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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: April 23, 2010

Title
Jury Instructions: Additions and Revisions to Criminal Instructions

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

Recommended by
Advisory Committee on Criminal Jury Instructions
Hon. Sandra L. Margulies, Chair

Agenda Item Type
Action Required

Effective Date
April 23, 2010

Date of Report
March 24, 2010

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Executive Summary

The Advisory Committee on Criminal Jury Instructions recommends approval of the proposed additions and revisions to the *Judicial Council Criminal Jury Instructions* (*CALCRIM*).

Recommendation

The Advisory Committee on Criminal Jury Instructions (the committee) recommends that the Judicial Council, effective April 23, 2010, approve the proposed additions and revisions to *CALCRIM*. The text of the proposed new and revised *CALCRIM* instructions is attached at pages 8–173.

Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted rule 6.59 of the California Rules of Court, subsequently renumbered as rule 10.59, which established the committee's charge.[1] On August 26, 2005, the council voted to approve the *CALCRIM* instructions pursuant to rule 855, subsequently renumbered as rule 2.1050. Since that time, the committee has complied with both rules by submitting regular proposed additions and changes to *CALCRIM* after they have been approved by the committee and circulated for public comment.

At the October 20, 2006, council meeting, the Rules and Projects Committee (RUPRO) recommended and the council approved authority for RUPRO to review and approve nonsubstantive technical changes and corrections and minor substantive changes unlikely to create controversy. At the same meeting, the council delegated authority to the Advisory Committee on Criminal Jury Instructions to review and approve nonsubstantive grammatical and typographical corrections to *CALCRIM* and other similar changes deemed appropriate by RUPRO.

The council approved the committee's last update at its August 14, 2009 meeting.

Rationale for Recommendation

The committee recommends the proposed additions and revisions to *CALCRIM* in compliance with its charge in rule 10.59.

The advisory committee drafted the new and revised instructions in this report and then circulated them for public comment. The official publisher, LexisNexis, is preparing to publish print, HotDocs document assembly, and online versions of the new and revised instructions upon receiving council approval.

There are 38 instructions in this proposal, including 3 newly drafted or substantially revised instructions and 35 revised instructions. In the former category are: CALCRIM Nos. 767, 890, and 1144. Revised instructions include CALCRIM Nos.: 101, 201, 334, 335, 362, 400, 403, 521, 540A, 540B, 540C, 563, 603, 821, 1125, 1126, 1128, 1170, 1301, 2040, 2041, 2042, 2043, 2361, 2362, 2363, 2370, 2375, 2376, 2510, 2511, 2512, 2997, 3220, and 3518.

RUPRO has already approved 16 minor changes and corrections to additional instructions under a delegation of authority from the council to RUPRO.

[1] Rule 10.59(a) states: "The [Advisory Committee on Criminal Jury Instructions] regularly reviews case law and statutes affecting jury instructions and makes recommendations to the Judicial Council for updating, amending, and adding topics to the council's criminal jury instructions."

The committee revised or added instructions based on comments or suggestions from justices, judges, and attorneys; proposals by staff and committee members; and recent developments in the law, including the following representative examples:

Proposed New *CALCRIM* Instructions

The committee added new CALCRIM No. 767, *Response to Juror Inquiry About Commutation of Sentence in Death Penalty Case*, based on a proposal that Judge Michael Wellington of the Superior Court of San Diego County provided in response to the Supreme Court's decision in *People v. Bramit* (2009) 46 Cal.4th 1221. Because it is so easy to make a mistake in instructing on this issue, the committee agreed that it was important to provide a carefully crafted instruction for courts to use.

The committee added new CALCRIM No. 890, *Assault with Intent to Commit Certain Felonies [During First Degree Burglary]* to replace the original instruction with the same number, entitled *Assault With Intent to Commit Sex Offense*. The committee was initially planning to add a new instruction, and then realized that the new draft encompassed every element in the original CALCRIM No. 890, rendering it unnecessary and ripe for replacement.

Finally, at the suggestion of council member Judge David S. Wesley of the Superior Court of Los Angeles County, the committee added CALCRIM No. 1144, *Using a Minor to Perform Prohibited Acts,* to complete the set of instructions added in response to recent legislation on sex crimes against minors.

Proposed Revisions to Existing *CALCRIM* Instructions

In response to a suggestion from committee member Judge Dennis Landin of the Superior Court of Los Angeles County, the committee revised the definition of "personal identifying information" in CALCRIM Nos. 2040–2043 on identity theft. The revised instructions now direct the user to insert the appropriate item referenced in Penal Code section 530.55(b) into a blank instead of providing a long list of options from the statute. Not only is the revision more user-friendly and succinct, it will also prevent unnecessary updates to the instructions should the statute be revised in the future.

The committee revised the instructions in the marijuana series in light of the Supreme Court's opinion in *People v. Mentch* (2009) 45 Cal.4th 274, 292–293. The paragraph on the compassionate use defense in all of the medical marijuana instructions now explains that "The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime."

In response to suggestions from Judges Dennis Landin and Jacqueline Connor, both of the Superior Court of Los Angeles County, the committee added clarifying language for jurors about the use of electronic devices and the Internet. It did not, however, choose to list specific means of inappropriately sharing information with electronic devices by name. The committee

concluded that a list of specific Web sites such as Google, Facebook, and My Space is likely to require constant updates because popular Web sites come and go very quickly in the digital age. Moreover, when jurors hear a blanket admonition not to communicate with others about the trial, that admonition may be undercut by a list of specific forbidden means of communication. After listening to a long list, jurors may even conclude that modes of communication not mentioned are permitted.

In response to a suggestion from Judge Jerome Benson of the Superior Court of San Francisco County, the committee updated the bench notes of CALCRIM Nos. 334 and 335 on accomplice testimony to add an additional admonition from *People v. Alvarez* (1996) 14 Cal.4th 155, 218, that "the court must also instruct on accomplice testimony when two co-defendants testify against each other and blame each other for the crime." *Id.* at pp. 218–219.

Michelle May, of the Appointed Counsel Projects in the Court of Appeal and Supreme Court, noted ambiguity in the *sua sponte* duty requirement to give CALCRIM No. 362, *Consciousness of Guilt: False Statements*. The committee agreed to delete the paragraph in the bench notes on *sua sponte* duty and also noted that this instruction was upheld in *People v. McGowan* (2008) 160 Cal.App.4th 1099, 1104.

The committee decided to make further changes to *CALCRIM* No. 400, *Aiding and Abetting: General Principles* in light of Justice Roger Boren's opinion in *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1166. The word "equally" was deleted from the paragraph beginning: "A person is [equally] guilty . . ." and an explanatory bench note added: "An aider and abettor may be found guilty of a different crime or degree of crime than the perpetrator if the aider and abettor and the perpetrator do not have the same mental state."

Judge Joseph Hurley of the Superior Court of Alameda County pointed out that the last sentence of the definition of deliberation and premeditation in CALCRIM No. 521, *Murder: Degrees* could be misleading in cases in which an extended act, such as strangling or drowning, causes the homicide. The committee agreed and changed the word "committing" to "completing" in that sentence, and provided an optional plural form for the word "act:" "The defendant acted with *premeditation* if (he/she) decided to kill before completing the act[s] that caused death."

Supervising Deputy Attorney General and former committee member Pamela Ratner noticed that CALCRIM Nos. 540A–C, the first degree felony murder instructions, refer to the "act causing death" as though it were distinct from the underlying felony. This could be misleading when the act causing death and the underlying felony are the same, as in cases of arson. The committee made the necessary revisions throughout these instructions to eliminate potential references to a separate "act."

Committee members and Michelle May of the Appointed Counsel Projects in the Court of Appeal and Supreme Court expressed concern about the ambiguous relationship between the offenses defined in CALCRIM Nos. 1125 and 1126, *Arranging Meeting With Minor for Lewd*

Purpose and *Going to Meeting With Minor for Lewd Purpose.* There is no precedent for whether the former is a lesser included offense of the latter, so the committee added an explanation in a bench note to that effect in CALCRIM No. 1126. With regard to CALCRIM No. 1125, the optional fourth element requiring a prior conviction of an offense enumerated in Penal Code section 290(c) was deleted and a bench note added to explain that whether the defendant suffered a prior conviction for an offense listed in subdivision (c) of section 290 is not an element of the offense and is subject to a severed jury trial pursuant to Penal Code section 288.4(a)(2). The committee also added a cross-reference to CALCRIM Nos. 3100 and 3101 on bifurcated and nonbifurcated Trials with respect to prior convictions.

In response to two new cases, *People v. Wallace* (2009) 176 Cal.App.4th 1088, 1102–-1104 and *People v. Cohens* (2009) 178 Cal.App.4th 1442, 1067–1070, the committee revised CALCRIM No. 1170, *Failure to Register as Sex Offender.* Element 2 now clarifies that every residence must be in California. Element 3 has been streamlined to provide for the possibility of a duty to register at multiple addresses. The committee added the new cases to the bench notes for convenient reference as well.

Council member and former committee member, Judge David S. Wesley of the Superior Court of Los Angeles County, suggested that element 4 of CALCRIM No. 1301, *Stalking*, be deleted because whether conduct is constitutionally protected is not an issue for the jury to decide. The committee followed Judge Wesley's suggestion by deleting element 4, revising the explanation of "course of conduct" and "constitutionally protected activity" in the instruction, and updating the bench notes to reflect these changes.

Finally, the committee deleted incorrect cross-references in the bench notes of CALCRIM Nos. 2510-2512 on possession of firearms by prohibited persons. Because these crimes have a knowledge requirement, the committee changed the reference to CALCRIM No. 250, *Union of Act and Intent: General Intent,* in the bench notes to explain that the knowledge requirement is a mental state. The bench notes now refer to CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State.*

The proposed additions to *CALCRIM* enhance the breadth of the criminal jury instructions. The proposed revisions are necessary to maintain the accuracy, ease of use, and juror comprehension of *CALCRIM*.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CALCRIM* circulated for comment in December 2009 through January 22, 2010. The committee received eight fairly lengthy comments from a total of five different individuals or organizations.[2] No instruction or group of instructions generated more than one comment. The committee evaluated all of the comments and revised some of the instructions as a result.

[2] A chart providing the full text of the comments and the committee responses is attached at pages 174–183.

Two commentators expressed agreement with all of the proposed changes. One entity made a comment beyond the scope of the proposed revisions. The committee will consider that comment at a future meeting. Two comments suggested supplementation or clarification of bench notes.

Of the substantive comments, one suggested three specific changes to the instructional language of proposed CALCRIM No. 1144, *Using a Minor to Perform Prohibited Acts*. The committee followed two of those suggestions but concluded that the third was not necessary.

Another commentator suggested breaking up the definition of "harassing" in CALCRIM No. 1301 into two paragraphs for clarity. The committee followed this suggestion.

One entity disagreed with the language in element 3 of CALCRIM No. 1170, *Failure to Register as Sex Offender*. The commentator contended that "the inclusion of two conditions –i.e., 'living at _____<*insert specific address in California*>' and '[or] wherever (he/she) resided in California' is vague, confusing, and inaccurate." The comment was based on language in *People v. Cohens* (2009) 178 Cal.App.4th 1442 and *People v. LeCorno* (2003) 109 Cal.App.4th 1058, 1068–1069, which require a defendant to have actual knowledge of a duty to register at a specific address in California.

The committee carefully considered this comment and decided to resolve any potential confusion by rewriting the instruction to require insertion of any specific address *or addresses* at which the defendant actually knew he or she had a duty to register. The new language allows for the situation in which a defendant may have multiple addresses while still making clear the defendant must have actual knowledge of the duty to register at each address.

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

Implementation Requirements, Costs, and Operational Impacts

There are no significant implementation costs. To the contrary, under the publication agreement, the official publisher, LexisNexis, will print a new supplement and pay royalties to the Administrative Office of the Courts (AOC). The official publisher will also make the supplement available free of charge to all judicial officers in both print and HotDocs document assembly software. With respect to commercial publishers, the AOC will register the copyright in this work and continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by

parties, attorneys, and the public, the AOC will provide a broad public license for their noncommercial use and reproduction.

Attachments

1. Full text of new and revised CALCRIM Nos. 767, 890, 1140, 101, 201, 33435, 362, 400, 403, 521, 540A–C, 563, 603, 821, 1125–1126, 1128, 1170, 1301, 2040–2043, 2361–2363, 2370, 2375–2376, 2510–2512, 2997, 3220, 3518 at pp. 8–173.
2. Comment chart at pp. 174–183

April 2010 CALCRIM
Proposed Changes for Judicial Council Review

Instruction Number	Instruction Title
767	[NEW] Response to Juror Inquiry About Commutation of Sentence in Death Penalty Case
890	[NEW VERSION] Assault with Intent to Commit Certain Specified Crimes [While Committing First Degree Burglary]
1144	[NEW] Using a Minor to Perform Prohibited Acts
101	Cautionary Admonitions: Jury Conduct (Before or After Jury Is Selected)
201 Do	Not Investigate
334–335	Accomplice Testimony Instructions
362	Consciousness of Guilt: False Statements
400 Aiding	and Abetting: General Principles
403	Natural and Probable Consequences (Only Non-Target Offense Charged)
521	Murder: Degrees
540A–C	First Degree Felony Murder Instructions
563	Conspiracy to Commit Murder
603	Attempted Voluntary Manslaughter: Heat of Passion — Lesser Included Offense
821	Child Abuse Likely to Produce Great Bodily Harm or Death
1125–1126	Arranging/Going to Meeting With Minor for Lewd Purpose
1128	Engaging in Oral Copulation or Sexual Penetration With Child 10 Years of Age or Younger
1170	Failure to Register as Sex Offender
1301 Stalking	
2040–2043	Definition of Personal Identifying Information

2361–2363	Medical Marijuana Instructions - Compassionate Use Defense
2370	Planting, etc. Marijuana
2375–2376	Simple Possession of Marijuana
2510–2512	Possession of Firearm by Person Prohibited Due to Conviction
2997	Money Laundering
3220	Amount of Loss
3518	Deliberations and Completion of Verdict Forms: For Use When Lesser Included Offenses and Greater Crimes Are Not Separately Charged and the Jury Is Given Only One Not Guilty Verdict Form for Each Count

767. Response to Juror Inquiry about Commutation of Sentence in Death Penalty Case

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The (governor/legislature/courts) (have/has) the power to reduce criminal sentences. This power applies equally to a death sentence or a sentence of life without the possibility of parole. In your deliberations, you must assume that whatever sentence you choose will be carried out. Do not consider the possibility of some future action by a (governor/legislature/court).

New (date of council approval)

BENCH NOTES

Instructional Duty

This instruction should **only** be given in response to a jury question about commutation of sentence or at the request of the defendant. (*People v. Ramos* (1984) 37 Cal.3d 136, 159, fn. 12). "The key in *Ramos* is whether the jury raises the commutation issue so that it 'cannot be avoided.'" (*People v. Bramit* (2009) 46 Cal.4th 1221, 1251 (conc. Opn. Of Moreno, J.)) Commutation instructions are proper, however, when the jury implicitly raises the issue of commutation. No direct question is necessary. (*People v. Beames* (2007) 40 Cal.4th 907, 932.)

AUTHORITY

- Instructional Requirements ▸ Pen. Code, § 190.3; *People v. Bramit* (2009) 46 Cal.4th 1221, 1247-1247; *People v. Ramos* (1984) 37 Cal.3d 136, 153-159.

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 496.

Assaultive Crimes and Battery

890. Assault With Intent to Commit Sex Offense (Pen. Code, § 220)

The defendant is charged [in Count __] with assault with intent to commit _____ ***<specify sex offense[s] listed in Pen. Code, § 220>*** [in violation of Penal Code section 220].

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

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

The defendant did that act willfully;

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;

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

AND

When the defendant acted, (he/she) intended to commit _____ *<specify sex offense[s] listed in Pen. Code, § 220>***.**

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

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.]

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].

To decide whether the defendant intended to commit _____ *<specify sex offense[s] listed in Pen. Code, § 220>* **please refer to Instruction[s] __ which define[s] (that/those) crime[s].**

New January 2006

BENCH NOTES

Instructional Duty

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

The court has a **sua sponte** duty to give a *Mayberry* consent instruction if the defense is supported by substantial evidence and is consistent with the defense raised at trial. (*People v. May* (1989) 213 Cal.App.3d 118, 124–125 [261 Cal.Rptr. 502]; see *People v. Mayberry* (1975) 15 Cal.3d 143 [125 Cal.Rptr. 745, 542 P.2d 1337]; see also CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats* [alternative paragraph on reasonable and actual belief in consent].)

The court has a **sua sponte** duty to instruct on the sex offense or offense alleged. (*People v. May* (1989) 213 Cal.App.3d 118, 129 [261 Cal.Rptr. 502].) In the blanks, specify the sex offense or offenses that the defendant is charged with intending to commit. Included sex offenses are: rape (Pen. Code, § 261); oral copulation (Pen. Code, § 288a [including in-concert offense]); sodomy (Pen. Code, § 286 [including in-concert offense]); sexual penetration (Pen. Code, § 289); rape, spousal rape, or sexual penetration in concert (Pen. Code, § 264.1); and lewd or lascivious acts (Pen. Code, § 288). (See Pen. Code, § 220.) Give the appropriate instructions on the offense or offenses alleged.

Related Instructions

CALCRIM No. 915, *Simple Assault*.

AUTHORITY

Elements ▸ Pen. Code, § 220.

Elements for Assault ▸ Pen. Code, § 240; *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].

Court Must Instruct on Elements of Intended Crime ▸ *People v. May* (1989) 213 Cal.App.3d 118, 129 [261 Cal.Rptr. 502].

Intent to Commit Sex Offense ▸ *People v. Meichtry* (1951) 37 Cal.2d 385, 388–389 [231 P.2d 847] [assault to commit rape is complete at any moment during the assault when the accused intends to use whatever force may be required].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 28–34.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11 (Matthew Bender).

LESSER INCLUDED OFFENSES

Attempted Sex Offense ▸ Pen. Code, §§ 663, 261, 264.1, 286, 288, 288a, 289; see *People v. De Porceri* (2003) 106 Cal.App.4th 60, 68–69 [130 Cal.Rptr.2d 280].

Simple Assault ▸ Pen. Code, § 240; see *People v. Greene* (1973) 34 Cal.App.3d 622, 653 [110 Cal.Rptr. 160].

Attempted sexual battery (Pen. Code, §§ 243.4, 664) is not a necessarily included offense of assault to commit rape. (*People v. Dixon* (1999) 75 Cal.App.4th 935, 943 [89 Cal.Rptr.2d 602].)

There is no crime of attempted assault to commit rape. (*People v. Duens* (1976) 64 Cal.App.3d 310, 314 [134 Cal.Rptr. 341].)

RELATED ISSUES

~~*Abandonment*~~

~~**Assault with intent to commit rape is complete at any point during the incident when the defendant entertains the intent to have sexual intercourse with his victim by force. "It makes no difference whatsoever that he later abandons that intent." (*People v. Trotter* (1984) 160 Cal.App.3d 1217, 1223 [207 Cal.Rptr. 165]; see *People v. Meichtry* (1951) 37 Cal.2d 385, 388–389 [231 P.2d 847].)**~~

8920. Assault With Intent to Commit Specified Crimes [While Committing First Degree Burglary] (Pen. Code, § 220(a),(b))

The defendant is charged [in Count __] with assault with intent to commit _____<*insert crime specified in Penal Code section 220(a)*> [**while committing first degree burglary] [in violation of Penal Code section 220((a)/ [and] (b))].**

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;**

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

[AND]

5. **When the defendant acted, (he/she) intended to commit _____**<*insert crime specified in Penal Code section 220(a)*>**;**

[**AND**

6. When the defendant acted, (he/she) was committing a first degree burglary.]

<If the court concludes that the first degree burglary requirement in Penal Code section 220(b) is a ~~an enhancement~~penalty allegation and not an element of the offense, give the bracketed language below in place of element 6.>

[If you find the defendant guilty of the charged crime, you must then decide whether the People have proved the additional allegation that the crime was committed in the commission of a first degree burglary.]

[_____ <*insert crime specified in Penal Code section 220(a)*> **and first degree burglary are defined in other instructions to which you should refer.]**

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

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.]

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].

New [insert date of council approval]

BENCH NOTES

Instructional Duty

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

The court has a **sua sponte** duty to give a *Mayberry* consent instruction if the defense is supported by substantial evidence and is consistent with the defense raised at trial. (*People v. May* (1989) 213 Cal.App.3d 118, 124–125 [261 Cal.Rptr. 502]; see *People v. Mayberry* (1975) 15 Cal.3d 143 [125 Cal.Rptr. 745, 542 P.2d 1337]; see also CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats* [alternative paragraph on reasonable and actual belief in consent].)

The court has a **sua sponte** duty to instruct on the sex offense or offense alleged. (*People v. May* (1989) 213 Cal.App.3d 118, 129 [261 Cal.Rptr. 502].) In the blanks, specify the sex offense or offenses that the defendant is charged with intending to commit. Included sex offenses are: rape (Pen. Code, § 261); oral copulation (Pen. Code, § 288a [including in-concert offense]); sodomy (Pen. Code, § 286 [including in-concert offense]); sexual penetration (Pen. Code, § 289); rape, spousal rape, or sexual penetration in concert (Pen. Code, § 264.1); and lewd or lascivious acts (Pen. Code, § 288). (See Pen. Code, § 220.) Give the appropriate instructions on the offense or offenses alleged.

The court should also give CALCRIM Nos. 1700 and 1701 on burglary, if defendant is charged with committing the offense during a first degree burglary, as well as the appropriate CALCRIM instruction on the target crime charged pursuant to Penal Code section 220.

If the specified crime is mayhem, give CALCRIM No. 891, *Assault With Intent to Commit Mayhem*.

Element 6 is in brackets because there is no guidance from courts of review regarding whether the first degree burglary requirement in Penal Code section 220(b) is an element or an enhancement.

Related Instructions
CALCRIM No. 915, *Simple Assault*.

AUTHORITY

- Elements ▸ Pen. Code, § 220.
- Elements for Assault ▸ Pen. Code, § 240; *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Court Must Instruct on Elements of Intended Crime ▸ *People v. May* (1989) 213 Cal.App.3d 118, 129 [261 Cal.Rptr. 502] [in context of assault to commit rape].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 28–34.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Assault ▸ Pen. Code, § 240; see *People v. Greene* (1973) 34 Cal.App.3d 622, 653 [110 Cal.Rptr. 160] [in context of charged assault with intent to commit rape].

There is no crime of attempted assault to commit an offense. (See *People v. Duens* (1976) 64 Cal.App.3d 310, 314 [134 Cal.Rptr. 341] [in context of assault to commit rape].)

RELATED ISSUES

Abandonment

An assault with intent to commit another crime is complete at any point during the incident when the defendant entertains the intent to commit the crime. "It makes no difference whatsoever that he later abandons that intent." (See *People v. Trotter* (1984) 160 Cal.App.3d 1217, 1223 [207 Cal.Rptr. 165]; *People v. Meichtry* (1951) 37 Cal.2d 385, 388–389 [231 P.2d 847] [both in context of assault to commit rape].)

~~893~~892–899. Reserved for Future Use

1144. Using a Minor to Perform Prohibited Acts (Pen. Code, §§ 311.4(b)-(c))

The defendant is charged [in Count __] with using a minor to perform prohibited acts [in violation of _____ <*insert appropriate code section[s]*>**].**

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

[1A. The defendant (promoted/ [or] employed/ [or] used/ [or] persuaded/ [or] induced/ [or] coerced) a minor who was under (18/14) years old at the time to pose or model or assist others to pose or model, alone or with others;

1B. The defendant knew that (he/she) was (promoting/ [or] employing/ [or] using/ [or] persuading/ [or] inducing/ [or] coercing) a minor of that age to pose or model or assist others to pose or model;]

[2A. The defendant was the (parent/ [or] guardian) in control of a minor who was under (18/14) years old at the time and the defendant permitted that minor to pose or model or assist others to pose or model, alone or with others;

2B. At the time the defendant gave permission to the minor, (he/she) knew that the minor would pose or model or assist others to pose or model, alone or with others;]

2. The purpose of the posing or modeling was to prepare matter containing [or incorporating] sexual conduct;

3. The minor participated in the sexual conduct alone[, or with other persons][, or with animals];

4. The defendant was aware of the character of the matter or live conduct;

[AND]

5. The defendant knew, or reasonably should have known, based on facts of which (he/she) was aware, that the minor was under (18/14) years of age;

[AND

6. When the defendant acted, (he/she) intended that the matter would be used for commercial purposes.]

Matter **means any representation of information, data, or image, including any (film/filmstrip/photograph/negative/slide/photocopy/videotape/video laser disc/computer hardware or software/computer floppy disk/data storage medium/CD-ROM/computer-generated equipment/ [or] computer-generated image that contains any film or filmstrip). For the purpose of this instruction matter does not include material in which all of the persons depicted under the age of 18 are legally emancipated/ [or] that only depicts lawful conduct between spouses).]**

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

Sexual conduct **means actual or simulated (sexual intercourse/ [or] oral copulation[,]/ [or] anal intercourse[,]/ [or] anal oral copulation[,]/ [or] _____** *<insert other sexual conduct as defined in Pen. Code, § 311.4(d)(1)>***). An act is simulated when it gives the appearance of being sexual conduct.**

[*Use for commercial purposes* includes intending to trade the *matter* depicting *sexual conduct* for a *commercial purpose* at some point in the future. A *commercial purpose* does not have to include financial gain.]

[A person accused of committing this crime can be an individual, partnership, firm, association, corporation, limited liability company, or other legal entity.]

<Defense: Legitimate scientific or educational purpose>
[The defendant is not guilty of this crime if (he/she) was engaging in legitimate medical, scientific, or educational activities. The People have the burden of proving beyond a reasonable doubt that the defendant was not acting for a legitimate medical, scientific, or educational purpose. If the People have not met this burden, you must find the defendant not guilty of this crime.]

