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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 29, 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 M. Margulies, Chair

Agenda Item Type
Action Required

Effective Date
October 29, 2010

Date of Report
August 26, 2010

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Executive Summary

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

Recommendation

The advisory committee recommends that the Judicial Council, effective October 29, 2010, approve for publication under rule 2.1050 of the California Rules of Court the criminal jury instructions prepared by the committee. On Judicial Council approval, the revised instructions will be officially published in the new 2011 edition of the *Judicial Council of California Criminal Jury Instructions (CALCRIM)*.

A table of contents and the proposed revisions to the criminal jury instructions are attached at pages 7–187.

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 April 23, 2010, meeting.

Rationale for Recommendation

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

The advisory committee prepared the 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 revised instructions upon receiving council approval.

There are 41 instructions in this proposal, including CALCRIM Nos.: 101, 520, 521, 571, 593, 604, 821, 823, 875, 945, 983, 1170, 1180, 1215, 1600, 1700, 1750, 1806, 1862, 1863, 2140, 2141, 2300, 2302, 2303, 2304, 2321, 2350, 2352, 2360, 2361, 2375, 2376, 2380, 2390, 2410, 2440, 2748, 3450, 3516, 3550.

The instructions were revised 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.

The committee revised CALCRIM No. 101, *Cautionary Admonitions: Before, During, or After Jury Is Selected* in response to suggestions from committee members. To avoid redundancy, the

[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."

committee deleted an admonition found in other instructions. It also streamlined some of the language and expanded the description of persons with whom jurors may not communicate during trial to include anyone associated with a defendant, witness, or lawyer.

The committee revised CALCRIM No. 520, *Murder With Malice Aforethought,* including a revision to the title, to clarify that it applies to first or second degree murder and to provide options for use when second degree murder is the only possible murder verdict, as well as a special direction to jurors when they must determine the degree of murder. Corresponding changes were made to CALCRIM No. 521, *Murder: Degrees*, for consistency and clarity. The committee made further corresponding changes to CALCRIM Nos. 1600, *Robbery,* and 1700, *Burglary*, because those crimes have two degrees as well.

The committee added a definition of "residence" to CALCRIM No. 1170, *Failure to Register as Sex Offender,* in response to the new definition provided in Penal Code section 290.011(g).

In response to suggestions from a judge and a committee member, the committee conformed the definition of criminal negligence in CALCRIM No. 821, *Child Abuse Likely to Cause Great Bodily Harm or Death,* to that in CALCRIM No. 823, *Child Abuse (Misdemeanor),* to avoid confusion when jurors are instructed on both crimes.

In response to a comment from a judge, the committee added an extra element to CALCRIM No. 1180, *Incest,* to comply with an amendment to Penal Code section 285 requiring that the victim be at least 14 years old.

In response to the Supreme Court's decision in *People v. Ceja* (2010) 49 Cal.4th 1 [conviction of receiving stolen property not possible if defendant convicted of theft], the committee revised CALCRIM No. 1750, *Receiving Stolen Property,* and CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited,* to ensure that jurors receive proper instruction on this issue, including clarifying bench notes.

An anonymous CALCRIM user pointed out that the language of CALCRIM No. 2410, *Possession of Controlled Substance Paraphernalia,* uses the broader term "consume" when Health and Safety Code section 11364 uses the term "smoking." The committee agreed it was better to use the statutory term and revised the instruction accordingly.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CALCRIM* circulated for comment from June 22, 2010, through August 6, 2010. The committee received and evaluated 33 comments and revised some of the instructions as a result. The committee withdrew the proposed changes to two instructions, CALCRIM Nos. 571, *Voluntary Manslaughter: Imperfect Self-Defense* and 3454, *Sexually Violent Predator,* in response to comments. A chart providing summaries of all comments received and the committee's responses is attached at pages 188-218.

There were two requests for the same additional instruction beyond the scope of the proposed revisions. The committee will consider those requests in its next release cycle.

Of the substantive comments, the three instructions that generated the most controversy were CALCRIM No. 593, *Misdemeanor Vehicular Manslaughter,* CALCRIM No. 1215, *Kidnapping,* and CALCRIM No. 3450, *Insanity: Determination, Effect of Verdict.*

CALCRIM No. 593: Misdemeanor Vehicular Manslaughter

This instruction as originally drafted was potentially ambiguous when read aloud regarding whether "ordinary negligence" is required if the defendant committed a misdemeanor or an infraction while driving. In revising the instruction to resolve the potential ambiguity, a committee member suggested that ordinary negligence was required for all violations of Penal Code section 192(c)(2). The case law, however, suggests, but does not compel, the conclusion that ordinary negligence is also required in case of a misdemeanor or infraction, so the committee decided to provide both options and leave the matter to the discretion of the trial court, with an explanatory bench note.

A criminal appellate specialist provided a lengthy comment in favor of including the ordinary negligence requirement for infractions, misdemeanors, and otherwise lawful acts done in an unlawful manner. The commentator acknowledged that there was neither Supreme Court authority nor an uncontradicted line of authority from the Court of Appeal, but argued that the trend of case law and weight of authority was sufficient for the committee to take a stand on this issue.

While it is true that the "ordinary negligence" requirement is logical and finds some support in the law, the committee believes that until there is direct authority on this point, it is bound to point out the ambiguity and leave it to the court's discretion.

CALCRIM No. 1215: Kidnapping

The committee received mutually contradictory comments from two groups of criminal defense attorneys to revisions made in response to *People v. Bell* (2009) 179 Cal.App.4th 428, 440–441, regarding the "substantial distance" requirement.

One group agreed that the proposed revisions conformed to the Court of Appeal's decision in *Bell*, but offered some suggestions for further improvement by deleting a bracket, which the committee adopted. The other group contended that deleting the separate paragraph devoted to the substantial distance requirement was error.

As the first group of criminal defense attorneys noted, the *Bell* case found that "CALCRIM No. 1215 should not be given in its current form because it is misleading. As currently phrased, the incidental movement paragraph operates as a threshold or gatekeeper determination of guilt or innocence. It states:

> In order for the defendant to be guilty of kidnapping, the other person must be moved or made to move a distance beyond that merely incidental to the commission of [the associated crime]." (*Id at 440.*)

The court in *Bell* then specifically stated how the CALCRIM language must be revised by making the incidental movement paragraph a part of the instruction on substantial distance. (*Id at 440-441*). This change is also consistent with the requirements of *People v. Martinez* (1999) 20 Cal.4th 225, 237, which is quoted in *Bell.* Accordingly, the committee concluded it was bound to follow the precise directive in *Bell.*

CALCRIM No. 3450, Insanity: Determination, Effect of Verdict

A judge pointed out that the language of the instruction was not consistent with the definition of insanity in Penal Code section 25(b), which provides that a defendant must be "incapable of knowing or understanding the nature and quality of his or her act." The instruction stated that the defendant "did not" know or understand. The commentator was concerned that as written, the instruction added the requirement of actual knowledge when the statute itself only requires being capable of knowing. The committee conformed the language of the instruction to the statute, but the change provoked two comments. A public defender stated that this change was erroneous because it "failed to track and convey the intended import and language of Penal Code section 25, subdivision (b) and *People v. Skinner* (1985) 39 Cal.3d 765." The committee disagreed with this comment because the new revision tracks the language of the Penal Code and the *Skinner* case stood for stating the requirement in the disjunctive, not the conjunctive, which the instruction already does by using the word "or" instead of "and."

A judge commented that the new revision improperly focused the jury's consideration on the defendant's capacity to know right from wrong, rather than on the defendant's mental state at the time, citing *People v. Kelly* (1973) 10 Cal.3d 565, 577. The committee disagreed with this comment, and notes that the *Kelly* case uses the word "capable" in discussing the trial court's necessary findings about the defendant's mental state. The committee concluded that being capable of knowing or understanding the nature and quality of an act is not at odds with describing the defendant's mental state at the time of the offense, be it permanent or temporary.

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 revised instructions are necessary to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee did not consider any alternative actions.

Implementation Requirements, Costs, and Operational Impacts

No significant implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will print a new edition and pay

royalties to the Administrative Office of the Courts (AOC). The official publisher will also make the new edition 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 revised CALCRIM instructions, at pages 7–187
2. Chart of comments, at pages 188–218

Table of Contents
CALCRIM Instructions With Proposed Revisions

Instruction Number	Instruction Title
1863	Defense to Theft or Robbery: Claim of Right
2140, 2141	Failure to Perform Duty Following Accident; Death or Injury Offense
2300 et. seq.	Controlled Substance Series
2410	Possession of Controlled Substance Paraphernalia
2440	Maintaining a Place for Controlled Substance Sale or Use
2748	Possession of Controlled Substance or Paraphernalia in Penal Institution
3450	Insanity: Determination, Effect of Verdict
3516	Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited
3550	Pre-Deliberation Instructions

101. Cautionary Admonitions: Jury Conduct (Before, During, 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, on the Internet, or by any other means of communication. You must not talk about these things with the other jurors either, until you begin deliberating. ~~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 _____]<*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~~a defendant, witness, ~~or~~ lawyer, or anyone associated with them ~~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, April 2010

BENCH NOTES

Instructional Duty

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

520. First or Second Degree Murder With Malice Aforethought (Pen. Code, § 187)

The defendant is charged [in Count __] with murder [in violation of Penal Code section 187].

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

1. **The defendant committed an act that caused the death of (another person/ [or] a fetus);**

[AND]

2. **When the defendant acted, (he/she) had a state of mind called malice aforethought(;/.)**

<Give element 3 when instructing on justifiable or excusable homicide.>
[AND

3. **(He/She) killed without lawful (excuse/[or] justification).]**

There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.

The defendant acted with *express malice* if (he/she) unlawfully intended to kill.

The defendant acted with *implied malice* if:

1. **(He/She) intentionally committed an act;**

2. **The natural and probable consequences of the act were dangerous to human life;**

3. **At the time (he/she) acted, (he/she) knew (his/her) act was dangerous to human life;**

AND

4. **(He/She) deliberately acted with conscious disregard for (human/ [or] fetal) life.**

Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time.

[It is not necessary that the defendant be aware of the existence of a fetus to be guilty of murdering that fetus.]

[A *fetus* is an unborn human being that has progressed beyond the embryonic stage after major structures have been outlined, which occurs at seven to eight weeks of development.]

[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 of 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.]

[(A/An) _____*<insert description of person owing duty>* **has a legal duty to (help/care for/rescue/warn/maintain the property of/** _____ *<insert other required action[s]>***)** _____*<insert description of decedent/person to whom duty is owed>***.**

If you conclude that the defendant owed a duty to _____ *<insert name of decedent>***, and the defendant failed to perform that duty, (his/her) failure to act is the same as doing a negligent or injurious act.]**

<Give the following bracketed paragraph if the second degree is the only possible degree of the crime for which the jury may return a verdict>
[If you find the defendant guilty of murder, it is murder of the second degree.]

<Give the following bracketed paragraph if there is substantial evidence of first degree murder>

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

New January 2006; Revised August 2009

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the first two elements of the crime. If there is sufficient evidence of excuse or justification, the court has a **sua sponte** duty to include the third, bracketed element in the instruction. (*People v. Frye* (1992) 7 Cal.App.4th 1148, 1155–1156 [10 Cal.Rptr.2d 217].) The court also has a **sua sponte** duty to give any other appropriate defense instructions. (See CALCRIM Nos. 505–627, and CALCRIM Nos. 3470–3477.)

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].) If the evidence indicates that there was only one cause of death, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the "substantial factor" instruction and definition in the second bracketed causation paragraph. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].) If there is an issue regarding a superseding or intervening cause, give the appropriate portion of CALCRIM No. 620, *Causation: Special Issues*.

If the prosecution's theory of the case is that the defendant committed murder based on his or her failure to perform a legal duty, the court may give the bracketed portion that begins, "(A/An) _____<*insert description of person owing duty*> has a legal duty to." Review the Bench Notes to CALCRIM No. 582, *Involuntary Manslaughter: Failure to Perform Legal Duty—Murder Not Charged*.

~~***Related Instructions***~~

If the defendant is charged with first degree murder, give this instruction and CALCRIM No. 521, *Murder: Degrees*. If the defendant is charged with second degree murder, no other instruction need be given.

If the defendant is also charged with first or second degree felony murder, instruct on those crimes and give CALCRIM No. 548, *Murder: Alternative Theories*.

~~If there is an issue regarding a superseding or intervening cause, give the appropriate portion of CALCRIM No. 620, *Causation: Special Issues*.~~

AUTHORITY

- Elements ▸ Pen. Code, § 187.
- Malice ▸ Pen. Code, § 188; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1217–1222 [264 Cal.Rptr. 841, 783 P.2d 200]; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103–105 [13 Cal.Rptr.2d 864, 840 P.2d 969]; *People v. Blakeley* (2000) 23 Cal.4th 82, 87 [96 Cal.Rptr.2d 451, 999 P.2d 675].
- Causation ▸ *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274].
- Fetus Defined ▸ *People v. Davis* (1994) 7 Cal.4th 797, 814–815 [30 Cal.Rptr.2d 50, 872 P.2d 591]; *People v. Taylor* (2004) 32 Cal.4th 863, 867 [11 Cal.Rptr.3d 510, 86 P.3d 881].
- Ill Will Not Required for Malice ▸ *People v. Sedeno* (1974) 10 Cal.3d 703, 722 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Breverman* (1998) 19 Cal.4th 142, 163 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- This Instruction Upheld ▸ *People v. Genovese* (2008) 168 Cal.App.4th 817, 831 [85 Cal.Rptr.3d 664].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 91–97.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04, Ch. 142, *Crimes Against the Person,* § 142.01 (Matthew Bender).

LESSER INCLUDED OFFENSES

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

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

Gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5(a)) is not a lesser included offense of murder. (*People v. Sanchez* (2001) 24 Cal.4th 983, 988–992 [103 Cal.Rptr.2d 698, 16 P.3d 118].) Similarly, child abuse homicide (Pen. Code, § 273ab) is not a necessarily included offense of murder. (*People v. Malfavon* (2002) 102 Cal.App.4th 727, 744 [125 Cal.Rptr.2d 618].)

RELATED ISSUES

Causation—Foreseeability

Authority is divided on whether a causation instruction should include the concept of foreseeability. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 362–363 [43 Cal.Rptr.2d 135]; *People v. Temple* (1993) 19 Cal.App.4th 1750, 1756 [24 Cal.Rptr.2d 228] [refusing defense-requested instruction on foreseeability in favor of standard causation instruction]; but see *People v. Gardner* (1995) 37 Cal.App.4th 473, 483 [43 Cal.Rptr.2d 603] [suggesting the following language be used in a causation instruction: "[t]he death of another person must be foreseeable in order to be the natural and probable consequence of the defendant's act"].) It is clear, however, that it is error to instruct a jury that foreseeability is immaterial to causation. (*People v. Roberts* (1992) 2 Cal.4th 271, 315 [6 Cal.Rptr.2d 276, 826 P.2d 274] [error to instruct a jury that when deciding causation it "[w]as immaterial that the defendant could not reasonably have foreseen the harmful result"].)

Second Degree Murder of a Fetus

The defendant does not need to know a woman is pregnant to be convicted of second degree murder of her fetus. (*People v. Taylor* (2004) 32 Cal.4th 863, 868 [11 Cal.Rptr.3d 510, 86 P.3d 881] ["[t]here is no requirement that the defendant specifically know of the existence of each victim."]) "[B]y engaging in the conduct he did, the defendant demonstrated a conscious disregard for all life, fetal or otherwise, and hence is liable for all deaths caused by his conduct." (*Id.* at p. 870.)

521. First Degree 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 paragraph 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 completing 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 requirements for second degree murder based on express or implied malice are explained in CALCRIM No. 520, *First or Second Degree Murder With Malice Aforethought*.]

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, April 2010

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 unbracketed~~ paragraph~~s~~ 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, 139 P.3d 492].
- 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].)

593. Misdemeanor Vehicular Manslaughter (Pen. Code § 192(c)(2))

<If misdemeanor vehicular manslaughter—ordinary negligence is a charged offense, give alternative A; if this instruction is being given as a lesser included offense, give alternative B.>

<Introductory Sentence: Alternative A—Charged Offense>
[The defendant is charged [in Count __] with vehicular manslaughter [in violation of Penal Code section 192(c)(2)].]

<Introductory Sentence: Alternative B—Lesser Included Offense>
[Vehicular manslaughter with ordinary negligence is a lesser crime than (gross vehicular manslaughter while intoxicated/ [and] gross vehicular manslaughter/ [and] vehicular manslaughter with ordinary negligence while intoxicated.)]

