point his gun at another officer, and then pull the trigger again.¹⁷⁹ If that sequence of events could be considered a single movement such that Thompson had the present ability to injure both officers, then Chance’s conduct should receive comparable treatment.

Second, Justice Kennard’s application of the standard of review cannot be reconciled with the testimony of Sergeant Murdoch. At trial Sergeant Murdoch explained that pulling the slide on a nine-millimeter semi-automatic handgun is exceptionally simple: “[Y]ou can actually load and fire this weapon with just one hand. . . . [Y]ou could hook the rear site on your belt, the heel of your shoe, rough clothing, anything that would take just that slide to the rear far enough to catch that round and then go into the chamber.”¹⁸⁰ Given Sergeant’s Murdoch’s testimony, a rational trier of fact could reasonably conclude that Chance could have chambered a bullet and pulled the trigger in a single movement. Indeed, and contrary to Justice Kennard’s opinion, Chance did not even have to turn around to injure the sergeant. He had already seen the sergeant’s position, having looked over his shoulder. Chance could have simply repositioned his weapon, chambered a bullet, and fired.

Consequently, in light of precedent, public policy, and the standard of review, the majority was correct in affirming Chance’s conviction.

176. *Id.* at 1177 (Kennard, J., dissenting).

177. *Id.*

178. *Id.* (“To fire the gun at the pursuing Sergeant Murdoch, defendant would have had to turn around (instead of just looking over his shoulder at Murdoch), pull back the slide of the gun to release a round into the firing chamber, aim the gun at Murdoch, and then pull the trigger.”).

179. *See Thompson*, 209 P.2d at 820.

180. Transcript of Reporter, *supra* note 7, at 86.

B. Immediacy

Aside from the Court's clarification of *Colantuono* and *Williams*, perhaps the most important aspect of the opinion concerns the discussion of immediacy. The Court clearly stated that a temporal element of immediacy constrains analyses of assault: "[The present ability] element is satisfied when a defendant has attained the means and location to strike *immediately*."¹⁸¹

The Court set out its conception of immediacy in various parts of the opinion. It instructed that "immediate" is not to be construed strictly.¹⁸² Rather, borrowing the dictionary definition, the Court wrote that "[i]mmediate' can mean 'near to or related to the present . . . of or relating to the here and now.'"¹⁸³ The most direct guidance the Court offered is toward the beginning of the opinion: "In this context . . . 'immediately' does not mean 'instantaneously.' It simply means that the defendant must have the ability to inflict injury on the present occasion."¹⁸⁴ The Court did not state that a defendant must be within a certain number of seconds, minutes, or hours of inflicting the injury in order to qualify as a present occasion.

The first question is whether the Court has provided a meaningful standard for immediacy.¹⁸⁵ Under the Court's account, present ability depends upon whether a defendant has attained the means and location to injure on the present occasion. The Court did not provide a definition of "occasion" or "present occasion." Still, that language is neither tautological nor surplusage. By limiting present ability to particular occasions, the Supreme Court has excluded certain classes of cases in which lags in time are so great as to prevent infliction of injury. Furthermore, by declining to define this element in terms of concrete units of time, the Court prudently recognized that assaults can take place in a variety of settings. To accommodate this range, courts must provide a flexible standard and defer to the jury's findings as to what, in any particular case, constitutes an occasion.

The second question is whether this fluid conception of immediacy is indeed consistent with precedent. A survey of the opinions suggests that it is. Since the earliest cases, courts' approach to the temporal element has never been rigid. In *Yslas*, for example, the Supreme Court upheld the assault

181. *Chance*, 44 Cal.4th at 1168 (emphasis added) (internal quotation marks omitted); see also *id.* at 1174 (adopting language from *Valdez* that "[o]nce a defendant has attained the means and location to strike immediately he has the 'present ability to injure.'").

182. *Id.* ("Numerous California cases establish that an assault may be committed even if the defendant is several steps away from actually inflicting injury, or if the victim is in a protected position so that injury would not be 'immediate,' in the strictest sense of that term.").

183. *Id.* at 1173, n.9.

184. *Id.* at 1168.

185. Justice Kennard took issue with the Court's analysis regarding the present occasion requirement, claiming that "the phrase 'present occasion' encompasses an act that goes beyond the test articulated in *Williams* and in *Colantuono*, unsettling the law of assault." *Id.* at 1178 (Kennard, J., dissenting). I consider this response in Part III.A.

conviction, citing a case that loosely used “a second or two” as an appropriate temporal benchmark.¹⁸⁶ Subsequent cases have taken an even more liberal approach, not offering any specific window of time outside of which injury could not immediately occur. *Ranson* is an excellent exemplar: “[T]ime is a continuum of which ‘present’ is a part. ‘Present’ can denote ‘immediate’ or a point near ‘immediate.’ . . . [W]e hold that the conduct of appellant is near enough to constitute ‘present’ ability for the purpose of an assault.”¹⁸⁷

C. Moving Forward

The reasoning and conclusion of *Chance* will affect both lower courts and practitioners. In this part I consider the implications of the case for judges, as well as for law enforcement and prosecutors.