New [insert date of council approval]

BENCH NOTES

Instructional Duty

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

Defenses—Instructional Duty

If there is sufficient evidence that the defendant was engaging in legitimate medical, scientific, or educational activities, the court has a **sua sponte** duty to instruct on that defense. (See Pen. Code, 311.8(a).) It is unclear who bears the burden of proof and what standard of proof applies to this defense. In the absence of statutory authority or case law stating that the defendant must prove the defense by a preponderance of the evidence, the committee has drafted the instruction to provide that the prosecution must prove beyond a reasonable doubt that the defense does not apply. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–479 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; see also *People v. Woodward* (2004) 116 Cal.App.4th 821, 840–841 [10 Cal.Rptr.3d 779] ["legitimate" does not require definition and the trial court erred in giving amplifying instruction based on *People v. Marler* (1962) 199 Cal.App.2d Supp. 889 [18 Cal.Rptr. 923]].)

AUTHORITY

- Elements ▸ Pen. Code, §§ 311.4(b)-(c).
- Sexual Conduct Defined ▸ Pen. Code, § 311.4(d)(1); see *People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1130–1131 [8 Cal.Rptr.3d 372].
- Person Defined ▸ Pen. Code, § 311(c).
- Defendant Need Not Directly Engage in Posing or Modeling Victim ▸ *People v. Hobbs* (2007) 152 Cal.App.4th 1, 5-7.
- Minor Under Age of 14 ▸ Pen. Code, § 311.4(f).
- Commercial Purposes Defined ▸ *People v. Cochran* (2002) 28 Cal.4th 396, 402-407 [121 Cal.Rptr.2d 595].
- Knowingly Defined ▸ Pen. Code, § 311(e); see *People v. Kuhns* (1976) 61 Cal.App.3d 735, 756–758 [132 Cal.Rptr. 725].
- Calculating Age ▸ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, § 96.

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

I will now explain some basic rules of law and procedure. These rules ensure that both sides receive a fair trial.

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

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

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

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

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

During the trial, do not speak to any party, witness, or lawyer involved in the trial. Do not listen to anyone who tries to talk to you about the case or about any of the people or subjects involved in it. If someone asks you about the case, tell him or her that you cannot discuss it. If that person keeps talking to you about the case, you must end the conversation.

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

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

Some words or phrases that may be used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in the instructions. Please be sure to listen carefully and follow the definitions that I give you. Words and phrases not specifically defined in the instructions are to be applied using their ordinary, everyday meanings.

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

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

You must reach your verdict without any consideration of punishment.

New January 2006; Revised June 2007, April 2008, December 2008

BENCH NOTES

Instructional Duty

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

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

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

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

AUTHORITY

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

Secondary Sources

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

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

RELATED ISSUES

Admonition Not to Discuss Case With Anyone

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

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

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

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

Jury Misconduct

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

201. Do Not Investigate

Do not do any research regarding this case on your own or as a group. Do not use a dictionary, the Internet, or other reference materials. Do not investigate the facts or law. Do not conduct any experiments, or visit the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate.

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

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

AUTHORITY

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

Secondary Sources

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

334. Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice

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Before you may consider the (statement/ [or] testimony) of _____ *<insert name[s] of witness[es]>* **as evidence against (the defendant/_____** *<insert names of defendants>)* **[regarding the crime[s] of _____***<insert name[s] of crime[s] if corroboration only required for some crime[s]>***], you must decide whether _____***<insert name[s] of witness[es]>***) (was/were) [an] accomplice[s] [to (that/those) crime[s]]. A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:**

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

AND

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

The burden is on the defendant to prove that it is more likely than not that _____ *<insert name[s] of witness[es]>* **(was/were) [an] accomplice[s].**

[An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is present at the scene of a crime, even if he or she knows that a crime will be committed or is being committed and does nothing to stop it.]

[A person who lacks criminal intent but who pretends to join in a crime only to detect or prosecute those who commit that crime is not an accomplice.]

[A person may be an accomplice even if he or she is not actually prosecuted for the crime.]

[You may not conclude that a child under 14 years old was an accomplice unless you also decide that when the child acted, (he/she) understood:

1. **The nature and effect of the criminal conduct;**

2. **That the conduct was wrongful and forbidden;**

AND

3. **That (he/she) could be punished for participating in the conduct.]**

If you decide that a (declarant/ [or] witness) was not an accomplice, then supporting evidence is not required and you should evaluate his or her (statement/ [or] testimony) as you would that of any other witness.

If you decide that a (declarant/ [or] witness) was an accomplice, then you may not convict the defendant of _____ *<insert charged crime[s]>* **based on his or her (statement/ [or] testimony) alone. You may use the (statement/ [or] testimony) of an accomplice to convict the defendant only if:**

1. **The accomplice's (statement/ [or] testimony) is supported by other evidence that you believe;**

2. **That supporting evidence is independent of the accomplice's (statement/ [or] testimony);**

AND

3. **That supporting evidence tends to connect the defendant to the commission of the crime[s].**

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime[s], and it does not need to support every fact (mentioned by the accomplice in the statement/ [or] about which the accomplice testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

[The evidence needed to support the (statement/ [or] testimony) of one accomplice cannot be provided by the (statement/ [or] testimony) of another accomplice.]

Any (statement/ [or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statement/ [or] testimony) the weight you

think it deserves after examining it with care and caution and in the light of all the other evidence.

New January 2006; Revised January 2007

BENCH NOTES

Instructional Duty

There is a **sua sponte** duty to instruct on the principles governing the law of accomplices, including the need for corroboration, if the evidence at trial suggests that a witness could be an accomplice. (*People v. Tobias* (2001) 25 Cal.4th 327, 331 [106 Cal.Rptr.2d 80, 21 P.3d 758]; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].)

"Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 104 [17 Cal.Rptr.3d 710, 96 P.3d 30].) When the court concludes that the witness is an accomplice as a matter of law or the parties agree about the witness's status as an accomplice, do not give this instruction. Give CALCRIM No. 335, *Accomplice Testimony: No Dispute Whether Witness Is Accomplice*.

If a codefendant's testimony tends to incriminate another defendant, the court must give an appropriate instruction on accomplice testimony. (*People v. Avila* (2006) 38 Cal.4th 491, 562 [43 Cal.Rptr.3d 1, 133 P.3d 1076]; *citing People v. Box* (2000) 23 Cal.4th 1153, 1209 [99 Cal.Rptr.2d 69, 5 P.3d 130]; *People v. Alvarez* (1996) 14 Cal.4th 155, 218 [58 Cal.Rptr.2d 385, 926 P.2d 365].) The court must also instruct on accomplice testimony when two codefendants testify against each other and blame each other for the crime. (*Id.* at 218-219).

When the witness is a codefendant whose testimony includes incriminating statements, the court **should not** instruct that the witness is an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555 [58 Cal.Rptr. 340, 426 P.2d 908].) Instead, the court should give this instruction, informing the jury that it must decide whether the testifying codefendant is an accomplice. In addition, the court should instruct that when the jury considers this testimony as it relates to the testifying codefendant's defense, the jury should evaluate the testimony using the general rules of credibility, but if the jury considers testimony as incriminating evidence against the non-testifying codefendant, the testimony must be corroborated and should be viewed with caution. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 105 [17 Cal.Rptr.3d 710, 96 P.3d 30].)

If the court concludes that the corroboration requirement applies to an out-of-court statement, use the word "statement" throughout the instruction. (See discussion in Related Issues section below.)

In a multiple codefendant case, if the corroboration requirement does not apply to all defendants, insert the names of the defendants for whom corroboration is required where indicated in the first sentence.

If the witness was an accomplice to only one or some of the crimes he or she testified about, the corroboration requirement only applies to those crimes and not to other crimes he or she may have testified about. (*People v. Wynkoop* (1958) 165 Cal.App.2d 540, 546 [331 P.2d 1040].) In such cases, the court may insert the specific crime or crimes requiring corroboration in the first sentence.

Give the bracketed paragraph that begins with "A person who lacks criminal intent" when the evidence suggests that the witness did not share the defendant's specific criminal intent, e.g., witness was an undercover police officer or an unwitting assistant.

Give the bracketed paragraph that begins with "You may not conclude that a child under 14 years old" on request if the defendant claims that a child witness's testimony must be corroborated because the child acted as an accomplice. (Pen. Code, § 26; *People v. Williams* (1936) 12 Cal.App.2d 207, 209 [55 P.2d 223].)

AUTHORITY

- Instructional Requirements ▸ Pen. Code, § 1111; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Accomplice May Not Provide Sole Basis for Admission of Other Evidence ▸ *People v. Bowley* (1963) 59 Cal.2d 855, 863 [31 Cal.Rptr. 471, 382 P.2d 591].
- Consideration of Incriminating Testimony ▸ *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Defendant's Burden of Proof ▸ *People v. Belton* (1979) 23 Cal.3d 516, 523 [153 Cal.Rptr. 195, 591 P.2d 485].
- Defense Admissions May Provide Necessary Corroboration ▸ *People v. Williams* (1997) 16 Cal.4th 635, 680 [66 Cal.Rptr.2d 573, 941 P.2d 752].
- Accomplice Includes Coperpetrator ▸ *People v. Felton* (2004) 122 Cal.App.4th 260, 268 [18 Cal.Rptr.3d 626].

- Definition of Accomplice as Aider and Abettor ‣ *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- Extent of Corroboration Required ‣ *People v. Szeto* (1981) 29 Cal.3d 20, 27 [171 Cal.Rptr. 652, 623 P.2d 213].
- One Accomplice May Not Corroborate Another ‣ *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15 [117 P.2d 437], disapproved on other grounds in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301, fn. 11 [124 Cal.Rptr. 204, 540 P.2d 44] and *People v. Dillon* (1983) 34 Cal.3d 441, 454, fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697].
- Presence or Knowledge Insufficient ‣ *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].
- Testimony of Feigned Accomplice Need Not Be Corroborated ‣ *People v. Salazar* (1962) 201 Cal.App.2d 284, 287 [20 Cal.Rptr. 25]; but see *People v. Brocklehurst* (1971) 14 Cal.App.3d 473, 476 [92 Cal.Rptr. 340]; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193 [120 Cal.Rptr. 136].
- Uncorroborated Accomplice Testimony May Establish Corpus Delicti ‣ *People v. Williams* (1988) 45 Cal.3d 1268, 1317 [248 Cal.Rtpr. 834, 756 P.2d 221].
- Witness an Accomplice as a Matter of Law ‣ *People v. Williams* (1997) 16 Cal.4th 635, 679 [66 Cal.Rptr.2d 573, 941 P.2d 752].

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation, §§ 98, 99, 105.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.03, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][b], 85.03[2][b], [d], Ch. 87, *Death Penalty*, § 87.23[4][b] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.02[5][b] (Matthew Bender).

RELATED ISSUES

Out-of-Court Statements

The out-of court statement of a witness *may* constitute "testimony" within the meaning of Penal Code section 1111, and may require corroboration. (*People v. Williams* (1997) 16 Cal.4th 153, 245 [66 Cal.Rptr.2d 123, 940 P.2d 710]; *People*

v. Belton (1979) 23 Cal.3d 516, 526 [153 Cal.Rptr. 195, 591 P.2d 485].) The Supreme Court has quoted with approval the following summary of the corroboration requirement for out-of-court statements:

> '[T]estimony' within the meaning of . . . section 1111 includes . . . all out-of-court statements of accomplices and coconspirators used as substantive evidence of guilt which are made under suspect circumstances. The most obvious suspect circumstances occur when the accomplice has been arrested or is questioned by the police. [Citation.] On the other hand, when the out-of-court statements are not given under suspect circumstances, those statements do not qualify as 'testimony' and hence need not be corroborated under . . . section 1111.

(*People v. Williams, supra*, 16 Cal.4th at p. 245 [quoting *People v. Jeffery* (1995) 37 Cal.App.4th 209, 218 [43 Cal.Rptr.2d 526] [quotation marks, citations, and italics removed]; see also *People v. Sully* (1991) 53 Cal.3d 1195, 1230 [283 Cal.Rptr. 144, 812 P.2d 163] [out-of-court statement admitted as excited utterance did not require corroboration].) The court must determine whether the out-of-court statement requires corroboration and, accordingly, whether this instruction is appropriate. The court should also determine whether the statement is testimonial, as defined in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], and whether the *Crawford* holding effects the corroboration requirement of Penal Code section 1111.

Incest With a Minor

Accomplice instructions are not appropriate in a trial for incest with a minor. A minor is a victim, not an accomplice, to incest. (*People v. Tobias* (2001) 25 Cal.4th 327, 334 [106 Cal.Rptr.2d 80, 21 P.3d 758]; see CALCRIM No. 1180, *Incest*.)

Liable to Prosecution When Crime Committed

The test for determining if a witness is an accomplice is not whether that person is subject to trial when he or she testifies, but whether he or she was liable to prosecution for the same offense at the time the acts were committed. (*People v. Gordon* (1973) 10 Cal.3d 460, 469 [110 Cal.Rptr. 906, 516 P.2d 298].) However, the fact that a witness was charged for the same crime and then granted immunity does not necessarily establish that he or she is an accomplice. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90 [270 Cal.Rptr. 817, 793 P.2d 23].)

Threats and Fear of Bodily Harm

A person who is induced by threats and fear of bodily harm to participate in a crime, other than murder, is not an accomplice. (*People v. Brown* (1970) 6

Cal.App.3d 619, 624 [86 Cal.Rptr. 149]; *People v. Perez* (1973) 9 Cal.3d 651, 659–660 [108 Cal.Rptr. 474, 510 P.2d 1026].)

Defense Witness

"[A]lthough an accomplice witness instruction must be properly formulated . . . , there is no error in giving such an instruction when the accomplice's testimony favors the defendant." (*United States v. Tirouda* (2005)394 F.3d 683, 688.)

335. Accomplice Testimony: No Dispute Whether Witness Is Accomplice

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If the crime[s] of _____ *<insert charged crime[s]>* **(was/were) committed, then _____** *<insert name[s] of witness[es]>* **(was/were) [an] accomplice[s] to (that/those) crime[s].**

You may not convict the defendant of _____ *<insert crime[s]>* **based on the (statement/ [or] testimony) of an accomplice alone. You may use the (statement]/ [or] testimony) of an accomplice to convict the defendant only if:**

1. **The accomplice's (statement/ [or] testimony) is supported by other evidence that you believe;**

2. **That supporting evidence is independent of the accomplice's (statement/ [or] testimony);**

AND

3. **That supporting evidence tends to connect the defendant to the commission of the crime[s].**

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact (mentioned by the accomplice in the statement/ [or] about which the witness testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

[The evidence needed to support the (statement/ [or] testimony) of one accomplice cannot be provided by the (statement/ [or] testimony) of another accomplice.]

Any (statement/ [or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statement/ [or] testimony) the weight you think it deserves after examining it with care and caution and in the light of all the other evidence.

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

There is a **sua sponte** duty to instruct on the principles governing the law of accomplices, including the need for corroboration, if the evidence at trial suggests that a witness could be an accomplice. (*People v. Tobias* (2001) 25 Cal.4th 327, 331 [106 Cal.Rptr.2d 80, 21 P.3d 758].)

"Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 104 [17 Cal.Rptr.3d 710, 96 P.3d 30].) Give this instruction only if the court concludes that the witness is an accomplice as a matter of law or the parties agree about the witness's status as an accomplice. (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1161 [123 Cal.Rptr.2d 322] [only give instruction " 'if undisputed evidence established the complicity' "].) If there is a dispute about whether the witness is an accomplice, give CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*.

If a codefendant's testimony tends to incriminate another defendant, the court must give an appropriate instruction on accomplice testimony. (*People v. Avila* (2006) 38 Cal.4th 491, 562 [43 Cal.Rptr.3d 1, 133 P.3d 1076]; *citing People v. Box* (2000) 23 Cal.4th 1153, 1209 [99 Cal.Rptr.2d 69, 5 P.3d 130]; *People v. Alvarez* (1996) 14 Cal.4th 155, 218 [58 Cal.Rptr.2d 385, 926 P.2d 365].) The court must also instruct on accomplice testimony when two codefendants testify against each other and blame each other for the crime. (*Id.* at 218-219).

When the witness is a codefendant whose testimony includes incriminating statements, the court **should not** instruct that the witness is an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555 [58 Cal.Rptr. 340, 426 P.2d 908].) Instead, the court should give CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*, informing the jury that it must decide whether the testifying codefendant is an accomplice. In addition, the court should instruct that when the jury considers this testimony as it relates to the testifying codefendant's defense, the jury should evaluate the testimony using the general rules of credibility, but if the jury considers testimony as incriminating evidence against the non-testifying codefendant, the testimony must be corroborated and should be viewed with caution. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 105 [17 Cal.Rptr.3d 710, 96 P.3d 30].)

If the court concludes that the corroboration requirement applies to an out-of-court statement, use the word "statement" throughout the instruction. (See discussion in Related Issues section to CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*.)

AUTHORITY

- Instructional Requirements ▸ Pen. Code, § 1111; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Accomplice May Not Provide Sole Basis for Admission of Other Evidence ▸ *People v. Bowley* (1963) 59 Cal.2d 855, 863 [31 Cal.Rptr. 471, 382 P.2d 591].
- Consideration of Incriminating Testimony ▸ *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Defense Admissions May Provide Necessary Corroboration ▸ *People v. Williams* (1997) 16 Cal.4th 635, 680 [66 Cal.Rptr.2d 573, 941 P.2d 752].
- Definition of Accomplice as Aider and Abettor ▸ *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817 793 P.2d 23].
- Extent of Corroboration Required ▸ *People v. Szeto* (1981) 29 Cal.3d 20, 27 [171 Cal.Rptr. 652, 623 P.2d 213].
- One Accomplice May Not Corroborate Another ▸ *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15 [117 P.2d 437], disapproved on other grounds in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301, fn. 11 [124 Cal.Rptr. 204, 540 P.2d 44] and *People v. Dillon* (1983) 34 Cal.3d 441, 454, fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697].
- Presence or Knowledge Insufficient ▸ *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].
- Testimony of Feigned Accomplice Need Not Be Corroborated ▸ *People v. Salazar* (1962) 201 Cal.App.2d 284, 287 [20 Cal.Rptr. 25]; but see *People v. Brocklehurst* (1971) 14 Cal.App.3d 473, 476 [92 Cal.Rptr. 340]; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193 [120 Cal.Rptr. 136].
- Uncorroborated Accomplice Testimony May Establish Corpus Delicti ▸ *People v. Williams* (1988) 45 Cal.3d 1268, 1317 [248 Cal.Rptr. 834, 756 P.2d 221].
- Witness an Accomplice as a Matter of Law ▸ *People v. Williams* (1997) 16 Cal.4th 635, 679 [66 Cal.Rptr.2d 573, 941 P.2d 752].

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation, §§ 98, 99, 105.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.03, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][b], 85.03[2][b], [d], Ch. 87, *Death Penalty*, § 87.23[4][b] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.02[5][b] (Matthew Bender).

362. Consciousness of Guilt: False Statements

If [the] defendant [_____ *<insert name of defendant when multiple defendants on trial>***] made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show (he/she) was aware of (his/her) guilt of the crime and you may consider it in determining (his/her) guilt. [You may not consider the statement in deciding any other defendant's guilt.]**

If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself.

New January 2006, Revised August 2009

BENCH NOTES

Instructional Duty

~~The court has a **sua sponte** duty to instruct on consciousness of guilt when there is evidence that the defendant intentionally made a false statement from which such an inference could be drawn. (*People v. Atwood* (1963) 223 Cal.App.2d 316, 333-334 [35 Cal.Rptr. 831]; see also *People v. Edwards* (1992) 8 Cal.App.4th 1092, 1103-1104 [10 Cal.Rptr.2d 821] [approving instruction on this point].)~~

This instruction should not be given unless it can be inferred that the defendant made the false statement for self-protection rather than to protect someone else. (*People v. Rankin* (1992) 9 Cal.App.4th 430, 436 [11 Cal.Rptr.2d 735] [error to instruct on false statements and consciousness of guilt where defendant lied to protect an accomplice]; see also *People v. Blakeslee* (1969) 2 Cal.App.3d 831, 839 [82 Cal.Rptr. 839].)

AUTHORITY

- Instructional Requirements ▸ *People v. Najera* (2008) 43 Cal.4th 1132, 1139 [in context of adoptive admissions]; *People v. Atwood* (1963) 223 Cal.App.2d 316, 333 [35 Cal.Rptr. 831]; but see *People v. Carter* (2003) 30 Cal.4th 1166, 1197-1198; see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 102–103 [17 Cal.Rptr.3d 710, 96 P.3d 30].
- This Instruction Upheld ▸ *People v. McGowan* (2008) 160 Cal.App.4th 1099, 1104.

Secondary Sources

1 Witkin, California Evidence (4th Ed. 2000) Hearsay, § 110.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.13[1], Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][c] (Matthew Bender).

COMMENTARY

The word "willfully" was not included in the description of the making of the false statement. Although one court suggested that the jury be explicitly instructed that the defendant must "willfully" make the false statement (*People v. Louis* (1984) 159 Cal.App.3d 156, 161–162 [205 Cal.Rptr. 306]), the California Supreme Court subsequently held that such language is not required. (*People v. Mickey* (1991) 54 Cal.3d 612, 672, fn. 9 [286 Cal.Rptr. 801, 818 P.2d 84].)

RELATED ISSUES

Evidence

The false nature of the defendant's statement may be shown by inconsistencies in the defendant's own testimony, his or her pretrial statements, or by any other prosecution evidence. (*People v. Kimble* (1988) 44 Cal.3d 480, 498 [244 Cal.Rptr. 148, 749 P.2d 803] [overruling line of cases that required falsity to be demonstrated only by defendant's own testimony or statements]; accord *People v. Edwards* (1992) 8 Cal.App.4th 1092, 1103 [10 Cal.Rptr.2d 821]; *People v. Williams* (1995) 33 Cal.App.4th 467, 478–479 [39 Cal.Rptr.2d 358].)

Un-Mirandized Voluntary Statement

The *Miranda* rule (*Miranda v. Arizona* (1966) 384 U.S. 436, 444, 479 [86 S.Ct. 1602, 16 L.Ed.2d 694]) does not prohibit instructing the jury that it may draw an inference of guilt from a willfully false or deliberately misleading un-*Mirandized* statement that the defendant voluntarily introduces into evidence on direct examination. (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1166–1169 [94 Cal.Rptr.2d 727].)

363–369. Reserved for Future Use

400. Aiding and Abetting: General Principles

A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime.

A person is ~~[equally]~~ guilty of ~~the~~ a crime whether he or she committed it personally or aided and abetted the perpetrator~~.~~. ~~who committed it.~~

[Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime.]

New January 2006; Revised June 2007, August 2009

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecutor relies on it as a theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].)

When the prosecution is relying on aiding and abetting, give this instruction before other instructions on aiding and abetting to introduce this theory of culpability to the jury.

~~Modify this instruction if the aider and abettor and the perpetrator may not have the same mental state.~~ An aider and abettor may be found guilty of a different crime or degree of crime than the perpetrator if the aider and abettor and the perpetrator do not have the same mental state. ~~(~~ *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1166 [91 Cal.Rptr.3d 874]; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1577-1578; *People v. McCoy* (2001) 25 Cal.4th 1111, 1115–1116 [108 Cal.Rptr.2d 188, 24 P.3d 1210] .)

~~Before instructing the jury with the bracketed word "equally," the court should ascertain whether doing so would be in accord with the controlling principles articulated in *People v. McCoy* (2001) 25 Cal.4th 1111, 1115–1116 [108 Cal.Rptr.2d 188, 24 P.3d 1210] and *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1166 [91 Cal.Rptr.3d 874].~~

If the prosecution is also relying on the natural and probable consequences doctrine, the court should also instruct with the last bracketed paragraph. Depending on which theories are relied on by the prosecution, the court should then instruct as follows.

Intended Crimes (Target Crimes)
If the prosecution's theory is that the defendant intended to aid and abet the crime or crimes charged (target crimes), give CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

Natural & Probable Consequences Doctrine (Non-Target Crimes)
If the prosecution's theory is that any of the crimes charged were committed as a natural and probable consequence of the target crime, CALCRIM No. 402 or 403 should also be given. If both the target and non-target crimes are charged, give CALCRIM No. 402, *Natural and Probable Consequences Doctrine (Target and Non-Target Offenses Charged)*. In some cases, the prosecution may not charge the target crime but only the non-target crime. In that case, give CALCRIM No. 403, *Natural and Probable Consequences (Only Non-Target Offense Charged)*.

AUTHORITY

- Aiding and Abetting Defined ▸ *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].
- Murder Not Complete Until Victim Dies ▸ *People v. Celis* (2006) 141 Cal.App.4th 466, 471-474 [46 Cal.Rptr.3d 139].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Introduction to Crimes, § 78.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.10 (Matthew Bender).

403. Natural and Probable Consequences (Only Non-Target Offense Charged)

[Before you may decide whether the defendant is guilty of _____ *<insert non-target offense>***, you must decide whether (he/she) is guilty of _____** *<insert target offense>***.]**

To prove that the defendant is guilty of _____ *<insert non-target offense>***, the People must prove that:**

1. **The defendant is guilty of _____** *<insert target offense>***;**

2. **During the commission of _____** *<insert target offense>* **a coparticipant in that _____** *<insert target offense>* **committed the crime of _____** *<insert non-target offense>*;

AND

3. **Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the _____** *<insert non-target offense>* **was a natural and probable consequence of the commission of the _____** *<insert target offense>***.**

A *coparticipant* in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.

A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the _____ *<insert non-target offense>* **was committed for a reason independent of the common plan to commit the _____** *<insert target offense>***, then the commission of _____** *<insert non-target offense>* **was not a natural and probable consequence of _____** *<insert target offense>***.**

To decide whether crime of _____ *<insert non-target offense>* **was committed, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].**

[The People are alleging that the defendant originally intended to aid and abet ~~either~~ _____ <*insert target offenses*> ~~or _____ <insert alternative other target offense>~~.

If you decide that the defendant aided and abetted one of these crimes and that _____ <*insert non-target offense*> was a natural and probable consequence of that crime, ~~T~~the defendant is guilty of _____ <*insert non-target offense*>~~>~~. ~~if you decide that the defendant aided and abetted one of these crimes and that _____ <insert non-target offense> was the natural and probable result of that crime.one of these crimes. However, y~~You do not need to agree about which of these ~~two~~ crimes the defendant aided and abetted.]