To prove that the defendant is guilty of vehicular manslaughter with ordinary negligence, the People must prove that:

<If the court concludes that negligence must established only for a ~~only a~~ "lawful act, committed in an unlawful manner," and not for a misdemeanor or infraction (see Bench Notes) ~~requires negligence,~~ give the following:>

1. **While (driving a vehicle/operating a vessel), the defendant committed (~~an~~ ~~otherwise~~ lawful act with ordinary negligence/ [or] a misdemeanor[,]/ [or] an infraction)**

2. **The (misdemeanor[,]/ [or] infraction[,]/ [or] negligent act) was dangerous to human life under the circumstances of its commission;**

AND

3. **The (misdemeanor[,]/ [or] infraction[,]/ [or] negligent act) caused the death of another person.**

<If the court concludes that negligence must be established for a misdemeanor or infraction, as well as for "a lawful act, committed in an unlawful manner," ~~require negligence,~~ give the following:>

1. **While (driving a vehicle/operating a vessel), the defendant**

committed (a lawful act in an unlawful manner/ [or] a misdemeanor[,]/ [or] an infraction);

2. **The (otherwise lawful act/ [or] misdemeanor[,]/ [or] infraction) was dangerous to human life under the circumstances of its commission;**
3. **The defendant committed the (otherwise lawful act/ [or] misdemeanor[,]/ [or] infraction) with ordinary negligence.**
4. **The (otherwise lawful act/ [or] misdemeanor[,]/ [or] infraction) caused the death of another person.**

[The People allege that the defendant committed the following (misdemeanor[s]/ [and] infraction[s]): _____ <*insert misdemeanor[s]/ infraction[s]*>**.**

Instruction[s] __ tell[s] you what the People must prove in order to prove that the defendant committed _____ <*insert misdemeanor[s]/infraction[s]*>**.]**

[The People [also] allege that the defendant committed the following otherwise lawful act[s] with ordinary negligence: _____ <*insert act[s] alleged*>**.]**

[The difference between this offense and the charged offense of gross vehicular manslaughter is the degree of negligence required. I have already defined gross negligence for you.]

***Ordinary negligence*[, on the other hand,] is the failure to use reasonable care to prevent reasonably foreseeable harm to oneself or someone else. A person is negligent if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).**

[A person facing a sudden and unexpected emergency situation not caused by that person's own negligence is required only to use the same care and judgment that an ordinarily careful person would use in the same situation, even if it appears later that a different course of action would have been safer.]

[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 of 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 People allege that the defendant committed the following (misdemeanor[s][,]/ [and] infraction[s][,]/ [and] lawful act[s] that might cause death): _____ <*insert alleged predicate acts when multiple acts alleged*>**. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant committed at least one of these alleged (misdemeanors[,]/ [or] infractions[,]/ [or] otherwise lawful acts that might cause death) and you all agree on which (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) the defendant committed.]**

New January 2006; Revised December 2008

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 specify the predicate misdemeanor(s) or infraction(s) alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].) In element 2, instruct on either theory of vehicular manslaughter (misdemeanor/infraction or lawful act committed with negligence) as appropriate. The court **must** also give the appropriate instruction on the elements of the predicate misdemeanor or infraction.

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].) If the evidence indicates that there was only one cause of death, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v.*

Gary (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, harmless error if was required].) A unanimity instruction is included in a bracketed paragraph for the court to use at its discretion. In the definition of ordinary negligence, the court should use the entire phrase "harm to oneself or someone else" if the facts of the case show a failure by the defendant to prevent harm to him- or herself rather than solely harm to another.

Authority is ambiguous about whether the requirement of negligence applies only to the commission of an otherwise lawful act or also to an infraction or misdemeanor. (See *People v. Wells* (1996) 12 Cal.4th 979, 987 [50 Cal.Rptr.2d 699, 911 P.2d 1374]; *People v. Burroughs* (1984) 35 Cal.3d 824, 835 [201 Cal.Rptr. 319, 678 P.2d 894], overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr. 2d 451, 999 P.2d 675]; *In re Dennis B.* (1976) 18 Cal.3d 687, 696 [135 Cal.Rptr. 82, 557 P.2d 514]; *People v. Mitchell* (1946) 27 Cal.2d 678, 683-684 [166 P.2d 10]; *People v. Pearne* (1897) 118 Cal. 154 [50 P. 376]; *People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr. 2d 803].) This instruction provides language for either alternative. The court must decide which one is legally correct.

If there is sufficient evidence and the defendant requests it, the court should instruct on the imminent peril/sudden emergency doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) Give the bracketed sentence that begins with "A person facing a sudden and unexpected emergency."

AUTHORITY

- Vehicular Manslaughter Without Gross Negligence ▸ Pen. Code, § 192(c)(2).
- Vehicular Manslaughter During Operation of a Vessel Without Gross Negligence ▸ Pen. Code, § 192.5(b).
- Unlawful Act Dangerous Under the Circumstances of Its Commission ▸ *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374].
- Specifying Predicate Unlawful Act ▸ *People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688].
- Elements of Predicate Unlawful Act ▸ *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].

- Unanimity Instruction ‣ *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481[76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].
- Ordinary Negligence ‣ Pen. Code, § 7, subd. 2; Rest.2d Torts, § 282.
- Causation ‣ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Imminent Peril/Sudden Emergency Doctrine ‣ *People v. Boulware* (1940) 41 Cal.App.2d 268, 269 [106 P.2d 436].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 238–245.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04, Ch. 142, *Crimes Against the Person,* § 142.02[1][a], [2][c], [4] (Matthew Bender).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 592, *Gross Vehicular Manslaughter*.

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

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

If you conclude the defendant acted in complete (self-defense/ [or] defense of another), (his/her) action was lawful and you must find (him/her) not guilty of any crime. The difference between complete (self-defense/ [or] defense of another) and imperfect (self-defense/ [or] defense of another) depends on whether the defendant's belief in the need to use deadly force was reasonable.

The defendant acted in imperfect (self-defense/ [or] defense of another) if:

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

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

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

AND

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

BUT

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

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

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

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

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

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

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

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

New January 2006; Revised August 2009

BENCH NOTES

Instructional Duty

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

Perfect Self-Defense

Most courts hold that an instruction on imperfect self-defense **is required** in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant's belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. (See *People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86 [31 Cal.Rptr.2d 475], overruled in part in *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675]; see also *People v. De Leon* (1992) 10 Cal.App.4th 815, 824 [12 Cal.Rptr.2d 825].) The court in *People v. Rodriguez* disagreed, however, and found that an imperfect self-defense instruction was not required sua sponte on the facts of the case where the

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

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

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

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

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

AUTHORITY

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

Secondary Sources

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

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

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

RELATED ISSUES

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

605–619. Reserved for Future Use

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~~was 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 (great bodily harm/ [or] death) ~~serious injury~~ is ~~great~~high.

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

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 harm* 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 is a gross departure from the way an ordinarily careful person would act in the same situation;

2. The person's acts amount to disregard for human life or indifference to the consequences of his or her acts;

AND

3. A reasonable person would have known that acting in that way would naturally and probably result in harm to others.

~~**[*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, April 2010

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*.

823. Child Abuse (Misdemeanor) (Pen. Code, § 273a(b))

The defendant is charged [in Count __] with child abuse [in violation of Penal Code section 273a(b)].

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

<Alternative 1A—inflicted pain>

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

<Alternative 1B—caused or permitted to suffer pain>

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

<Alternative 1C—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 1D—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~~was endangered;]

<Give element 2 when giving alternative 1B, 1C, or 1D.>

[AND]

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

<Give element 2/3 when instructing on parental right to discipline.>

[AND

(2/3). 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.

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.]

[*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 is a gross departure from the way an ordinarily careful person would act in the same situation;

2. The person's acts amount to disregard for human life or indifference to the consequences of his or her acts;

AND

3. A reasonable person would have known that acting in that way would naturally and probably result in harm to others.

New January 2006; Revised August 2006, August 2009

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 Cal.Rptr.2d 33].) Give bracketed element 2/3 and CALCRIM No. 3405, *Parental Right to Punish a Child*.

Give alternative 1A if it is alleged that the defendant directly inflicted unjustifiable physical pain or mental suffering. Give alternative 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 alternative 1C. Finally, give alternative 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(b).)

Give bracketed element 2 and the bracketed definition of "criminal negligence" if alternative 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 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(b); *People v. Burton* (2006) 143 Cal.App.4th 447, 453–457 [49 Cal.Rptr.3d 334]; *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].
- Willfully Defined ▸ Pen. Code, § 7(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, 358 [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, §§ 159–165.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.13[1], 142.23[7] (Matthew Bender).

COMMENTARY

See Commentary to CALCRIM No. 821, *Child Abuse Likely to Produce Great Bodily Harm or Death*.

RELATED ISSUES

See the Related Issues section of CALCRIM No. 821, *Child Abuse Likely to Produce Great Bodily Harm or Death*.

824–829. Reserved for Future Use

875. Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury (Pen. Code, §§ 240, 245(a)(1)–(3), (b))

The defendant is charged [in Count __] with assault with (force likely to produce great bodily injury/a deadly weapon other than a firearm/a firearm/a semiautomatic firearm/a machine gun/an assault weapon/a .50 BMG rifle) [in violation of Penal Code section 245].

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

<Alternative 1A—force with weapon>

[1. The defendant did an act with (a deadly weapon other than a firearm/a firearm/a semiautomatic firearm/a machine gun/an assault weapon/a .50 BMG rifle) that by its nature would directly and probably result in the application of force to a person;]

<Alternative 1B—force without weapon>

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

1B. The force used was likely to produce great bodily injury;]

2. The defendant did that act willfully;

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

[AND]

4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon other than a firearm/with a firearm/with a semiautomatic firearm/with a machine gun/with an assault weapon/with a .50 BMG rifle) to a person(;/.)

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

[AND

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

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

[The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

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

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

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

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

[Voluntary intoxication is not a defense to assault.]

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

[A *deadly weapon* other than a firearm is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]

[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 *semiautomatic firearm* extracts a fired cartridge and chambers a fresh cartridge with each single pull of the trigger.]

[A *machine gun* is any weapon that (shoots/is designed to shoot/ [or] can readily be restored to shoot) automatically more than one shot by a single function of the trigger and without manual reloading.]

[An *assault weapon* includes _____ *<insert names of appropriate designated assault weapons listed in Pen. Code, §§ 12276 and 12276.1>***.]**

[A *.50 BMG rifle* is a center fire rifle that can fire a .50 BMG cartridge [and that is not an assault weapon or a machine gun]. A *.50 BMG cartridge* is a cartridge that is designed and intended to be fired from a center fire rifle and that has all three of the following characteristics:

1. **The overall length is 5.54 inches from the base of the cartridge to the tip of the bullet;**

2. **The bullet diameter for the cartridge is from .510 to, and including, .511 inch;**

AND

3. **The case base diameter for the cartridge is from .800 inch to, and including, .804 inch.]**

[The term[s] (*great bodily injury[,]/ deadly weapon other than a firearm[,]/ firearm[,]/ machine gun[,]/assault weapon[,]/* [and] *.50 BMG rifle)* (is/are) defined in another instruction to which you should refer.]

New January 2006; Revised June 2007, August 2009

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 of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 4 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give element 1A if it is alleged the assault was committed with a deadly weapon other than a firearm, firearm, semiautomatic firearm, machine gun, an assault weapon, or .50 BMG rifle. Give 1B if it is alleged that the assault was committed with force likely to produce great bodily injury. (See Pen. Code, § 245(a).)

Give the bracketed definition of "application or force and apply force" on request.

Give the relevant bracketed definitions 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.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

AUTHORITY

- Elements ▸ Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- To Have Present Ability to Inflict Injury, Gun Must Be Loaded Unless Used as Club or Bludgeon ▸ *People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3 [82 Cal.Rptr.2d 413, 971 P.2d 618].
- This Instruction Affirmed ▸ *People v. Golde* (2008) 163 Cal.App.4th 101, 122-123 [77 Cal.Rptr.3d 120].
- Assault Weapon Defined ▸ Pen. Code, §§ 12276, 12276.1.
- Semiautomatic Firearm Defined ▸ Pen. Code, § 12126(e).
- Firearm Defined ▸ Pen. Code, § 12001(b).
- Machine Gun Defined ▸ Pen. Code, § 12200.
- .50 BMG Rifle Defined ▸ Pen. Code, § 12278.
- Willful Defined ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Mental State for Assault ▸ *People v. Williams* (2001) 26 Cal.4th 779, 790 [111 Cal.Rptr.2d 114, 29 P.3d 197].
- Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 40–47.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault ▸ Pen. Code, § 240.

A misdemeanor brandishing of a weapon or firearm under Penal Code section 417 is not a lesser and necessarily included offense of assault with a deadly weapon. (*People v. Escarcega* (1974) 43 Cal.App.3d 391, 398 [117 Cal.Rptr. 595]; *People v. Steele* (2000) 83 Cal.App.4th 212, 218, 221 [99 Cal.Rptr.2d 458].)

945. Battery Against Peace Officer (Pen. Code, §§ 242, 243(b), (c)(2))

The defendant is charged [in Count __] with battery against a peace officer [in violation of Penal Code section 243].

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

1. **_____** *<Insert officer's name, excluding title>* **was a peace officer performing the duties of (a/an) _____** *<insert title of peace officer specified in Pen. Code, § 830 et seq.>***;**

2. **The defendant willfully [and unlawfully] touched _____** *<insert officer's name, excluding title>* **in a harmful or offensive manner;**

[AND]

3. **When the defendant acted, (he/she) knew, or reasonably should have known, that _____** *<insert officer's name, excluding title>* **was a peace officer who was performing (his/her) duties(;/.)**

<Give element 4 when instructing on felony battery against a peace officer.>

[AND

4. **_____***<insert officer's name, excluding title>* **suffered injury as a result of the touching(;/.)]**

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

[AND

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

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

<Do not give this paragraph when instructing on felony battery against a peace officer.>

[The slightest touching can be enough to commit a battery 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.]

<Give this definition when instructing on felony battery against a peace officer.>

[An *injury* is any physical injury that requires professional medical treatment. The question whether an injury requires such treatment cannot be answered simply by deciding whether or not a person sought or received treatment. You may consider those facts, but you must decide this question based on the nature, extent, and seriousness of the injury itself.]

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

[A person who is employed as a police officer by _____ *<insert name of agency that employs police officer>* **is a *peace officer*.]**

[A person employed by _____ *<insert name of agency that employs peace officer, e.g., "the Department of Fish and Game">* **is a *peace officer* if** _____ *<insert description of facts necessary to make employee a peace officer, e.g, "designated by the director of the agency as a peace officer">***.]**

[The duties of a _____ *<insert title of officer>* **include** _____ *<insert job duties>***.]**

[It does not matter whether _____ *<insert officer's name, excluding title>* **was actually on duty at the time.]**

[A _____ *<insert title of peace officer specified in Pen. Code, § 830 et seq.>* **is also performing the duties of a peace officer if (he/she) is in a police uniform and performing the duties required of (him/her) as a peace officer and, at the same time, is working in a private capacity as a part-time or casual private security guard or (patrolman/patrolwoman).]**

~~*<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>*~~

~~**[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]**~~

New January 2006; Revised August 2006, December 2008

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 of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 5, the bracketed words "and unlawfully" in element 2, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance is an issue, give ~~the bracketed paragraph on lawful performance and~~ the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. In addition, give CALCRIM No. 2672, *Lawful Performance: Resisting Unlawful Arrest With Force*, if requested.

Give the bracketed paragraph on indirect touching if that is an issue.

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)* If the alleged victim is a police officer, give the bracketed sentence that begins with "A person employed as a police

officer." If the alleged victim is another type of peace officer, give the bracketed sentence that begins with "A person employed by."

The court may give the bracketed sentence that begins, "The duties of a _____ <*insert title* . . .> include," on request. The court may insert a description of the officer's duties such as "the correct service of a facially valid search warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

Give the bracketed language about a peace officer working in a private capacity if relevant. (Pen. Code, § 70.)

AUTHORITY

- Elements ▸ Pen. Code, §§ 242, 243(b), (c)(2); see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- Peace Officer Defined ▸ Pen. Code, § 830 et seq.
- Willful Defined ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Physical Injury Defined ▸ Pen. Code, § 243(f)(5); *People v. Longoria* (1995) 34 Cal.App.4th 12, 17–18 [40 Cal.Rptr.2d 213].
- Least Touching ▸ *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 5.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.12 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault ▸ Pen. Code, § 240.
- Assault on Specified Victim ▸ Pen. Code, § 241(b).
- Battery ▸ Pen. Code, § 242.

- Misdemeanor Battery on Specified Victim ▸ Pen. Code, § 243(b).
- Resisting Officer ▸ Pen. Code, § 148.

RELATED ISSUES

See the Related Issues sections to CALCRIM No. 960, *Simple Battery* and 2670, *Lawful Performance: Peace Officer*.

983. Brandishing Firearm or Deadly Weapon: Misdemeanor (Pen. Code, § 417(a)(1) & (2))

The defendant is charged [in Count __] with brandishing a (firearm/deadly weapon) [in violation of Penal Code section 417(a)].

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

1. **The defendant drew or exhibited a (firearm/deadly weapon) in the ~~immediate~~ presence of someone else;**

[AND]

<Alternative 2A—displayed in rude, angry, or threatening manner>
[2. The defendant did so in a rude, angry, or threatening manner(;/.)]

<Alternative 2B—used in fight>
[2. The defendant [unlawfully] used the (firearm/deadly weapon) in a fight or quarrel(;/.)]

<Give element 3 when instructing on self-defense or defense of another.>
[AND

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

[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 *deadly weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.] [*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[The term[s] (*firearm[,]/ deadly weapon[,]/* [and] *great bodily injury*) (is/are) defined in another instruction to which you should refer.]

[It is not required that the firearm be loaded.]

New January 2006

BENCH NOTES

Instructional Duty

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

If the prosecution alleges that the defendant displayed the weapon in a rude, angry, or threatening manner, give alternative 2A. If the prosecution alleges that the defendant used the weapon in a fight, give alternative 2B.

If the defendant is charged under Penal Code section 417(a)(2)(A), the court **must** also give CALCRIM No. 984, *Brandishing Firearm: Misdemeanor—Public Place*.

Give the bracketed definition of "firearm" or "deadly weapon" 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, give the bracketed sentence stating that the firearm need not be loaded.