1. Jury Instructions

Judges presiding over cases in which a defendant has been charged with assault should offer jury instructions modified to reflect the reasoning in *Chance*. The most widely used jury instructions in California are the Judicial Council of California Criminal Jury Instructions (CALCRIM). In relevant part, the CALCRIM instructions on assault provide that “[t]o prove that the defendant is guilty of this crime, the People must prove that . . . [w]hen the defendant acted, (he/she) had the present ability to apply force to a person.”¹⁸⁸

186. *Yslas*, 27 Cal. at 634.

187. *Ranson*, 114 Cal. Rptr. at 877.

188. The instructions provide in full:

915 Simple Assault (Pen. Code, §§ 240, 241(a))

The defendant is charged [in Count _____] with assault [in violation of Penal Code section 241(a)].

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

1. The defendant did an act that by its nature would directly and probably result in the application of force to a person;

2. The defendant did that act willfully;

3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;

[AND]

4. When the defendant acted, (he/she) had the present ability to apply force to a person(./.)

<Give element 5 when instructing on self-defense or defense of another>

[AND]

5. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough 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.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

To be sure, the instructions as they currently stand are not inconsistent with *Chance*. They do not, for example, state that the defendant’s next movement must complete the battery. Nevertheless, trial courts can sharpen the provision concerning present ability and expand the instructions to reflect the outcome in *Chance*. Just as the instructions describe in fuller detail what it means to act willfully, the instructions should describe in fuller detail the present ability requirement. One possible iteration is as follows: “‘Present ability’ means that the person committing the act had both the means and the location to injure another person immediately. He must be able to injure another person on the present occasion; a defendant can be guilty of assault even if his next movement would not result in the infliction of the injury.” Once the CALCRIM instructions are changed to reflect the holding in *Chance*, jurors will be able to apply the law to all defendants in a uniform manner.

2. Arrests and Prosecutions

It remains to be seen how *Chance* will influence the behavior of law enforcement and prosecutors, though preliminary research indicates that police officers are being educated about *Chance*. One significant example is the California Commission on Peace Officer Standards and Training (POST), which in part produces training materials for law enforcement.¹⁸⁹ In December 2008, as part of its *Recent Cases* series, POST produced a video in which a deputy district attorney from the Alameda County District Attorney’s Office discussed *Chance*.¹⁹⁰ In addition to featuring excerpts from an interview with Sergeant Murdoch, the video briefly described—and contained reenactments of—*McMakin*, *Raviart*, *Hunter*, and *Yslas*.¹⁹¹ Throughout the video, the deputy district attorney emphasized the Court’s holding that a defendant need not be one step away from inflicting an injury to be guilty of assault.¹⁹²

To the extent that *Chance* becomes well known, both peace officers and prosecutors must be careful to read *Chance* in a way that preserves the distinction between assault and lesser crimes, particularly brandishing a weapon.¹⁹³ In short, to be guilty of brandishing a weapon, a defendant must

The People are not required to prove that the defendant actually intended to use force against someone when (he/she) acted.

No one needs to actually have been injured by the defendant’s act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[Voluntary intoxication is not a defense to assault.]

189. For a background on POST and its influence, see Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519 (2008).

190. See DVD: Case Law Today: The “Present Ability” Element of Assault (POST Dec. 2008).

191. See *id.*

192. See *id.*

193. Needless to say, basic ethical requirements will constrain peace officers’ and prosecutors’ willingness to exploit *Chance*, and juries should be trusted to make the final determination whether an assault has occurred.

“draw[] or exhibit[] any firearm . . . in a rude, angry, or threatening manner.”¹⁹⁴ Brandishing a weapon, like assault, is a crime of general intent.¹⁹⁵ One can imagine a typical brandishing case¹⁹⁶ where a suspect opens his jacket and displays a loaded gun to an officer. The suspect then threatens the officer and refuses the officer’s command to relinquish the gun. The suspect could arguably be arrested and prosecuted for either brandishing or assault. With regard to the latter, the conduct and threats could evidence the requisite attempt, and the suspect would be able to shoot the officer on the present occasion—he need only draw his gun, point, and pull the trigger. Accordingly, each case should continue to be scrutinized for the defendant’s manifested intent before a formal charge is made.

CONCLUSION

The *Chance* opinion significantly advanced the state’s jurisprudence on assault. In addition to clarifying *Colantuono* and *Williams*, it established a test for the present ability requirement. The ramifications are potentially widespread and long-term. Because the Supreme Court does not interpret section 240 frequently, *Chance* will likely be the leading assault case for years to come.

194. The statute provides in full:

Every person who, in the immediate presence of a peace officer, draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner, and who knows, or reasonably should know, by the officer’s uniformed appearance or other action of identification by the officer, that he or she is a peace officer engaged in the performance of his or her duties, and that peace officer is engaged in the performance of his or her duties, shall be punished by imprisonment in a county jail for not less than nine months and not to exceed one year, or in the state prison.

CAL. PENAL CODE § 417(c).

195. *People v. Hall*, 100 Cal. Rptr. 2d 279, 285 (Cal. Ct. App. 2000).

196. This example is loosely based on the facts in *People v. Mercer*, 169 Cal. Rptr. 897, 898 (Cal. Ct. App. 1980).