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecution relies on it as a theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-561 [199 Cal.Rptr. 60, 674 P.2d 1318].)

The court has a **sua sponte** duty to identify and instruct on any target offense relied on by the prosecution as a predicate offense when substantial evidence supports the theory. Give all relevant instructions on the alleged target offense or offenses. The court, however, does not have to instruct on all potential target offenses supported by the evidence if the prosecution does not rely on those offenses. (*People v. Prettyman* (1996) 14 Cal.4th 248, 267–268 [58 Cal.Rptr.2d 827, 926 P.2d 1013]; see *People v. Huynh* (2002) 99 Cal.App.4th 662, 677–678 [121 Cal.Rptr.2d 340] [no sua sponte duty to instruct on simple assault when prosecutor never asked court to consider it as target offense].)

The target offense is the crime that the accused parties intended to commit. The non-target is an additional unintended crime that occurs during the commission of the target.

Do not give the first bracketed paragraph in cases in which the prosecution is also pursuing a conspiracy theory.

Related Instructions

Give CALCRIM No. 400, *Aiding and Abetting: General Principles*, and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*, before this instruction.

This instruction should be used when the prosecution relies on the Natural and Probable Consequences Doctrine and charges only non-target crimes. If both target and non-target crimes are charged, give CALCRIM No. 402.

AUTHORITY

- Aiding and Abetting Defined ▸ *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].
- Natural and Probable Consequences, Reasonable Person Standard ▸ *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [26 Cal.Rptr.2d 323].
- No Unanimity Required ▸ *People v. Prettyman* (1996) 14 Cal.4th 248, 267–268 [58 Cal.Rptr.2d 827, 926 P.2d 1013].
- Presence or Knowledge Insufficient ▸ *People v. Boyd* (1990) 222 Cal.App.3d 541, 557 fn.14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87, 926 P.2d 1013].
- Withdrawal ▸ *People v. Norton* (1958) 161 Cal.App.2d 399, 403 [327 P.2d 87]; *People v. Ross* (1979) 92 Cal.App.3d 391, 404–405 [154 Cal.Rptr. 783].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Introduction to Crimes, §§ 82, 84, 88.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.10[3] (Matthew Bender).

COMMENTARY

In *People v. Prettyman* (1996) 14 Cal.4th 248, 268 [58 Cal.rptr.2d 827, 926 P.2d 1013], the court concluded that the trial court must sua sponte identify and describe for the jury any target offenses allegedly aided and abetted by the defendant.

Although no published case to date gives a clear definition of the terms "natural" and "probable," nor holds that there is a sua sponte duty to define them, we have

included a suggested definition. (See *People v. Prettyman, supra,* 14 Cal.4th at p. 291 (conc. & dis. opn. of Brown, J.); see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107–109 [17 Cal.Rptr.3d 710, 96 P.3d 30] [court did not err in failing to define "natural and probable."])

RELATED ISSUES

See the Related Issues section under CALCRIM No. 401, *Aiding and Abetting*, and CALCRIM No. 402, *Natural and Probable Consequences Doctrine (Target and Non-Target Offenses Charged)*.

521. Murder: Degrees (Pen. Code, § 189)

If you decide that the defendant has committed murder, you must decide whether it is murder of the first or second degree.

<Select the appropriate section[s]. Give the final two paragraphs in every case.>

<Give if multiple theories alleged.>
[The defendant has been prosecuted for first degree murder under (two/__ <*insert number***>) theories: (1) _____** *<insert first theory, e.g., "the murder was willful, deliberate, and premeditated">* **[and] (2) _____** *<insert second theory, e.g., "the murder was committed by lying in wait">* **[_____** *<insert additional theories>***].**

Each theory of first degree murder has different requirements, and I will instruct you on (both/all __ <*insert number***>).**

You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory.]

<A. Deliberation and Premeditation>

[The defendant is guilty of first degree murder if the People have proved that (he/she) acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if (he/she) intended to kill. The defendant acted *deliberately* if (he/she) carefully weighed the considerations for and against (his/her) choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if (he/she) decided to kill before com[pleting]~~mitting~~ the act[s] that caused death.

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

<B. Torture>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by torture. The defendant murdered by torture if:

1. **(He/She) willfully, deliberately, and with premeditation intended to inflict extreme and prolonged pain on the person killed while that person was still alive;**

2. **(He/She) intended to inflict such pain on the person killed for the calculated purpose of revenge, extortion, persuasion, or any other sadistic reason;**

3. **The acts causing death involved a high degree of probability of death;**

AND

4. **The torture was a cause of death.]**

[A person commits an act *willfully* when he or she does it willingly or on purpose. A person *deliberates* if he or she carefully weighs the considerations for and against his or her choice and, knowing the consequences, decides to act. An act is done with *premeditation* if the decision to commit the act is made before the act is done.]

[There is no requirement that the person killed be aware of the pain.]

[A finding of torture does not require that the defendant intended to kill.]

<C. Lying in Wait>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered while lying in wait or immediately thereafter. The defendant murdered by lying in wait if:

1. **(He/She) concealed (his/her) purpose from the person killed;**

2. **(He/She) waited and watched for an opportunity to act;**

AND

3. **Then, from a position of advantage, (he/she) intended to and did make a surprise attack on the person killed.**

The lying in wait does not need to continue for any particular period of time, but its duration must be substantial enough to show a state of mind equivalent to deliberation or premeditation. [*Deliberation* means carefully weighing the considerations for and against a choice and, knowing the consequences, deciding to act. An act is done with *premeditation* if the decision to commit the act is made before the act is done.]

[A person can conceal his or her purpose even if the person killed is aware of the person's physical presence.]

[The concealment can be accomplished by ambush or some other secret plan.]]

<D. Destructive Device or Explosive>
[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using a destructive device or explosive.]

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is [also] any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ *<insert type of explosive from Health & Saf. Code, § 12000>* **is an *explosive.*]**

[A *destructive device* is _____ *<insert definition supported by evidence from Pen. Code, § 12301>***.]**

[_____ *<insert type of destructive device from Pen. Code, § 12301>* **is a *destructive device.*]**

<E. Weapon of Mass Destruction>
[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using a weapon of mass destruction.

[_____ *<insert type of weapon from Pen. Code, § 11417(a)(1)>* **is a *weapon of mass destruction*.]**

[_____ *<insert type of agent from Pen. Code, § 11417(a)(2)>* **is a *chemical warfare agent*.]]**

<F. Penetrating Ammunition>
[The defendant is guilty of first degree murder if the People have proved that when the defendant murdered, (he/she) used ammunition designed primarily to penetrate metal or armor to commit the murder and (he/she) knew that the ammunition was designed primarily to penetrate metal or armor.]

<G. Discharge From Vehicle>
[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by shooting a firearm from a motor vehicle. The defendant committed this kind of murder if:

1. **(He/She) shot a firearm from a motor vehicle;**

2. **(He/She) intentionally shot at a person who was outside the vehicle;**

AND

3. **(He/She) intended to kill that person.**

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

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

<H. Poison>
[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using poison.

[*Poison* is a substance, applied externally to the body or introduced into the body, that can kill by its own inherent qualities.]]

[_____ *<insert name of substance>* **is a *poison*.]**

<GIVE FINAL TWO PARAGRAPHS IN EVERY CASE.>
All other murders are of the second degree.

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

New January 2006; Revised August 2006; June 2007

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Before giving this instruction, the court must give CALCRIM No. 520, *Murder With Malice Aforethought*. Depending on the theory of first degree murder relied on by the prosecution, give the appropriate alternatives A through H.

The court **must give** the final two paragraphs in every case.

If the prosecution alleges two or more theories for first degree murder, give the bracketed section that begins with "The defendant has been prosecuted for first degree murder under." If the prosecution alleges felony murder in addition to one of the theories of first degree murder in this instruction, give CALCRIM No. 548, *Murder: Alternative Theories*, instead of the bracketed paragraph contained in this instruction.

When instructing on torture or lying in wait, give the bracketed sections explaining the meaning of "deliberate" and "premeditated" if those terms have not already been defined for the jury.

When instructing on murder by weapon of mass destruction, explosive, or destructive device, the court may use the bracketed sentence stating, "_____ is a weapon of mass destruction" or "is a chemical warfare agent," only if the device used is listed in the code section noted in the instruction. For example, "Sarin is a chemical warfare agent." However, the court may not instruct the jury that the defendant used the prohibited weapon. For example, the court may not state, "the defendant used a chemical warfare agent, sarin," or "the material used by the defendant, sarin, was a chemical warfare agent." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

AUTHORITY

- Types of Statutory First Degree Murder ▸ Pen. Code, § 189.
- Armor Piercing Ammunition Defined ▸ Pen. Code, § 12323(b).
- Destructive Device Defined ▸ Pen. Code, § 12301.
- For Torture, Act Causing Death Must Involve a High Degree of Probability of Death ▸ *People v. Cook* (2006) 39 Cal.4th 566, 602 [47 Cal.Rptr.3d 22].

- Mental State Required for Implied Malice ▸ *People v. Knoller* (2007) 41 Cal.4th 139, 143 [59 Cal.Rptr.3d 157, 158 P.3d 731].
- Explosive Defined ▸ Health & Saf. Code, § 12000; *People v. Clark* (1990) 50 Cal.3d 583, 604 [268 Cal.Rptr. 399, 789 P.2d 127].
- Weapon of Mass Destruction Defined ▸ Pen. Code, § 11417.
- Discharge From Vehicle ▸ *People v. Chavez* (2004) 118 Cal.App.4th 379, 386–387 [12 Cal.Rptr.3d 837] [drive-by shooting clause is not an enumerated felony for purposes of the felony murder rule].
- Lying in Wait Requirements ▸ *People v. Stanley* (1995) 10 Cal.4th 764, 794 [42 Cal.Rptr.2d 543, 897 P.2d 481]; *People v. Ceja* (1993) 4 Cal.4th 1134, 1139 [17 Cal.Rptr.2d 375, 847 P.2d 55]; *People v. Webster* (1991) 54 Cal.3d 411, 448 [285 Cal.Rptr. 31, 814 P.2d 1273]*; People v. Poindexter* (2006) 144 Cal.App.4th 572, 582-585 [50 Cal.Rptr.3d 489]; *People v. Laws* (1993) 12 Cal.App.4th 786, 794–795 [15 Cal.Rptr.2d 668].
- Poison Defined ▸ *People v. Van Deleer* (1878) 53 Cal. 147, 149.
- Premeditation and Deliberation Defined ▸ *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [73 Cal.Rptr. 550, 447 P.2d 942]; *People v. Bender* (1945) 27 Cal.2d 164, 183–184 [163 P.2d 8]; *People v. Daugherty* (1953) 40 Cal.2d 876, 901–902 [256 P.2d 911].
- Torture Requirements ▸ *People v. Pensinger* (1991) 52 Cal.3d 1210, 1239 [278 Cal.Rptr. 640, 805 P.2d 899]; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1101 [259 Cal.Rptr. 630, 774 P.2d 659], habeas corpus granted in part on other grounds in *In re Bittaker* (1997) 55 Cal.App.4th 1004 [64 Cal.Rptr.2d 679]; *People v. Wiley* (1976) 18 Cal.3d 162, 168–172 [133 Cal.Rptr. 135, 554 P.2d 881]; see also *People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739] [comparing torture murder with torture].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 102–162.

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

LESSER INCLUDED OFFENSES

- Murder ▸ Pen. Code, § 187.
- Voluntary Manslaughter ▸ Pen. Code, § 192(a).

- Involuntary Manslaughter ▸ Pen. Code, § 192(b).
- Attempted First Degree Murder ▸ Pen. Code, §§ 663, 189.
- Attempted Murder ▸ Pen. Code, §§ 663, 187.

RELATED ISSUES

Premeditation and Deliberation*—Anderson *Factors

Evidence in any combination from the following categories suggests premeditation and deliberation: (1) events before the murder that indicate planning; (2) motive, specifically evidence of a relationship between the victim and the defendant; and (3) method of the killing that is particular and exacting and evinces a preconceived design to kill. (*People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [73 Cal.Rptr. 550, 447 P.2d 942].) Although these categories have been relied on to decide whether premeditation and deliberation are present, an instruction that suggests that each of these factors *must* be found in order to find deliberation and premeditation is not proper. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1020–1021 [245 Cal.Rptr. 185, 750 P.2d 1342].) *Anderson* also noted that the brutality of the killing alone is not sufficient to support a finding that the killer acted with premeditation and deliberation. Thus, the infliction of multiple acts of violence on the victim without any other evidence indicating premeditation will not support a first degree murder conviction. (*People v. Anderson, supra,* 70 Cal.2d at pp. 24–25.) However, "[t]he *Anderson* guidelines are descriptive, not normative." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125 [9 Cal.Rptr.2d 577, 831 P.2d 1159].) The holding did not alter the elements of murder or substantive law but was intended to provide a "framework to aid in appellate review." *(Ibid.)*

Premeditation and Deliberation—Heat of Passion Provocation

Provocation may reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [156 P.2d 7] [provocation raised reasonable doubt about premeditation or deliberation, "leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation"]; see *People v. Padilla* (2002) 103 Cal.App.4th 675, 679 [126 Cal.Rptr.2d 889] [evidence of hallucination is admissible at guilt phase to negate deliberation and premeditation and to reduce first degree murder to second degree murder].) There is, however, no sua sponte duty to instruct the jury on this issue. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 31–33 [60 Cal.Rptr.2d 366], disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752 [3 Cal.Rptr.3d 676, 74 P.3d 771].) On request, give CALCRIM No. 522, *Provocation: Effect on Degree of Murder*.

Torture—Causation

The finding of murder by torture encompasses the totality of the brutal acts and circumstances that led to a victim's death. "The acts of torture may not be segregated into their constituent elements in order to determine whether any single act by itself caused the death; rather, it is the continuum of sadistic violence that constitutes the torture [citation]." (*People v. Proctor* (1992) 4 Cal.4th 499, 530–531 [15 Cal.Rptr.2d 340, 842 P.2d 1100].)

Torture—Instruction on Voluntary Intoxication

"[A] court should instruct a jury in a torture-murder case, when evidence of intoxication warrants it, that intoxication is relevant to the specific intent to inflict cruel suffering." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1242 [278 Cal.Rptr. 640, 805 P.2d 899]; see CALCRIM No. 625, *Voluntary Intoxication: Effects on Homicide Crimes*.)

Torture—Pain Not an Element

All that is required for first degree murder by torture is the calculated *intent to cause pain* for the purpose of revenge, extortion, persuasion, or any other sadistic purpose. There is no requirement that the victim actually suffer pain. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1239 [278 Cal.Rptr. 640, 805 P.2d 899].)

Torture—Premeditated Intent to Inflict Pain

Torture-murder, unlike the substantive crime of torture, requires that the defendant acted with deliberation and premeditation when inflicting the pain. (*People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739]; *People v. Mincey* (1992) 2 Cal.4th 408, 434–436 [6 Cal.Rptr.2d 822, 827 P.2d 388].)

Lying in Wait—Length of Time Equivalent to Premeditation and Deliberation

In *People v. Stanley* (1995) 10 Cal.4th 764, 794 [42 Cal.Rptr.2d 543, 897 P.2d 481], the court approved this instruction regarding the length of time a person lies in wait: "[T]he lying in wait need not continue for any particular time, provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation."

Discharge From a Vehicle—Vehicle Does Not Have to Be Moving

Penal Code section 189 does not require the vehicle to be moving when the shots are fired. (Pen. Code, § 189; see also *People v. Bostick* (1996) 46 Cal.App.4th 287, 291 [53 Cal.Rptr.2d 760] [finding vehicle movement is not required in context of enhancement for discharging firearm from motor vehicle under Pen. Code, § 12022.55].)

540A. Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act (Pen. Code, § 189)

The defendant is charged [in Count __] with murder, under a theory of felony murder.

To prove that the defendant is guilty of first degree murder under this theory, the People must prove that:

1. **The defendant committed [or attempted to commit]** _____ *<insert felony or felonies from Pen. Code, § 189>***;**

2. **The defendant intended to commit** _____ *<insert felony or felonies from Pen. Code, § 189>***;**

   AND

3. **While committing [or attempting to commit]** _____*, <insert felony or felonies from Pen. Code, § 189>* **the defendant ~~did an act that~~ caused the death of another person.**

A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether the defendant committed [or attempted to commit] _____ *<insert felony or felonies from Pen. Code, § 189>***, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder.** *<Make certain that all appropriate instructions on all underlying felonies are given.>*

[The defendant must have intended to commit the (felony/felonies) of _____ *<insert felony or felonies from Pen. Code, § 189>* **before or at the time that (he/she) caused~~of the act causing~~ the death.]**

[It is not required that the person die immediately, as long as the cause of the death~~act causing the death)~~ and the (felony/felonies) are part of one continuous transaction.]

[It is not required that the person killed be the (victim/intended victim) of the (felony/felonies).]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of any underlying felonies. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].) Give all appropriate instructions on all underlying felonies with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense.

If causation is an issue, the court has a **sua sponte** duty to give CALCRIM No. 240, *Causation*.

The felonies that support a charge of first degree felony murder are arson, rape, carjacking, robbery, burglary, kidnapping, mayhem, train wrecking, sodomy, lewd or lascivious acts on a child, oral copulation, and sexual penetration. (See Pen. Code, § 189.)

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127 [287 P.2d 497]; *People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769].) Give the bracketed sentence that begins with "The defendant must have intended to commit the felony." For an instruction specially tailored to robbery-murder cases, see *People v. Turner* (1990) 50 Cal.3d 668, 691 [268 Cal.Rptr. 706, 789 P.2d 887].

Give the bracketed sentence that begins with "It is not required that the person die immediately" on request if relevant based on the evidence.

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [104 Cal.Rptr. 807] [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [104 Cal.Rptr. 217, 501 P.2d 225] [innocent bystander]; *People v. Salas* (1972) 7 Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7] [police officer].) Give the bracketed sentence that begins with "It is not required that the person killed be" on request.

The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*.

Drive-By Shooting

The drive-by shooting clause in Penal Code section 189 is not an enumerated felony for purposes of the felony-murder rule. (*People v. Chavez* (2004) 118 Cal.App.4th 379, 386–387 [12 Cal.Rptr.3d 837].) A finding of a specific intent to kill is required in order to find first degree murder under this clause. *(Ibid.)*

If the prosecutor is proceeding under both malice and felony-murder theories, also give CALCRIM No. 548, *Murder: Alternative Theories*. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [40 Cal.Rptr.2d 481, 892 P.2d 1224] [error to instruct on malice when felony murder only theory].)

Related Instructions—Other Causes of Death

This instruction should be used only when the prosecution alleges that the defendant committed the act causing the death.

If the prosecution alleges that another coparticipant in the felony committed the fatal act, give CALCRIM No. 540B, *Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act*. If the evidence indicates that either the defendant or a coparticipant may have committed the fatal act, give both instructions.

When the alleged victim dies during the course of the felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants, give CALCRIM No. 540C, *Felony Murder: First Degree—Other Acts Allegedly Caused Death*. (*People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].)

If the evidence indicates that someone other than the defendant or a coparticipant committed the fatal act, then the crime is not felony murder. (*People v. Washington* (1965) 62 Cal.2d 777, 782–783 [44 Cal.Rptr. 442, 402 P.2d 130]; *People v. Caldwell* (1984) 36 Cal.3d 210, 216 [203 Cal.Rptr. 433, 681 P.2d 274];

see also *People v. Gardner* (1995) 37 Cal.App.4th 473, 477 [43 Cal.Rptr.2d 603].) Liability may be imposed, however, under the provocative act doctrine. (*Pizano v. Superior Court* (1978) 21 Cal.3d 128, 134 [145 Cal.Rptr. 524, 577 P.2d 659]; see CALCRIM No. 560, *Homicide: Provocative Act by Defendant*.)

AUTHORITY

- Felony Murder: First Degree ▸ Pen. Code, § 189; *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Specific Intent to Commit Felony Required ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Continuous Transaction Requirement ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Infliction of Fatal Injury ▸ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Logical Nexus Between Felony and Killing ▸ *People v. Dominguez* (2006) 39 Cal.4th 1141 [47 Cal.Rptr.3d 575, 140 P.3d 866]; *People v. Cavitt* (2004) 33 Cal.4th 187, 197–206 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Merger Doctrine Does Not Apply to First Degree Felony Murder ▸ *People v. Farley* (2009) 46 Cal.4th 1053, 1118-1120.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 134–147.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 87, *Death Penalty*, § 87.13[7] (Matthew Bender).

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

RELATED ISSUES

Does Not Apply Where Felony Committed Only to Facilitate Murder
If a felony, such as robbery, is committed merely to facilitate an intentional murder, then the felony-murder rule does not apply. (*People v. Green* (1980) 27

Cal.3d 1, 61 [164 Cal.Rptr. 1, 609 P.2d 468], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99] [robbery committed to facilitate murder did not satisfy felony-murder special circumstance].) If the defense requests a special instruction on this point, see CALCRIM No. 730, *Special Circumstances: Murder in Commission of Felony, Pen. Code, § 190.2(a)(17).*

No Duty to Instruct on Lesser Included Offenses of Uncharged Predicate Felony

"Although a trial court on its own initiative must instruct the jury on lesser included offenses of *charged* offenses, this duty does not extend to *uncharged* offenses relevant only as predicate offenses under the felony-murder doctrine." (*People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769] [original italics]; see *People v. Cash* (2002) 28 Cal.4th 703, 736–737 [122 Cal.Rptr.2d 545] [no duty to instruct on theft as lesser included offense of uncharged predicate offense of robbery].)

Auto Burglary

Auto burglary may form the basis for a first degree felony-murder conviction. (*People v. Fuller* (1978) 86 Cal.App.3d 618, 622–623, 628 [150 Cal.Rptr. 515] [noting the problems of applying the felony-murder rule to a nondangerous daytime auto burglary].)

Duress

"[D]uress can, in effect, provide a defense to murder on a felony-murder theory by negating the underlying felony." (*People v. Anderson* (2002) 28 Cal.4th 767, 784 [122 Cal.Rptr.2d 587, 50 P.3d 368] [dictum]; see also CALCRIM No. 3402, *Duress or Threats*.)

Imperfect Self-Defense

Imperfect self-defense is not a defense to felony murder because malice aforethought, which imperfect self-defense negates, is not an element of felony murder. (*People v. Tabios* (1998) 67 Cal.App.4th 1, 6–9 [78 Cal.Rptr.2d 753].)

540B. Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act (Pen. Code, § 189)

<Give the following introductory sentence when not giving Instruction 540A.>
[The defendant is charged [in Count __] with murder, under a theory of felony murder.]

The defendant may [also] be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the *perpetrator.*

To prove that the defendant is guilty of first degree murder under this theory, the People must prove that:

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit)** _____ *<insert felony or felonies from Pen. Code, § 189>***;**

2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit)** _____ *<insert felony or felonies from Pen. Code, § 189>***;**

3. **If the defendant did not personally commit [or attempt to commit]** _____ *<insert felony or felonies from Pen. Code, § 189>***, then a perpetrator, (whom the defendant was aiding and abetting/ [or] with whom the defendant conspired), personally committed [or attempted to commit]** _____ *<insert felony or felonies from Pen. Code, § 189>***;**

[AND]

4. **While committing [or attempting to commit]** _____*, <insert felony or felonies from Pen. Code, § 189>* **the perpetrator ~~did an act that~~ caused the death of another person(;/.)**

<Give element 5 if the court concludes it must instruct on causal relationship between felony and death; see Bench Notes.>

[AND

5. **There was a logical connection between the ~~act causing the~~cause of death and the _____** *<insert felony or felonies from Pen. Code, § 189>* **[or attempted _____** *<insert felony or felonies from Pen. Code, § 189>***]. The connection between the ~~fatal act~~cause of death and the _____** *<insert felony or felonies from Pen. Code, § 189>* **[or attempted _____** *<insert felony or felonies from Pen. Code, § 189>***] must involve more than just their occurrence at the same time and place.]**

A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] _____ *<insert felony or felonies from Pen. Code, § 189>***, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. [To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I (will give/have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit a crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder.**
<Make certain that all appropriate instructions on all underlying felonies, aiding and abetting, and conspiracy are given.>

[The defendant must have (intended to commit[,]/ [or] aid and abet[,]/ [or] been a member of a conspiracy to commit) the (felony/felonies) of _____ *<insert felony or felonies from Pen. Code, § 189>* **before or at the time that (he/she) caused~~of the act causing~~ the death.]**

[It is not required that the person die immediately, as long as the cause of the death~~act causing the death~~ and the (felony felonies) are part of one continuous transaction.]

[It is not required that the person killed be the (victim/intended victim) of the (felony/felonies).]

[It is not required that the defendant be present when ~~act causing~~ the death occurs.]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of any underlying felonies. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].)

If causation is an issue, the court has a **sua sponte** duty to give CALCRIM No. 240, *Causation*.

If the prosecution's theory is that the defendant, as well as the perpetrator, committed or attempted to commit the underlying felony or felonies, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select both "the defendant and the perpetrator." Give all appropriate instructions on any underlying felonies with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the defendant and the perpetrator each committed [the crime] if . . . ."

If the prosecution's theory is that the defendant aided and abetted or conspired to commit the felony, select one or both of these options in element 1 and the corresponding intent requirements in element 2. In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on any underlying felonies and on aiding and abetting and/or conspiracy with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the perpetrator committed," rather than "the defendant," in the instructions on the underlying felony.

Bracketed element 5 is based on *People v. Cavitt* (2004) 33 Cal.4th 187, 193 [14 Cal.Rtpr.3d 281, 91 P.3d 222]. In *Cavitt*, the Supreme Court clarified the liability of a nonkiller under the felony-murder rule when a cofelon commits a killing. The court held that "the felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act causing the death. The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one

continuous transaction." (*Ibid.* [italics in original].) The majority concluded that the court has no sua sponte duty to instruct on the necessary causal connection. (*Id.* at pp. 203–204.) In concurring opinions, Justice Werdegar, joined by Justice Kennard, and Justice Chin expressed the view that the jury should be instructed on the necessary causal relationship. (*Id.* at pp. 212–213.) Give bracketed element 5 if the evidence raises an issue over the causal connection between the felony and the killing. In addition, the court may give this bracketed element at its discretion in any case in which this instruction is given. If the prosecution alleges that the defendant did not commit the felony but aided and abetted or conspired to commit the felony, the committee recommends giving bracketed element 5. (See discussion of conspiracy liability in the Related Issues section below.)