AUTHORITY

- Elements ▸ Pen. Code, § 417(a)(1) & (2).
- Firearm Defined ▸ Pen. Code, § 12001(b).
- Deadly Weapon Defined ▸ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Victim's Awareness of Firearm Not a Required Element ▸ *People v. McKinzie* (1986) 179 Cal.App.3d 789, 794 [224 Cal.Rptr. 891].
- Weapon Need Not Be Pointed Directly at Victim ▸ *People v. Sanders* (1995) 11 Cal.4th 475, 542 [46 Cal.Rptr.2d 751, 905 P.2d 420].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 5.

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

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)>***;**

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.

[*Residence* means one or more addresses where someone regularly resides, regardless of the number of days or nights spent there, such as a shelter or structure that can be located by a street address. A *residence* may include, but is not limited to, houses, apartment buildings, motels, hotels, homeless shelters, and recreational and other vehicles.]

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 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].
- Definition of Residence ▸ Pen. Code, § 290.011(g); *People v. Gonzales* (2010) 183Cal.App.4th 24, 35 [107 Cal.Rptr.3d 11].
- 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

1180. Incest (Pen. Code, § 285)

The defendant is charged [in Count __] with incest [in violation of Penal Code section 285].

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

1. **The defendant had sexual intercourse with another person;**

2. **When the defendant did so, (he/she) was at least 14 years old;**

3. **When the defendant did so, the other person was at least 14 years old;**

AND

4. **The defendant and the other person are related to each other as (parent and child/[great-]grandparent and [great-]grandchild/[half] brother and [half] sister/uncle and niece/aunt and nephew).**

Sexual intercourse **means any penetration, no matter how slight, of the vagina or genitalia by the penis. [Ejaculation is not required.]**

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

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

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

This instruction focuses on incestuous sexual intercourse with a minor, which is the most likely form of incest to be charged. Incest is also committed by intercourse between adult relatives within the specified degree of consanguinity, or by an incestuous marriage. (See Pen. Code, § 285.)

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, § 285.
- Incestuous Marriages ▸ Fam. Code, § 2200.
- Sexual Intercourse Defined ▸ See Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585 [250 Cal.Rptr. 635, 758 P.2d 1165].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 138–142.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Incest ▸ Pen. Code, §§ 664, 285.

RELATED ISSUES

Accomplice Instructions

A minor is a victim of, not an accomplice to, incest. Accomplice instructions are not appropriate in a trial for incest involving a minor. (*People v. Tobias* (2001) 25 Cal.4th 327, 334 [106 Cal.Rptr.2d 80, 21 P.3d 758]; see *People v. Stoll* (1927) 84 Cal.App. 99, 101–102 [257 P. 583].) An exception may exist when two minors engage in consensual sexual intercourse, and thus both are victims of the other's crime. (*People v. Tobias, supra,* 327 Cal.4th at p. 334; see *In re T.A.J.* (1998) 62 Cal.App.4th 1350, 1364–1365 [73 Cal.Rptr.2d 331] [minor perpetrator under Pen. Code, § 261.5].) An adult woman who voluntarily engages in the incestuous act is

an accomplice, whose testimony must be corroborated. (See *People v. Stratton* (1904) 141 Cal. 604, 609 [75 P. 166].)

Half-Blood Relationship

Family Code section 2200 prohibits sexual relations between brothers and sisters of half blood, but not between uncles and nieces of half blood. (*People v. Baker* (1968) 69 Cal.2d 44, 50 [69 Cal.Rptr. 595, 442 P.2d 675] [construing former version of § 2200].) However, sexual intercourse between persons the law deems to be related is proscribed. A trial court may properly instruct on the conclusive presumption of legitimacy (see Fam. Code, § 7540) if a defendant uncle asserts that the victim's mother is actually his half sister. The presumption requires the jury to find that if the defendant's mother and her potent husband were living together when the defendant was conceived, the husband was the defendant's father, and thus the defendant was a full brother of the victim's mother. (*People v. Russell* (1971) 22 Cal.App.3d 330, 335 [99 Cal.Rptr. 277].)

Lack of Knowledge as Defense

No reported cases have held that lack of knowledge of the prohibited relationship is a defense to incest. (But see *People v. Patterson* (1894) 102 Cal. 239, 242–243 [36 P. 436] [dictum that party without knowledge of relationship would not be guilty]; see also *People v. Vogel* (1956) 46 Cal.2d 798, 801, 805 [299 P.2d 850] [good faith belief is defense to bigamy].)

1215. Kidnapping (Pen. Code, § 207(a))

The defendant is charged [in Count __] with kidnapping [in violation of Penal Code section 207(a)].

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

1. **The defendant took, held, or detained another person by using force or by instilling reasonable fear;**

2. **Using that force or fear, the defendant moved the other person [or made the other person move] a substantial distance;**

[AND]

3. **The other person did not consent to the movement(;/.)**

<Give element 4 when instructing on reasonable belief in consent.>
[AND]

[4. The defendant did not actually and reasonably believe that the other person consented to the movement.]

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

~~[~~*Substantial distance* means more than a slight or trivial distance. In deciding whether the distance was substantial, you must consider all the circumstances relating to the movement. [Thus, in addition to considering the actual distance moved, you may also consider other factors such as [whether the distance the other person was moved was beyond that merely incidental to the commission of _____,*<insert associated crime>*] whether the movement increased the risk of [physical or psychological] harm, increased the danger of a foreseeable escape attempt, or gave the attacker a greater opportunity to commit additional crimes, or decreased the likelihood of detection.]

~~[The defendant is also charged in Count __ with _____ *<insert crime>*. In order for the defendant to be guilty of kidnapping, the other person must be moved or made to move a distance beyond that merely incidental to the commission of _____ *<insert crime>*.]~~

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

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

<Defense: Consent Given>
[The defendant is not guilty of kidnapping if the other person consented to go with the defendant. The other person consented if (he/she) (1) freely and voluntarily agreed to go with or be moved by the defendant, (2) was aware of the movement, and (3) had sufficient maturity and understanding to choose to go with the defendant. The People have the burden of proving beyond a reasonable doubt that the other person did not consent to go with the defendant. If the People have not met this burden, you must find the defendant not guilty of this crime.

[Consent may be withdrawn. If, at first, a person agreed to go with the defendant, that consent ended if the person changed his or her mind and no longer freely and voluntarily agreed to go with or be moved by the defendant. The defendant is guilty of kidnapping if after the other person withdrew consent, the defendant committed the crime as I have defined it.]]

New January 2006

BENCH NOTES

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

In the paragraph defining "substantial distance," give the bracketed sentence listing factors that the jury may consider, when evidence permits, in evaluating the totality of the circumstances. (*People v. Martinez* (1999) 20 Cal.4th 225, 237.) However, in the case of simple kidnapping, if the movement was for a substantial distance, the jury does not need to consider any other factors. (*People v. Martinez*,

supra, 20 Cal.4th at p. 237 [83 Cal.Rptr.2d 533, 973 P.2d 512]; see *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601 [114 Cal.Rptr. 250, 522 P.2d 1058].)

~~The bracketed paragraph that begins with "The defendant is also charged" must be given on request when an associated crime is charged. (See *People v. Martinez*, *supra*, 20 Cal.4th at pp. 237–238.) See also Commentary to CALCRIM No. 1203, *Kidnapping: For Robbery, Rape, or Other Sex Offenses*.~~
The court must give the bracketed language on movement incidental to an associated crime when it is supported by the evidence. (*People v. Martinez* (1999) 20 Cal.4th 225, 237; *People v. Bell* (2009) 179 Cal.App.4th 428, 439.)

Give the bracketed definition of "consent" on request.

Defenses—Instructional Duty
The court has a **sua sponte** duty to instruct on the defense of consent if there is sufficient evidence to support the defense. (See *People v. Davis* (1995) 10 Cal.4th 463, 516–518 [41 Cal.Rptr.2d 826, 896 P.2d 119] [approving consent instruction as given]; see also *People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7 [112 Cal.Rptr. 1, 518 P.2d 913] overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 165 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [when court must instruct on defenses].) An optional paragraph is provided for this purpose, "Defense: Consent Given."

On request, if supported by the evidence, also give the bracketed paragraph that begins with "Consent may be withdrawn." (See *People v. Camden* (1976) 16 Cal.3d 808, 814 [129 Cal.Rptr. 438, 548 P.2d 1110].)

The court has a **sua sponte** duty to instruct on the defendant's reasonable and actual belief in the victim's consent to go with the defendant, if supported by the evidence. (See *People v. Greenberger* (1997) 58 Cal.App.4th 298, 375 [68 Cal.Rptr.2d 61]; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [127 Cal.Rptr. 279] [reasonable, good faith belief that victim consented to movement is a defense to kidnapping].) Give bracketed element 4 and the bracketed paragraph on the defense.

Related Instructions
If the victim is incapable of consent because of immaturity or mental condition, see CALCRIM No. 1201, *Kidnapping: Child or Person Incapable of Consent*.

A defendant may be prosecuted for both the crimes of child abduction and kidnapping. Child abduction or stealing is a crime against the parents, while kidnapping is a crime against the child. (*In re Michele D.* (2002) 29 Cal.4th 600, 614 [128 Cal.Rptr.2d 92, 59 P.3d 164]; *People v. Campos* (1982) 131 Cal.App.3d

894, 899 [182 Cal.Rptr. 698].) See CALCRIM No. 1250, *Child Abduction: No Right to Custody*.

For instructions relating to other defenses to kidnapping, see CALCRIM No. 1225, *Defense to Kidnapping: Protecting Child From Imminent Harm*, and CALCRIM No. 1226, *Defense to Kidnapping: Citizen's Arrest*.

AUTHORITY

- Elements ▸ Pen. Code, § 207(a).
- Punishment If Victim Under 14 Years of Age ▸ Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206] [ignorance of victim's age not a defense].
- Asportation Requirement ▸ *People v. Martinez* (1999) 20 Cal.4th 225, 235–237 [83 Cal.Rptr.2d 533, 973 P.2d 512] [adopting modified two-pronged asportation test from *People v. Rayford* (1994) 9 Cal.4th 1, 12–14 [36 Cal.Rptr.2d 317, 884 P.2d 1369], and *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 [80 Cal.Rptr. 897, 459 P.2d 225]].
- Consent to Physical Movement ▸ See *People v. Davis* (1995) 10 Cal.4th 463, 516–518 [41 Cal.Rptr.2d 826, 896 P.2d 119].
- Force or Fear Requirement ▸ *People v. Moya* (1992) 4 Cal.App.4th 912, 916–917 [6 Cal.Rptr.2d 323]; *People v. Stephenson* (1974) 10 Cal.3d 652, 660 [111 Cal.Rptr. 556, 517 P.2d 820]; see *People v. Davis* (1995) 10 Cal.4th 463, 517, fn. 13, 518 [41 Cal.Rptr.2d 826, 896 P.2d 119] [kidnapping requires use of force or fear; consent not vitiated by fraud, deceit, or dissimulation].
- Good Faith Belief in Consent ▸ Pen. Code, § 26(3) [mistake of fact]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–155 [125 Cal.Rptr. 745, 542 P.2d 1337]; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [127 Cal.Rptr. 279]; *People v. Patrick* (1981) 126 Cal.App.3d 952, 968 [179 Cal.Rptr. 276].
- Incidental Movement Test ▸ *People v. Martinez* (1999) 20 Cal.4th 225, 237–238 [83 Cal.Rptr.2d 533, 973 P.2d 512].
- Intent Requirement ▸ *People v. Thornton* (1974) 11 Cal.3d 738, 765 [114 Cal.Rptr. 467, 523 P.2d 267], disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Davis* (1995) 10 Cal.4th 463, 519 [41 Cal.Rptr.2d 826, 896 P.2d 119]; *People v. Moya* (1992) 4 Cal.App.4th 912, 916 [6 Cal.Rptr.2d 323].
- Substantial Distance Requirement ▸ *People v. Derek Daniels* (1993) 18 Cal.App.4th 1046, 1053; *People v. Stanworth* (1974) 11 Cal.3d 588, 600–601

[114 Cal.Rptr. 250, 522 P.2d 1058] [since movement must be more than slight or trivial, it must be substantial in character].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 246–255, 277.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.38 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.14 (Matthew Bender).

COMMENTARY

Penal Code section 207(a) uses the term "steals" in defining kidnapping not in the sense of a theft, but in the sense of taking away or forcible carrying away. (*People v. McCullough* (1979) 100 Cal.App.3d 169, 176 [160 Cal.Rptr. 831].) The instruction uses "take," "hold," or "detain" as the more inclusive terms, but includes in brackets the statutory terms "steal" and "arrest" if either one more closely matches the evidence.

LESSER INCLUDED OFFENSES

- Attempted Kidnapping ▸ Pen. Code, §§ 664, 207; *People v. Fields* (1976) 56 Cal.App.3d 954, 955–956 [129 Cal.Rptr. 24].
- False Imprisonment ▸ Pen. Code, §§ 236, 237; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1120–1121 [281 Cal.Rptr. 338]; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547 [90 Cal.Rptr. 866].

RELATED ISSUES

Victim Must Be Alive

A victim must be alive when kidnapped. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 498 [117 Cal.Rptr.2d 45, 40 P.3d 754].)

Threat of Arrest

"[A]n implicit threat of arrest satisfies the force or fear element of section 207(a) kidnapping if the defendant's conduct or statements cause the victim to believe that unless the victim accompanies the defendant the victim will be forced to do

so, and the victim's belief is objectively reasonable." (*People v. Majors* (2004) 33 Cal.4th 321, 331 [14 Cal.Rptr.3d 870, 92 P.3d 360].)

1216–1224. Reserved for Future Use

1600. Robbery (Pen. Code, § 211)

The defendant is charged [in Count __] with robbery [in violation of Penal Code section 211].

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

1. **The defendant took property that was not (his/her) own;**

2. **The property was taken from another person's possession and immediate presence;**

3. **The property was taken against that person's will;**

4. **The defendant used force or fear to take the property or to prevent the person from resisting;**

AND

5. **When the defendant used force or fear to take the property, (he/she) intended (to deprive the owner of it permanently/ [or] to remove it from the owner's possession that the owner would be deprived of a major portion of the value or enjoyment of the property).**

The defendant's intent to take the property must have been formed before or during the time (he/she) used force or fear. If the defendant did not form this required intent until after using the force or fear, then (he/she) did not commit robbery.

<Give the following bracketed paragraph if the second degree is the only possible degree of the charged crime for which the jury may return a verdict>
[If you find the defendant guilty of robbery, it is robbery of the second degree.]

[A person *takes* something when he or she gains possession of it and moves it some distance. The distance moved may be short.]

[The property taken can be of any value, however slight.] [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.]

[A (store/ [or] business) (employee/_____<*insert description*>) who is on duty has possession of the (store/ [or] business) owner's property.]

[*Fear*, as used here, means fear of (injury to the person himself or herself[,]/ [or] injury to the person's family or property[,]/ [or] immediate injury to someone else present during the incident or to that person's property).]

[Property is within a person's *immediate presence* if it is sufficiently within his or her physical control that he or she could keep possession of it if not prevented by force or fear.]

[An act is done *against a person's will* if that person does not consent to the act. In order to *consent,* a person must act freely and voluntarily and know the nature of the act.]

New January 2006; Revised August 2009

BENCH NOTES

Instructional Duty

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

To have the requisite intent for theft, the defendant must either intend to deprive the owner permanently or to deprive the owner of a major portion of the property's value or enjoyment. (See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1].) Select the appropriate language in element 5.

There is no sua sponte duty to define the terms "possession," "fear," and "immediate presence." (*People v. Anderson* (1966) 64 Cal.2d 633, 639 [51 Cal.Rptr. 238, 414 P.2d 366] [fear]; *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708 [286 Cal.Rptr. 394] [fear].) These definitions are discussed in the Commentary below.

If second degree robbery is the only possible degree of robbery that the jury may return as their verdict, do not give CALCRIM No. 1602, *Robbery: Degrees.*

Give the bracketed definition of "against a person's will" on request.

If there is an issue as to whether the defendant used force or fear during the commission of the robbery, the court may need to instruct on this point. (See *People v. Estes* (1983) 147 Cal.App.3d 23, 28 [194 Cal.Rptr. 909].) See CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule*.

AUTHORITY

- Elements ▸ Pen. Code, § 211.
- Fear Defined ▸ Pen. Code, § 212; see *People v. Cuevas* (2001) 89 Cal.App.4th 689, 698 [107 Cal.Rptr.2d 529] [victim must actually be afraid].
- Immediate Presence Defined ▸ *People v. Hayes* (1990) 52 Cal.3d 577, 626–627 [276 Cal.Rptr. 874, 802 P.2d 376].
- Intent ▸ *People v. Green* (1980) 27 Cal.3d 1, 52–53 [164 Cal.Rptr. 1, 609 P.2d 468], overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99]; see *Rodriguez v. Superior Court* (1984) 159 Cal.App.3d 821, 826 [205 Cal.Rptr. 750] [same intent as theft].
- Intent to Deprive Owner of Main Value ▸ See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1] [in context of theft]; *People v. Zangari* (2001) 89 Cal.App.4th 1436, 1447 [108 Cal.Rptr.2d 250] [same].
- Possession Defined ▸ *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618].
- Constructive Possession by Employee ▸ *People v. Scott* (2009) 45 Cal.4th 743, 751 [89 Cal.Rptr.3d 213, 200 P.3d 837].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes--Property, § 86.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.10 (Matthew Bender).

COMMENTARY

The instruction includes definitions of "possession," "fear," and "immediate presence" because those terms have meanings in the context of robbery that are

technical and may not be readily apparent to jurors. (See *People v. McElheny* (1982) 137 Cal.App.3d 396, 403 [187 Cal.Rptr. 39]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 22].)

Possession was defined in the instruction because either actual or constructive possession of property will satisfy this element, and this definition may not be readily apparent to jurors. (*People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797] [defining possession], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618]; see also *People v. Nguyen* (2000) 24 Cal.4th 756, 761, 763 [102 Cal.Rptr.2d 548, 14 P.3d 221] [robbery victim must have actual or constructive possession of property taken; disapproving *People v. Mai* (1994) 22 Cal.App.4th 117, 129 [27 Cal.Rptr.2d 141]].)

Fear was defined in the instruction because the statutory definition includes fear of injury to third parties, and this concept is not encompassed within the common understanding of fear. Force was not defined because its definition in the context of robbery is commonly understood. (See *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1709 [286 Cal.Rptr. 394] ["force is a factual question to be determined by the jury using its own common sense"].)

Immediate presence was defined in the instruction because its definition is related to the use of force and fear and to the victim's ability to control the property. This definition may not be readily apparent to jurors.

LESSER INCLUDED OFFENSES

- Attempted Robbery ▸ Pen. Code, §§ 664, 211; *People v. Webster* (1991) 54 Cal.3d 411, 443 [285 Cal.Rptr. 31, 814 P.2d 1273].
- Grand Theft ▸ Pen. Code, §§ 484, 487g; *People v. Webster, supra,* at p. 443; *People v. Ortega* (1998) 19 Cal.4th 686, 694, 699 [80 Cal.Rptr.2d 489, 968 P.2d 48]; see *People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1411–1413 [116 Cal.Rptr.2d 1] [insufficient evidence to require instruction].
- Grand Theft Automobile ▸ Pen. Code, § 487(d); *People v. Gamble* (1994) 22 Cal.App.4th 446, 450 [27 Cal.Rptr.2d 451] [construing former Pen. Code, § 487h]; *People v. Escobar* (1996) 45 Cal.App.4th 477, 482 [53 Cal.Rptr.2d 9] [same].
- Petty Theft ▸ Pen. Code, §§ 484, 488; *People v. Covington* (1934) 1 Cal.2d 316, 320 [34 P.2d 1019].
- Petty Theft With Prior ▸ Pen. Code, §666; *People v. Villa* (2007) 157 Cal.App.4th 1429, 1433–1434 [69 Cal.Rptr.3d 282].

When there is evidence that the defendant formed the intent to steal *after* the application of force or fear, the court has a **sua sponte** duty to instruct on any relevant lesser included offenses. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055–1057 [60 Cal.Rptr.2d 225, 929 P.2d 544] [error not to instruct on lesser included offense of theft]); *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 350–352 [216 Cal.Rptr. 455, 702 P.2d 613] [same].)

On occasion, robbery and false imprisonment may share some elements (e.g., the use of force or fear of harm to commit the offense). Nevertheless, false imprisonment is not a lesser included offense, and thus the same conduct can result in convictions for both offenses. (*People v. Reed* (2000) 78 Cal.App.4th 274, 281–282 [92 Cal.Rptr.2d 781].)

RELATED ISSUES

Asportation—Felonious Taking

To constitute a taking, the property need only be moved a small distance. It does not have to be under the robber's actual physical control. If a person acting under the robber's direction, including the victim, moves the property, the element of taking is satisfied. (*People v. Martinez* (1969) 274 Cal.App.2d 170, 174 [79 Cal.Rptr. 18]; *People v. Price* (1972) 25 Cal.App.3d 576, 578 [102 Cal.Rptr. 71].)

Claim of Right

If a person honestly believes that he or she has a right to the property even if that belief is mistaken or unreasonable, such belief is a defense to robbery. (*People v. Butler* (1967) 65 Cal.2d 569, 573 [55 Cal.Rptr. 511, 421 P.2d 703]; *People v. Romo* (1990) 220 Cal.App.3d 514, 518 [269 Cal.Rptr. 440] [discussing defense in context of theft]; see CALCRIM No. 1863, *Defense to Theft or Robbery: Claim of Right*.) This defense is only available for robberies when a specific piece of property is reclaimed; it is not a defense to robberies perpetrated to settle a debt, liquidated or unliquidated. (*People v. Tufunga* (1999) 21 Cal.4th 935, 945–950 [90 Cal.Rptr.2d 143, 987 P.2d 168].)

Fear

A victim's fear may be shown by circumstantial evidence. (*People v. Davison* (1995) 32 Cal.App.4th 206, 212 [38 Cal.Rptr.2d 438].) Even when the victim testifies that he or she is not afraid, circumstantial evidence may satisfy the element of fear. (*People v. Renteria* (1964) 61 Cal.2d 497, 498–499 [39 Cal.Rptr. 213, 393 P.2d 413].)

Force—Amount

The force required for robbery must be more than the incidental touching necessary to take the property. (*People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246 [53 Cal.Rptr.2d 256] [noting that the force employed by a pickpocket would be insufficient], disapproved on other grounds in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fns. 2, 3 [15 Cal.Rptr.3d 262, 92 P.3d 841].) Administering an intoxicating substance or poison to the victim in order to take property constitutes force. (*People v. Dreas* (1984) 153 Cal.App.3d 623, 628–629 [200 Cal.Rptr. 586]; see also *People v. Wright* (1996) 52 Cal.App.4th 203, 209–210 [59 Cal.Rptr.2d 316] [explaining force for purposes of robbery and contrasting it with force required for assault].)

Force—When Applied

The application of force or fear may be used when taking the property or when carrying it away. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8 [282 Cal.Rptr. 450, 811 P.2d 742]; *People v. Pham* (1993) 15 Cal.App.4th 61, 65–67 [18 Cal.Rptr.2d 636]; *People v. Estes* (1983) 147 Cal.App.3d 23, 27–28 [194 Cal.Rptr. 909].)

Immediate Presence

Property that is 80 feet away or around the corner of the same block from a forcibly held victim is not too far away, as a matter of law, to be outside the victim's immediate presence. (*People v. Harris* (1994) 9 Cal.4th 407, 415–419 [37 Cal.Rptr.2d 200, 886 P.2d 1193]; see also *People v. Prieto* (1993) 15 Cal.App.4th 210, 214 [18 Cal.Rptr.2d 761] [reviewing cases where victim is a distance away from property taken].) Property has been found to be within a person's immediate presence when the victim is lured away from his or her property and force is subsequently used to accomplish the theft or escape (*People v. Webster* (1991) 54 Cal.3d 411, 440–442 [285 Cal.Rptr. 31, 814 P.2d 1273]) or when the victim abandons the property out of fear (*People v. Dominguez* (1992) 11 Cal.App.4th 1342, 1348–1349 [15 Cal.Rptr.2d 46].)

Multiple Victims

Multiple counts of robbery are permissible when there are multiple victims even if only one taking occurred. (*People v. Ramos* (1982) 30 Cal.3d 553, 589 [180 Cal.Rptr. 266, 639 P.2d 908], reversed on other grounds *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446, 77 L.Ed.2d 1171]; *People v. Miles* (1996) 43 Cal.App.4th 364, 369, fn. 5 [51 Cal.Rptr.2d 87] [multiple punishment permitted].) Conversely, a defendant commits only one robbery, no matter how many items are taken from a single victim pursuant to a single plan. (*People v. Brito* (1991) 232 Cal.App.3d 316, 325–326, fn. 8 [283 Cal.Rptr. 441].)

Value

The property taken can be of small or minimal value. (*People v. Simmons* (1946) 28 Cal.2d 699, 705 [172 P.2d 18]; *People v. Thomas* (1941) 45 Cal.App.2d 128, 134–135 [113 P.2d 706].) The property does not have to be taken for material gain. All that is necessary is that the defendant intended to permanently deprive the person of the property. (*People v. Green* (1980) 27 Cal.3d 1, 57 [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].)

1700. Burglary (Pen. Code, § 459)

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

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

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

AND

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

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

<Give the following bracketed paragraph if the second degree is the only possible degree of the charged crime for which the jury may return a verdict>
[If you find the defendant guilty of burglary, it is burglary of the second degree.]

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

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

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

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

New January 2006

BENCH NOTES

Instructional Duty

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

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

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

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

On request, give the bracketed paragraph that begins with "Under the law of burglary," if there is evidence that only a portion of the defendant's body, or an instrument, tool, or other object under his or control, entered the building. (See *People v. Valencia* (2002) 28 Cal.4th 1, 7–8 [120 Cal.Rptr.2d 131, 46 P.3d 920];

People v. Davis (1998) 18 Cal.4th 712, 717–722 [76 Cal.Rptr.2d 770, 958 P.2d 1083].)

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

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

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

AUTHORITY

- Elements ▸ Pen. Code, § 459.
- Instructional Requirements ▸ *People v. Failla* (1966) 64 Cal.2d 560, 564, 568–569 [51 Cal.Rptr. 103, 414 P.2d 39]; *People v. Smith* (1978) 78 Cal.App.3d 698, 706–711 [144 Cal.Rptr. 330]; *People v. Montoya* (1994) 7 Cal.4th 1027, 1041–1042 [31 Cal.Rptr.2d 128, 874 P.2d 903].

Secondary Sources

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

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

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Auto Burglary–Entry of Locked Vehicle

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

Auto Burglary–Definition of Locked

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

Auto Burglary–Intent to Steal

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

Building

A building has been defined for purposes of burglary as "any structure which has walls on all sides and is covered by a roof." (*In re Amber S.* (1995) 33 Cal.App.4th 185, 187 [39 Cal.Rptr.2d 672].) Courts have construed "building" broadly and found the following structures sufficient for purposes of burglary: a telephone booth, a popcorn stand on wheels, a powder magazine dug out of a hillside, a wire chicken coop, and a loading dock constructed of chain link fence. (*People v. Brooks* (1982) 133 Cal.App.3d 200, 204–205 [183 Cal.Rptr. 773].) However, the definition of building is not without limits and courts have focused on "whether

the nature of a structure's composition is such that a reasonable person would expect some protection from unauthorized intrusions." (*In re Amber S.* (1995) 33 Cal.App.4th 185, 187 [39 Cal.Rptr.2d 672] [open pole barn is not a building]; see *People v. Knight* (1988) 204 Cal.App.3d 1420, 1423–1424 [252 Cal.Rptr. 17] [electric company's "gang box," a container large enough to hold people, is not a building; such property is protected by Penal Code sections governing theft].)

Outer Boundary

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

Theft

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

Burglarizing One's Own Home—Possessory Interest

A person cannot burglarize his or her own home as long as he or she has an unconditional possessory right of entry. (*People v. Gauze* (1975) 15 Cal.3d 709, 714 [125 Cal.Rptr. 773, 542 P.2d 1365].) However, a family member who has moved out of the family home commits burglary if he or she makes an unauthorized entry with a felonious intent, since he or she has no claim of a right to enter that residence. (*In re Richard M.* (1988) 205 Cal.App.3d 7, 15–16 [252 Cal.Rptr. 36] [defendant, who lived at youth rehabilitation center, properly convicted of burglary for entering his parent's home and taking property]; *People v. Davenport* (1990) 219 Cal.App.3d 885, 889–893 [268 Cal.Rptr. 501] [defendant convicted of burglarizing cabin owned and occupied by his estranged wife and her parents]; *People v. Sears* (1965) 62 Cal.2d 737, 746 [44 Cal.Rptr. 330, 401 P.2d 938], overruled on other grounds by *People v. Cahill* (1993) 5 Cal.4th 478, 494, 510 [20 Cal.Rptr.2d 582, 853 P.2d 1037] [burglary conviction proper where husband had moved out of family home three weeks before and had no right to enter without permission]; compare *Fortes v. Municipal Court* (1980) 113 Cal.App.3d 704, 712–714 [170 Cal.Rptr. 292] [husband had unconditional possessory interest in jointly owned home; his access to the house was not limited and strictly permissive, as in *Sears*].)

Consent

While lack of consent is not an element of burglary, consent by the owner or occupant of property may constitute a defense to burglary. (*People v. Felix* (1994)

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

Entry by Instrument

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

Multiple Convictions

Courts have adopted different tests for multi-entry burglary cases. In *In re William S.* (1989) 208 Cal.App.3d 313, 316–318 [256 Cal.Rptr. 64], the court analogized burglary to sex crimes and adopted the following test formulated in *People v. Hammon* (1987) 191 Cal.App.3d 1084, 1099 [236 Cal.Rptr. 822] [multiple penetration case]: " '[W]hen there is a pause . . . sufficient to give defendant a reasonable opportunity to reflect upon his conduct, and the [action by the defendant] is nevertheless renewed, a new and separate crime is committed.' " (*In re William S., supra,* 208 Cal.App.3d at p. 317.) The court in *In re William S.* adopted this test because it was concerned that under certain circumstances, allowing separate convictions for every entry could produce "absurd results." The court gave this example: where "a thief reaches into a window twice attempting, unsuccessfully, to steal the same potted geranium, he could potentially be convicted of two separate counts." (*Ibid*.) The *In re William S.* test has been called into serious doubt by *People v. Harrison* (1989) 48 Cal.3d 321, 332–334 [256 Cal.Rptr. 401, 768 P.2d 1078], which disapproved of *Hammon*. *Harrison* held that for sex crimes each penetration equals a new offense. (*People v. Harrison, supra,* 48 Cal.3d at p. 329.)

The court in *People v. Washington* (1996) 50 Cal.App.4th 568 [57 Cal.Rptr.2d 774], a burglary case, agreed with *In re William S.* to the extent that burglary is

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

Room

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

Entry into a bedroom within a single-family house with the requisite intent can support a burglary conviction if that intent was formed only after entry into the house. (*People v. Sparks* (2002) 28 Cal.4th 71, 86–87 [120 Cal.Rptr.2d 508, 47 P.3d 289] ["the unadorned word 'room' in section 459 reasonably must be given its ordinary meaning"]; see *People v. McCormack* (1991) 234 Cal.App.3d 253, 255–257 [285 Cal.Rptr. 504]; *People v. Young* (1884) 65 Cal. 225, 226 [3 P. 813].) However, entry into multiple rooms within one apartment or house cannot support multiple burglary convictions unless it is established that each room is a separate dwelling space, whose occupant has a separate, reasonable expectation of privacy. (*People v. Richardson* (2004) 117 Cal.App.4th 570, 575 [11 Cal.Rptr.3d 802]; see also *People v. Thomas* (1991) 235 Cal.App.3d 899, 906, fn. 2 [1 Cal.Rptr.2d 434].)

Temporal or Physical Proximity–Intent to Commit the Felony

According to some cases, a burglary occurs "if the intent at the time of entry is to commit the offense in the immediate vicinity of the place entered by defendant; if the entry is made as a means of facilitating the commission of the theft or felony; and if the two places are so closely connected that intent and consummation of the crime would constitute a single and practically continuous transaction." (*People v. Wright* (1962) 206 Cal.App.2d 184, 191 [23 Cal.Rptr. 734] [defendant entered office with intent to steal tires from attached open-air shed].) This test was

followed in *People v. Nance* (1972) 25 Cal.App.3d 925, 931–932 [102 Cal.Rptr. 266] [defendant entered a gas station to turn on outside pumps in order to steal gas]; *People v. Nunley* (1985) 168 Cal.App.3d 225, 230–232 [214 Cal.Rptr. 82] [defendant entered lobby of apartment building, intending to burglarize one of the units]; and *People v. Ortega* (1992) 11 Cal.App.4th 691, 695–696 [14 Cal.Rptr.2d 246] [defendant entered a home to facilitate the crime of extortion].

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

1750. Receiving Stolen Property (Pen. Code, § 496(a))

The defendant is charged [in Count __] with receiving stolen property [in violation of Penal Code section 496(a)].

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

1. **The defendant (bought/received/sold/aided in selling/concealed or withheld from its owner/aided in concealing or withholding from its owner) property that had been (stolen/obtained by extortion);**

[AND]

2. **When the defendant (bought/received/sold/aided in selling/concealed or withheld/aided in concealing or withholding) the property, (he/she) knew that the property had been (stolen/obtained by extortion)(;/.)**

<Give element 3 when instructing on knowledge of presence of property; see Bench Notes>

[AND

3. **The defendant actually knew of the presence of the property.]**

[Property is *stolen* if it was obtained by any type of theft, or by burglary or robbery. [Theft includes obtaining property by larceny, embezzlement, false pretense, or trick.]]

[Property is *obtained by extortion* if: (1) the property was obtained from another person with that person's consent, and (2) that person's consent was obtained through the use of force or fear.]

[To *receive property* means to take possession and control of it. Mere presence near or access to the property is not enough.] [Two or more people can possess the property 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.]

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.

If the defendant is also charged with a theft crime, the court has a **sua sponte** duty to instruct that the defendant may not be convicted of receiving stolen property if he is convicted of the theft of the same property.~~both theft and receiving the same stolen property.~~ (CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event – Dual Conviction Prohibited*, *see* Pen. Code, § 496(a), *People v. Ceja* (2010) 49 Cal.4th 1 [108 Cal.Rptr.3d 568], *People v. Garza* (2005) 35 Cal.4th 866, 881–882 [28 Cal.Rptr.3d 335, 111 P.3d 310] [upholding dual convictions for receiving stolen property and a violation of Vehicle Code section 10851(a) as a nontheft conviction for post-theft driving].)