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, or did not join the conspiracy or aid and abet the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127 [287 P.2d 497]; *People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769].) Give the bracketed sentence that begins with "The defendant must have (intended to commit." For an instruction specially tailored to robbery-murder cases, see *People v. Turner* (1990) 50 Cal.3d 668, 691 [268 Cal.Rptr. 706, 789 P.2d 887].

Give the bracketed sentence that begins with "It is not required that the person die immediately" on request if relevant based on the evidence.

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [104 Cal.Rptr. 807] [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [104 Cal.Rptr. 217, 501 P.2d 225] [innocent bystander]; *People v. Salas* (1972) 7 Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7] [police officer].) Give the bracketed sentence that begins with "It is not required that the person killed be" on request.

Give the last bracketed sentence, stating that the defendant need not be present, on request.

The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*.

If the prosecutor is proceeding under both malice and felony-murder theories, give CALCRIM No. 548, *Murder: Alternative Theories*. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [40 Cal.Rptr.2d 481, 892 P.2d 1224] [error to instruct on malice when felony murder only theory].)

Related Instructions—Other Causes of Death
This instruction should be used only when the prosecution alleges that a coparticipant in the felony committed the act causing the death.

When the alleged victim dies during the course of the felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants, give CALCRIM No. 540C, *Felony Murder: First Degree—Other Acts Allegedly Caused Death*. (*People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].)

If the evidence indicates that someone other than the defendant or a coparticipant committed the fatal act, then the crime is not felony murder. (*People v. Washington* (1965) 62 Cal.2d 777, 782–783 [44 Cal.Rptr. 442, 402 P.2d 130]; *People v. Caldwell* (1984) 36 Cal.3d 210, 216 [203 Cal.Rptr. 433, 681 P.2d 274]; see also *People v. Gardner* (1995) 37 Cal.App.4th 473, 477 [43 Cal.Rptr.2d 603].) Liability may be imposed, however, under the provocative act doctrine. (*Pizano v. Superior Court of Tulare County* (1978) 21 Cal.3d 128, 134 [145 Cal.Rptr. 524, 577 P.2d 659]; see CALCRIM No. 560, *Homicide: Provocative Act by Defendant*.)

Related Instructions
CALCRIM No. 400 et seq., *Aiding and Abetting: General Principles*.

CALCRIM No. 415 et seq., *Conspiracy*.

AUTHORITY

- Felony Murder: First Degree ▸ Pen. Code, § 189; *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Specific Intent to Commit Felony Required ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222].

- Continuous Transaction Requirement ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Logical Connection Required for Liability of Nonkiller ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Infliction of Fatal Injury ▸ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Defendant Must Join Felonious Enterprise Before or During Killing of Victim ▸ *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].
- Logical Nexus Between Felony and Killing ▸ *People v. Dominguez* (2006) 39 Cal.4th 1141 [47 Cal.Rptr.3d 575, 140 P.3d 866]; *People v. Cavitt* (2004) 33 Cal.4th 187, 197–206 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Merger Doctrine Does Not Apply to First Degree Felony Murder ▸ *People v. Farley* (2009) 46 Cal.4th 1053, 1118-1120.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Introduction to Crimes, §§ 80, 87; Crimes Against the Person, §§ 134–147, 156.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.10[3][b], Ch. 142, *Crimes Against the Person,* § 142.01[1][e], [2][b] (Matthew Bender).

RELATED ISSUES

Conspiracy Liability—Natural and Probable Consequences

In the context of nonhomicide crimes, a coconspirator is liable for any crime committed by a member of the conspiracy that was a natural and probable consequence of the conspiracy. (*People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 842–843 [68 Cal.Rptr.2d 388].) This is analogous to the rule in aiding and abetting that the defendant may be held liable for any unintended crime that was the natural and probable consequence of the intended crime. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [26 Cal.Rptr.2d 323].) In the context of felony murder, the Supreme Court has explicitly held that the natural and probable consequences doctrine does not apply to a defendant charged with felony murder based on aiding and abetting the underlying felony. (See *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1658 [285 Cal.Rptr. 523].) The court has not

explicitly addressed whether the natural and probable consequences doctrine continues to limit liability for felony murder where the defendant's liability is based solely on being a member of a conspiracy.

In *People v. Pulido* (1997) 15 Cal.4th 713, 724 [63 Cal.Rptr.2d 625, 936 P.2d 1235], the court stated in dicta, "[f]or purposes of complicity in a cofelon's homicidal act, the conspirator and the abettor stand in the same position. [Citation; quotation marks omitted.] In stating the rule of felony-murder complicity we have not distinguished accomplices whose responsibility for the underlying felony was pursuant to prior agreement (conspirators) from those who intentionally assisted without such agreement (aiders and abettors). [Citations]." In the court's two most recent opinions on felony-murder complicity, the court refers to the liability of "cofelons" or "accomplices" without reference to whether liability is based on directly committing the offense, aiding and abetting the offense, or conspiring to commit the offense. (*People v. Cavitt* (2004) 33 Cal.4th 187, 197–205 [14 Cal.Rptr.3d 281, 91 P.3d 222]; *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542].) On the other hand, in both of these cases, the defendants were present at the scene of the felony and directly committed the felonious acts. (*People v. Cavitt, supra,* 33 Cal.4th at p. 194; *People v. Billa, supra,* 31 Cal.4th at p. 1067.) Thus, the court has not had occasion recently to address a situation in which the defendant was convicted of felony murder based solely on a theory of coconspirator liability.

The requirement for a logical nexus between the felony and the act causing the death, articulated in *People v. Cavitt, supra,* 33 Cal.4th at p. 193, may be sufficient to hold a conspiring defendant liable for the resulting death under the felony-murder rule. However, *Cavitt* did not clearly answer this question. Nor has any case explicitly held that the natural and probable consequences doctrine does not apply in the context of felony murder based on conspiracy.

Thus, if the trial court is faced with a factual situation in which the defendant's liability is premised solely on being a member of a conspiracy in which another coparticipant killed an individual, the committee recommends that the court do the following: (1) give bracketed element 6 requiring a logical nexus between the felony and the act causing death; (2) request briefing and review the current law on conspiracy liability and felony murder; and (3) at the court's discretion, add as element 7, "The act causing the death was a natural and probable consequence of the plan to commit _____ <*insert felony or felonies from Pen. Code, § 189*>."

See the Related Issues section of CALCRIM No. 540A, *Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act*.

540C. Felony Murder: First Degree—Other Acts Allegedly Caused Death (Pen. Code, § 189)

The defendant is charged [in Count __] with murder, under a theory of felony murder.

The defendant may be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the *perpetrator.*

To prove that the defendant is guilty of first degree murder under this theory, the People must prove that:

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit)** _____ *<insert felony or felonies from Pen. Code, § 189>***;**

2. **The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit)** _____ *<insert felony or felonies from Pen. Code, § 189>***;**

<Give element 3 if defendant did not personally commit or attempt felony.>

[3. A perpetrator, (whom the defendant was aiding and abetting/ [or] with whom the defendant conspired), personally committed [or attempted to commit] _____ *<insert felony or felonies from Pen. Code, § 189>***;]**

(3/4). The commission [or attempted commission] of the _____ *<insert felony or felonies from Pen. Code, § 189>* **was a substantial factor in causing the death of another person;**

(4/5). The ~~act causing the~~cause of death and the _____ *<insert felony or felonies from Pen. Code, § 189>* **[or attempted** _____ *<insert felony or felonies from Pen. Code, § 189>***] were part of one continuous transaction;**

AND

(5/6). There was a logical connection between the ~~act causing the~~cause of death and the _____ *<insert felony or felonies from Pen.*

Code, § 189>**. The connection between the ~~fatal act~~cause of death and the _____** *<insert felony or felonies from Pen. Code, § 189>* **must involve more than just their occurrence at the same time and place.**

A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] _____ *<insert felony or felonies from Pen. Code, § 189>***, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. [To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I (will give/have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit a crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder.**

<Make certain that all appropriate instructions on all underlying felonies, aiding and abetting, and conspiracy are given.>

An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.

[There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]

[The defendant must have (intended to commit[,]/ [or] aid and abet[,]/ [or] been a member of a conspiracy to commit) the (felony/felonies) of _____ *<insert felony or felonies from Pen. Code, § 189>* **before or at the time that (he/she) caused~~of the act causing~~ the death.]**

[It is not required that the person die immediately, as long as the cause of death~~act causing the death~~ and the (felony/felonies) are part of one continuous transaction.]

[It is not required that the person killed be the (victim/intended victim) of the (felony/felonies).]

[It is not required that the defendant be present when ~~the act causing~~ the death occurs.]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of any underlying felonies. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401]; see generally, *People v. Cervantes* (2001) 26 Cal.4th 860, 866–874 [111 Cal.Rptr.2d 148, 29 P.3d 225].) Because causation is likely to be an issue in any case where this instruction is given, the committee has included the paragraph that begins with "An act causes death if." If there is evidence of multiple potential causes, the court should also give the bracketed paragraph that begins with "There may be more than one cause of death." (*People v. Sanchez* (2001) 26 Cal.4th 834, 845–849 [111 Cal.Rptr.2d 129, 29 P.3d 209]; *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135].)

If the prosecution's theory is that the defendant committed or attempted to commit the underlying felony, then select "committed [or attempted to commit]" in element 1 and "intended to commit" in element 2. In addition, in the paragraph that begins with "To decide whether," select "the defendant" in the first sentence. Give all appropriate instructions on any underlying felonies with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense.

If the prosecution's theory is that the defendant aided and abetted or conspired to commit the felony, select one of these options in element 1 and the corresponding intent requirement in element 2. Give bracketed element 3. Give the bracketed sentence at the beginning of the instruction that begins with "The defendant may be guilty of murder." In addition, in the paragraph that begins with "To decide whether," select "the perpetrator" in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on any underlying felonies and on aiding and abetting and/or conspiracy with this instruction. The

court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state "the perpetrator committed," rather than "the defendant," in the instructions on the underlying felony.

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, or did not join the conspiracy or aid and abet the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127 [287 P.2d 497]; *People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769].) Give the bracketed sentence that begins with "The defendant must have (intended to commit." For an instruction specially tailored to robbery-murder cases, see *People v. Turner* (1990) 50 Cal.3d 668, 691 [268 Cal.Rptr. 706, 789 P.2d 887].

Give the bracketed sentence that begins with "It is not required that the person die immediately" on request if relevant based on the evidence.

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [104 Cal.Rptr. 807] [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [104 Cal.Rptr. 217, 501 P.2d 225] [innocent bystander]; *People v. Salas* (1972) 7 Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7] [police officer].) Give the bracketed sentence that begins with "It is not required that the person killed be" on request.

Give the last bracketed sentence, stating that the defendant need not be present, on request.

The Supreme Court has not decided whether the trial court has a sua sponte duty to instruct on the meaning of "one continuous transaction." (See *People v. Cavitt* (2004) 33 Cal.4th 187, 204 [14 Cal.Rptr.3d 281, 91 P.3d 222].) If the evidence raises an issue of whether the act causing the death and the felony were part of "one continuous transaction," the committee recommends that the court also give CALCRIM No. 549, *Felony Murder: One Continuous Transaction—Defined*.

If the prosecutor is proceeding under both malice and felony-murder theories, give CALCRIM No. 548, *Murder: Alternative Theories*. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [40 Cal.Rptr.2d 481, 892 P.2d 1224] [error to instruct on malice when felony murder only theory].)

Related Instructions—Other Causes of Death

This instruction should be used only when the alleged victim dies during the course of the felony as a result of a heart attack, fire, or a similar cause rather than as a result of some act of force or violence committed against the victim by one of the participants in the felony. (*People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542] [arson causing death of accomplice]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598] [heart attack caused by robbery]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166] [same]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].)

See the Bench Notes to CALCRIM No. 540A, *Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act* for a discussion of other instructions to use if the evidence indicates a person committed an act of force or violence causing the death.

AUTHORITY

- Felony Murder: First Degree ▸ Pen. Code, § 189; *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Specific Intent to Commit Felony Required ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Continuous Transaction Requirement ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Logical Connection Required for Liability of Nonkiller ▸ *People v. Cavitt* (2004) 33 Cal.4th 187, 206–209 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Infliction of Fatal Injury ▸ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Defendant Must Join Felonious Enterprise Before or During Killing of Victim ▸ *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].
- Death Caused by Felony but Not by Act of Force or Violence Against Victim ▸ *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542] [arson causing death of accomplice]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598] [heart attack caused by robbery]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166] [same]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [a simultaneous or coincidental death is not a killing].

- Logical Nexus Between Felony and Killing ▸ *People v. Dominguez* (2006) 39 Cal.4th 1141 [47 Cal.Rptr.3d 575, 140 P.3d 866]; *People v. Cavitt* (2004) 33 Cal.4th 187, 197–206 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Merger Doctrine Does Not Apply to First Degree Felony Murder ▸ *People v. Farley* (2009) 46 Cal.4th 1053, 1118-1120.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 134–147.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* §§ 140.04, 140.10[3][b], Ch. 142, *Crimes Against the Person,* § 142.01[1][e], [2][b] (Matthew Bender).

RELATED ISSUES

Accidental Death of Accomplice During Commission of Arson

In *People v. Ferlin* (1928) 203 Cal. 587, 596–597 [265 P. 230], the Supreme Court held that an aider and abettor is not liable for the accidental death of an accomplice to arson when (1) the defendant was neither present nor actively participating in the arson when it was committed; (2) the accomplice acted alone in actually perpetrating the arson; and (3) the accomplice killed only himself or herself and not another person. More recently, the court stated,

> We conclude that felony-murder liability for any death in the course of arson attaches to all accomplices in the felony at least where, as here, one or more surviving accomplices were present at the scene and active participants in the crime. We need not decide here whether *Ferlin* was correct on its facts.

(*People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542].)

See the Related Issues section to CALCRIM No. 540A, *Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act* and CALCRIM No. 540B, *Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act.*

563. Conspiracy to Commit Murder (Pen. Code, § 182)

(The defendant[s]/Defendant[s] _____ <*insert name[s]*>) **(is/are) charged [in Count __] with conspiracy to commit murder [in violation of Penal Code section 182].**

To prove that (the/a) defendant is guilty of this crime, the People must prove that:

1. **The defendant intended to agree and did agree with [one or more of] (the other defendant[s]/ [or] _____** <*insert name[s] or description[s] of coparticipant[s]*>**) to intentionally and unlawfully kill;**

2. **At the time of the agreement, the defendant and [one or more of] the other alleged member[s] of the conspiracy intended that one or more of them would intentionally and unlawfully kill;**

3. **(The/One of the) defendant[s][,] [or _____** <*insert name[s] or description[s] of coparticipant[s]*>**][,] [or (both/all) of them] committed [at least one of] the following overt act[s] alleged to accomplish the killing: _____ <***insert the alleged overt acts***>;**

AND

4. **[At least one of these/This] overt act[s] was committed in California.**

To decide whether (the/a) defendant committed (this/these) overt act[s], consider all of the evidence presented about the overt act[s].

To decide whether (the/a) defendant and [one or more of] the other alleged member[s] of the conspiracy intended to commit *murder*, please refer to Instructions __, which define that crime.

The People must prove that the members of the alleged conspiracy had an agreement and intent to commit murder. The People do not have to prove that any of the members of the alleged conspiracy actually met or came to a detailed or formal agreement to commit that crime. An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime.

An *overt act* is an act by one or more of the members of the conspiracy that is done to help accomplish the agreed upon crime. The overt act must happen after the defendant has agreed to commit the crime. The overt act must be more than the act of agreeing or planning to commit the crime, but it does not have to be a criminal act itself.

[You must all agree that at least one alleged overt act was committed in California by at least one alleged member of the conspiracy, but you do not have to all agree on which specific overt act or acts were committed or who committed the overt act or acts.]

[You must make a separate decision as to whether each defendant was a member of the alleged conspiracy.]

[A member of a conspiracy does not have to personally know the identity or roles of all the other members.]

[Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the crime is not a member of the conspiracy.]

[Evidence that a person did an act or made a statement that helped accomplish the goal of the conspiracy is not enough, by itself, to prove that the person was a member of the conspiracy.]

Revised August 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime when the defendant is charged with conspiracy. (See *People v. Morante* (1999) 20 Cal.4th 403, 416 [84 Cal.Rptr.2d 665, 975 P.2d 1071].) Use this instruction only if the defendant is charged with conspiracy to commit murder. If the defendant is charged with conspiracy to commit another crime, give CALCRIM No. 415, *Conspiracy*. If the defendant is not charged with conspiracy but evidence of a conspiracy has been admitted for another purpose, do not give either instruction. Give CALCRIM No. 416, *Evidence of Uncharged Conspiracy*.

The court has a **sua sponte** duty to instruct on the elements of the offense alleged to be the target of the conspiracy. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1238–

1239 [77 Cal.Rptr.2d 733, 960 P.2d 537]; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608].) Give all appropriate instructions defining the elements of murder.

In elements 1 and 3, insert the names or descriptions of alleged coconspirators if they are not defendants in the trial. (See *People v. Liu* (1996) 46 Cal.App.4th 1119, 1131 [54 Cal.Rptr.2d 578].) See also the Commentary section below.

Give the bracketed sentence that begins with "You must all agree that at least one overt act alleged" if multiple overt acts are alleged in connection with a single conspiracy. (See *People v. Russo* (2001) 25 Cal.4th 1124, 1135–1136 [108 Cal.Rptr.2d 436, 25 P.3d 641].)

Give the bracketed sentence that begins with "You must make a separate decision," if more than one defendant is charged with conspiracy. (See *People v. Fulton* (1984) 155 Cal.App.3d 91, 101 [201 Cal.Rptr. 879]; *People v. Crain* (1951) 102 Cal.App.2d 566, 581–582 [228 P.2d 307].)

Do not cross-reference the murder instructions unless they have been modified to delete references to implied malice. Otherwise, a reference to implied malice could confuse jurors, because conspiracy to commit murder may not be based on a theory of implied malice. (*People v. Swain* (1996) 12 Cal.4th 593, 602-603, 607 [49 Cal.Rptr.2d 390, 909 P.2d 994].)

Give the bracketed sentence that begins with "A member of a conspiracy does not have to personally know," on request if there is evidence that the defendant did not personally know all the alleged coconspirators. (See *People v. Van Eyk* (1961) 56 Cal.2d 471, 479 [15 Cal.Rptr. 150, 364 P.2d 326].)

Give the two final bracketed sentences on request. (See *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820 [345 P.2d 529].)

Defenses—Instructional Duty

If there is sufficient evidence that the defendant withdrew from the alleged conspiracy, the court has a **sua sponte** duty to give CALCRIM No. 420, *Withdrawal From Conspiracy*.

If the case involves an issue regarding the statute of limitations or evidence of withdrawal by the defendant, a unanimity instruction may be required. (*People v. Russo* (2001) 25 Cal.4th 1124, 1136, fn. 2 [108 Cal.Rptr.2d 436, 25 P.3d 641]; see also Related Issues section to CALCRIM No. 415, *Conspiracy*, and CALCRIM 3500, *Unanimity*.)

Related Instructions

CALCRIM No. 415, *Conspiracy*.
CALCRIM No. 520, *Murder With Malice Aforethought*.

AUTHORITY

- Elements ▸ Pen. Code, §§ 182(a), 183; *People v. Morante* (1999) 20 Cal.4th 403, 416 [84 Cal.Rptr.2d 665, 975 P.2d 1071]; *People v. Swain* (1996) 12 Cal.4th 593, 600 [49 Cal.Rptr.2d 390, 909 P.2d 994]; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1128 [54 Cal.Rptr.2d 578].
- Overt Act Defined ▸ Pen. Code, § 184; *People v. Saugstad* (1962) 203 Cal.App.2d 536, 549–550 [21 Cal.Rptr. 740]; *People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8 [134 Cal.Rptr. 784, 557 P.2d 75].
- Elements of Underlying Offense ▸ *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 [54 Cal.Rptr.2d 608]; *People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239 [77 Cal.Rptr.2d 733, 960 P.2d 537].
- Express Malice Murder ▸ *People v. Swain* (1996) 12 Cal.4th 593, 602-603, 607 [49 Cal.Rptr.2d 390, 909 P.2d 994].
- Premeditated First Degree Murder ▸ *People v. Cortez* (1998) 18 Cal.4th 1223, 1232 [77 Cal.Rptr.2d 733, 960 P.2d 537].

- Two Specific Intents for Conspiracy ▸ *People v. Miller* (1996) 46 Cal.App.4th 412, 423–426 [53 Cal.Rptr.2d 773], disapproved by *People v.* Cortez (1998) 18 Cal.4th 1223 [77 Cal.Rptr.2d 733, 960 P.2d 537] to the extent it suggests instructions on premeditation and deliberation must be given in every conspiracy to murder case.
- Unanimity on Specific Overt Act Not Required ▸ *People v. Russo* (2001) 25 Cal.4th 1124, 1133–1135 [108 Cal.Rptr.2d 436, 25 P.3d 641].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, §§ 77, 78.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt,* §§ 141.01[2], 141.02[3], [4][b], [5][c], Ch. 142, *Crimes Against the Person,* § 142.01[2][e] (Matthew Bender).

COMMENTARY

It is sufficient to refer to coconspirators in the accusatory pleading as "persons unknown." (*People v. Sacramento Butchers' Protective Association* (1910) 12 Cal.App. 471, 483 [107 P. 712]; *People v. Roy* (1967) 251 Cal.App.2d 459, 463 [59 Cal.Rptr. 636]; see 1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Elements, § 82.) Nevertheless, this instruction assumes the prosecution has named at least two members of the alleged conspiracy, whether charged or not.

Conspiracy to commit murder cannot be based on a theory of implied malice. (*People v. Swain* (1996) 12 Cal.4th 593, 602-603, 607 [49 Cal.Rptr.2d 390, 909 P.2d 994].) All conspiracy to commit murder is necessarily conspiracy to commit premeditated first degree murder. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1232 [77 Cal.Rptr. 2d 733, 960 P.2d 537].)

LESSER INCLUDED OFFENSES

There is no crime of conspiracy to commit attempted murder. (*People v. Iniguez* (2002) 96 Cal.App.4th 75, 79 [116 Cal.Rptr.2d 634].)

RELATED ISSUES

Multiple Conspiracies

Separately planned murders are punishable as separate conspiracies, even if the separate murders are incidental to a single objective. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1133 [54 Cal.Rptr.2d 578].)

See the Related Issues section to CALCRIM No. 415, *Conspiracy*.

564–569. Reserved for Future Use

603. Attempted Voluntary Manslaughter: Heat of Passion—Lesser Included Offense (Pen. Code, §§ 21a, 192, 664)

An attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter if the defendant attempted to kill someone because of a sudden quarrel or in the heat of passion.

The defendant attempted to kill someone because of a sudden quarrel or in the heat of passion if:

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

2. **The defendant intended to kill that person;**

3. **The defendant attempted the killing because (he/she) was provoked;**

4. **The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment;**

AND

5. **The attempted killing was a rash act done under the influence of intense emotion that obscured the defendant's reasoning or judgment.**

Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.

In order for a sudden quarrel or heat of passion to reduce an attempted murder to attempted voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

It is not enough that the defendant simply was provoked. The defendant is not allowed to set up (his/her) own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In

deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts.

[If enough time passed between the provocation and the attempted killing for a person of average disposition to "cool off" and regain his or her clear reasoning and judgment, then the attempted murder is not reduced to attempted voluntary manslaughter on this basis.]

The People have the burden of proving beyond a reasonable doubt that the defendant attempted to kill someone and was not acting as a result ofthat the attempt was not the result of a sudden quarrel or in the heat of passion.did not attempt to kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of attempted murder.

New January 2006; Revised August 2009

BENCH NOTES

Instructional Duty

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

Related Instructions

CALCRIM No. 511, *Excusable Homicide: Accident in the Heat of Passion*.

CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion—Lesser Included Offense*.

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

AUTHORITY

- Attempt Defined ▸ Pen. Code, §§ 21a, 664.
- Manslaughter Defined ▸ Pen. Code, § 192.

- Attempted Voluntary Manslaughter ▸ *People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824–825 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].

Secondary Sources

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

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

RELATED ISSUES

Specific Intent to Kill Required

> An attempt to commit a crime requires an intention to commit the crime and an overt act towards its completion. Where a person intends to kill another person and makes an unsuccessful attempt to do so, his intention may be accompanied by any of the aggravating or mitigating circumstances which can accompany the completed crimes. In other words, the intent to kill may have been formed after premeditation or deliberation, it may have been formed upon a sudden explosion of violence, or it may have been brought about by a heat of passion or an unreasonable but good faith belief in the necessity of self-defense.

(*People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824 [217 Cal.Rptr. 581] [citation omitted].)

No Attempted Involuntary Manslaughter

There is no crime of attempted *involuntary* manslaughter. (*People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332 [59 Cal.Rptr.2d 798].)

See the Related Issues section to CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion—Lesser Included Offense*.

821. Child Abuse Likely to Produce Great Bodily Harm or Death (Pen. Code, § 273a(a))

The defendant is charged [in Count __] with child abuse likely to produce (great bodily harm/ [or] death) [in violation of Penal Code section 273a(a)].

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

<Alternative A—inflicted pain>

[1. The defendant willfully inflicted unjustifiable physical pain or mental suffering on a child;]

<Alternative B—caused or permitted to suffer pain>

[1. The defendant willfully caused or permitted a child to suffer unjustifiable physical pain or mental suffering;]

<Alternative C—while having custody, caused or permitted to suffer injury>

[1. The defendant, while having care or custody of a child, willfully caused or permitted the child's person or health to be injured;]

<Alternative D—while having custody, caused or permitted to be placed in danger>

[1. The defendant, while having care or custody of a child, willfully caused or permitted the child to be placed in a situation where the child's person or health might have been endangered;]

[AND]

2. The defendant (inflicted pain or suffering on the child/ [or] caused or permitted the child to (suffer/ [or] be injured/ [or] be endangered)) under circumstances or conditions likely to produce (great bodily harm/ [or] death)(;/.)