If there are factual issues regarding whether the received stolen property was taken with the intent to permanently deprive the owner of possession, the court has a **sua sponte** duty to instruct on the complete definitions of theft. *People v. MacArthur* (2006) 142 Cal.App.4th 275 [47 Cal.Rptr.3d 736]. For instructions defining extortion and the different forms of theft, see series 1800, Theft and Extortion. On request, the court should give the complete instruction on the elements of theft or extortion.

If substantial evidence exists, a specific instruction must be given on request that the defendant must have knowledge of the presence of the stolen goods. (*People v. Speaks* (1981) 120 Cal.App.3d 36, 39–40 [174 Cal.Rptr. 65]; see *People v. Gory* (1946) 28 Cal.2d 450, 455–456, 458–459 [170 P.2d 433] [possession of narcotics requires knowledge of presence]; see also discussion of voluntary intoxication in Related Issues, below.) Give bracketed element 3 when supported by the evidence.

Related Instructions

For an instruction about when guilt may be inferred from possession of recently stolen property, see CALCRIM No. 376, *Possession of Recently Stolen Property as Evidence of a Crime*.

AUTHORITY

- Elements ▸ Pen. Code, § 496(a); *People v. Land* (1994) 30 Cal.App.4th 220, 223 [35 Cal.Rptr.2d 544].
- Extortion Defined ▸ Pen. Code, § 518.
- Theft Defined ▸ Pen. Code, §§ 484, 490a.
- Concealment ▸ *Williams v. Superior Court* (1978) 81 Cal.App.3d 330, 343–344 [146 Cal.Rptr. 311].
- General Intent Required ▸ *People v. Wielograf* (1980) 101 Cal.App.3d 488, 494 [161 Cal.Rptr. 680] [general intent crime]; but see *People v. Reyes* (1997) 52 Cal.App.4th 975, 985 [61 Cal.Rptr.2d 39] [knowledge element is a "specific mental state"].
- Knowledge Element ▸ *People v. Reyes* (1997) 52 Cal.App.4th 975, 985 [61 Cal.Rptr.2d 39].
- Possession and Control ▸ *People v. Land* (1994) 30 Cal.App.4th 220, 223–224 [35 Cal.Rptr.2d 544]; *People v. Zyduck* (1969) 270 Cal.App.2d 334, 336 [75 Cal.Rptr. 616]; see *People v. Gatlin* (1989) 209 Cal.App.3d 31, 44–45 [257 Cal.Rptr. 171] [constructive possession means knowingly having the right of control over the property directly or through another]; *People v. Scott* (1951) 108 Cal.App.2d 231, 234 [238 P.2d 659] [two or more persons may jointly possess property].
- Stolen Property ▸ *People v. Kunkin* (1973) 9 Cal.3d 245, 250 [107 Cal.Rptr. 184, 507 P.2d 1392] [theft]; see, e.g., *People v. Candiotto* (1960) 183 Cal.App.2d 348, 349 [6 Cal.Rptr. 876] [burglary]; *People v. Siegfried* (1967) 249 Cal.App.2d 489, 493 [57 Cal.Rptr. 423] [robbery].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 72–81.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, §§ 143.01[2][c], 143.03, 143.10[2][c], [d] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Receiving Stolen Property ▸ Pen. Code, §§ 664, 496(d); *People v. Rojas* (1961) 55 Cal.2d 252, 258 [10 Cal.Rptr. 465, 358 P.2d 921] [stolen

goods recovered by police were no longer "stolen"]; *People v. Moss* (1976) 55 Cal.App.3d 179, 183 [127 Cal.Rptr. 454] [antecedent theft not a necessary element].

Theft by appropriation of lost property (Pen. Code, § 485) is not a necessarily included offense of receiving stolen property. (*In re Greg F.* (1984) 159 Cal.App.3d 466, 469 [205 Cal.Rptr. 614].)

RELATED ISSUES

Defense of Voluntary Intoxication or Mental Disease

Though receiving stolen property is a general intent crime, one element of the offense is knowledge that the property was stolen, a specific mental state. With regard to the element of knowledge, receiving stolen property is a "specific intent crime" as that term is used in Penal Code sections 22(b) and 28(a). (*People v. Reyes* (1997) 52 Cal.App.4th 975, 985 [61 Cal.Rptr.2d 39].) Therefore, the defendant should have the opportunity to introduce evidence and request instructions regarding the lack of requisite knowledge. (*Id.* at p. 986; see *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131 [77 Cal.Rptr.2d 428, 959 P.2d 735]; but see *People v. Atkins* (2001) 25 Cal.4th 76, 96–97 [104 Cal.Rptr.2d 738, 18 P.3d 660] (conc. opn. of Brown, J.) [criticizing *Mendoza* and *Reyes* as wrongly transmuting a knowledge requirement into a specific intent].) See CALCRIM No. 3426, *Voluntary Intoxication*.

Dual Convictions Prohibited

A person may not be convicted of stealing and of receiving the same property. (*People v. Jaramillo* (1976) 16 Cal.3d 752, 757 [129 Cal.Rptr. 306, 548 P.2d 706] superseded by statute on related grounds, as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157 [68 Cal.Rptr.2d 440]; see *People v. Tatum* (1962) 209 Cal.App.2d 179, 183 [25 Cal.Rptr. 832].) See CALCRIM No. 3516, *Multiple Counts: Alternative Charges For One Event—Dual Conviction Prohibited*.

Receiving Multiple Items on Single Occasion

A defendant who receives more than one item of stolen property on a single occasion commits one offense of receiving stolen property. (See *People v. Lyons* (1958) 50 Cal.2d 245, 275 [324 P.2d 556].)

Specific Vendors

The Penal Code establishes separate crimes for specific persons buying or receiving particular types of stolen property, including the following:

1. Swap meet vendors and persons dealing in or collecting merchandise or personal property. (Pen. Code, § 496(b).)

2. Dealers or collectors of junk metals or secondhand materials who buy or receive particular metals used in providing telephone, transportation, or public utility services. (Pen. Code, § 496a(a).)

3. Dealers or collectors of secondhand books or other literary materials. (Pen. Code, § 496b [misdemeanors].)

4. Persons buying or receiving motor vehicles, trailers, special construction equipment, or vessels. (Pen. Code, § 496d(a).)

5. Persons buying, selling, receiving, etc., specific personal property, including integrated computer chips or panels, electronic equipment, or appliances, from which serial numbers or identifying marks have been removed or altered. (Pen. Code, § 537e(a).)

1806. Theft by Embezzlement (Pen. Code, §§ 484, 503)

The defendant is charged [in Count ___] with [grand/petty] theft by embezzlement [in violation of Penal Code section 503].

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

1. **An owner [or the owner's agent] entrusted (his/her) property to the defendant;**

2. **The owner [or owner's agent] did so because (he/she) trusted the defendant;**

3. **The defendant fraudulently (converted/used) that property for (his/her) own benefit;**

AND

4. **When the defendant (converted/used) the property, (he/she) intended to deprive the owner of (it/its use).**

A person acts *fraudulently* when he or she takes undue advantage of another person or causes a loss to that person by breaching a duty, trust or confidence.

[A good faith belief in acting with authorization to use the property is a defense.]

[In deciding whether the defendant believed that (he/she) had a right to the property and whether (he/she) held that belief in good faith, consider all the facts known to (him/her) at the time (he/she) obtained the property, along with all the other evidence in the case. The defendant may hold a belief in good faith even if the belief is mistaken or unreasonable. But if the defendant was aware of facts that made that belief completely unreasonable, you may conclude that the belief was not held in good faith.]

[An intent to deprive the owner of property, even temporarily, is enough.]

[Intent to restore the property to its owner is not a defense.]

[An *agent* is someone to whom the owner has given complete or partial authority and control over the owner's property.]

[For petty theft, the property taken can be of any value, no matter how slight.]

New January 2006; Revised June 2007, April 2008

BENCH NOTES

Instructional Duty

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

If the evidence supports it, the court has a **sua sponte** duty to instruct that a good faith belief in acting with authorization to use the property is a defense. *People v. Stewart* (1976) 16 Cal.3d 133, 140 [127 Cal.Rptr.117, 544 P.2d 1317].

Intent to return the property at the time of the taking is not a defense to embezzlement under Pen. Code, § 512 unless the property was returned before the person was charged. *People v. Sisuphan* (2010) 181 Cal.App.4th 800, 812 [104 Cal.Rptr.3d 654].

Related Instructions

If the defendant is charged with grand theft, give CALCRIM No. 1801 *Theft: Degrees*. If the defendant is charged with petty theft, no other instruction is required, and the jury should receive a petty theft verdict form.

If the defendant is charged with petty theft with a prior conviction, give CALCRIM No. 1850, *Petty Theft With Prior Conviction*.

AUTHORITY

Elements ▸ Pen. Code, §§ 484, 503–515; *In re Basinger* (1988) 45 Cal.3d 1348, 1363 [249 Cal.Rptr. 110, 756 P.2d 833]; *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1845 [52 Cal.Rptr.2d 765]; *People v. Kronemyer* (1987) 189 Cal.App.3d 314 [234 Cal.Rptr. 442].

Fraud Defined ▸ *People v. Talbot* (1934) 220 Cal. 3, 15 [28 P.2d 1057]; People v. Stein (1979) 94 Cal.App.3d 235, 241 [156 Cal.Rptr. 299].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 26.

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

LESSER INCLUDED OFFENSES

- Petty Theft ‣ Pen. Code, § 486.
- Attempted Theft ‣ Pen. Code, §§ 664, 484.

RELATED ISSUES

Alter Ego Defense

A partner can be guilty of embezzling from his own partnership. "[T]hough [the Penal Code] requir[es] that the property be 'of another' for larceny, [it] does not require that the property be 'of another' for embezzlement. . . . It is both illogical and unreasonable to hold that a partner cannot steal from his partners merely because he has an undivided interest in the partnership property. Fundamentally, stealing that portion of the partners' shares which does not belong to the thief is no different from stealing the property of any other person." (*People v. Sobiek* (1973) 30 Cal.App.3d 458, 464, 468 [106 Cal.Rptr. 519]; see Pen. Code, § 484.)

Fiduciary Relationships

Courts have held that creditor/debtor and employer/employee relationships are not presumed to be fiduciary relationships in the absence of other evidence of trust or confidence. (*People v. Wooten* (1996) 44 Cal.App.4th 1834, 1846 [52 Cal.Rptr.2d 765] [creditor/debtor]; *People v. Threestar* (1985) 167 Cal.App.3d 747, 759 [213 Cal.Rptr. 510] [employer/employee].)

1862. Return of Property Not a Defense to Theft (Pen. Code, §§ 512, 513)

If you conclude that the People have proved that the defendant committed _____<*insert charged theft crime*>, the return or offer to return (some/all) of the property wrongfully obtained is not a defense to that charge.

New January 2006

BENCH NOTES

Instructional Duty

An instruction that restoration of wrongfully obtained property is no defense to a charge of theft may be given on request. (See *People v. Pond* (1955) 44 Cal.2d 665, 674–675 [284 P.2d 793]; see also *People v. Jenkins* (1994) 29 Cal.App.4th 287, 297 [34 Cal.Rptr.2d 483] [court need not instruct on its own motion on specific points developed at trial]; *People v. Hood* (1969) 1 Cal.3d 444, 449 [82 Cal.Rptr. 618, 462 P.2d 370].)

AUTHORITY

- Instructional Requirements ▸ Pen. Code, §§ 512, 513; see *People v. Pond* (1955) 44 Cal.2d 665, 674–675 [284 P.2d 793].
- Intent to Return Embezzled Property At Time of Taking Not a Defense Under Pen. Code, § 512 unless the property was returned before the person was charged. ▸ *People v. Sisuphan* (2010) 181 Cal.App.4th 800, 812 [104 Cal.Rptr.3d 654].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 36.

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

RELATED ISSUES

Exception to Show Evidence of Intent

This instruction relates to wrongfully obtained property. However, a defendant may present evidence that he or she restored or improved property to show that his or her intent at the time of the taking was not larcenous. But there must be a relevant and probative link in the defendant's subsequent actions from which an original, innocent intent might be inferred. (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1100–1101 [10 Cal.Rptr.2d 821].)

Embezzlement of Public Funds

In a case of alleged embezzlement of public funds, it is error to instruct that restoration may be used to mitigate punishment. (*People v. Smith* (1929) 206 Cal. 235, 237 [273 P. 789]; *People v. Marquis* (1957) 153 Cal.App.2d 553, 558–559 [315 P.2d 57]; see Pen. Code, § 1203(e)(7) [probation prohibited for embezzlement of public funds].)

1863. Defense to Theft or Robbery: Claim of Right (Pen. Code, § 511)

If the defendant obtained property under a claim of right, (he/she) did not have the intent required for the crime of (theft/ [or] robbery).

The defendant obtained property under a claim of right if (he/she) believed in good faith that (he/she) had a right to the specific property or a specific amount of money, and (he/she) openly took it.

In deciding whether the defendant believed that (he/she) had a right to the property and whether (he/she) held that belief in good faith, consider all the facts known to (him/her) at the time (he/she) obtained the property, along with all the other evidence in the case. The defendant may hold a belief in good faith even if the belief is mistaken or unreasonable. But if the defendant was aware of facts that made that belief completely unreasonable, you may conclude that the belief was not held in good faith.

[The claim-of-right defense does not apply if the defendant attempted to conceal the taking at the time it occurred or after the taking was discovered.]

[The claim-of-right defense does not apply to offset or pay claims against the property owner of an undetermined or disputed amount.]

[The claim-of-right defense does not apply if the claim arose from an activity commonly known to be illegal or known by the defendant to be illegal.]

If you have a reasonable doubt about whether the defendant had the intent required for (theft/ [or] robbery), you must find (him/her) not guilty of _____ <*insert specific theft crime*>.

New January 2006

BENCH NOTES

Instructional Duty

When a claim of right is supported by substantial evidence, the trial court must instruct **sua sponte** on the defense. (*People v. Creath* (1995) 31 Cal.App.4th 312, 319 [37 Cal.Rptr.2d 336]; see *People v. Barnett* (1998) 17 Cal.4th 1044, 1145 [74 Cal.Rptr.2d 121, 954 P.2d 384] [no substantial evidence supporting inference of bona fide belief].)

AUTHORITY

- Defense. ▸ Pen. Code, § 511; *People v. Tufunga* (1999) 21 Cal.4th 935, 952, fn. 4 [90 Cal.Rptr.2d 143, 987 P.2d 168]; *People v. Romo* (1990) 220 Cal.App.3d 514, 517, 518 [269 Cal.Rptr. 440].
- Good Faith Belief. ▸ *People v. Stewart* (1976) 16 Cal.3d 133, 139–140 [127 Cal.Rptr. 117, 544 P.2d 1317]; *People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, 4, 10–11 [160 Cal.Rptr. 692].
- No Concealment of Taking. ▸ *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1848–1849 [52 Cal.Rptr.2d 765].
- Not Available to Recover Unliquidated Claims. ▸ *People v. Holmes* (1970) 5 Cal.App.3d 21, 24–25 [84 Cal.Rptr. 889].
- Not Available to Recover From Notoriously or Known Illegal Activity. ▸ *People v. Gates* (1987) 43 Cal.3d 1168, 1181–1182 [240 Cal.Rptr. 666, 743 P.2d 301].
- Claim of Right Defense Available to Aiders and Abettors ▸ *People v. Williams* (2009) 176 Cal.App.4th 1521, 1529 [98 Cal.Rptr.3d 770].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 32, 34.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.10[1][b], Ch. 143, *Crimes Against Property*, § 143.01[1][d] (Matthew Bender).

1864–1899. Reserved for Future Use

2140. Failure to Perform Duty Following Accident: Death or Injury—Defendant Driver (Veh. Code, §§ 20001, 20003 & 20004)

The defendant is charged [in Count __] with failing to perform a legal duty following a vehicle accident that caused (death/ [or] [permanent] injury) to another person [in violation of _____ <*insert appropriate code section[s]*>].
To prove that the defendant is guilty of this crime, the People must prove that:

1. **While driving, the defendant was involved in a vehicle accident;**

2. **The accident caused (the death of/ [or] [permanent, serious] injury to) someone else;**

3. **The defendant knew that (he/she) had been involved in an accident that injured another person [or knew from the nature of the accident that it was probable that another person had been injured];**

AND

4. **The defendant willfully failed to perform one or more of the following duties:**

   (a) To immediately stop at the scene of the accident;

   (b) To provide reasonable assistance to any person injured in the accident;

   (c) To give to (the person struck/the driver or occupants of any vehicle collided with) or any peace officer at the scene of the accident all of the following information:

   - **The defendant's name and current residence address;**

   [AND]

   - **The registration number of the vehicle (he/she) was driving(;/.)**

<Give following sentence if defendant not owner of vehicle.>
[[AND]

- **The name and current residence address of the owner of the vehicle if the defendant is not the owner(;/.)]**

<Give following sentence if occupants of defendant's vehicle were injured.>
[AND

- **The names and current residence addresses of any occupants of the defendant's vehicle who were injured in the accident.]**

[AND]

(d) When requested, to show (his/her) driver's license to (the person struck/the driver or occupants of any vehicle collided with) or any peace officer at the scene of the accident(;/.)

<Give element 4(e) if accident caused death.>
[AND

(e) The driver must, without unnecessary delay, notify either the police department of the city where the accident happened or the local headquarters of the California Highway Patrol if the accident happened in an unincorporated area.]

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

The duty to *stop immediately* means that the driver must stop his or her vehicle as soon as reasonably possible under the circumstances.

To *provide reasonable assistance* means the driver must determine what assistance, if any, the injured person needs and make a reasonable effort to see that such assistance is provided, either by the driver or someone else. *Reasonable assistance* includes transporting anyone who has been injured for medical treatment, or arranging the transportation for such treatment, if it is apparent that treatment is necessary or if an injured person requests transportation. [The driver is not required to provide assistance that is unnecessary or that is already being provided by someone else. However, the

requirement that the driver provide assistance is not excused merely because bystanders are on the scene or could provide assistance.]

The driver of a vehicle must perform the duties listed regardless of who was injured and regardless of how or why the accident happened. It does not matter if someone else caused the accident or if the accident was unavoidable.

You may not find the defendant guilty unless all of you agree that the People have proved that the defendant failed to perform at least one of the required duties. You must all agree on which duty the defendant failed to perform.

[To be *involved in a vehicle accident* means to be connected with the accident in a natural or logical manner. It is not necessary for the driver's vehicle to collide with another vehicle or person.]

[When providing his or her name and address, the driver is required to identify himself or herself as the driver of a vehicle involved in the accident.]

[A *permanent, serious injury* is one that permanently impairs the function or causes the loss of any organ or body part.]

[An accident causes (death/ [or] [permanent, serious] injury) if the (death/ [or] injury) is the direct, natural, and probable consequence of the accident and the (death/ [or] injury) would not have happened without the accident. 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/ [or] [permanent, serious] injury). An accident causes (death/ [or] injury) only if it is a substantial factor in causing the (death/ [or] injury). A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the (death/ [or] injury).]

[If the accident caused the defendant to be unconscious or disabled so that (he/she) was not capable of performing the duties required by law, then (he/she) did not have to perform those duties at that time. [However, (he/she) was required to do so as soon as reasonably possible.]]

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. Give this instruction if the prosecution alleges that the defendant drove the vehicle. If the prosecution alleges that the defendant was a nondriving owner present in the vehicle or other passenger in control of the vehicle, give CALCRIM No. 2141, *Failure to Perform Duty Following Accident: Death or Injury—Defendant Nondriving Owner or Passenger in Control.*

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].) If the evidence indicates that there was only one cause of death or injury, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death or injury, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

If the defendant is charged under Vehicle Code section 20001(b)(1) with leaving the scene of an accident causing injury, but not death or permanent, serious injury, delete the words "death" and "permanent, serious" from the instruction. If the defendant is charged under Vehicle Code section 20001(b)(2) with leaving the scene of an accident causing death or permanent, serious injury, use either or both of these options throughout the instruction, depending on the facts of the case. When instructing on both offenses, give this instruction using the words "death" and/or "permanent, serious injury," and give CALCRIM No. 2142, *Failure to Perform Duty Following Accident: Lesser Included Offense*.

Give bracketed element 4(e) only if the accident caused a death.

Give the bracketed portion that begins with "The driver is not required to provide assistance" if there is an issue over whether assistance by the defendant to the injured person was necessary in light of aid provided by others. (See *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027 [80 Cal.Rptr.2d 676]; *People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914]; see also discussion in the Related Issues section below.)

Give the bracketed paragraph defining "involved in a vehicle accident" if that is an issue in the case.

Give the bracketed paragraph stating that "the driver is required to identify himself or herself as the driver" if there is evidence that the defendant stopped and identified himself or herself but not in a way that made it apparent to the other parties that the defendant was the driver. (*People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546 [83 Cal.Rptr.2d 493].)

Give the bracketed paragraph that begins with "If the accident caused the defendant to be unconscious" if there is sufficient evidence that the defendant was unconscious or disabled at the scene of the accident.

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

AUTHORITY

- Elements ▸ Veh. Code, §§ 20001, 20003 & 20004.
- Sentence for Death or Permanent Injury ▸ Veh. Code, § 20001(b)(2).
- Sentence for Injury ▸ Veh. Code, § 20001(b)(1).
- Knowledge of Accident and Injury ▸ *People v. Holford* (1965) 63 Cal.2d 74, 79–80 [45 Cal.Rptr. 167, 403 P.2d 423]; *People v. Carter* (1966) 243 Cal.App.2d 239, 241 [52 Cal.Rptr. 207]; *People v. Hamilton* (1978) 80 Cal.App.3d 124, 133–134 [145 Cal.Rptr. 429].
- Willful Failure to Perform Duty ▸ *People v. Crouch* (1980) 108 Cal.App.3d Supp. 14, 21–22 [166 Cal.Rptr. 818].
- Duty Applies Regardless of Fault for Accident ▸ *People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914].
- Involved Defined ▸ *People v. Bammes* (1968) 265 Cal.App.2d 626, 631 [71 Cal.Rptr. 415]; *People v. Sell* (1950) 96 Cal.App.2d 521, 523 [215 P.2d 771].
- Immediately Stopped Defined ▸ *People v. Odom* (1937) 19 Cal.App.2d 641, 646–647 [66 P.2d 206].
- Duty to Render Assistance ▸ *People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914]; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027 [80 Cal.Rptr.2d 676].
- Permanent, Serious Injury Defined ▸ Veh. Code, § 20001(d).
- Statute Does Not Violate Fifth Amendment Privilege ▸ *California v. Byers* (1971) 402 U.S. 424, 434 [91 S.Ct. 1535, 29 L.Ed.2d 9].
- Must Identify Self as Driver ▸ *People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546 [83 Cal.Rptr.2d 493].

- Unanimity Instruction Required ▸ *People v. Scofield* (1928) 203 Cal. 703, 710 [265 P. 914].
- Unconscious Driver Unable to Comply at Scene ▸ *People v. Flores* (1996) 51 Cal.App.4th 1199, 1204 [59 Cal.Rptr.2d 637].
- Offense May Occur on Private Property ▸ *People v. Stansberry* (1966) 242 Cal.App.2d 199, 204 [51 Cal.Rptr. 403].
- Duty Applies to Injured Passenger in Defendant's Vehicle ▸ *People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546 [83 Cal.Rptr.2d 493].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 246–252.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, §§ 91.60[2][b][ii], 91.81[1][d] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.03, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[3A][a] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Failure to Stop Following Accident—Injury ▸ Veh. Code, § 20001(b)(1).
- Misdemeanor Failure to Stop Following Accident—Property Damage ▸ Veh. Code, § 20002; but see *People v. Carter* (1966) 243 Cal.App.2d 239, 242–243 [52 Cal.Rptr. 207].

RELATED ISSUES

Constructive Knowledge of Injury

"[K]nowledge may be imputed to the driver of a vehicle where the fact of personal injury is visible and obvious or where the seriousness of the collision would lead a reasonable person to assume there must have been resulting injuries." (*People v. Carter* (1966) 243 Cal.App.2d 239, 241 [52 Cal.Rptr. 207] [citations omitted].)

Accusatory Pleading Alleged Property Damage

- If accusatory pleading alleges property damage, Veh. Code, § 20002, see *People v. Carter* (1966) 243 Cal.App.2d 239, 242–243 [52 Cal.Rptr. 207].

Reasonable Assistance

Failure to render reasonable assistance to an injured person constitutes a violation of the statute. (*People v. Limon* (1967) 252 Cal.App.2d 575, 578 [60 Cal.Rptr. 448].) "In this connection it must be noted that the statute requires that *necessary* assistance be rendered." (*People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914] [emphasis in original].) In *People v. Scofield, supra,* the court held that where other people were caring for the injured person, the defendant's "assistance was not *necessary*." (*Id.* at p. 709 [emphasis in original].) An instruction limited to the statutory language on rendering assistance "is inappropriate where such assistance by the driver is unnecessary, as in the case where paramedics have responded within moments following the accident." (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027 [80 Cal.Rptr.2d 676].) However, "the driver's duty to render necessary assistance under Vehicle Code section 20003, at a minimum, requires that the driver first ascertain what assistance, if any, the injured person needs, and then the driver must make a reasonable effort to see that such assistance is provided, whether through himself or third parties." *(Ibid.)* The presence of bystanders who offer assistance is not alone sufficient to relieve the defendant of the duty to render aid. *(Ibid.)* "[T]he 'reasonable assistance' referred to in the statute might be the summoning of aid," rather than the direct provision of first aid by the defendant. (*People v. Limon* (1967) 252 Cal.App.2d 575, 578 [60 Cal.Rptr. 448].)

2141. Failure to Perform Duty Following Accident: Death or Injury—Defendant Nondriving Owner or Passenger in Control (Veh. Code, §§ 20001, 20003 & 20004)

The defendant is charged [in Count __] with failing to perform a legal duty following a vehicle accident that caused (death/ [or] [permanent] injury) to another person [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 and] was riding as a passenger in a vehicle involved in an accident;**

2. **At the time of the accident, the defendant had full authority to direct and control the vehicle even though another person was driving the vehicle;**

3. **The accident caused (the death of/ [or] [permanent, serious] injury to) someone else;**

4. **The defendant knew that the vehicle had been involved in an accident that injured another person [or knew from the nature of the accident that it was probable that another person had been injured];**

AND

5. **The defendant willfully failed to perform one or more of the following duties:**

   (a) To cause the driver of the vehicle to immediately stop at the scene of the accident;

   (b) When requested, to show (his/her) driver's license, or any other available identification, to (the person struck/ the driver or occupants of any vehicle collided with) or any peace officer at the scene of the accident;

(c) To provide reasonable assistance to any person injured in the accident;

[OR]

(d) To give to (the person struck/the driver or occupants of any vehicle collided with) or any peace officer at the scene of the accident all of the following information:

- **The defendant's name and current residence address;**

- **The registration number of the vehicle (he/she) (owned/ was a passenger in);**

[AND]

- **The name and current residence address of the driver of the vehicle(;/.)**

<Give following sentence if defendant not owner of vehicle.>
[[AND]

- **The name and current residence address of the owner of the vehicle if the defendant is not the owner(;/.)]**

<Give following sentence if occupants of defendant's vehicle were injured.>
[AND

- **The names and current residence addresses of any occupants of the defendant's vehicle who were injured in the accident(;/.)]**

<Give element 5(e) if accident caused death.>
[OR

(e) The driver must, without unnecessary delay, notify either the police department of the city where the accident happened or the local headquarters of the California Highway Patrol if the accident happened in an unincorporated area.]

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

The duty to *immediately stop* means that the (owner/passenger in control) must cause the vehicle he or she is a passenger in to stop as soon as reasonably possible under the circumstances.

To *provide reasonable assistance* means the (owner/passenger in control) must determine what assistance, if any, the injured person needs and make a reasonable effort to see that such assistance is provided, either by the (owner/passenger in control) or someone else. *Reasonable assistance* includes transporting anyone who has been injured for medical treatment, or arranging the transportation for such treatment, if it is apparent that treatment is necessary or if an injured person requests transportation. [The (owner/passenger in control) is not required to provide assistance that is unnecessary or that is already being provided by someone else. However, the requirement that the (owner/passenger in control) provide assistance is not excused merely because bystanders are on the scene or could provide assistance.]

The (owner/passenger in control) of a vehicle must perform the duties listed regardless of who was injured and regardless of how or why the accident happened. It does not matter if someone else caused the accident or if the accident was unavoidable.

You may not find the defendant guilty unless all of you agree that the People have proved that the defendant failed to perform at least one of the required duties. You must all agree on which duty the defendant failed to perform.

[To be *involved in an accident* means to be connected with the accident in a natural or logical manner. It is not necessary for the vehicle to collide with another vehicle or person.]

[A *permanent, serious injury* is one that permanently impairs the function or causes the loss of any organ or body part.]

[An accident causes (death/ [or] [permanent, serious] injury) if the (death/ [or] injury) is the direct, natural, and probable consequence of the accident and the (death/ [or] injury) would not have happened without the accident. 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/ [or] [permanent, serious] injury). An accident causes (death/ [or] injury) only if it is a substantial factor in causing the (death/ [or] injury). A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the (death/ [or] injury).]

[If the accident caused the defendant to be unconscious or disabled so that (he/she) was not capable of performing the duties required by law, then (he/she) did not have to perform those duties at that time. [However, (he/she) was required to do so as soon as reasonably possible.]]

[If the defendant told the driver to stop and made a reasonable effort to stop the vehicle, but the driver refused, then the defendant is not guilty of this crime.

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the prosecution alleges that the defendant was a nondriving owner present in the vehicle or other passenger in control. If the prosecution alleges that the defendant drove the vehicle, give CALCRIM No. 2140, *Failure to Perform Duty Following Accident: Death or Injury—Defendant Driver*.

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].) If the evidence indicates that there was only one cause of death or injury, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death or injury, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

If the defendant is charged under Vehicle Code section 20001(b)(1) with leaving the scene of an accident causing injury, but not death or permanent, serious injury, delete the words "death" and "permanent, serious" from the instruction. If the

defendant is charged under Vehicle Code section 20001(b)(2) with leaving the scene of an accident causing death or permanent, serious injury, use either or both of these options throughout the instruction, depending on the facts of the case. When instructing on both offenses, give this instruction using the words "death" and/or "permanent, serious injury," and give CALCRIM No. 2142, *Failure to Perform Duty Following Accident: Lesser Included Offense*.

Give bracketed element 5(e) only if the accident caused a death.

Give the bracketed portion that begins with "The (owner/passenger in control) is not required to provide assistance" if there is an issue over whether assistance by the defendant to the injured person was necessary in light of aid provided by others. (See *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027 [80 Cal.Rptr.2d 676]; *People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914]; see also discussion in the Related Issues section of CALCRIM No. 2140, *Failure to Perform Duty Following Accident: Death or Injury—Defendant Driver*.)

Give the bracketed paragraph defining "involved in an accident" if that is an issue in the case.

Give the bracketed paragraph that begins with "If the accident caused the defendant to be unconscious" if there is sufficient evidence that the defendant was unconscious or disabled at the scene of the accident.

Give the bracketed paragraph that begins with "If the defendant told the driver to stop" if there is sufficient evidence that the defendant attempted to cause the vehicle to be stopped.

AUTHORITY

- Elements ▸ Veh. Code, §§ 20001, 20003 & 20004.
- Sentence for Death or Permanent Injury ▸ Veh. Code, § 20001(b)(2).
- Knowledge of Accident and Injury ▸ *People v. Holford* (1965) 63 Cal.2d 74, 79–80 [45 Cal.Rptr. 167, 403 P.2d 423]; *People v. Carter* (1966) 243 Cal.App.2d 239, 241 [52 Cal.Rptr. 207]; *People v. Hamilton* (1978) 80 Cal.App.3d 124, 133–134 [145 Cal.Rptr. 429].
- Willful Failure to Perform Duty ▸ *People v. Crouch* (1980) 108 Cal.App.3d Supp. 14, 21–22 [166 Cal.Rptr. 818].
- Duty Applies Regardless of Fault for Accident ▸ *People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914].

- Involved Defined ‣ *People v. Bammes* (1968) 265 Cal.App.2d 626, 631 [71 Cal.Rptr. 415]; *People v. Sell* (1950) 96 Cal.App.2d 521, 523 [215 P.2d 771].
- Immediately Stopped Defined ‣ *People v. Odom* (1937) 19 Cal.App.2d 641, 646–647 [66 P.2d 206].
- Duty to Render Assistance ‣ *People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914]; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027 [80 Cal.Rptr.2d 676].
- Permanent, Serious Injury Defined ‣ Veh. Code, § 20001(d).
- Nondriving Owner ‣ *People v. Rallo* (1931) 119 Cal.App. 393, 397 [6 P.2d 516].
- Statute Does Not Violate Fifth Amendment Privilege ‣ *California v. Byers* (1971) 402 U.S. 424, 434 [91 S.Ct. 1535, 29 L.Ed.2d 9].
- Unanimity Instruction Required ‣ *People v. Scofield* (1928) 203 Cal. 703, 710 [265 P. 914].
- Unconscious Driver Unable to Comply at Scene ‣ *People v. Flores* (1996) 51 Cal.App.4th 1199, 1204 [59 Cal.Rptr.2d 637].
- Offense May Occur on Private Property ‣ *People v. Stansberry* (1966) 242 Cal.App.2d 199, 204 [51 Cal.Rptr. 403].
- Duty Applies to Injured Passenger in Defendant's Vehicle ‣ *People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546 [83 Cal.Rptr.2d 493].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 246–252.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.03 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Failure to Stop Following Accident—Injury ‣ Veh. Code, § 20001(b)(1).

- Misdemeanor Failure to Stop Following Accident—Property Damage ▸ Veh. Code, § 20002; but see *People v. Carter* (1966) 243 Cal.App.2d 239, 242–243 [52 Cal.Rptr. 207].

RELATED ISSUES

See the Related Issues section in CALCRIM No. 2140, *Failure to Perform Duty Following Accident: Death or Injury—Defendant Driver*.

2300. Sale, Transportation, etc., of Controlled Substance (Health & Saf. Code, §§ 11352, 11379)

The defendant is charged [in Count __] with (selling/furnishing/administering/giving away/transporting/importing) _____ *<insert type of controlled substance>***, a controlled substance [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 (sold/furnished/administered/gave away/transported/imported into California) 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;**

[AND]

4. **The controlled substance was _____** *<insert type of controlled substance>***(;/.)**

<Give element 5 when instructing on usable amount; see Bench Notes.>
[AND

5. **The controlled substance was in a usable amount.]**

[*Selling* for the purpose of this instruction means exchanging a controlled substance for money, services, or anything of value.]

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

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[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.]