<Give element 3 when giving alternatives 1B, 1C or 1D>

[AND]

[3. The defendant was criminally negligent when (he/she) caused or permitted the child to (suffer/ [or] be injured/ [or] be endangered)(;/.)]

<Give element 4 when instructing on parental right to discipline>
[AND

4. The defendant did not act while reasonably disciplining a child.]

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

The phrase *likely to produce (great bodily harm/ [or] death)* means the probability of serious injury is great.

A *child* is any person under the age of 18 years.

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

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

[*Unjustifiable* physical pain or mental suffering is pain or suffering that is not reasonably necessary or is excessive under the circumstances.]

[*Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when:

1. He or she acts in a reckless way that creates a high risk of death or great bodily harm;

AND

2. A reasonable person would have known that acting in that way would naturally and probably create such a risk.

In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.]

[A child does not need to actually suffer great bodily harm. But if a child does suffer great bodily harm, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed the offense.]

New January 2006; Revised August 2006

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense of disciplining a child. (*People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1049 [12 CR2d 33].) Give bracketed element 4 and CALCRIM No. 3405, *Parental Right to Punish a Child*.

Give element 1A if it is alleged that the defendant directly inflicted unjustifiable physical pain or mental suffering. Give element 1B if it is alleged that the defendant caused or permitted a child to suffer. If it is alleged that the defendant had care or custody of a child and caused or permitted the child's person or health to be injured, give element 1C. Finally, give element 1D if it is alleged that the defendant had care or custody of a child and endangered the child's person or health. (See Pen. Code, § 273a(a).)

Give bracketed element 3 and the bracketed definition of "criminally negligent" if element 1B, 1C, or 1D is given alleging that the defendant committed any indirect acts. (See *People v. Valdez* (2002) 27 Cal.4th 778, 788–789 [118 Cal.Rptr.2d 3, 42 P.3d 511]; *People v. Peabody* (1975) 46 Cal.App.3d 43, 48–49 [119 Cal.Rptr. 780].)

Give on request the bracketed definition of "unjustifiable" physical pain or mental suffering if there is a question about the necessity or degree of pain or suffering. (See *People v. Curtiss* (1931) 116 Cal.App. Supp. 771, 779–780 [300 P. 801].)

Give on request the bracketed paragraph stating that a child need not actually suffer great bodily harm. (See *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519]; *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 835 [159 Cal.Rptr. 771].)

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

AUTHORITY

- Elements ▸ Pen. Code, § 273a(a); *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519]; *People v. Smith* (1984) 35 Cal.3d 798, 806 [201 Cal.Rptr. 311, 678 P.2d 886].
- Child Defined ▸ See Fam. Code, § 6500; *People v. Thomas* (1976) 65 Cal.App.3d 854, 857–858 [135 Cal.Rptr. 644] [in context of Pen. Code, § 273d].
- "Likely" Defined ▸ *People v. Chaffin* (2009) 173 Cal.App.4th 1348, 1351-1352 [93 Cal.Rptr.3d 531] [questioning analysis of the term in *People v. Wilson*]; *People v. Wilson* (2006) 138 Cal.App.4th 1197, 1204 [41 Cal.Rptr.3d 919].
- Great Bodily Harm or Injury Defined ▸ Pen. Code, § 12022.7(f); *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519].
- Willful Defined ▸ Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402]; *People v. Vargas* (1988) 204 Cal.App.3d 1455, 1462, 1468–1469 [251 Cal.Rptr. 904].
- Criminal Negligence Required for Indirect Conduct ▸ *People v. Valdez* (2002) 27 Cal.4th 778, 788, 789 [118 Cal.Rptr.2d 3, 42 P.3d 511]; *People v. Peabody* (1975) 46 Cal.App.3d 43, 47, 48–49 [119 Cal.Rptr. 780]; see *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926] [criminal negligence for homicide]; *Walker v. Superior Court* (1988) 47 Cal.3d 112, 135 [253 Cal.Rptr. 1, 763 P.2d 852].
- General Criminal Intent Required for Direct Infliction of Pain or Suffering ▸ *People v. Sargent* (1999) 19 Cal.4th 1206, 1224 [81 Cal.Rptr.2d 835, 970 P.2d 409]; see *People v. Atkins* (1975) 53 Cal.App.3d 348, 361 [125 Cal.Rptr. 855]; *People v. Wright* (1976) 60 Cal.App.3d 6, 14 [131 Cal.Rptr. 311].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 159–163.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.01[2][a][v], 142.23[7] (Matthew Bender).

COMMENTARY

Any violation of Penal Code section 273a(a) must be willful. (*People v. Smith* (1984) 35 Cal.3d 798, 806 [678 P.2d 886]; *People v. Cortes* (1999) 71

Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519]; but see *People v. Valdez* (2002) 27 Cal.4th 778, 789 [118 Cal.Rptr.2d 3, 42 P.3d 511] [the prong punishing a *direct infliction* of unjustifiable physical pain or mental suffering does not expressly require that the conduct be willful].) Following *Smith* and *Cortes,* the committee has included "willfully" in element 1A regarding direct infliction of abuse until there is further guidance from the courts.

LESSER INCLUDED OFFENSES

- Attempted Child Abuse ▸ Pen. Code, §§ 664, 273a(a).
- Misdemeanor Child Abuse ▸ Pen. Code, § 273a(b).

RELATED ISSUES

Care or Custody

"The terms 'care or custody' do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver." (*People v. Toney* (1999) 76 Cal.App.4th 618, 621–622 [90 Cal.Rptr.2d 578] [quoting *People v. Cochran* (1998) 62 Cal.App.4th 826, 832 [73 Cal.Rptr.2d 257]].)

Prenatal Conduct

Penal Code section 273a does not apply to prenatal conduct endangering an unborn child. (*Reyes v. Superior Court* (1977) 75 Cal.App.3d 214, 217–218, 219 [141 Cal.Rptr. 912].)

Unanimity

The court has a sua sponte duty to instruct on unanimity when the prosecution has presented evidence of multiple acts to prove a single count. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 [108 Cal.Rptr.2d 436, 25 P.3d 641].) However, the court does not have to instruct on unanimity if the offense constitutes a "continuous course of conduct." (*People v. Napoles* (2002) 104 Cal.App.4th 108, 115–116 [127 Cal.Rptr.2d 777].) Child abuse may be a continuous course of conduct or a single, isolated incident. *(Ibid.)* The court should carefully examine the statute charged, the pleadings, and the evidence presented to determine whether the offense constitutes a continuous course of conduct. *(Ibid.)* See generally CALCRIM No. 3500, *Unanimity*.

1125. Arranging Meeting With Minor for Lewd Purpose (Pen. Code, § 288.4(a)(1))

The defendant is charged [in Count __] with arranging a meeting with a minor for a lewd purpose [while having a prior conviction] [in violation of Penal Code section 288.4(a)(1)].

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

1. **The defendant arranged a meeting with (a minor / [or] a person (he/she) believed to be a minor);**

2. **When the defendant did so, (he/she) was motivated by an unnatural or abnormal sexual interest in children;**

[AND]

3. **At that meeting, the defendant intended to (expose (his/her) genitals or pubic or rectal area/ [or] have the minor expose (his/her) genitals or pubic or rectal area/ [or] engage in lewd or lascivious behavior)~~(;/.)~~**

~~**[AND**~~

~~**When the defendant did so, (he/she) had a prior conviction for** _____*<insert description and code section for offense listed in subdivision (c) of Penal Code section 290>*.**]**~~

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

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

[*Lewd and lascivious behavior* includes any touching of a person with the intent to sexually arouse the perpetrator or the other person. The touching need not be done in a lewd or sexual manner. Lewd or lascivious behavior includes touching any part of the person's body, either on the bare skin or through the clothes the person is wearing. [A lewd or lascivious act includes causing someone to touch his or her own body or someone else's body at the instigation of the perpetrator who has the required intent.]]

New August 2009

BENCH NOTES

Instructional Duty

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

The court has a **sua sponte** duty to instruct on the good faith belief that the victim was not a minor as a defense for certain sex crimes with minors, including statutory rape, when that defense is supported by evidence. Until courts of review clarify whether this defense is available in prosecutions for violations of Pen. Code, § 288.4(a)(1), the court will have to exercise its own discretion. Suitable language for such an instruction is found in CALCRIM No. 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older.*

Whether the defendant suffered a prior conviction for an offense listed in subsection (c) of section 290 is not an element of the offense and is subject to a severed jury trial. (Penal Code section 288.4(a)(2).) See CALCRIM No. 3101 *Prior Conviction: NonBifurcated Trial* or CALCRIM No. 3100, *Prior Conviction: Bifurcated Trial.*

AUTHORITY

- Elements and Enumerated Offenses ▸ Pen. Code, § 288.4.
- Lewd Defined ▸ See *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256-257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].
- Calculating Age ▸ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849-850 [21 Cal.Rptr.2d 373, 855 P.2d 391].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2008 supp.) Sex Offenses and Crimes Against Decency, § 54A.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21 (Matthew Bender).

1126. Going to Meeting With Minor for Lewd Purpose (Pen. Code, § 288.4(b))

The defendant is charged [in Count __] with going to a meeting with a minor for a lewd purpose [in violation of Penal Code section 288.4(b)].

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

1. **The defendant arranged a meeting with (a minor/ [or] a person (he/she) believed to be a minor);**

2. **When the defendant did so, (he/she) was motivated by an unnatural or abnormal sexual interest in children;**

3. **At that meeting, the defendant intended to (expose (his/her) genitals or pubic or rectal area/ [or] have the minor expose (his/her) genitals or pubic or rectal area/ [or] engage in lewd or lascivious behavior);**

AND

4. **The defendant went to the arranged meeting place at or about the arranged time.**

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

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

[*Lewd and lascivious behavior* includes any touching of a person with the intent to sexually arouse the perpetrator or the other person. The touching need not be done in a lewd or sexual manner. Lewd or lascivious behavior includes touching any part of the person's body, either on the bare skin or through the clothes the person is wearing. [A lewd or lascivious act includes causing someone to touch his or her own body or someone else's body at the instigation of the perpetrator who has the required intent.]]

New August 2009

BENCH NOTES

Instructional Duty

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

It is unclear how violations of Pen. Code, § 288.4(b), which involve actually going to an arranged meeting, correlate to violations of Pen. Code, § 288.4(a) (cf. CALCRIM No. 1125, *Arranging Meeting with Minor for Lewd Purpose).* Violations of section 288.4(a) may be lesser included offenses of violations of section 288.4(b). In the alternative, a violation of section 288.4(b) could be characterized as sentence enhancement of a violation of section 288.4(a). This matter must be left to the trial court's discretion until courts of review provide guidance.

The court has a **sua sponte** duty to instruct on the good faith belief that the victim was not a minor as a defense for certain sex crimes with minors, including statutory rape, when that defense is supported by evidence. Until courts of review clarify whether this defense is available in prosecutions for violations of Pen. Code, § 288.4(b), the court will have to exercise its own discretion. Suitable language for such an instruction is found in CALCRIM No. 1070, *Unlawful Sexual Intercourse: Defendant 21 or Older.*

AUTHORITY

- Elements and Enumerated Offenses ▸ Pen. Code, § 288.4.
- Lewd Defined ▸ See *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256-257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].
- Calculating Age ▸ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849-850 [21 Cal.Rptr.2d 373, 855 P.2d 391].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2008 supp.) Sex Offenses and Crimes Against Decency, § 54A.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21 (Matthew Bender).

1128. Engaging in Oral Copulation or Sexual Penetration with Child 10 Years of Age or Younger (Pen. Code, § 288.7(b))

The defendant is charged [in Count __] with engaging in (oral copulation/ [or] sexual penetration) with a child under 10 years of age or younger [in violation of Penal Code section 288.7(b)].

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

1. **The defendant engaged in an act of (oral copulation/ [or] sexual penetration) with _____** *<insert name of complaining witness>***;**

2. **When the defendant did so, _____** *<insert name of complaining witness>* **was 10 years of age or younger;**

3. **At the time of the act, the defendant was at least 18 years old.**

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

[*Oral copulation* is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.]

[*Sexual penetration* means (penetration, however slight, of the genital or anal opening of the other person/ [or] causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, however slightly, his or her own genital or anal opening) by any foreign object, substance, instrument, ~~or~~ device, or ~~by~~ any unknown object for the purpose of sexual abuse, arousal, or gratification ~~by any foreign object, substance, instrument, or device, or by any unknown object~~.]

[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]

[An *unknown object* includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object penetrated the opening.]

[A *foreign object, substance, instrument, or device* includes any part of the body except a sexual organ.]

New August 2009

BENCH NOTES

Instructional Duty

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

AUTHORITY

- Elements ▸ Pen. Code, § 288.7(b).
- Sexual Penetration Defined ▸ Pen. Code, § 289(k)(1); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].
- Unknown Object Defined ▸ Pen. Code, § 289(k)(3).
- Foreign Object, Substance, Instrument, or Device Defined ▸ Pen. Code, § 289(k)(2); *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [a finger is a "foreign object"].
- Oral Copulation Defined ▸ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].
- Calculating Age ▸ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849-850 [21 Cal.Rptr.2d 373, 855 P.2d 391].
- Sexual Abuse Defined ▸ *People v. White* (1986) 179 Cal.App.3d 193, 205-206 [224 Cal.Rptr. 467].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2008 supp.) Sex Offenses and Crimes Against Decency, §§ 33, 48.

1170. Failure to Register as Sex Offender (Pen. Code, § 290(b))

The defendant is charged [in Count __] with failing to register as a sex offender [in violation of Penal Code section 290(b)].

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

1. **The defendant was previously (convicted of/found to have committed) _____** *<specify the offense for which the defendant is allegedly required to register>***;**

2. **The defendant resided (in _____** *<insert name of city>***, California/in an unincorporated area or a city with no police department in _____** *<insert name of county>* **County, California/on the campus or in the facilities of _____** *<insert name of university or college>***in California);**

3. **The defendant actually knew (he/she) had a duty under Penal Code section 290 to register as a sex offender living at _____** *<insert specific address or addresses in California* **[and that (he/she) had to register within five working days of _____** *<insert triggering event specified in Penal Code section 290(b)>***]**~~under **Penal Code section 290 [within five working days of (his/her) birthday] wherever (he/she) resided~~;**

AND

<Alternative 4A—change of residence>

[4. The defendant willfully failed to register as a sex offender with the (police chief of that city/sheriff of that county/the police chief of that campus or its facilities) within five working days of (coming into/ [or] changing (his/her) residence within) that (city/county/campus).]

<Alternative 4B—birthday>

[4. The defendant willfully failed to annually update (his/her) registration as a sex offender with the (police chief of that city/sheriff of that county/the police chief of that campus) within five working days of (his/her) birthday.]

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

New January 2006; Revised August 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. This instruction is based on the language of the statute effective January 1, 2006. The instruction may not be appropriate for offenses that occurred prior to that date. Note also that this is an area where case law is developing rapidly. The court should review recent decisions on Penal Code section 290 before instructing.

In element 3, choose the option "living at _____ <*insert specific address in California*> if there is an issue whether the defendant actually knew that a place where he or she spent time was a residence triggering the duty to register. (*People v. Cohens* (2009) 178 Cal.App.4th 1442, 1451 [101 Cal.Rptr.3d 289]; *People v. LeCorno* (2003) 109 Cal.App.3d 1058, 1068-1069 [135 Cal.Rptr.2d 775].

In element 4, give alternative 4A if the defendant is charged with failing to register within five working days of changing his or her residence or becoming homeless. (Pen. Code, § 290(b).) Give alternative 4B if the defendant is charged with failing to update his or her registration within five working days of his or her birthday. (Pen. Code, § 290.012.) If alternative 4B is given, also give the bracketed phrase in element 3.

If the defendant is charged with a prior conviction for failing to register, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, unless the defendant has stipulated to the truth of the prior conviction. (See *People v. Merkley* (1996) 51 Cal.App.4th 472, 476 [58 Cal.Rptr. 2d 21]; *People v. Bouzas* (1991) 53 Cal.3d 467, 477–480 [279 Cal.Rptr. 847, 807 P.2d 1076]; *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].)

For the charge of failure to register, it is error to give an instruction on general criminal intent that informs the jury that a person is "acting with general criminal intent, even though he may not know that his act or conduct is unlawful." (*People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rptr.3d 260, 96 P.3d 507]; *People v. Edgar* (2002) 104 Cal.App.4th 210, 219 [127 Cal.Rptr.2d 662].) The court should consider whether it is more appropriate to give CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*, or to give a modified version of

CALCRIM No. 250, *Union Of Act And Intent: General Intent*, as explained in the Related Issues section to CALCRIM No. 250.

AUTHORITY

- Elements ▸ Pen. Code, §§ 290(b) [change in residence] & 290.012 [birthday]; *People v. Garcia* (2001) 25 Cal.4th 744, 752 [107 Cal.Rptr.2d 355, 23 P.3d 590].
- Willfully Defined ▸ Pen. Code, § 7(1); see *People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rptr.3d 260, 96 P.3d 507].
- Actual Knowledge of Duty Required ▸ *People v. Garcia* (2001) 25 Cal.4th 744, 752 [107 Cal.Rptr.2d 355, 23 P.3d 590].
- Continuing Offense ▸ *Wright v. Superior Court* (1997) 15 Cal.4th 521, 527–528 [63 Cal.Rptr.2d 322, 936 P.2d 101].
- General Intent Crime ▸ *People v. Barker* (2004) 34 Cal.4th 345, 360 [18 Cal.Rptr.3d 260, 96 P.3d 507]; *People v. Johnson* (1998) 67 Cal.App.4th 67, 72 [78 Cal.Rptr.2d 795].
- No Duty to Define Residence ▸ *People v. McCleod* (1997) 55 Cal.App.4th 1205, 1219 [64 Cal.Rptr.2d 545].
- Registration is Not Punishment ▸ *In re Alva* (2004) 33 Cal.4th 254, 262 [14 Cal.Rptr.3d 811, 92 P.3d 311].
- Jury May Consider Evidence That Significant Involuntary Condition Deprived Defendant of Actual Knowledge ▸ *People v. Sorden* (2005) 36 Cal.4th 65, 72 [29 Cal.Rptr.3d 777, 113 P.3d 565].
- People Must Prove Defendant Was California Resident at Time of Offense ▸ *People v Wallace* (2009) 176 Cal.App.4th 1088, 1102-1104 [.98 Cal.Rptr.3d 618].
- Defendant Must Have Actual Knowledge That Location is Residence for Purpose of Duty to Register ▸ (*People .v Cohens* (2009) 178 Cal.App.4th 1442, 1451 [101 Cal.Rptr.3d 289]; *People v. LeCorno* (2003) 109 Cal.App.4th 1058, 1067-1070 [135 Cal.Rptr.2d 775].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 184–188.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 93, *Disabilities Flowing From Conviction*, § 93.04[2] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.20[1][a], Ch. 142, *Crimes Against the Person*, § 142.21 (Matthew Bender).

RELATED ISSUES

Other Violations of Section 290

This instruction applies to violations under Penal Code sections 290(b) and 290.012. Section 290 imposes numerous other duties on persons convicted of sex offenses. For example, a registered sex offender must:

1. Notify the agency where he or she was *last* registered of any new address or location, whether inside or outside California, or any name change. (See Pen. Code, §§ 290.013–290.014; *People v. Smith* (2004) 32 Cal.4th 792, 800–802 [11 Cal.Rptr.3d 290, 86 P.3d 348] [under former Pen. Code, § 290(f), which allowed notice of change of address in writing, there is sufficient notice if defendant mails change of address form even if agency does not receive it]; *People v. Annin* (2004) 116 Cal.App.4th 725, 737–740 [10 Cal.Rptr.3d 712] [discussing meaning of "changed" residence]; *People v. Davis* (2002) 102 Cal.App.4th 377, 385 [125 Cal.Rptr.2d 519] [must instruct on requirement of actual knowledge of duty to notify law enforcement when moving out of jurisdiction]; see also *People v. Franklin* (1999) 20 Cal.4th 249, 255–256 [84 Cal.Rptr.2d 241, 975 P.2d 30] [construing former Pen. Code, § 290(f), which did not specifically require registration when registrant moved outside California].)

2. Register multiple residences wherever he or she regularly resides. (See Pen. Code, § 290.010; *People v. Edgar* (2002) 104 Cal.App.4th 210, 219–222 [127 Cal.Rptr.2d 662] [court failed to instruct that jury must find that defendant actually knew of duty to register multiple residences; opinion cites former section 290(a)(1)(B)]; *People v. Vigil* (2001) 94 Cal.App.4th 485, 501 [114 Cal.Rptr.2d 331].)

3. Update his or her registration at least once every 30 days if he or she is "a transient." (See Pen. Code, § 290.011.)

A sexually violent predator who is released from custody must verify his or her address at least once every 90 days and verify any place of employment. (See Pen. Code, § 290.012.) Other special requirements govern:

1. Residents of other states who must register in their home state but are working or attending school in California. (See Pen. Code, § 290.002.)

2. Sex offenders enrolled at, employed by, or carrying on a vocation at any university, college, community college, or other institution of higher learning. (See Pen. Code, § 290.01.)

In addition, providing false information on the registration form is a violation of section 290.018. (See also *People v. Chan* (2005) 128 Cal.App.4th 408 [26 Cal.Rptr.3d 878].)

Forgetting to Register

If a person actually knows of his or her duty to register, "just forgetting" is not a defense. (*People v. Barker* (2004) 34 Cal.4th 345, 356–357 [18 Cal.Rptr.3d 260, 96 P.3d 507].) In reaching this conclusion, the court stated, "[w]e do not here express an opinion as to whether forgetfulness resulting from, for example, an *acute psychological condition*, or a *chronic deficit of memory or intelligence*, might negate the willfulness required for a section 290 violation." (*Id.* at p. 358 [italics in original].)

Registration Requirement for Consensual Oral Copulation With Minor

Penal Code section 290 requires lifetime registration for a person convicted of consensual oral copulation with a minor but does not require such registration for a person convicted of consensual sexual intercourse with a minor. (Pen. Code, § 290(c).) The mandatory registration requirement for consensual oral copulation with a minor is unenforceable because this disparity denies equal protection of the laws. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1191, 1205–1206 [39 Cal.Rptr.3d 821, 129 P.3d 29].) A defendant convicted of consensual oral copulation with a minor might, however, be required to register pursuant to judicial discretion under [former] section 290(a)(2)(E) (after October 13, 2007 section 290.006). (*Id.* at p. 1208.)

Moving Between Counties—Failure to Notify County Leaving and County Moving To Can Only Be Punished as One Offense

A person who changes residences a single time, failing to notify both the jurisdiction he or she is departing from and the jurisdiction he or she is entering, commits two violations of Penal Code section 290 but can only be punished for one. (*People v. Britt* (2004) 32 Cal.4th 944, 953–954 [12 Cal.Rptr.3d 66, 87 P.3d 812].) Further, if the defendant has been prosecuted in one county for the violation, and the prosecutor in the second county is aware of the previous prosecution, the second county cannot subsequently prosecute the defendant. (*Id.* at pp. 955–956.)

Notice of Duty to Register on Release From Confinement

No reported case has held that the technical notice requirements are elements of the offense, especially when the jury is told that they must find the defendant had actual knowledge. (See former Pen. Code, § 290(b), after October 13, 2007, section 290.017; *People v. Garcia* (2001) 25 Cal.4th 744, 754, 755–756 [107 Cal.Rptr.2d 355, 23 P.3d 590] [if defendant willfully and knowingly failed to register, *Buford* does not require reversal merely because authorities failed to comply with technical requirements]; see also *People v. Buford* (1974) 42 Cal.App.3d 975, 987 [117 Cal.Rptr. 333] [revoking probation for noncompliance with section 290, an abuse of discretion when court and jail officials also failed to comply].) The court in *Garcia* did state, however, that the "court's instructions on 'willfulness' should have required proof that, in addition to being formally notified by the appropriate officers as required by section 290, in order to willfully violate section 290 the defendant must actually know of his duty to register." (*People v. Garcia, supra,* 25 Cal.4th at p. 754.)

1171–1179. Reserved for Future Use

1301. Stalking (Pen. Code, § 646.9(a), (e)–(h))

The defendant is charged [in Count __] with stalking [in violation of Penal Code section 646.9].

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

1. **The defendant willfully and maliciously harassed or willfully, maliciously, and repeatedly followed another person;**

[AND]

2. **The defendant made a credible threat with the intent to place the other person in reasonable fear for (his/her) safety [or for the safety of (his/her) immediate family](;/.)**

<Give element 3 if the defendant is charged with stalking in violation of a court order, Pen. Code, § 646.9(b).>
[AND]

[3. A/An (temporary restraining order/injunction/_____ *<describe other court order>*) prohibiting the defendant from engaging in this conduct against the threatened person was in effect at the time of the conduct~~(;/.)~~]

~~*<Give element 4 when instructing on conduct that was constitutionally protected.>*~~
~~**[AND**~~

~~**The defendant's conduct was not constitutionally protected.]**~~

A *credible threat* is one that causes the target of the threat to reasonably fear for his or her safety [or for the safety of his or her immediate family] and one that the maker of the threat appears to be able to carry out.

A *credible threat* may be made orally, in writing, or electronically or may be implied by a pattern of conduct or a combination of statements and conduct.

Harassing **means engaging in a knowing and willful *course of conduct* directed at a specific person that seriously annoys, alarms, torments, or terrorizes the person and that serves no legitimate purpose.**

A *course of conduct* means two or more acts occurring over a period of time, however short, demonstrating a continuous purpose.

[A person is not guilty of stalking if (his/her) conduct is constitutionally protected activity. ~~The course of conduct does not include constitutionally protected activity.~~ _____ *<Describe type of activity; see Bench Notes below>* is constitutionally protected activity.]

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

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

~~**[**_____ *<Describe type of activity; see Bench Notes below>* **is constitutionally protected activity.]**~~

[*Repeatedly* means more than once.]

[The People do not have to prove that a person who makes a threat intends to actually carry it out.]