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

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

New January 2006

BENCH NOTES

Instructional Duty

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

Transportation of a controlled substance requires a "usable amount." (*People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567].) Sale of a controlled substance does not. (See *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316].) When the prosecution alleges transportation, give bracketed element 5 and the definition of usable amount. When the prosecution alleges sales, do not use these portions. There is no case law on whether furnishing, administering, giving away, or importing require usable quantities.

If the defendant is charged with attempting to import or transport a controlled substance, give CALCRIM No. 460, *Attempt Other Than Attempted Murder*, with this instruction.

AUTHORITY

- Elements ▸ Health & Saf. Code, §§ 11352, 11379.
- Administering ▸ Health & Saf. Code, § 11002.
- Administering Does Not Include Self-Administering ▸ *People v. Label* (1974) 43 Cal.App.3d 766, 770–771 [119 Cal.Rptr. 522].

- Knowledge ‣ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling ‣ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Transportation: Usable Amount ‣ *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567].
- 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].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–102.

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

LESSER INCLUDED OFFENSES

- Simple Possession of Controlled Substance ‣ Health & Saf. Code, §§ 11350, 11377; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].
- Possession for Sale ‣ Health & Saf. Code, §§ 11351, 11378; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].

Note: In reviewing the appropriateness of sentencing enhancements, *Valenzuela v. Superior Court* (1995) 33 Cal.App.4th 1445, 1451 [39 Cal.Rptr.2d 781], finds that offering to sell is a lesser included offense of selling, and that therefore a lesser sentence is appropriate for offering to sell. However, the cases it cites in support of that conclusion do not address that specific issue. Because offering to sell is a specific-intent crime (see *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1]) and selling does not require specific intent, the committee does not include offering to sell as a lesser included offense.

RELATED ISSUES

Transportation

Transportation does not require intent to sell or distribute. (*People v. Rogers* (1971) 5 Cal.3d 129, 134 [95 Cal.Rptr. 601, 486 P.2d 129].) Transportation also does not require personal possession by the defendant. *(Ibid*.) "Proof of his knowledge of the character and presence of the drug, together with his control over the vehicle, is sufficient to establish his guilt . . . ." (*Id.* at pp. 135–136.) Transportation of a controlled substance includes transporting by riding a bicycle (*People v. LaCross* (2001) 91 Cal.App.4th 182, 187 [109 Cal.Rptr.2d 802]) or walking (*People v. Ormiston* (2003) 105 Cal.App.4th 676, 685 [129 Cal.Rptr.2d 567]). The controlled substance must be moved "from one location to another," but the movement may be minimal. (*Id.* at p. 684.)

Transportation for Personal Use

A defendant convicted of transporting a controlled substance "for personal use" is entitled to be sentenced to probation with drug treatment pursuant to Penal Code section 1210(a); see *People v. Barasa* (2002) 103 Cal.App.4th 287, 295–297 [126 Cal.Rptr.2d 628].) Two cases have held that the judge, not the jury, may determine whether the defendant transported the drugs for personal use. (*People v. Barasa, supra,* 103 Cal.App.4th at pp. 294–295; *People v. Glasper* (2003) 113 Cal.App.4th 1104, 1115 [7 Cal.Rptr.3d 4].)

2302. Possession for Sale of Controlled Substance (Health & Saf. Code, §§ 11351, 11351.5, 11378, 11378.5)

The defendant is charged [in Count ___] with possession for sale of _____ *<insert type of controlled substance>*, **a controlled substance [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 [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. **When the defendant possessed the controlled substance, (he/she) intended to sell it;**

5. **The controlled substance was** _____ *<insert type of controlled substance>***;**

   AND

6. **The controlled substance was in a usable amount.**

Selling **for the purpose of this instruction means exchanging** _____ *<insert type of controlled substance>* **for money, services, or anything of value.**

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.

[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.]

New January 2006

BENCH NOTES

Instructional Duty

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

AUTHORITY

- Elements ▸ Health & Saf. Code, §§ 11351, 11351.5, 11378, 11378.5.
- Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge ▸ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling ▸ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- 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].
- This Instruction Is Correct ▸ *People v. Montero* (2007) 155 Cal.App.4th 1170, 1177 [66 Cal.Rptr.3d 668].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 81–93.

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

LESSER INCLUDED OFFENSES

- Simple Possession of a Controlled Substance ‣ *People v. Saldana* (1984) 157 Cal.App.3d 443, 453–458 [204 Cal.Rptr. 465].
- Possession of cocaine for sale is not necessarily included offense of selling cocaine base. *People v. Murphy* (2005) 134 Cal.App.4th 1504, 1508 [36 Cal.Rptr.3d 872]).

2303. Possession of Controlled Substance While Armed With Firearm (Health & Saf. Code, § 11370.1)

The defendant is charged [in Count ___] with possessing _____ *<insert type of controlled substance specified in Health & Saf. Code, § 11370.1>***, a controlled substance, while armed with 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 [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 _____** *<insert type of controlled substance specified in Health & Saf. Code, § 11370.1>***;**

5. **The controlled substance was in a usable amount;**

6. **While possessing that controlled substance, the defendant had a loaded, operable firearm available for immediate offensive or defensive use;**

AND

7. **The defendant knew that (he/she) had the firearm available for immediate offensive or defensive use.**

Knowledge that an available firearm is loaded and operable is not required.

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.

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.

[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.]

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.

AUTHORITY

- Elements ▸ Health & Saf. Code, § 11370.1; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge of Controlled Substance ▸ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- 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].
- Loaded Firearm ▸ *People v. Clark* (1996) 45 Cal.App.4th 1147, 1153 [53 Cal.Rptr.2d 99].
- Knowledge of Presence of Firearm ▸ *People v. Singh* (2004) 119 Cal.App.4th 905, 912–913 [14 Cal.Rptr.3d 769].
- Knowledge That Firearm is Loaded or Operable Not Required ▸ *People v. Heath* (2005) 134 Cal.App.4th 490, 498 [36 Cal.Rptr.3d 66]

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 80.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][f]; Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[d], [3][b] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of a Controlled Substance ▸ Health & Saf. Code, §§ 11350, 11377.

See also Firearm Possession instructions, CALCRIM Nos. 2510 to 2530.

RELATED ISSUES

Loaded Firearm

"Under the commonly understood meaning of the term 'loaded,' a firearm is 'loaded' when a shell or cartridge has been placed into a position from which it can be fired; the shotgun is not 'loaded' if the shell or cartridge is stored elsewhere and not yet placed in a firing position." (*People v. Clark* (1996) 45 Cal.App.4th 1147, 1153 [53 Cal.Rptr.2d 99].)

2304. Simple Possession of Controlled Substance (Health & Saf. Code, §§ 11350, 11377)

The defendant is charged [in Count __] with possessing _____ *<insert type of controlled substance>*, **a controlled substance [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 [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 _____** *<insert type of controlled substance>*;

   AND

5. **The controlled substance was in a usable amount.**

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.

[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: Prescription>
[The defendant is not guilty of possessing _____ *<insert type of controlled substance>* **if (he/she) had a valid, written prescription for that substance from a physician, dentist, podiatrist, [naturopathic doctor], or veterinarian licensed to practice in California. The People have the burden of proving beyond a reasonable doubt that the defendant did not have a valid prescription. If the People have not met this burden, you must find the defendant not guilty of possessing a controlled substance.]**

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.

Defenses—Instructional Duty
The prescription defense is codified in Health and Safety Code sections 11350 and 11377. It is not available as a defense to possession of all controlled substances. The defendant need only raise a reasonable doubt about whether his or her possession of the drug was lawful because of a valid prescription. (See *People v. Mower* (2002) 28 Cal.4th 457, 479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If there is sufficient evidence, the court has a **sua sponte** duty to give the bracketed paragraph on the defense.

A recent amendment to section 11150 includes a naturopathic doctor in the category of those who may furnish or order certain controlled substances, so that bracketed option should be included in this instruction if substantial evidence supports it.

AUTHORITY

- Elements ▸ Health & Saf. Code, §§ 11350, 11377; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge ▸ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].

- 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].
- Prescription ‣ Health & Saf. Code, §§ 11027, 11164, 11164.5.
- Persons Authorized to Write Prescriptions ‣ Health & Saf. Code, § 11150.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 77–93.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[d], [2][b] (Matthew Bender).

2321. Forged Prescription for Narcotic: With Possession of Drug (Health & Saf. Code, § 11368)

The defendant is charged [in Count __] with (obtaining/possessing) a narcotic drug [obtained] with (a/an) (forged[,]/ fictitious[,]/ [or] altered) prescription [in violation of Health and Safety Code section 11368].

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

1. **The defendant (obtained/possessed) a narcotic drug;**

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

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

4. **The narcotic drug was in a usable amount;**

5. **The narcotic drug was obtained by using (a/an) (forged[,]/ fictitious[,]/ [or] altered) prescription;**

AND

6. **The defendant knew that the narcotic was obtained using (a/an) (forged[,]/ fictitious[,]/ [or] altered) prescription.**

_____ *<insert name or description of narcotic from Health & Saf. Code, § 11019>* **is a *narcotic drug*.**

A *usable amount* is a quantity that is enough to be used by someone as a narcotic drug. 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.

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

[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 narcotic drug does not, by itself, mean that a person has control over that 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.

Use this instruction when the prosecution alleges that the defendant obtained or possessed the narcotic by using a forged prescription. When the prosecution alleges that the defendant forged or attempted to use a forged prescription without obtaining the narcotic, use CALCRIM No. 2320, *Forged Prescription for Narcotic*.

AUTHORITY

- Elements ▸ Health & Saf. Code, § 11368; *People v. Beesly* (1931) 119 Cal.App. 82, 86 [6 P.2d 114] [intent to defraud not an element]; *People v. Katz* (1962) 207 Cal.App.2d 739, 745 [24 Cal.Rptr. 644].
- Narcotic Drug ▸ Health & Saf. Code, § 11019.
- Prescription ▸ Health & Saf. Code, §§ 11027, 11164, 11164.5.
- Persons Authorized to Write Prescriptions ▸ Health & Saf. Code, § 11150.
- Forgery of Prescription by Telephone ▸ *People v. Jack* (1965) 233 Cal.App.2d 446, 455 [43 Cal.Rptr. 566].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 119–120.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[d], [2][b], [c] (Matthew Bender).

2322–2329. Reserved for Future Use

2350. Sale, Furnishing, etc., of Marijuana (Health & Saf. Code, § 11360(a))

The defendant is charged [in Count ___] with (selling/furnishing/administering/importing) 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 (sold/furnished/administered/imported into California) 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;**

[AND]

4. **The controlled substance was marijuana(;/.)**

<Give element 5 when instructing on usable amount; see Bench Notes.>
[AND

5. **The controlled substance was in a usable amount.]**

[*Selling* for the purpose of this instruction means exchanging the marijuana for money, services, or anything of value.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[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) (sold/furnished/administered/imported)~~, 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 (sell/furnish/administer/import) it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

New January 2006; Revised December 2008

BENCH NOTES

Instructional Duty

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

Sale of a controlled substance does not require a usable amount. (See *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316].) When the prosecution alleges sales, do not give element 5 or the bracketed definition of "usable amount." There is no case law on whether furnishing, administering, or importing require usable quantities. (See *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907] [transportation requires usable quantity]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567] [same].) Element 5 and the definition of usable amount are provided for the court to use at its discretion.

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].)

Until courts of review provide further clarification, the court will have to determine whether under the facts of a given case the compassionate use defense should apply pursuant to Health & Saf. Code, §§ 11362.765 and 11362.775.

AUTHORITY

- Elements ▸ Health & Saf. Code, § 11360(a); *People v. Van Alstyne* (1975) 46 Cal.App.3d 900, 906 [121 Cal.Rptr. 363].
- 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].
- Selling ▸ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Administering ▸ Health & Saf. Code, § 11002.
- Administering Does Not Include Self-Administering ▸ *People v. Label* (1974) 43 Cal.App.3d 766, 770–771 [119 Cal.Rptr. 522].
- 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].
- Compassionate Use Defense Generally ▸ *People v. Wright* (2006) 40 Cal.4th 81 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Urziceanu* (2005) 132 Cal.App.4th 747 [33 Cal.Rptr.3d 859]; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–100.

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

LESSER INCLUDED OFFENSES

- Simple Possession of Marijuana ▸ Health & Saf. Code, § 11357.

- Possession for Sale of Marijuana ‣ Health & Saf. Code, § 11359.

2352. Possession for Sale of Marijuana (Health & Saf. Code, §§ 11018, 11359)

The defendant is charged [in Count ___] with possessing for sale marijuana, a controlled substance [in violation of Health and Safety Code section 11359].

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

1. **The defendant 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. **When the defendant possessed the controlled substance, (he/she) intended to sell it;**

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

AND

6. **The controlled substance was in a usable amount.**

Selling **for the purpose of this instruction means exchanging the marijuana for money, services, or anything of value.**

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 there

from), 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.]

New January 2006; Revised December 2008

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].)

Until courts of review provide further clarification, the court will have to determine whether under the facts of a given case the compassionate use defense should apply pursuant to Health & Saf. Code, §§ 11362.765 and 11362.775.

AUTHORITY

- Elements ▸ Health & Saf. Code, § 11359.
- "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].
- Selling ‣ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- 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].
- Compassionate Use Defense Generally ‣ *People v. Wright* (2006) 40 Cal.4th 81 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Urziceanu* (2005) 132 Cal.App.4th 747 [33 Cal.Rptr.3d 859]; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 68–93.

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

LESSER INCLUDED OFFENSES

- Simple Possession of Marijuana ‣ Health & Saf. Code, § 11357.

2353–2359. Reserved for Future Use

2360. Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor (Health & Saf. Code, § 11360(b))

The defendant is charged [in Count ___] with (giving away/transporting) 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] (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 was in a usable amount but not more than 28.5 grams in weight.**

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.]]

[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* 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 a 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 28.5 grams or less of marijuana. 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 more than 28.5 grams, use CALCRIM No. 2361, *Transporting or Giving Away Marijuana: More Than 28.5 Grams*. 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*.

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].
- 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.

- 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.).
- 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].

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].

Secondary Sources

*2 Witkin & Ep*stein, 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]–[c], [g], [3][a], [a.1] (Matthew Bender).

RELATED ISSUES

Transportation

Transportation does not require intent to sell or distribute. (*People v. Rogers* (1971) 5 Cal.3d 129, 134 [95 Cal.Rptr. 601, 486 P.2d 129].) Transportation also does not require personal possession by the defendant. *(Ibid.)* "Proof of his knowledge of the character and presence of the drug, together with his control over the vehicle, is sufficient to establish his guilt . . . ." (*Id*. at pp. 135–136.) Transportation of a controlled substance includes transporting by riding a bicycle (*People v. LaCross* (2001) 91 Cal.App.4th 182, 187 [109 Cal.Rptr.2d 802]) or walking (*People v. Ormiston* (2003) 105 Cal.App.4th 676, 685 [129 Cal.Rptr.2d 567]). The controlled substance must be moved "from one location to another," but the movement may be minimal. (*Id.* at p. 684.)

Medical Marijuana Not a Defense to Giving Away

The medical marijuana defense provided by Health and Safety Code section 11362.5 is not available to a charge of sales under Health and Safety Code section 11360. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383,

1389 [70 Cal.Rptr.2d 20].) The defense is not available even if the marijuana is provided to someone permitted to use marijuana for medical reasons (*People v. Galambos, supra,* 104 Cal.App.4th at pp. 1165–1167) or if the marijuana is provided free of charge (*People ex rel. Lungren v. Peron, supra,* 59 Cal.App.4th at p. 1389).

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* 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*.

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. The Compassionate Use Act allows a person to possess 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 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 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; Revised June 2007, April 2010

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.

[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, April 2010

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).

2380. Sale, Furnishing, etc., of Controlled Substance to Minor (Health & Saf. Code, §§ 11353, 11354, 11380(a))

The defendant is charged [in Count __] with (selling/furnishing/administering/giving away) _____ *<insert type of controlled substance>***, a controlled substance, to someone under 18 years of age [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 [unlawfully] (sold/furnished/administered/gave away) a controlled substance to _____** *<insert name of alleged recipient>***;**

2. **The defendant knew of the presence of the controlled substance;**

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

4. **At that time, the defendant was 18 years of age or older;**

5. **At that time, _____** *<insert name of alleged recipient>* **was under 18 years of age;**

[AND]

6. **The controlled substance was _____** *<insert type of controlled substance>***(;/.)**

<Give element 7 when instructing on usable amount; see Bench Notes.>
[AND

7. **The controlled substance was in a usable amount.]**

[*Selling* for the purpose of this instruction means exchanging _____ *<insert type of controlled substance>* **for money, services, or anything of value.]**

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[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.]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (sold/furnished/administered/gave away)~~, 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 (sell it/furnish it/administer it/give it away). It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

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

New January 2006

BENCH NOTES

Instructional Duty

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

Sale of a controlled substance does not require a usable amount. (See *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316].) When the prosecution alleges sales, do not use bracketed element 7 or the definition of usable amount. There is no case law on whether furnishing, administering, or giving away require usable quantities. (See *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907] [transportation requires usable quantity]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567] [same].) The bracketed element 7 and the definition of usable amount are provided here for the court to use at its discretion.

If the defendant is charged with violating Health and Safety Code section 11354(a), in element 4, the court should replace "18 years of age or older" with "under 18 years of age."

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 ▸ Health & Saf. Code, §§ 11353, 11354, 11380(a).
- Age of Defendant Element of Offense ▸ *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- No Defense of Good Faith Belief Offeree Over 18 ▸ *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454]; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760 [77 Cal.Rptr. 59].
- Administering ▸ Health & Saf. Code, § 11002.
- Knowledge ▸ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling ▸ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- 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].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 103–105.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.06[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.02, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[c], [h], [i], [3][a], [d] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Sale to Person Not a Minor ▸ Health & Saf. Code, §§ 11352, 11379.