[Someone who makes a threat while in prison or jail may still be guilty of stalking.]

[A threat may be made electronically by using a telephone, cellular telephone, pager, computer, video recorder, fax machine, or other similar electronic communication device.]

[*Immediate family* means (a) any spouse, parents, and children; (b) any grandchildren, grandparents, brothers, and sisters related by blood or marriage; or (c) any person who regularly lives in the other person's household [or who regularly lived there within the prior six months].]

[The terms and conditions of (a/an) (restraining order/injunction/_____ *<describe other court order>***) remain enforceable despite the parties' actions, and may only be changed by court order.]**

New January 2006

BENCH NOTES

Instructional Duty

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

Give element 3 if the defendant is charged with stalking in violation of a temporary restraining order, injunction, or any other court order. (See Pen. Code, § 646.9(b).)

If there is substantial evidence that any of the defendant's conduct was constitutionally protected, instruct on the type of~~If the defendant argues that his or her conduct or threat was constitutionally protected, give element 4. (See Pen. Code, § 646.9(f), (g).) The court must then further instruct on the type of~~ constitutionally protected activity involved. (See the optional bracketed paragraph regarding constitutionally protected activity.) Examples of constitutionally protected activity include speech, protest, and assembly. (See Civ. Code, § 1708.7(f) [civil stalking statute].)

The bracketed sentence that begins with "The People do not have to prove that" may be given on request. (See Pen. Code, § 646.9(g).)

The bracketed sentence about the defendant's incarceration may be given on request if the defendant was in prison or jail when the threat was made. (See Pen. Code, § 646.9(g).)

Give the bracketed definition of "electronic communication" on request. (See Pen. Code, § 422; 18 U.S.C., § 2510(12).)

If there is evidence that the threatened person feared for the safety of members of his or her immediate family~~, the bracketed phrase in element 5 and the final~~give the bracketed paragraph defining "immediate family" ~~should be given~~ on request. (See Pen. Code, § 646.9(*l*); see Fam. Code, § 6205; Prob. Code, §§ 6401, 6402.)

If the defendant argues that the alleged victim acquiesced to contact with the defendant contrary to a court order, the court may, on request, give the last bracketed paragraph stating that such orders may only be changed by the court. (See Pen. Code, § 13710(b); *People v. Gams* (1996) 52 Cal.App.4th 147, 151–152, 154–155 [60 Cal.Rptr.2d 423].)

AUTHORITY

- Elements ▸ Pen. Code, § 646.9(a), (e)–(h); *People v. Ewing* (1999) 76 Cal.App.4th 199, 210 [90 Cal.Rptr.2d 177]; *People v. Norman* (1999) 75 Cal.App.4th 1234, 1239 [89 Cal.Rptr.2d 806].
- Intent to Cause Victim Fear ▸ *People v. Falck* (1997) 52 Cal.App.4th 287, 295, 297–298 [60 Cal.Rptr.2d 624]; *People v. Carron* (1995) 37 Cal.App.4th 1230, 1236, 1238–1240 [44 Cal.Rptr.2d 328]; see *People v. McCray* (1997) 58 Cal.App.4th 159, 171–173 [67 Cal.Rptr.2d 872] [evidence of past violence toward victim].
- Repeatedly Defined ▸ *People v. Heilman* (1994) 25 Cal.App.4th 391, 399, 400 [30 Cal.Rptr.2d 422].
- Safety Defined ▸ *People v. Borrelli* (2000) 77 Cal.App.4th 703, 719–720 [91 Cal.Rptr.2d 851]; see *People v. Falck* (1997) 52 Cal.App.4th 287, 294–295 [60 Cal.Rptr.2d 624].
- Substantial Emotional Distress Defined ▸ *People v. Ewing* (1999) 76 Cal.App.4th 199, 210 [90 Cal.Rptr.2d 177]; see *People v. Carron* (1995) 37 Cal.App.4th 1230, 1240–1241 [44 Cal.Rptr.2d 328].
- Victim's Fear Not Contemporaneous With Stalker's Threats ▸ *People v. Norman* (1999) 75 Cal.App.4th 1234, 1239–1241 [89 Cal.Rptr.2d 806].
- This Instruction Upheld ▸ *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1195–1197 [67 Cal.Rptr.3d 871].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 294–297.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11A[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Stalking ▸ Pen. Code, §§ 664, 646.9.

RELATED ISSUES

Harassment Not Contemporaneous With Fear

The harassment need not be contemporaneous with the fear caused. (See *People v. Norman* (1999) 75 Cal.App.4th 1234, 1239–1241 [89 Cal.Rptr.2d 806].)

Constitutionality of Terms

The term "credible threat" is not unconstitutionally vague. (*People v. Halgren* (1996) 52 Cal.App.4th 1223, 1230 [61 Cal.Rptr.2d 176].) The element that the objectionable conduct "serve[] no legitimate purpose" (Pen. Code, § 646.9(e) is also not unconstitutionally vague; "an ordinary person can reasonably understand what conduct is expressly prohibited." (*People v. Tran* (1996) 47 Cal.App.4th 253, 260 [54 Cal.Rptr.2d 650].)

Labor Picketing

Section 646.9 does not apply to conduct that occurs during labor picketing. (Pen. Code, § 646.9(i).)

2040. Unauthorized Use of Personal Identifying Information (Pen. Code, § 530.5(a))

The defendant is charged [in Count __] with the unauthorized use of someone else's personal identifying information [in violation of Penal Code section 530.5(a)].

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

1. **The defendant willfully obtained someone else's personal identifying information;**

2. **The defendant willfully used that information for an unlawful purpose;**

AND

3. **The defendant used the information without the consent of the person whose identifying information (he/she) was using.**

Personal identifying information **means** _____ *<insert relevant items from Pen. Code, § 530.55(b)>* **or an equivalent form of identification.**

~~*Personal identifying information* includes a person's (name [;]/ [and] address[;]/ [and] telephone number[;]/ [and] health insurance identification number[;]/ [and] taxpayer identification number[;]/ [and] school identification number[;]/ [and] state or federal driver's license number or identification number[;]/ [and] social security number[;]/ [and] place of employment[;]/ [and] employee identification number[;]/ [and] mother's maiden name[;]/ [and] demand deposit account number[;]/ [and] savings account number[;]/ [and] checking account number[;]/ [and] PIN (personal identification number) or password[;]/ [and] alien registration number[;]/ [and] government passport number[;]/ [and] date of birth[;]/ [and] unique biometric data such as fingerprints, facial scan identifiers, voice print, retina or iris image, or other unique physical representation[;]/ [and] unique electronic data such as identification number, address, or routing code, telecommunication identifying information or access device[;]/ [and] information contained in a birth or death certificate[;]/ and credit card number) or an equivalent form of identification.~~

[As used here, *person* means a human being, whether living or dead, or a firm, association, organization, partnership, business trust, company, corporation, limited liability company, public entity, or any other legal entity.]

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

An *unlawful purpose* includes unlawfully (obtaining/[or] attempting to obtain) (credit[,]/[or] goods[,]/[or] services[,]/[or] real property[,]/ [or] medical information) in the name of the other person without the consent of that person [[or] _____ <*insert other unlawful purpose*>].

It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.

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

BENCH NOTES

Instructional Duty

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

In the definition of personal identifying information, give the relevant items based on the evidence presented.

The definition of unlawful purpose is not limited to acquiring information for financial motives, and may include any unlawful purpose for which the defendant may have acquired the personal identifying information, such as using the information to facilitate violation of a restraining order. (*See, e.g., People v. Tillotson* (2007) 157 Cal.App.4th 517, 533 [69 Cal.Rptr.3d 42].)

AUTHORITY

- Elements ▸ Pen. Code, § 530.5(a).
- Personal Identifying Information Defined ▸ Pen. Code, § 530.55(b).
- Person Defined ▸ Pen. Code, § 530.5(g).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 209.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.01[1], [4][h] (Matthew Bender).

2041. Fraudulent Possession of Personal Identifying Information (Pen. Code, § 530.5(c)(1), (2), or (3))

The defendant is charged [in Count __] with the fraudulent possession of personal identifying information [with a prior conviction for the same offense][in violation of Penal Code section 530.5(c) ((1)/(2)/(3))].

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

1. **The defendant acquired or kept the personal identifying information of (another person/ten or more other persons);**

[AND]

2. **The defendant did so with the intent to defraud another person(;/.)**

<Give paragraph 3 if defendant is charged with having a prior conviction and has not stipulated to that conviction.>
[AND

3. **The defendant has a prior conviction for _____<***insert prior conviction suffered pursuant to Penal Code section 530.5***>.]**

A person intends to *defraud* if he or she intends to deceive another person in order to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,] [or] something [else] of value), or to cause damage to a legal, financial, or property right.

Personal identifying information **means _____** *<insert relevant items from Pen. Code, § 530.55(b)>* **or an equivalent form of identification.**

~~***Personal identifying information*** **includes a person's (name [;]/ [and] address[;]/ [and] telephone number[;]/ [and] health insurance identification number[;]/ [and] taxpayer identification number[;]/ [and] school identification number[;]/ [and] state or federal driver's license number or identification number[;]/ [and] social security number[;]/ [and] place of employment[;]/ [and] employee identification number[;]/ [and] mother's maiden name[;]/ [and] demand deposit account number[;]/ [and] savings account number[;]/ [and] checking account number[;]/ [and] PIN (personal identification number) or password[;]/ [and] alien registration number[;]/~~

~~**[and] government passport number[;]/ [and] date of birth[;]/ [and] unique biometric data such as fingerprints, facial-scan identifiers, voice print, retina or iris image, or other unique physical representation[;]/ [and] unique electronic data such as identification number, address, or routing code, telecommunication identifying information or access device[;]/ [and] information contained in a birth or death certificate[;]/ and credit card number) or an equivalent form of identification.**~~

[As used here, *person* means a human being, whether living or dead, or a firm, association, organization, partnership, business trust, company, corporation, limited liability company, public entity or any other legal entity.]

It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.

New August 2009

BENCH NOTES

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

Give the bracketed sentence that begins with "As used here" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

In the definition of personal identifying information, give the relevant items based on the evidence presented.

AUTHORITY

- Elements ▸ Pen. Code, § 530.5(c).
- Personal Identifying Information Defined ▸ Pen. Code, § 530.55(b).
- Person Defined ▸ Pen. Code, § 530.55(a).
- Intent to Defraud—Defined ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity ▸ Pen. Code, § 8.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (2008 Supp.) Crimes Against Property, § 209A.

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

2042. Fraudulent Sale, Transfer or Conveyance of Personal Identifying Information (Pen. Code, § 530.5(d)(1))

The defendant is charged [in Count __] with the fraudulent (sale/ [or] transfer/ [or] conveyance) of personal identifying information [in violation of Penal Code section 530.5(d)(1)].

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

1. **The defendant (sold/ [or] transferred/ [or] conveyed) the personal identifying information of another person;**

AND

2. **The defendant did so with the intent to defraud.**

A person intends to *defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,] [or] something [else] of value), or to cause damage to a legal, financial, or property right.

Personal identifying information **means** _____ *<insert relevant items from Pen. Code, § 530.55(b)>* **or an equivalent form of identification.**

~~***Personal identifying information*** **includes a person's (name [;]/ [and] address[;]/ [and] telephone number[;]/ [and] health insurance identification number[;]/ [and] taxpayer identification number[;]/ [and] school identification number[;]/ [and] state or federal driver's license number or identification number[;]/ [and] social security number[;]/ [and] place of employment[;]/ [and] employee identification number[;]/ [and] mother's maiden name[;]/ [and] demand deposit account number[;]/ [and] savings account number[;]/ [and] checking account number[;]/ [and] PIN (personal identification number) or password[;]/ [and] alien registration number[;]/ [and] government passport number[;]/ [and] date of birth[;]/ [and] unique biometric data such as fingerprints, facial-scan identifiers, voice print, retina or iris image, or other unique physical representation[;]/ [and] unique electronic data such as identification number, address, or routing code, telecommunication identifying information or access device[;]/ [and] information contained in a birth or death certificate[;]/ and credit card number) or an equivalent form of identification.~~

[As used here, *person* means a human being, whether living or dead, or a firm, association, organization, partnership, business trust, company, corporation, limited liability company, public entity or any other legal entity.]

It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.

New August 2009

BENCH NOTES

Instructional Duty

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

Give the bracketed sentence that begins with "As used here" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

In the definition of personal identifying information, give the relevant items based on the evidence presented.

AUTHORITY

- Elements ▸ Pen. Code, § 530.5(d).
- Personal Identifying Information Defined ▸ Pen. Code, § 530.55(b).
- Person Defined ▸ Pen. Code, § 530.55(a).
- Intent to Defraud—Defined ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity ▸ Pen. Code, § 8.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (2008 Supp.) Crimes Against Property, § 209A.

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

2043. Knowing Sale, Transfer, or Conveyance of Personal Identifying Information to Facilitate Its Unauthorized Use (Pen. Code, § 530.5(d)(2))

The defendant is charged [in Count __] with the knowing (sale/ [or] transfer [or] conveyance) of personal identifying information [in violation of Penal Code section 530.5(d)(2)].

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

1. **The defendant (sold/ [or] transferred/ [or] conveyed) the personal identifying information of (a specific person/ _____**<*insert name of victim*>**);**

AND

2. **When the defendant did so, (he/she) knew that the personal identifying information would be used to obtain or attempt to obtain (credit/ [or] goods/ [or] services/ [or] real property/ [or] medical information) [[or] _____**<*insert other unlawful purpose*> **] without the consent of that specific person.**

Personal identifying information **means _____** *<insert relevant items from Pen. Code, § 530.55(b)>* **or an equivalent form of identification.**

~~***Personal identifying information*** **includes a person's (name [;]/ [and] address[;]/ [and] telephone number[;]/ [and] health insurance identification number[;]/ [and] taxpayer identification number[;]/ [and] school identification number[;]/ [and] state or federal driver's license number or identification number[;]/ [and] social security number[;]/ [and] place of employment[;]/ [and] employee identification number[;]/ [and] mother's maiden name[;]/ [and] demand deposit account number[;]/ [and] savings account number[;]/ [and] checking account number[;]/ [and] PIN (personal identification number) or password[;]/ [and] alien registration number[;]/ [and] government passport number[;]/ [and] date of birth[;]/ [and] unique biometric data such as fingerprints, facial-scan identifiers, voice print, retina or iris image, or other unique physical representation[;]/ [and] unique electronic data such as identification number, address, or routing code, telecommunication identifying information or access device[;]/ [and]~~

~~**information contained in a birth or death certificate[;]/ and credit card number) or an equivalent form of identification.**~~

[As used here, *person* means a human being, whether living or dead, or a firm, association, organization, partnership, business trust, company, corporation, limited liability company, public entity or any other legal entity.]

New August 2009

BENCH NOTES

Instructional Duty

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

Give the bracketed sentence that begins with "As used here" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

In the definition of personal identifying information, give the relevant items based on the evidence presented.

The definition of unlawful purpose is not limited to acquiring information for financial motives, and may include any unlawful purpose for which the defendant may have acquired the personal identifying information, such as using the information to facilitate violation of a restraining order. (*See, e.g., People v. Tillotson* (2007) 157 Cal.App.4th 517, 533 [69 Cal.Rptr.3d 42].)

AUTHORITY

- Elements ▸ Pen. Code, § 530.5(d)(2).
- Personal Identifying Information Defined ▸ Pen. Code, § 530.55(b).
- Person Defined ▸ Pen. Code, § 530.55(a).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (2008 Supp.) Crimes Against Property, § 209A.

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

2361. Transporting or Giving Away Marijuana: More Than 28.5 Grams (Health & Saf. Code, § 11360(a))

The defendant is charged [in Count ___] with (giving away/transporting) more than 28.5 grams of marijuana, a controlled substance [in violation of Health and Safety Code section 11360(a)].

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

1. **The defendant [unlawfully] (gave away/transported) a controlled substance;**

2. **The defendant knew of its presence;**

3. **The defendant knew of the substance's nature or character as a controlled substance;**

4. **The controlled substance was marijuana;**

AND

5. **The marijuana possessed by the defendant weighed more than 28.5 grams.**

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (gave away/transported), only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[A person does not have to actually hold or touch something to (give it away/transport it). It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

<Defense: Compassionate Use>

[Possession or transportation of marijuana is ~~not *unlawful*~~lawful if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or transport marijuana (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) when a physician has recommended [or approved] such use. The amount of marijuana possessed or transported must be reasonably related to the patient's current medical needs. In deciding if marijuana was transported for medical purposes, also consider whether the method, timing, and distance of the transportation were reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]

New January 2006

BENCH NOTES

Instructional Duty

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

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Defenses—Instructional Duty

- The medical marijuana defense is available in some cases where the defendant is charged with transportation. (*People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80, 146 P.3d 531] (Medical Marijuana Program applies retroactively and defense may apply to transportation of marijuana); *People v.*

Trippet (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully." If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

Related Instructions

Use this instruction when the defendant is charged with transporting or giving away more than 28.5 grams of marijuana. For offering to transport or give away more than 28.5 grams of marijuana, use CALCRIM No. 2363, *Offering to Transport or Give Away Marijuana: More Than 28.5 Grams*. For transporting or giving away 28.5 grams or less, use CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*. For offering to transport or give away 28.5 grams or less of marijuana, use CALCRIM No. 2362, *Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*.

AUTHORITY

- Elements ▸ Health & Saf. Code, § 11360(a).
- Knowledge ▸ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Medical Marijuana ▸ Health & Saf. Code, § 11362.5.
- Compassionate Use Defense to Transportation ▸ *People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].

- Burden of Proof for Defense of Medical Use ▸ *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Primary Caregiver ▸ *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061].
- Defendant's Burden of Proof on Compassionate Use Defense ▸ *People v. Mentch* (2008) 45 Cal.4th 274, 292-294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J.).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–101.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [b], [g], [3][a], [a.1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Transporting, Giving Away, etc., Not More Than 28.5 Grams of Marijuana ▸ Health & Saf. Code, § 11360(b).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*.

2362. Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor (Health & Saf. Code, § 11360(b))

The defendant is charged [in Count ___] with (offering to give away/offering to transport/attempting to transport) 28.5 grams or less of marijuana, a controlled substance [in violation of Health and Safety Code section 11360(b)].

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

1. **The defendant [unlawfully] (offered to give away/offered to transport/attempted to transport) marijuana, a controlled substance, in an amount weighing 28.5 grams or less;**

AND

2. **When the defendant made the (offer/attempt), (he/she) intended to (give away/transport) the controlled substance.**

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

<Defense: Compassionate Use>

[Possession or transportation of marijuana is ~~not *unlawful*~~lawful if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or transport marijuana (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) when a physician has recommended [or approved] such use. The amount of marijuana possessed or transported must be reasonably related to the patient's current medical needs. In deciding if marijuana was transported for medical purposes, also

consider whether the method, timing, and distance of the transportation were reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]

[The People do not need to prove that the defendant actually possessed the controlled substance.]

New January 2006

BENCH NOTES

Instructional Duty

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

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Also give CALCRIM No. 460, *Attempt Other Than Attempted Murder*, if the defendant is charged with attempt to transport.

Defenses—Instructional Duty

The medical marijuana defense is available in some cases where the defendant is charged with transportation. (*People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80, 146 P.3d 531] (Medical Marijuana Program applies retroactively and defense may apply to transportation of marijuana); *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish "medical

necessity"].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully." If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

Related Instructions
Use this instruction when the defendant is charged with offering to transport or give away 28.5 grams or less of marijuana. For transporting or giving away 28.5 grams or less of marijuana, use CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*. For offering to transport or give away more than 28.5 grams of marijuana, use CALCRIM No. 2363, *Offering to Transport or Give Away Marijuana: More Than 28.5 Grams*. For transporting or giving away more than 28.5 grams, use CALCRIM No. 2361, *Transporting or Giving Away Marijuana: More Than 28.5 Grams*.

AUTHORITY

- Elements ▸ Health & Saf. Code, § 11360(b).
- Knowledge ▸ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Specific Intent ▸ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Medical Marijuana ▸ Health & Saf. Code, § 11362.5.
- Compassionate Use Defense to Transportation ▸ *People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].
- Burden of Proof for Defense of Medical Use ▸ *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Primary Caregiver ▸ *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061].
- Defendant's Burden of Proof on Compassionate Use Defense ▸ *People v. Mentch* (2008) 45 Cal.4th 274, 292-294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J.).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–101.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a], [g], [j], [3][a], [a.1] (Matthew Bender).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*.

2363. Offering to Transport or Give Away Marijuana: More Than 28.5 Grams (Health & Saf. Code, § 11360(a))

The defendant is charged [in Count ___] with (offering to give away/offering to transport/attempting to transport) more than 28.5 grams of marijuana, a controlled substance [in violation of Health and Safety Code section 11360(a)].

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

1. **The defendant [unlawfully] (offered to give away/offered to transport/attempted to transport) marijuana, a controlled substance, in an amount weighing more than 28.5 grams;**

AND

2. **When the defendant made the (offer/attempt), (he/she) intended to (give away/transport) the controlled substance.**

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short.]

<Defense: Compassionate Use>

[Possession or transportation of marijuana is ~~not *unlawful*~~lawful if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or transport marijuana for personal medical purposes [or as the primary caregiver of a patient with a medical need] when a physician has recommended [or approved] such use. The amount of marijuana possessed or transported must be reasonably related to the patient's current medical needs. In deciding if marijuana was transported for medical purposes, also

consider whether the method, timing, and distance of the transportation were reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]

[The People do not need to prove that the defendant actually possessed the marijuana.]

New January 2006

BENCH NOTES

Instructional Duty

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

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Also give CALCRIM No. 460, *Attempt Other Than Attempted Murder*, if the defendant is charged with attempt to transport.

Defenses—Instructional Duty

The medical marijuana defense is available in some cases where the defendant is charged with transportation. (*People v. Wright* (2006) 40 Cal.4th 81, 87-88 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].) If the defendant meets

this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully." If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

Related Instructions
Use this instruction when the defendant is charged with offering to transport or give away more than 28.5 grams of marijuana. For transporting or giving away more than 28.5 grams of marijuana, use CALCRIM No. 2361, *Transporting or Giving Away Marijuana: More Than 28.5 Grams*. For offering to transport or give away 28.5 grams or less of marijuana, use CALCRIM No. 2362, *Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*. For transporting or giving away 28.5 grams or less, use CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*.

AUTHORITY

- Elements ▸ Health & Saf. Code, § 11360(a).
- Knowledge ▸ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Specific Intent ▸ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Medical Marijuana ▸ Health & Saf. Code, § 11362.5.
- Compassionate Use Defense to Transportation ▸ *People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].
- Burden of Proof for Defense of Medical Use ▸ *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Primary Caregiver ▸ *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061].
- Defendant's Burden of Proof on Compassionate Use Defense ▸ *People v. Mentch* (2008) 45 Cal.4th 274, 292-294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J.).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–101.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [g], [j], [3][a], [a.1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Offering to Transport or Giving Away Not More Than 28.5 Grams of Marijuana ▸ Health & Saf. Code, § 11360(b).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*.

2364–2369. Reserved for Future Use

2370. Planting, etc., Marijuana (Health & Saf. Code, § 11358)

The defendant is charged [in Count ___] with [unlawfully] (planting[,] [or]/ cultivating[,] [or]/ harvesting[,] [or]/ drying[,] [or]/ processing) marijuana, a controlled substance [in violation of Health and Safety Code section 11358].

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

1. **The defendant [unlawfully] (planted[,] [or]/ cultivated[,] [or]/ harvested[,] [or]/ dried[,] [or]/ processed) one or more marijuana plants;**

AND

2. **The defendant knew that the substance (he/she) (planted[,] [or]/ cultivated[,] [or]/ harvested[,] [or]/ dried[,] [or]/ processed) was marijuana.**

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

<Defense: Compassionate Use>

[Possession or cultivation of marijuana is lawful if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or cultivate marijuana for personal medical purposes [or as the primary caregiver of a patient with a medical need] when a physician has recommended [or approved] such use. The amount of marijuana possessed or cultivated must be reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or cultivate marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.

~~[Possession of marijuana is lawful if authorized by the Compassionate Use Act. In order for the Compassionate Use Act to apply, the defense must produce evidence tending to show that (his/her) possession or cultivation of marijuana was (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) with a physician's recommendation or approval. The amount of marijuana possessed must be reasonably related to the patient's current medical needs. If you have a reasonable doubt about whether the defendant's possession or cultivation of marijuana was unlawful under the Compassionate Use Act, you must find the defendant not guilty.~~

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

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

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Defenses—Instructional Duty

The medical marijuana defense may be raised to a charge of violating Health and Safety Code section 11358. (See Health & Saf. Code, § 11362.5.) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the possession may have been lawful under the act, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then also give the bracketed word "unlawfully" in the first paragraph and element 1. If the evidence shows that a

physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

AUTHORITY

- Elements ▸ Health & Saf. Code, § 11358.
- Harvesting ▸ *People v. Villa* (1983) 144 Cal.App.3d 386, 390 [192 Cal.Rptr. 674].
- Aider and Abettor Liability ▸ *People v. Null* (1984) 157 Cal.App.3d 849, 852 [204 Cal.Rptr. 580].
- Medical Marijuana ▸ Health & Saf. Code, § 11362.5.
- Burden of Proof for Defense of Medical Use ▸ *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Amount Must Be Reasonably Related to Patient's Medical Needs ▸ *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].
- Primary Caregiver ▸ *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061].
- Defendant's Burden of Proof on Compassionate Use Defense ▸ *People v. Mentch* (2008) 45 Cal.4th 274, 292-294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J.).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 70, 111.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [b], [3][a], [a.1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of Marijuana ▸ Health & Saf. Code, § 11357.

RELATED ISSUES

Aider and Abettor Liability of Landowner

In *People v. Null* (1984) 157 Cal.App.3d 849, 852 [204 Cal.Rptr. 580], the court held that a landowner could be convicted of aiding and abetting cultivation of marijuana based on his or her knowledge of the activity and failure to prevent it. "If [the landowner] knew of the existence of the illegal activity, her failure to take steps to stop it would aid and abet the commission of the crime. This conclusion is based upon the control that she had over her property." *(Ibid.)*

2371–2374. Reserved for Future Use

2375. Simple Possession of Marijuana: Misdemeanor (Health & Saf. Code, § 11357(c))

The defendant is charged [in Count ___] with possessing more than 28.5 grams of marijuana, a controlled substance [in violation of Health and Safety Code section 11357(c)].

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

1. **The defendant [unlawfully] possessed a controlled substance;**

2. **The defendant knew of its presence;**

3. **The defendant knew of the substance's nature or character as a controlled substance;**

4. **The controlled substance was marijuana;**

AND

5. **The marijuana possessed by the defendant weighed more than 28.5 grams.**

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed, only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

<Defense: Compassionate Use>
[Possession of marijuana is lawful if authorized by the Compassionate Use Act. In order for the Compassionate Use Act to apply, the defense must produce evidence tending to show that (his/her) possession or cultivation of marijuana was (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) with a physician's recommendation or approval. The amount of marijuana possessed must be reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or cultivate marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.~~If you have a reasonable doubt about whether the defendant's possession or cultivation of marijuana was unlawful under the Compassionate Use Act, you must find the defendant not guilty.~~

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]

New January 2006; Revised June 2007

BENCH NOTES

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

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Defenses—Instructional Duty
The medical marijuana defense may be raised to a charge of violating Health and Safety Code section 11357. (See Health & Saf. Code, § 11362.5.) The burden is

on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the possession may have been lawful under the act, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully." If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase "or approved" in the paragraph on medical marijuana. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

AUTHORITY

- Elements ▸ Health & Saf. Code, § 11357(c); *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- "Marijuana" Defined ▸ Health & Saf. Code, § 11018.
- Knowledge ▸ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Medical Marijuana ▸ Health & Saf. Code, § 11362.5.
- Burden of Proof for Defense of Medical Use ▸ *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Frazier* (2005) 128 Cal.App.4th 807, 820–821 [27 Cal.Rptr.3d 336].
- Amount Must Be Reasonably Related to Patient's Medical Needs ▸ *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].
- Primary Caregiver ▸ *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061].
- Defendant's Burden of Proof on Compassionate Use Defense ▸ *People v. Mentch* (2008) 45 Cal.4th 274, 292-294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J.).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 64–92.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [b], [d], [3][a], [a.1] (Matthew Bender).

2376. Simple Possession of Marijuana on School Grounds: Misdemeanor (Health & Saf. Code, § 11357(d))

The defendant is charged [in Count ___] with possessing marijuana, a controlled substance, on the grounds of a school [in violation of Health and Safety Code section 11357(d)].

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

1. **The defendant [unlawfully] possessed a controlled substance;**

2. **The defendant knew of its presence;**

3. **The defendant knew of the substance's nature or character as a controlled substance;**

4. **The controlled substance was marijuana;**

5. **The marijuana was in a usable amount but not more than 28.5 grams in weight;**

6. **The defendant was at least 18 years old;**

AND

7. **The defendant possessed the marijuana on the grounds of or inside a school providing instruction in any grade from kindergarten through 12, when the school was open for classes or school-related programs.**

A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the

seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed, only that (he/she) was aware of the substance's presence and that it was a controlled substance.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

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

<Defense: Compassionate Use>

[Possession or cultivation of marijuana is lawful if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or cultivate marijuana for personal medical purposes [or as the primary caregiver of a patient with a medical need] when a physician has recommended [or approved] such use. The amount of marijuana possessed or cultivated must be reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or cultivate marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.

~~**[Possession of marijuana is lawful if authorized by the Compassionate Use Act. In order for the Compassionate Use Act to apply, the defendant must produce evidence tending to show that (his/her) possession or cultivation of marijuana was (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) with a physician's recommendation or approval. The amount of marijuana possessed must be reasonably related to the patient's current medical needs. If you have a reasonable doubt about whether the defendant's possession or cultivation of marijuana was unlawful under the Compassionate Use Act, you must find the defendant not guilty.**~~

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

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

When instructing on the definition of "marijuana," the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

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

Defenses—Instructional Duty

The medical marijuana defense may be raised to a charge of violating Health and Safety Code section 11357. (See Health & Saf. Code, § 11362.5.) However, there are no cases on whether the defense applies to the charge of possession on school grounds. In general, the burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the possession may have been lawful under the act, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions if the court concludes that the defense applies to possession on school grounds.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully." If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase

"or approved" in the paragraph on medical marijuana. *People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

AUTHORITY

- Elements ▸ Health & Saf. Code, § 11357(d); *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- "Marijuana" Defined ▸ Health & Saf. Code, § 11018.
- Knowledge ▸ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Usable Amount ▸ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Medical Marijuana ▸ Health & Saf. Code, § 11362.5.
- Burden of Proof for Defense of Medical Use ▸ *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Frazier* (2005) 128 Cal.App.4th 807, 820–821 [27 Cal.Rptr.3d 336].
- Amount Must Be Reasonably Related to Patient's Medical Needs ▸ *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].
- Primary Caregiver ▸ *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061].
- Defendant's Burden of Proof on Compassionate Use Defense ▸ *People v. Mentch* (2008) 45 Cal.4th 274, 292-294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J.).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 64–92.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[d], [3][a], [a.1] (Matthew Bender).

2510. Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction (Pen. Code, §§ 12021(a)–(c) & (e), 12021.1(a), 12001.6)

The defendant is charged [in Count __] with unlawfully possessing a firearm [in violation of _____ *<insert appropriate code section[s]>***].**

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

1. **The defendant (owned/purchased/received/possessed) a firearm;**

2. **The defendant knew that (he/she) (owned/purchased/received/possessed) the firearm;**

[AND]

3. **The defendant had previously been convicted of (a felony/two offenses of brandishing a firearm/the crime of _____** *<insert misdemeanor offense from Pen. Code, § 12021(c) or Pen. Code, § 12001.6(a), (b), or (d), or a juvenile finding from Pen. Code, § 12021(e)>***(;/.)**

[AND]

<Alternative 4A—give only if the defendant is charged under Pen. Code, § 12021(c) .>

[4. The previous conviction was within 10 years of the date the defendant possessed the firearm.]

<Alternative 4B—give only if the defendant is charged under Pen. Code, § 12021(e).>

[4. The defendant was under 30 years old at the time (he/she) possessed the firearm.]

[A *firearm* is any device, designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion. [The frame or receiver of such a *firearm* is also a *firearm* for the purpose of this instruction.]]

<Do not use the language below unless the other instruction defines firearm in the context of a crime charged pursuant to Penal Code section 12021>
[The term *firearm* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.]

[A *juvenile court finding* is the same as a conviction.]

[A conviction of _____ *<insert name of offense from other state or federal offense>* **is the same as a conviction for a felony.]**

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[You may consider evidence, if any, that the defendant was previously convicted of a crime only in deciding whether the People have proved this element of the crime [or for the limited purpose of _____ *<insert other permitted purpose, e.g., assessing defendant's credibility>*]**. Do not consider such evidence for any other purpose.]**

[The People allege that the defendant (owned/purchased/received/possessed) the following firearms: _____ *<insert description of each firearm when multiple firearms alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (owned/purchased/received/possessed) at least one of the firearms, and you all agree on which firearm (he/she) (owned/purchased/received/possessed).]**

<Defense: Momentary Possession>
[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that:

1. **(He/She) possessed the firearm only for a momentary or transitory period;**

2. **(He/She) possessed the firearm in order to (abandon[,]/ [or] dispose of[,]/ [or] destroy) it;**

AND

3. **(He/She) did not intend to prevent law enforcement officials from seizing the firearm**.

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true.]

<Defense: Justifiable Possession>
[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove that (he/she) was justified in possessing the firearm. In order to establish this defense, the defendant must prove that:

1. **(He/She) (found the firearm/took the firearm from a person who was committing a crime against the defendant);**

[AND]

2. **(He/She) possessed the firearm no longer than was necessary to deliver or transport the firearm to a law enforcement agency for that agency to dispose of the weapon(;/.)**

[AND

3. **If the defendant was transporting the firearm to a law enforcement agency, (he/she) gave prior notice to the law enforcement agency that (he/she) would be delivering a firearm to the agency for disposal.]]**

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true.

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Use this instruction only if the defendant does not stipulate to the prior conviction. (*People v. Sapp* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].) If the defendant stipulates, use CALCRIM No. 2511, *Possession of Firearm by Person Prohibited Due to Conviction—Stipulation to Conviction*. (*People v. Sapp, supra,* 31 Cal.4th at p. 261; *People v. Valentine, supra,* 42 Cal.3d at p. 173.)

~~The court has a **sua sponte** duty to instruct on the union of general criminal intent and action, CALCRIM No. 250, *Union of Act and Intent—General Intent*. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 924 [49 Cal.Rptr.2d 86].) "Wrongful intent must be shown with regard to the possession and custody elements of the crime of being a felon in possession of a firearm. . . . [A] felon who acquires possession of a firearm through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent." (*Id.* at p. 922.) The defendant is also entitled to a pinpoint instruction on unintentional possession if there is sufficient evidence to support the defense. (*Id.* at pp. 924–925.)~~ The court has a **sua sponte** duty to instruct on the union of act and specific intent or mental state. (*People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365].) Therefore, because of the knowledge requirement in element 2 of this instruction, the court must give CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State* together with this instruction. Nevertheless, the knowledge requirement in element 2 does not require any "specific intent."

If the prosecution alleges under a single count that the defendant possessed multiple firearms and the possession was "fragmented as to time . . . [or] space," the court has a **sua sponte** duty to instruct on unanimity. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following firearms," inserting the items alleged.

Element 4 should only be given if the defendant is charged under Penal Code section 12021(c), possession within 10 years of a specified misdemeanor conviction, or Penal Code section 12021(e), possession by someone under 30 years old with a specified juvenile finding.

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions on crimes based on Penal Code section 12021. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

On request, the court should give the limiting instruction regarding the evidence of the prior conviction that begins, "You may consider . . . ." (*People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913].) There is no sua sponte duty to give the limiting instruction, and the defense may prefer that no limiting instruction be given. (*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].)

Defenses—Instructional Duty

"[T]he defense of transitory possession devised in [*People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115]] applies only to momentary or transitory possession of contraband for the purpose of disposal." (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) The court in *Martin, supra,* approved of *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853], which held that the defense of momentary possession applies to a charge of violating Penal Code section 12021. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. (*People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Momentary Possession."

Penal Code section 12021(h) states that a violation of the statute is "justifiable" if the listed conditions are met. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. *(Ibid.)* If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Justifiable Possession."

If there is sufficient evidence that the defendant possessed the firearm only in self-defense, the court has a **sua sponte** duty to give CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute—Self-Defense*.

AUTHORITY

- Elements ▸ Pen. Code, §§ 12021(a), (b), (c) & (e), 12021.1(a), 12001.6; *People v. Snyder* (1982) 32 Cal.3d 590, 592 [186 Cal.Rptr. 485, 652 P.2d 42].
- Defense of Justifiable Possession ▸ Pen. Code, § 12021(h).

- Presenting Evidence of Prior Conviction to Jury ▸ *People v. Sapp* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].
- Limiting Instruction on Prior Conviction ▸ *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].
- Accidental Possession ▸ *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 [49 Cal.Rptr.2d 86].
- Lack of Knowledge of Nature of Conviction Not a Defense ▸ *People v. Snyder* (1982) 32 Cal.3d 590, 593 [186 Cal.Rptr. 485, 652 P.2d 42].
- Momentary Possession Defense ▸ *People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081]; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853]; *People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115].
- Constructive vs. Actual Possession ▸ *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Possession of Frame or Receiver Sufficient but not Necessary For Crimes Charged Under Section 12021 ▸ *People v. Arnold* (2006) 145 Cal.App.4th 1408, 1414 [52 Cal.Rptr.3d 545].

Secondary Sources

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

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

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

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

RELATED ISSUES

Proof of Prior Conviction

The trial court "has two options when a prior conviction is a substantive element of a current charge: Either the prosecution proves each element of the offense to

the jury, or the defendant stipulates to the conviction and the court 'sanitizes' the prior by telling the jury that the defendant has a prior felony conviction, without specifying the nature of the felony committed." (*People v. Sapp* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].)

Lack of Knowledge of Status of Conviction Not a Defense

"[R]egardless of what she reasonably believed, or what her attorney may have told her, defendant was deemed to know under the law that she was a convicted felon forbidden to possess concealable firearms. Her asserted mistake regarding her correct legal status was a mistake of law, not fact. It does not constitute a defense to section 12021." (*People v. Snyder* (1982) 32 Cal.3d 590, 593 [186 Cal.Rptr. 485, 652 P.2d 42].)

Out-of-State Convictions

For an out-of-state conviction, it is sufficient if the offense is a felony under the laws of the "convicting jurisdiction." (*People v. Shear* (1999) 71 Cal.App.4th 278, 283 [83 Cal.Rptr.2d 707].) The prosecution does not have to establish that the offense would be a felony under the laws of California. *(Ibid.)* Even if the convicting jurisdiction has restored the defendant's right to possess a firearm, the defendant may still be convicted of violating Penal Code section 12021. *(Ibid.)*

Pardons and Penal Code Section 1203.4 Motions

A pardon pursuant to Penal Code section 4852.17 restores a person's right to possess a firearm unless the person was convicted of a "felony involving the use of a dangerous weapon." (Pen. Code, § 4852.17.) The granting of a Penal Code section 1203.4 motion, however, does not restore the person's right to possess any type of firearm. (Pen. Code, § 1203.4(a); *People v. Frawley* (2000) 82 Cal.App.4th 784, 796 [98 Cal.Rptr.2d 555].)

Submitting False Application for Firearm

A defendant who submitted a false application to purchase a firearm may not be prosecuted for "attempted possession of a firearm by a felon." (*People v. Duran* (2004) 124 Cal.App.4th 666, 673 [21 Cal.Rptr.3d 495].) "Instead, the felon may only be prosecuted pursuant to the special statute, [Penal Code section] 12076, which expressly proscribes such false application." *(Ibid.)*

2511. Possession of Firearm by Person Prohibited Due to Conviction—Stipulation to Conviction (Pen. Code, §§ 12021(a)–(c) & (e), 12021.1(a), 12001.6)

The defendant is charged [in Count __] with unlawfully possessing a firearm [in violation of _____ *<insert appropriate code section[s]>***].**

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

1. **The defendant (owned/purchased/received/possessed) a firearm;**

2. **The defendant knew that (he/she) (owned/purchased/received/possessed) the firearm;**

[AND]

3. **The defendant had previously been convicted of (a/two) (felony/misdemeanor[s])(;/.)**

[AND]

<Alternative 4A—give only if the defendant is charged under Pen. Code, § 12021(c).>

[4. The previous conviction was within 10 years of the date the defendant possessed the firearm.]

<Alternative 4B—give only if the defendant is charged under Pen. Code, § 12021(e).>

[4. The defendant was under 30 years old at the time (he/she) possessed the firearm.]

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

[The term *firearm* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person).]

The defendant and the People have stipulated, or agreed, that the defendant was previously convicted of (a/two) (felony/misdemeanor[s]). This stipulation means that you must accept this fact as proved.

[Do not consider this fact for any other purpose [except for the limited purpose of _____ *<insert other permitted purpose, e.g., determining the defendant's credibility>***]. Do not speculate about or discuss the nature of the conviction.]**

[The People allege that the defendant (owned/purchased/received/possessed) the following firearms: _____ *<insert description of each firearm when multiple firearms alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (owned/purchased/received/possessed) at least one of the firearms, and you all agree on which firearm (he/she) (owned/purchased/received/possessed).]**

<Defense: Momentary Possession>
[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that:

1. **(He/She) possessed the firearm only for a momentary or transitory period;**

2. **(He/She) possessed the firearm in order to (abandon[,]/ [or] dispose of[,]/ [or] destroy) it;**

   AND

3. **(He/She) did not intend to prevent law enforcement officials from seizing the firearm**.

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more

likely than not that each element of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.]

<Defense: Justifiable Possession>
[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove that (he/she) was justified in possessing the firearm. In order to establish this defense, the defendant must prove that:

1. **(He/She) (found the firearm/took the firearm from a person who was committing a crime against the defendant);**

[AND]

2. **(He/She) possessed the firearm no longer than was necessary to deliver or transport the firearm to a law enforcement agency for that agency to dispose of the weapon(;/.)**

[AND

3. **If the defendant was transporting the firearm to a law enforcement agency, (he/she) gave prior notice to the law enforcement agency that (he/she) would be delivering a firearm to the agency for disposal.]]**

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true.

New January 2006

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Use this instruction only if the defendant stipulates to the prior conviction. (*People v. Sapp* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].) If the defendant does not stipulate, use CALCRIM No. 2510, *Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to*

Conviction. (*People v. Sapp, supra*, 31 Cal.4th at p. 261; *People v. Valentine, supra*, 42 Cal.3d at p. 173.)

If the defendant has stipulated to the fact of the conviction, the court should sanitize all references to the conviction to prevent disclosure of the nature of the conviction to the jury. (*People v. Sapp, supra,* 31 Cal.4th at p. 261; *People v. Valentine, supra,* 42 Cal.3d at p. 173.) If the defendant agrees, the court should not read the portion of the information describing the nature of the conviction. Likewise, the court should ensure that the verdict forms do not reveal the nature of the conviction.

~~The court has a **sua sponte** duty to instruct on the union of general criminal intent and action, CALCRIM No. 250, *Union of Act and Intent—General Intent*. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 924 [49 Cal.Rptr.2d 86].) "Wrongful intent must be shown with regard to the possession and custody elements of the crime of being a felon in possession of a firearm. . . . [A] felon who acquires possession of a firearm through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent." (*Id.* at p. 922.) The defendant is also entitled to a pinpoint instruction on unintentional possession if there is sufficient evidence to support the defense. (*Id.* at pp. 924–925.)~~

The court has a **sua sponte** duty to instruct on the union of act and specific intent or mental state. (*People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365].) Therefore, because of the knowledge requirement in element 2 of this instruction, the court must give CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State* together with this instruction. Nevertheless, the knowledge requirement in element 2 does not require any "specific intent."

If the prosecution alleges under a single count that the defendant possessed multiple firearms and the possession was "fragmented as to time . . . [or] space," the court has a **sua sponte** duty to instruct on unanimity. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following firearms," inserting the items alleged.

Element 4 should only be given if the defendant is charged under Penal Code section 12021(c), possession within 10 years of a specified misdemeanor conviction, or Penal Code section 12021(e), possession by someone under 30 years old with a specified juvenile finding.

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

On request, the court should give the limiting instruction regarding the evidence of the prior conviction that begins, "Do not consider this fact for any other purpose. . . ." (*People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913].) There is no sua sponte duty to give the limiting instruction, and the defense may prefer that no limiting instruction be given. (*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].)

Defenses—Instructional Duty

"[T]he defense of transitory possession devised in [*People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115]] applies only to momentary or transitory possession of contraband for the purpose of disposal." (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) The court in *Martin, supra,* approved of *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853], which held that the defense of momentary possession applies to a charge of violating Penal Code section 12021. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. (*People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Momentary Possession."

Penal Code section 12021(h) states that a violation of the statute is "justifiable" if the listed conditions are met. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. *(Ibid.)* If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Justifiable Possession."

If there is sufficient evidence that the defendant possessed the firearm only in self-defense, the court has a **sua sponte** duty to give CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute—Self-Defense*.

AUTHORITY

- Elements ▸ Pen. Code, §§ 12021(a), (b), (c) & (e), 12021.1(a), 12001.6; *People v. Snyder* (1982) 32 Cal.3d 590, 592 [186 Cal.Rptr. 485, 652 P.2d 42].
- Defense of Justifiable Possession ▸ Pen. Code, § 12021(h).

- Presenting Evidence of Prior Conviction to Jury ▸ *People v. Sapp* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].
- Limiting Instruction on Prior Conviction ▸ *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].
- Accidental Possession ▸ *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 [49 Cal.Rptr.2d 86].
- Lack of Knowledge of Nature of Conviction Not a Defense ▸ *People v. Snyder* (1982) 32 Cal.3d 590, 593 [186 Cal.Rptr. 485, 652 P.2d 42].
- Momentary Possession Defense ▸ *People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081]; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853]; *People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115].
- Constructive vs. Actual Possession ▸ *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].

Secondary Sources

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

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

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

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

RELATED ISSUES

See CALCRIM No. 2510, *Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction*.

2512. Possession of Firearm by Person Prohibited by Court Order (Pen. Code, § 12021(d) & (g))

The defendant is charged [in Count __] with unlawfully possessing a firearm [in violation of Penal Code section 12021].

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

1. **The defendant (owned/purchased/received/possessed) a firearm;**

2. **The defendant knew that (he/she) (owned/purchased/received/possessed) the firearm;**

[AND]

3. **A court had ordered that the defendant not (own/purchase/receive/possess) a firearm(;/.)**

<Give element 4 only if the defendant is charged under Pen. Code, § 12021(g).>
[AND

4. **The defendant knew of the court's order.]**

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

[The term *firearm* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[The defendant and the People have stipulated, or agreed, that a court ordered the defendant not to (own/purchase/receive/possess) a firearm. This stipulation means that you must accept this fact as proved.]

<Alternative A—limiting instruction when stipulation to order>

[Do not consider this fact for any other purpose [except for the limited purpose of _____ *<insert other permitted purpose, e.g., determining the defendant's credibility>***]. Do not speculate about why the court's order was made.]**

<Alternative B—limiting instruction when no stipulation to order>

[You may consider evidence, if any, that a court ordered the defendant not to (own/purchase/receive/possess) a firearm only in deciding whether the People have proved this element of the crime [or for the limited purpose of _____ *<insert other permitted purpose, e.g., assessing defendant's credibility>***]. Do not consider such evidence for any other purpose.]**

[The People allege that the defendant (owned/purchased/received/possessed) the following firearms: _____ *<insert description of each firearm when multiple firearms alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (owned/purchased/received/possessed) at least one of the firearms, and you all agree on which firearm (he/she) (owned/purchased/received/possessed).]**

<Defense: Momentary Possession>

[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that:

1. **(He/She) possessed the firearm only for a momentary or transitory period;**

2. **(He/She) possessed the firearm in order to (abandon[,]/ [or] dispose of[,]/ [or] destroy) it;**

AND

3. **(He/She) did not intend to prevent law enforcement officials from seizing the firearm**.

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more

likely than not that each element of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.]

<Defense: Justifiable Possession>
[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove that (he/she) was justified in possessing the firearm. In order to establish this defense, the defendant must prove that:

1. **(He/She) (found the firearm/took the firearm from a person who was committing a crime against the defendant);**

[AND]

2. **(He/She) possessed the firearm no longer than was necessary to deliver or transport the firearm to a law enforcement agency for that agency to dispose of the weapon(;/.)**

[AND

3. **If the defendant was transporting the firearm to a law enforcement agency, (he/she) had given prior notice to the agency that (he/she) would be delivering a firearm to the agency for disposal.]]**

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true.

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Use this instruction only if the defendant is charged under Penal Code section 12021(d)(1), possession by someone prohibited as a condition of probation following conviction for a crime not listed in other provisions of Penal Code section 12021, or Penal Code section 12021(g), possession by someone prohibited by a temporary restraining order or other protective order.

The court has a **sua sponte** duty to instruct on the union of act and specific intent or mental state. (*People v. Alvarez* (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365].) Therefore, because of the knowledge requirement in element 2 of this instruction, the court must give CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State* together with this instruction. Nevertheless, the knowledge requirement in element 2 does not require any "specific intent."

~~The court has a **sua sponte** duty to instruct on the union of general criminal intent and action, CALCRIM No. 250, *Union Of Act And Intent—General Intent*. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 924 [49 Cal.Rptr.2d 86].)~~

~~"Wrongful intent must be shown with regard to the possession and custody elements of the crime of being a felon in possession of a firearm. . . . [A] felon who acquires possession of a firearm through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent." (*Id.* at p. 922.) The defendant is also entitled to a pinpoint instruction on unintentional possession if there is sufficient evidence to support the defense. (*Id.* at pp. 924–925.)~~

If the prosecution alleges under a single count that the defendant possessed multiple firearms and the possession was "fragmented as to time . . . [or] space," the court has a **sua sponte** duty to instruct on unanimity. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following firearms," inserting the items alleged.

Give element 4 only if the defendant is charged under Penal Code section 12021(g).

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

If the defendant has not stipulated to the probation order, do not give the bracketed paragraph that begins, "The defendant and the People have stipulated . . . ."

If the defendant does stipulate to the probation order, the court must give the bracketed paragraph that begins, "The defendant and the People have stipulated . . . ." The court must also sanitize all references to the probation order to prevent disclosure of the nature of the conviction to the jury. (*People v. Sapp,* (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; *People v. Valentine* (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].) If the defendant agrees, the court must not read the portion of the information describing the nature of the

conviction. Likewise, the court must ensure that the verdict forms do not reveal the nature of the conviction.

On request, the court should give the limiting instruction regarding the evidence of the probation condition. (*People v. Valentine, supra,* 42 Cal.3d at 182, fn. 7.) There is no sua sponte duty to give the limiting instruction, and the defense may prefer that no limiting instruction be given. (*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].) If the defendant does not stipulate to the probation condition, give alternative A. If the defendant does stipulate, give alternative B.

Defenses—Instructional Duty

"[T]he defense of transitory possession devised in [*People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115]] applies only to momentary or transitory possession of contraband for the purpose of disposal." (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) The court in *Martin, supra,* approved of *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853], which held that the defense of momentary possession applies to a charge of violating Penal Code section 12021. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. (*People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1064].) If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Momentary Possession."

Penal Code section 12021(h) states that a violation of the statute is "justifiable" if the listed conditions are met. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. *(Ibid.)* If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Justifiable Possession."

If there is sufficient evidence that the defendant possessed the firearm only in self-defense, the court has a **sua sponte** duty to give CALCRIM No. 2514, *Possession of Firearm by Person Prohibited by Statute—Self-Defense*.

AUTHORITY

- Elements ▸ Pen. Code, § 12021(d) & (g); *People v. Snyder* (1982) 32 Cal.3d 590, 592 [186 Cal.Rptr. 485, 652 P.2d 42].
- Defense of Justifiable Possession ▸ Pen. Code, § 12021(h).

- Limiting Instruction on Prior Conviction ▸ *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].
- Accidental Possession ▸ *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 [49 Cal.Rptr.2d 86].
- Momentary Possession Defense ▸ *People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081]; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853]; *People v. Mijares* (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115].
- Constructive vs. Actual Possession ▸ *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].

Secondary Sources

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

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

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

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

2997. Money Laundering (Pen. Code, § 186.10)

The defendant is charged [in Count __] with money laundering [in violation of Penal Code section 186.10].

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

1. **The defendant (conducted/ [or] attempted to conduct) one or more financial transactions involving at least one monetary instrument through at least one financial institution;**

   <Give 2A when only one transaction is alleged.>

   [2A. The financial transaction involved [a] monetary instrument[s] with a total value of more than $5,000;]

   <Give 2B and/or 2C as appropriate when multiple transactions are alleged.>

   [2B. The defendant (conducted/ [or] attempted to conduct) the financial transactions within a seven-day period and the monetary instrument[s] involved had a total value of more than $5,000;]

   [OR]

   [2C. The defendant (conducted/ [or] attempted to conduct) the financial transactions within a 30-day period and the monetary instrument[s] involved had a total value of more than $25,000;]

   [AND]

   <Give 3A, 3B or both, as appropriate.>
   [3A. When the defendant did so, (he/she) intended to (promote/ [or] manage/ [or] establish/ [or] carry on/ [or] facilitate) criminal activity;]

   [OR]

[3B. The defendant knew that the monetary instrument[s] represented the proceeds of criminal activity or (was/were) derived directly or indirectly from the proceeds of criminal activity(;/.)]

[AND]

<Give element 4 as appropriate if the defendant is an attorney.>

[4. The attorney defendant accepted a fee for representing a client in a criminal investigation or proceeding and accepted the monetary instrument with the intent to disguise or aid in disguising the source of the funds or the nature of the criminal activity.]

~~**[AND**~~

~~**(4./5.) The [total] value of the [attempted] transaction[s] was more than** _____*<inserted alleged minimum value>* **but less than** _____*<insert alleged top limit>***.]**~~

Conducting **includes, but is not limited to, initiating, participating in, or concluding a transaction.**

Financial institution **means (any national bank or banking institution/** _____*<insert appropriate entity from Pen. Code, § 186.9(b)>*) **located or doing business in the state of California.**

A *transaction* includes the (deposit/ [or] withdrawal/ [or] transfer/ [or] bailment/ [or] loan/ [or] pledge/ [or] payment/ [or] exchange) of (currency/ [or] a monetary instrument/ [or] the electronic, wire, magnetic, or manual transfer) of funds between accounts by, through, or to, a financial institution.

A *monetary instrument* means (money of the United States of America/ [or] _____*<insert appropriate item from Pen. Code, § 186.9(d)>***.**

Criminal activity **means (a criminal offense punishable under the laws of the state of California by [death or] imprisonment in the state prison/ [or] a criminal offense committed in another jurisdiction, which, under the laws of that jurisdiction is punishable by death or imprisonment for a term exceeding one year).**

[*Foreign bank draft* means a bank draft or check issued or made out by a foreign (bank/ [or] savings and loan/ [or] casa de cambio/ [or] credit union/ [or] currency dealer or exchanger/ [or] check cashing business/ [or] money transmitter/ [or] insurance company/ [or] investment or private bank) [or any other foreign financial institution that provides similar financial services,] on an account in the name of the foreign bank or foreign financial institution held at a bank or other financial institution located in the United States or a territory of the United States.]

<Give the following paragraph if a sentence enhancement is alleged pursuant to Pen. Code, §186.10(c)>

If you find the defendant guilty of this crime, you must then determine whether the [total] value of the [attempted] transaction[s] was more than ____*<insert alleged minimum value>* but less than __*<insert alleged top limit>*. The People have the burden of proving this additional allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.]

New August 2009

BENCH NOTES

Instructional Duty

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

If the definition of proceeds is an issue, see *United States v. Santos* (2008) — U.S. — [128 S.Ct. 2020, 2022, 170 L.Ed.2d 912], holding that "proceeds" in the federal money laundering statute means "profits" in the context of an illegal gambling scheme.

AUTHORITY

- Elements ▸ Pen. Code, § 186.10; *People v. Mays* (2007) 148 Cal.App.4th 13, 29 [55 Cal.Rptr.3d 356].
- Definitions ▸ Pen. Code, § 186.9.
- Definition of Proceeds ▸ *United States v. Santos* (2008) — U.S. — [128 S.Ct. 2020, 2022, 170 L.Ed.2d 912].

Secondary Sources
2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 155.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.48 (Matthew Bender).

2998–3099. Reserved for Future Use

3220. Amount of Loss (Pen. Code, § 12022.6)

If you find the defendant guilty of the crime[s] charged in Count[s] __[,] [or of attempting to commit (that/those) crime[s]][or the lesser crimes[s] of _____ *<insert lesser offense[s]>*, **you must then decide whether the People have proved the additional allegation that the value of the property (taken[,]/ [or] damaged[,]/ [or] destroyed) was more than $_____** *<insert amount alleged>*.

To prove this allegation, the People must prove that:

1. **In the commission [or attempted commission] of the crime, the defendant (took[,]/ [or] damaged[,]/ [or] destroyed) property;**

2. **When the defendant acted, (he/she) intended to (take[,]/ [or] damage[,]/ [or] destroy) the property;**

AND

3. **The loss caused by the defendant's (taking[,]/ [or] damaging[,]/ [or] destroying) the property was greater than $_____** *<insert amount alleged>***.**

[If you find the defendant guilty of more than one crime, you may add together the loss suffered by each victim in Count[s] _____*<specify all counts that jury may use to compute cumulative total loss>* **to determine whether the total losses ~~from~~ to all the victims were~~as~~ more than $_____** *<insert amount alleged>* **if the People prove that:**

A. **The defendant intended to and did (take[,]/ [or] damage[,]/ [or] destroy) property in each crime;**

AND

B. **~~Each crime~~The losses arose from a common scheme or plan.]**

[The value of property is the fair market value of the property.]

[When computing the amount of loss according to this instruction, do not count any taking, damage, or destruction more than once simply because it is mentioned in more than one count, if the taking, damage, or destruction

mentioned in those counts refers to the same taking, damage, or destruction with respect to the same victim.]

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

New January 2006; Revised August 2009

BENCH NOTES

Instructional Duty

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

The court must insert the alleged amounts of loss in the blanks provided so that the jury may first determine whether the statutory threshold amount exists for any single victim, and then whether the statutory threshold amount exists for all victims or for all losses to one victim cumulatively.

AUTHORITY

- Enhancement ▸ Pen. Code, § 12022.6 [in effect until January 1, 2018 unless otherwise extended].
- Value Is Fair Market Value ▸ *People v. Swanson* (1983) 142 Cal.App.3d 104, 107–109 [190 Cal.Rptr. 768].
- Definition of "Loss" of Computer Software ▸ Pen. Code, § 12022.6(e).
- Defendant Need Not Intend to Permanently Deprive Owner of Property ▸ *People v. Kellett* (1982) 134 Cal.App.3d 949, 958–959 [185 Cal.Rptr. 1].
- Victim Need Not Suffer Actual Loss ▸ *People v. Bates* (1980) 113 Cal.App.3d 481, 483–484 [169 Cal.Rptr 853]; *People v. Ramirez* (1980) 109 Cal.App.3d 529, 539–540 [167 Cal.Rptr. 174].
- Defendant Need Not Know or Reasonably Believe Value of Item Exceeded Amount Specified ▸ *People v. DeLeon* (1982) 138 Cal.App.3d 602, 606–607 [188 Cal.Rptr. 63].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 292.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.45 (Matthew Bender).

COMMENTARY

Penal Code section 12022.6 applies to "any person [who] takes, damages, or destroys any property . . . ." The statute does not explicitly include vicarious liability but also does not use the term "personally" to limit the scope of liability. In *People v. Fulton* (1984) 155 Cal.App.3d 91, 102 [201 Cal.Rptr. 879], the Fourth Appellate District of the Court of Appeal interpreted this language to mean that the statute did not require that the defendant personally take, damage, or destroy the property, but provided for vicarious liability. In reaching this conclusion, the court relied on the reasoning of *People v. Le* (1984) 154 Cal.App.3d 1 [200 Cal.Rptr. 839], which held that an enhancement for being armed with a firearm under Penal Code section 12022.3(b) allowed for vicarious liability despite the fact that the statute does not explicitly include vicarious liability. The *Fulton* court also disagreed with the holding of *People v. Reed* (1982) 135 Cal.App.3d 149 [185 Cal.Rptr. 169], which held that Penal Code section 12022.3(b) did not include vicarious liability. However, the *Fulton* decision failed to consider the Supreme Court opinion in *People v. Walker* (1976) 18 Cal.3d 232, 241–242 [133 Cal.Rptr. 520, 555 P.2d 306], which held that an enhancement does not provide for vicarious liability unless the underlying statute contains an explicit statement that vicarious liability is included within the statute's scope. Moreover, the Supreme Court has endorsed the *Reed* opinion and criticized the *Le* opinion, noting that *Le* also failed to consider the holding of *Walker*. (*People v. Piper* (1986) 42 Cal.3d 471, 477, fn. 5 [229 Cal.Rptr. 125, 722 P.2d 899].) Similarly, the Fifth Appellate District of the Court of Appeal has observed that "the weight of authority has endorsed the analysis in *Reed*" and rejected the holding of *Le*. (*People v. Rener* (1994) 24 Cal.App.4th 258, 267 [29 Cal.Rptr.2d 392] [holding that Pen. Code, §12022.3(a) & (b) does not include vicarious liability].) Thus, although no case has explicitly overruled *Fulton*, the holding of that case appears to be contrary to the weight of authority.

RELATED ISSUES

"Take"

As used in Penal Code section 12022.6, "take" does not have the same meaning as in the context of theft. (*People v. Kellett* (1982) 134 Cal.App.3d 949, 958–959 [185 Cal.Rptr. 1].) The defendant need not intend to permanently deprive the

owner of the property so long as the defendant intends to take, damage, or destroy the property. *(Ibid.)* Moreover, the defendant need not actually steal the property but may "take" it in other ways. (*People v. Superior Court (Kizer)* (1984) 155 Cal.App.3d 932, 935 [204 Cal.Rptr. 179].) Thus, the enhancement may be applied to the crime of receiving stolen property *(ibid.)* and to the crime of driving a stolen vehicle (*People v. Kellett, supra,* 134 Cal.App.3d at pp. 958–959).

"Loss"

As used in Penal Code section 12022.6, "loss" does not require that the victim suffer an actual or permanent loss. (*People v. Bates* (1980) 113 Cal.App.3d 481, 483–484 [169 Cal.Rptr. 853]; *People v. Ramirez* (1980) 109 Cal.App.3d 529, 539–540 [167 Cal.Rptr. 174].) Thus, the enhancement may be imposed when the defendant had temporary possession of the stolen property but the property was recovered (*People v. Bates, supra,* 113 Cal.App.3d at pp. 483–484), and when the defendant attempted fraudulent wire transfers but the bank suffered no actual financial loss (*People v. Ramirez, supra,* 109 Cal.App.3d at pp. 539–540).

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

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

[Now I will explain to you which charges are affected by this instruction:]

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

It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime.

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

1. **If all of you agree the People have proved beyond a reasonable doubt that the defendant is guilty of the greater crime, complete and sign the verdict form for guilty of that crime. Do not complete or sign any other verdict form [for that count].**

2. **If all of you agree the People have not proved beyond a reasonable doubt that the defendant is guilty of the greater crime and also agree the People have proved beyond a reasonable doubt that (he/she) is**

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

3. **If all of you agree the People have not proved beyond a reasonable doubt that the defendant is guilty of the greater or lesser crime, complete and sign the verdict form for not guilty.**

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

<Give the following paragraph if the court is instructing on a lesser included offense within another lesser included offense:>
[Follow these directions when you decide whether a defendant is guilty or not guilty of _____<*insert crime*>**, which is a lesser crime of _____**<*insert crime*>**.]**

New January 2006; Revised August 2006, June 2007

BENCH NOTES

Instructional Duty

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

In all cases in which one or more lesser included offenses are submitted to the jury, whether charged or not, the court has a sua sponte duty to instruct on the applicable procedures. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555-557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of greater offense, must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309-310 [52 Cal.Rptr.2d 282, 914 P.2d 832] [duty to instruct that jury cannot convict of a lesser included offense unless it has concluded that defendant is not guilty of the greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809] [duty to give jury opportunity to render a verdict of partial acquittal on a greater

offense], clarified in *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [no duty to inquire about partial acquittal in absence of indication jury may have found defendant not guilty of greater offense].**)**

~~The procedure outlined in this instruction is disfavored.~~ In *Stone v. Superior Court, supra,* 31 Cal.3d at p. 519, the Supreme Court suggested that the trial court provide the jury with verdict forms of guilty/not guilty on each of the charged and lesser included offenses. The court later referred to this "as a judicially declared rule of criminal procedure." (*People v. Kurtzman* (1988) 46 Cal.3d 322, 32~~8~~9 [250 Cal.Rptr. 244, 758 P.2d 572].) However, this is not a mandatory procedure. *(Ibid.)* If the court chooses to follow the procedure suggested in *Stone,* the court should give CALCRIM No. 3517 in place of this instruction.

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

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

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

AUTHORITY

- Lesser Included Offenses—Duty to Instruct ▸ Pen. Code, § 1159; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094].

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

Secondary Sources

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

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

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

RELATED ISSUES

Duty to Instruct on Lesser

The court has a **sua sponte** duty to instruct "on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation] but not when there is no evidence that the offense was less than that charged. [Citations.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.] Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154–155 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Acquittal of Greater Does Not Bar Retrial of Lesser

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

Lesser Included Offenses Barred by Statute of Limitations

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

Conviction of Greater and Lesser

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

Instruction No.	Commentator	Summary of Comment	Committee Response
890	Michael P. Judge Janice Fukai Los Angeles County Public Defender's Office	The proposed changes on the Bench Notes are problematic. The revisions would delete the paragraph stating that "[t]he court has a sua sponte duty to give a *Mayberry* consent instruction if the defense is supported by substantial evidence and is consistent with the defense raised at trial." Consequently, the entire paragraph included below would be deleted. The deletion of this paragraph would make it substantially more difficult for the defense to obtain a *Mayberry* consent instruction. The court has a sua sponte duty to give a *Mayberry* consent instruction if the defense is supported by substantial evidence and is consistent with the defense raised at trial. (*People v. May* (1989) 213 Cal.App.3d 118, 124-125 [261 Cal.Rptr. 502]; see *People v. Mayberry* (1975) 15 Cal.3d 143 [125 Cal.Rptr. 745, 542 P.2d 1337]; see also CALCRIM No. 1000, Rape or Spousal Rape by Force, Fear, or Threats [alternative paragraph on reasonable and actual belief in consent].) Additionally, the modification would delete the paragraph quoted below which states that the court has a sua sponte duty to instruct on the sex offense or other offense alleged. The court has a sua sponte duty to instruct on the sex offense or offense alleged. (*People v. May* (1989) 213 Cal.App.3d 118, 129 [261 Cal.Rptr. 502].) In the blanks, specify the sex offense or offenses that the defendant is charged with intending to commit. Included sex offenses are: rape (Pen. Code, § 261); or al copulation (Pen.	The committee agrees to restore the two deleted paragraphs on instructional duty and the references to the secondary sources.

Instruction No.	Commentator	Summary of Comment	Committee Response
		Code, § 288a [including in-concert offense]); sodomy (Pen. Code, § 286 [including in-concert offense]); sexual penetration (Pen. Code, § 289); rape, spousal rape, or sexual penetration in concert (Pen. Code, § 264.1); and lewd or lascivious acts (Pen. Code, § 288). (See Pen. Code, § 220.) Give the appropriate instructions on the offense or offenses alleged. This paragraph would instead be replaced with the following paragraph: The court should also give CALCRIM Nos. 1700 and 1701 on burglary, as well as the appropriate CALCRIM instruction on the target crime charged pursuant to Penal Code section 220. This change is also problematic. Changing the mandate of the instruction on the court from "[t]he court has a sua sponte duty to instruct on the sex offense or offense alleged," to "the court should also give..." will inevitably allow trial courts to challenge or refuse to give instructions necessary for a fair trial. Consequently, the proposed deletion of both of these paragraphs should be challenged. The proposed changes would also delete mention of 6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, Crimes Against the Person, § 142.11 (Matthew Bender) as a reference. The deletion is probably prompted by the fact that Lexis rather than West publishes this legal manual. It would be helpful to continue to list this resource for Lexis users who may not have	

Instruction No.	Commentator	Summary of Comment	Committee Response
		access to *Witkin*.	
1144	Michael P. Judge Janice Fukai Los Angeles County Public Defender's Office	The proposed revision of CALCRIM 1144 contains four paragraphs which convey inaccurate legal requirements. *(1) The proposed revision to paragraph 2A reads:* "The defendant was the (parent/ [or] guardian) in control of a minor who was (18/14) years old at the time and the defendant permitted that minor to pose or model or assist others to pose or model, alone or with others;" It is suggested that following language be substituted for paragraph 2A: "The defendant was the (parent/ [or] guardian) in control of a minor who was <u>under</u> (18/14) years old at the time and the defendant permitted that minor to pose or model or assist others to pose or model, alone or with others;" *(2) The proposed revision to paragraph 5 reads:* "The defendant knew, or reasonably should have known, that the minor was under (18/14) years of age; It is suggested that following language be substituted for paragraph 5: "The defendant knew, or reasonably should have known <u>based on any facts in his/her possession</u>, that the minor was under (18/14) years of age;" (Pen. Code § 311.4, subd. (b) ["while in possession	The committee agrees to insert the word "under" in element 2A and agrees to clarify in element 5 that the defendant's knowledge must be based on facts of which he or she is aware. It disagrees with the remaining suggestion because it believes the suggested addition of "at the time of its making" is ambiguous in the context and unnecessary.

Instruction No.	Commentator	Summary of Comment	Committee Response
		of any facts on the basis of which he or she should reasonably know that the person is a minor. . . ."].) *(3) The proposed revision to the paragraph which reads:* "*Matter* means any representation of information, data or image, including any (film/filmstrip/photograph/ negative/slide/photocopy/videotape/video laser disc/computer hardware or software/computer floppy disk/data storage medium/CD-ROM/computer- generated equipment/ [or] computer-generated image that contains any film or filmstrip). For the purpose of this instruction matter does not include material in which all of the persons depicted under the age of 18 are legally emancipated/ [or] that only depicts lawful conduct between spouses).]" It is suggested that following language be substituted for foregoing paragraph by separating the second sentence from the paragraph and adding a paragraph 6, which states: "6. The minor under age 18 years old at the time was not legally emancipated/ [or] was not married." *(4) The proposed revision to the paragraph reads:* "[*Use for commercial purposes* includes intending to trade the *matter* depicting *sexual conduct* for a *commercial purpose* at some point in the future. A *commercial purpose* does not have to include	

Instruction No.	Commentator	Summary of Comment	Committee Response
		financial gain.]" It is suggested that following language be substituted for foregoing paragraph: "[*Use for commercial purposes* includes intending to trade the *matter* depicting *sexual conduct* at the time of its making for a *commercial purpose* at some point in the future. A *commercial purpose* does not have to include financial gain.]" (*People v. Cochran* (2002) 28 Cal.4th 396, 405, ["focuses less on evidence of a defendant's actual marketing of pornography in a profitmaking venture and more on a defendant's intent to trade it to the public at the time he is making the pornographic product"].)	
1170	Michael P. Judge Janice Fukai Los Angeles County Public Defender's Office	*The current version of CALCRIM 1170, paragraph (3) states:* "3. The de fendant a ctually k new (he/she) had a duty to register as a sex o ffender u nder P enal C ode section 290 [within f ive w orking days of (his/her) bi rthday] wherever (he/she) resided;" *The proposed revision of CALCRIM 1170, paragraph (3) reads:* "3. The de fendant a ctually k new (he/she) ha d a d uty unde r *Penal*	Although the committee is not convinced that "wherever (he/she) resided in California" fails to describe a specific address, it decided to redraft the language to eliminate any potential ambiguity.

Instruction No.	Commentator	Summary of Comment	Committee Response
		Code section 290 to register as a sex offender *(living at _____<insert specific address in California>/ [or] wherever (he/she) resided in California [and that he had to register within five working days of _____<insert triggering event specified in Penal Code section 290(b)>].*" The proposed revision of CALCRIM 1170, paragraph (3) is erroneous. Specifically, the inclusion of two conditions – i.e., "living at _____<insert specific address in California>" and "[or] wherever (he/she) resided in California" – is vague, confusing, and inaccurate. The *Cohens* and *LeCorno* decisions require proof that the defendant had actual knowledge of his duty to register at a specific address, not a "wherever" address. (*People v. Cohens* (2009) 178 Cal.App.4th 1442, 101 Cal.Rptr.3d 289, 297 ["Accordingly, the jury should have been instructed that the People had to prove that defendant had actual knowledge of his duty to register the Frederick address in particular." [¶] "Thus, the modified CALCRIM No. 1170 instruction given to the jury was erroneous because it did not tell the jury that the prosecution had to prove defendant had actual knowledge of his duty to register the Frederick address. . . ."]; and *People v. LeCorno* (2003) 109 Cal.App.4th 1058, 1068-1069 ["It is nonsensical to say that in order to purposefully fail to register, defendant must have	

Instruction No.	Commentator	Summary of Comment	Committee Response
		knowledge only of an abstract duty to register, but that he need not know what that means or how it applies to his circumstances. If defendant did not know that he had become a resident of San Mateo and therefore was required to register there, it hardly matters that he was aware that there was a duty to register under other circumstances. While defendant admittedly knew there was a duty to register-somewhere-he did register, in San Francisco. Defendant was convicted of failing to register a second time, in San Mateo; what matters is whether he knew he was supposed to register there."].) *Set forth below is the suggested substitute language for CALCRIM 1170, paragraph (3):* "3. The defendant actually knew (he/she) had a duty under *Penal Code section 290* to register as a sex offender *(living at* _____*<insert specific address in California> [and that he had to register within five working days of* _____*<insert triggering event specified in Penal Code section 290(b)>].*"	
1301	Hon. Kent Hamlin, Fresno County	In reviewing the proposed additions and amendments to CALCRIM in this revision cycle, I offer two suggestions: (1) The new language in 1301 needs work. The problem is that the language chosen does not clearly say what the committee intends to	The committee agrees with this comment and has made a corresponding revision.

Instruction No.	Commentator	Summary of Comment	Committee Response
		communicate by the proposed revision. This can be corrected by italicizing "course of conduct" in the paragraph defining "*harassing,*" breaking that paragraph in two parts, so the next paragraph reads: "A *course of conduct* means two or more acts occurring over a period of time, however short, demonstrating a continuous purpose." Then the new language needs to be changed to reflect that *any* conduct which is constitutionally protected cannot give rise to a conviction. The current language raises an ambiguity and suggests that only "*harassing*" conduct can be constitutionally protected, because of the use of the term "course of conduct" in the new paragraph, whether italicized or not. I would suggest: "A person is not guilty of stalking if (his/her) conduct is constitutionally protected. _____ is a constitutionally protected activity."	
2370	Michael P. Judge Janice Fukai Los Angeles County Public Defender's Office	The proposed language clarifies that the prosecution carries the burden of proving that the possession of marijuana was not for medical purposes; and if the prosecution fails to meet this burden, then the jury must find the defendant not guilty. However, there is a significant problem that the proposed changes do not address. Although this jury instruction does include the Compassionate Use Defense, it fails to include the collective/cooperative defense. Under the Medical Marijuana Program Act, Health & Safety Code section 11362.775 provides immunity to qualified patients who associate within the State of California collectively or cooperatively in order to	This comment goes beyond the scope of the changes that circulated for public comment and will be discussed by the committee at a future meeting.

Instruction No.	Commentator	Summary of Comment	Committee Response
		cultivate medical marijuana for medical purposes. The California Legislature expressly stated that it intended to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (*People* v. *Urziceanu* (2005) 132 Cal.App.4th 747, 786 (citing Stats. 2003, Ch. 875, subds. (b)(3), (c).) The Court of Appeal also found that Health & Safety Code section 11362.775 provided a new affirmative defense allowing collective cultivation of marijuana and expanded this defense to penal code sections not covered by the Compassionate Use Act. (*Id.* at p. 786). Although there is support for this defense both statutorily and by case law, there is no mention of this defense in CALCRIM 2370.	
2510-2512	Robert Turner ASO II Research & Evaluation Division Superior Court of California County of Sacramento	The Superior Court of California, County of Sacramento has reviewed the proposed jury instructions for CALCRIM and has the following comment to submit related to the modification of the Use Notes of CALCRIM 2510-2512: The proposed modification is somewhat confusing in that it deletes the language regarding the requisite intent as "general intent" and advises that the court has a sua sponte duty to instruct on the union of act and specific intent or mental state. Although unlawful possession of a firearm is a "general intent" crime, "knowledge" is an element of the offense. (People v Spirlin (200) 81 Cal. App. 4th 119; People v Bray (1975) 52 Cal. App. 3d 494) The proposed modification to the use notes advises that CALCRIM 250 should not be used and that CALCRIM 251 should be used. The current use notes for CALCRIM 2510-2512	The CALCRIM instructions generally don't use the term "specific intent." Instead they state what must be specifically intended. Nevertheless, the committee acknowledges that the term may be helpful to jurists reading the bench notes and therefore agrees to make a corresponding clarification.

Instruction No.	Commentator	Summary of Comment	Committee Response
		conflicts with the use notes for CALCRIM 250. The modification reconciles the conflict in the use notes. It might be clearer if the use note or the instruction included the language indicating that "a requirement of knowledge does not mean that the act must be done with any specific intent." (CALJIC 1.21)	
CALCRIM	Mike Roddy Executive Officer Superior Court of California County of San Diego	Agree with proposed changes. No additional comments.	No response required.
CALCRIM	Orange County Bar Association	Agree with all proposed changes.	No response required.