- Simple Possession of Controlled Substance ▸ Health & Saf. Code, §§ 11350, 11377; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].
- Possession for Sale of Controlled Substance ▸ Health & Saf. Code, §§ 11351, 11378; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].

RELATED ISSUES

No Defense of Good Faith Belief Over 18

"The specific intent for the crime of selling cocaine to a minor is the intent to sell cocaine, not the intent to sell it to a minor. [Citations omitted.] It follows that ignorance as to the age of the offeree neither disproves criminal intent nor negates an evil design on the part of the offerer. It therefore does not give rise to a 'mistake of fact' defense to the intent element of the crime. [Citations omitted.]" (*People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454].)

2390. Sale, Furnishing, etc., of Marijuana to Minor (Health & Saf. Code, § 11361)

The defendant is charged [in Count __] with (selling/furnishing/administering/giving away) marijuana, a controlled substance, to someone under (18/14) years of age [in violation of Health and Safety Code section 11361].

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

1. **The defendant [unlawfully] (sold/furnished/administered/gave away) marijuana, a controlled substance, to _____** *<insert name of alleged recipient>***;**

2. **The defendant knew of the presence of the controlled substance;**

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

4. **At that time, the defendant was 18 years of age or older;**

[AND]

5. **At that time, _____** *<insert name of alleged recipient>* **was under (18/14) years of age;**

<Give element 6 when instructing on usable amount; see Bench Notes.>
[AND

6. **The marijuana was in a usable amount.]**

[*Selling* for the purpose of this instruction means exchanging the marijuana for money, services, or anything of value.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[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) (sold/furnished/administered/gave away)~~, 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 (sell it/furnish it/administer it/give it away). It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

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

New January 2006

BENCH NOTES

Instructional Duty

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

In element 5, give the alternative of "under 14 years of age" only if the defendant is charged with furnishing, administering, or giving away marijuana to a minor under 14. (Health & Saf. Code, § 11361(a).)

Sale of a controlled substance does not require a usable amount. (See *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316].) When the prosecution alleges sales, do not use bracketed element 6 or the definition of usable amount. There is no case law on whether furnishing, administering, or giving away require usable quantities. (See *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907] [transportation requires usable quantity]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d

567] [same].) Element 6 and the bracketed definition of usable amount are provided here for the court to use at its discretion.

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].)

AUTHORITY

- Elements ▸ Health & Saf. Code, § 11361.
- Age of Defendant Element of Offense ▸ *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- No Defense of Good Faith Belief Offeree Over 18 ▸ *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454]; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760 [77 Cal.Rptr. 59].
- Administering ▸ Health & Saf. Code, § 11002.
- Knowledge ▸ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling ▸ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Usable Amount ▸ *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 103–105.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.06[1] (Matthew Bender).

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

LESSER INCLUDED OFFENSES

- Sale to Person Not a Minor ‣ Health & Saf. Code, § 11360.
- Simple Possession of Marijuana ‣ Health & Saf. Code, § 11357.
- Possession for Sale of Marijuana ‣ Health & Saf. Code, § 11359.

RELATED ISSUES

No Defense of Good Faith Belief Over 18

"The specific intent for the crime of selling cocaine to a minor is the intent to sell cocaine, not the intent to sell it to a minor. [Citations omitted.] It follows that ignorance as to the age of the offeree neither disproves criminal intent nor negates an evil design on the part of the offerer. It therefore does not give rise to a 'mistake of fact' defense to the intent element of the crime. [Citations omitted.]" (*People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454].)

2410. Possession of Controlled Substance Paraphernalia (Health & Saf. Code, § 11364)

The defendant is charged [in Count __] with possessing an object that can be used to unlawfully inject or ~~consume~~ smoke a controlled substance [in violation of Health and Safety Code section 11364].

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

1. **The defendant [unlawfully] possessed an object that can be used to unlawfully inject or ~~consume~~ smoke a controlled substance;**

2. **The defendant knew of the object's presence;**

AND

3. **The defendant knew that the object could be used to unlawfully inject or ~~consume~~ smoke 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.]

[The People allege that the defendant possessed the following items: _____ *<insert each specific item of paraphernalia when multiple items alleged>***. You may not find the defendant guilty unless you all agree that the People have proved that the defendant possessed at least one of these items and you all agree on which item (he/she) possessed.]**

<Defense: Authorized Possession for Personal Use>
[The defendant did not unlawfully possess [a] hypodermic (needle[s]/ [or] syringe[s]) if (he/she) was legally authorized to possess (it/them). The defendant was legally authorized to possess (it/them) if:

1. **(He/She) possessed the (needle[s]/ [or] syringe[s]) for personal use;**

[AND]

2. (He/She) obtained (it/them) from an authorized source(;/.)

[AND

3. (He/She) possessed no more than 10 (needles/ [or] syringes).]

The People have the burden of proving beyond a reasonable doubt that the defendant was not legally authorized to possess the hypodermic (needle[s]/ [or] syringe[s]). If the People have not met this burden, you must find the defendant not guilty of this crime.]

New January 2006

BENCH NOTES

Instructional Duty

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

If the prosecution alleges under a single count that the defendant possessed multiple items, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with "The People allege that the defendant possessed," inserting the items alleged.

Defenses—Instructional Duty

In 2004, the Legislature created the Disease Prevention Demonstration Project. (Health & Saf. Code, § 121285.) The purpose of this project is to evaluate "the long-term desirability of allowing licensed pharmacists to furnish or sell nonprescription hypodermic needles or syringes to prevent the spread of blood-borne pathogens, including HIV and hepatitis C." (Health & Saf. Code, § 121285(a).) In a city or county that has authorized participation in the project, a pharmacist may provide up to 10 hypodermic needles and syringes to an individual for personal use. (Bus. & Prof. Code, § 4145(a)(2).) Similarly, in a city or county that has authorized participation in the project, Health and Safety Code section 11364(a) "shall not apply to the possession solely for personal use of 10 or fewer hypodermic needles or syringes if acquired from an authorized source." (Health & Saf. Code, § 11364(c).) The defendant need only raise a reasonable doubt about whether his or her possession of these items was lawful. (See *People v. Mower* (2002) 28 Cal.4th 457, 479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If there is sufficient evidence, the court has a **sua sponte** duty to instruct on this defense. (See *People v. Fuentes* (1990) 224 Cal.App.3d 1041, 1045 [274 Cal.Rptr.

17] [authorized possession of hypodermic is an affirmative defense]); *People v. Mower, ibid.* at pp. 478–481 [discussing affirmative defenses generally and the burden of proof].) Give the bracketed word "unlawfully" in element 1 and the bracketed paragraph on that defense.

AUTHORITY

- Elements ▸ Health & Saf. Code, § 11364.
- Statute Constitutional ▸ *People v. Chambers* (1989) 209 Cal.App.3d Supp. 1, 4 [257 Cal.Rptr. 289].
- Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Unanimity ▸ *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].
- Disease Prevention Demonstration Project ▸ Health & Saf. Code, § 121285; Bus. & Prof. Code, § 4145(a)(2).
- Possession Permitted Under Project ▸ Health & Saf. Code, § 11364(c).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 116.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.04[2][a] (Matthew Bender).

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

RELATED ISSUES

Marijuana Paraphernalia Excluded
Possession of a device for smoking marijuana, without more, is not a crime. (*In re Johnny O.* (2003) 107 Cal.App.4th 888, 897 [132 Cal.Rptr.2d 471].)

2440. Maintaining a Place for Controlled Substance Sale or Use (Health & Saf. Code, § 11366)

The defendant is charged [in Count __] with (opening/ [or] maintaining) a place for the (sale/ [or] use) of a (controlled substance/ [or] narcotic drug) [in violation of Health and Safety Code section 11366].

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

1. **The defendant (opened/ [or] maintained) a place;**

   AND

2. **The defendant (opened/ [or] maintained) the place with the intent to (sell[,]/ [or] give away[,]/ [or] allow others to use) a (controlled substance/ [or] narcotic drug), specifically _____** *<insert name of drug>***, on a continuous or repeated basis at that place.**

New January 2006; Revised 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 ▸ Health & Saf. Code, § 11366.
- Purpose Must Be Continuous or Repetitive Use of Place for Illegal Activity ▸ *People v. Horn* (1960) 187 Cal.App.2d 68, 72 [9 Cal.Rptr. 578]; *People v. Holland* (1958) 158 Cal.App.2d 583, 588–589 [322 P.2d 983].
- Jury Must Be Instructed on Continuous or Repeated Use ▸ *People v. Shoals* (1992) 8 Cal.App.4th 475, 490 [10 Cal.Rptr.2d 296].
- "Opening" and "Maintaining" Need Not Be Defined ▸ *People v. Hawkins* (2004) 124 Cal.App.4th 675, 684 [21 Cal.Rptr.3d 500].

- Violations Are Crimes of Moral Turpitude Involving Intent to Corrupt Others, So Solo Use of Drugs Not Covered by Section 11366 ▸ *People v. Vera* (1999) 69 Cal.App.4th 1100, 1102–1103 [82 Cal.Rptr.2d 128].
- Evidence of Personal Drug Use Not Sufficient ▸ *People v. Franco* (2009) 180 Cal.App.4th 713, 718-719 [103 Cal.Rptr.3d 310].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 118.

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

RELATED ISSUES

Corpus Delicti Includes Intent

"[T]he perpetrator's purpose of continuously or repeatedly using a place for selling, giving away, or using a controlled substance is part of the corpus delicit of a violation of Health and Safety Code section 11366." (*People v. Hawkins* (2004) 124 Cal.App.4th 675, 681 [21 Cal.Rptr.3d 500].)

2748. Possession of Controlled Substance or Paraphernalia in Penal Institution (Pen. Code, § 4573.6)

The defendant is charged [in Count __] with possessing (_____ <*insert type of controlled substance*>, a controlled substance/an object intended for use to inject or consume controlled substances), in a penal institution [in violation of Penal Code section 4573.6].

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

1. **The defendant [unlawfully] possessed (a controlled substance/an object intended for use to inject or consume controlled substances) in a penal institution [or on the grounds of a penal institution];**

2. **The defendant knew of the (substance's/object's) presence;**

[AND]

3. **The defendant knew (of the substance's nature or character as a controlled substance/that the object was intended to be used for injecting or consuming controlled substances)(;/.)**

<Give elements 4 and 5 if defendant is charged with possession of a controlled substance, not possession of paraphernalia.>

[4. The controlled substance that the defendant possessed was _____ <*insert type of controlled substance*>**;**

AND

5. **The controlled substance was a usable amount.]**

A *penal institution* is a (state prison[,]/ [or] prison camp or farm[,]/ [or] (county/ [or] city) jail[,]/ [or] county road camp[,]/ [or] county farm[,]/ [or] place where prisoners of the state prison are located under the custody of prison officials, officers, or employees/ [or] place where prisoners or inmates are being held under the custody of a (sheriff[,]/ [or] chief of police[,]/ [or] peace officer[,]/ [or] probation officer).

[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.]

[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~~.]

[An object is *intended to be used* for injecting or consuming controlled substances if the defendant (1) actually intended it to be so used, or (2) should have known, based on the item's objective features, that it was intended for such use.]

[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.]

[The People allege that the defendant possessed the following items: _____ <*insert description of each controlled substance or all paraphernalia when multiple items alleged*>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant possessed at least one of these items and you all agree on which item (he/she) possessed.]

<A. Defense: Prescription>
[The defendant is not guilty of unlawfully possessing _____ <*insert type of controlled substance*> if (he/she) had a valid prescription for that substance written by a physician, dentist, podiatrist, or veterinarian licensed to practice in California. The People have the burden of proving beyond a reasonable doubt that the defendant did not have a valid prescription. If the People have not met this burden, you must find the defendant not guilty of possessing a controlled substance.]

<B. Defense: Conduct Authorized>
[The defendant is not guilty of this offense if (he/she) was authorized to possess the (substance/item) by (the rules of the (Department of Corrections/prison/jail/institution/camp/farm/place)/ [or] the specific authorization of the (warden[,]/ [or] superintendent[,]/ [or] jailer[,]/ [or] [other] person in charge of the (prison/jail/institution/camp/farm/place)). The People have the burden of proving beyond a reasonable doubt that the

defendant was not authorized to possess the (substance/item). If the People have not met this burden, you must find the defendant not guilty of this offense.]

New January 2006

BENCH NOTES

Instructional Duty

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

If the defendant is charged with possessing a controlled substance, give elements 1 through 5. If the defendant is charged with possession of paraphernalia, give elements 1 through 3 only.

If the prosecution alleges under a single count that the defendant possessed multiple items, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with "The People allege that the defendant possessed," inserting the items alleged.

Give the bracketed sentence defining "intended to be used" if there is an issue over whether the object allegedly possessed by the defendant was drug paraphernalia. (See *People v. Gutierrez* (1997) 52 Cal.App.4th 380, 389 [60 Cal.Rptr.2d 561].)

The prescription defense is codified in Health & Safety Code sections 11350 and 11377. This defense does apply to a charge of possession of a controlled substance in a penal institution. (*People v. Fenton* (1993) 20 Cal.App.4th 965, 969 [25 Cal.Rptr.2d 52].) The defendant need only raise a reasonable doubt about whether his possession of the drug was lawful because of a valid prescription. (See *People v. Mower* (2002) 28 Cal.4th 457, 479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If there is sufficient evidence of a prescription, give the bracketed "unlawfully" in element 1 and the bracketed paragraph headed "Defense: Prescription."

If there is sufficient evidence that the defendant was authorized to possess the substance or item, give the bracketed word "unlawfully" in element 1 and the bracketed paragraph headed "Defense: Conduct Authorized." (*People v. George* (1994) 30 Cal.App.4th 262, 275–276 [35 Cal.Rptr.2d 750]; *People v. Cardenas* (1997) 53 Cal.App.4th 240, 245–246 [61 Cal.Rptr.2d 583].)

AUTHORITY

- Elements ▸ Pen. Code, § 4573.6; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717]; *People v. Carrasco* (1981) 118 Cal.App.3d 936, 944–948 [173 Cal.Rptr. 688].
- Knowledge ▸ *People v. Carrasco* (1981) 118 Cal.App.3d 936, 944–947 [173 Cal.Rptr. 688].
- Usable Amount ▸ *People v. Carrasco* (1981) 118 Cal.App.3d 936, 948 [173 Cal.Rptr. 688].
- Prescription Defense ▸ Health & Saf. Code, §§ 11350, 11377.
- Prescription ▸ Health & Saf. Code, §§ 11027, 11164, 11164.5.
- Persons Authorized to Write Prescriptions ▸ Health & Saf. Code, § 11150.
- Prescription Defense Applies ▸ *People v. Fenton* (1993) 20 Cal.App.4th 965, 969 [25 Cal.Rptr.2d 52].
- Authorization Is Affirmative Defense ▸ *People v. George* (1994) 30 Cal.App.4th 262, 275–276 [35 Cal.Rptr.2d 750]; *People v. Cardenas* (1997) 53 Cal.App.4th 240, 245–246 [61 Cal.Rptr.2d 583].
- Jail Defined ▸ *People v. Carter* (1981) 117 Cal.App.3d 546, 550 [172 Cal.Rptr. 838].
- Knowledge of Location as Penal Institution ▸ *People v. Seale* (1969) 274 Cal.App.2d 107, 111 [78 Cal.Rptr. 811].
- "Adjacent to" and "Grounds" Not Vague ▸ *People v. Seale* (1969) 274 Cal.App.2d 107, 114–115 [78 Cal.Rptr. 811].
- Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Unanimity ▸ *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 124.

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. 94, *Prisoners' Rights,* § 94.04 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01 (Matthew Bender).

RELATED ISSUES

Inmate Transferred to Mental Hospital

A prison inmate transferred to a mental hospital for treatment under Penal Code section 2684 is not "under the custody of prison officials." (*People v. Superior Court (Ortiz)* (2004) 115 Cal.App.4th 995, 1002 [9 Cal.Rptr.3d 745].) However, the inmate is "held under custody by peace officers within the facility." (*Id.* at p. 1003.) Thus, Penal Code section 4573.6 does apply. *(Ibid.)*

Use of Controlled Substance Insufficient to Prove Possession

" '[*P*]*ossession*,' as used in that section, does not mean 'use' and mere evidence of use (or being under the influence) of a proscribed substance cannot circumstantially prove its '*possession*.' " (*People v. Spann* (1986) 187 Cal.App.3d 400, 408 [232 Cal.Rptr. 31] [italics in original]; see also *People v. Carrasco* (1981) 118 Cal.App.3d 936, 947 [173 Cal.Rptr. 688].)

Posting of Prohibition

Penal Code section 4573.6 requires that its "prohibitions and sanctions" be posted on the grounds of the penal institution. (Pen. Code, § 4573.6.) However, that requirement is not an element of the offense, and the prosecution is not required to prove compliance. (*People v. Gutierrez* (1997) 52 Cal.App.4th 380, 389 [60 Cal.Rptr.2d 561]; *People v. Cardenas* (1997) 53 Cal.App.4th 240, 246 [61 Cal.Rptr.2d 583].)

Possession of Multiple Items at One Time

"[C]ontemporaneous possession in a state prison of two or more discrete controlled substances . . . at the same location constitutes but one offense under Penal Code section 4573.6." (*People v. Rouser* (1997) 59 Cal.App.4th 1065, 1067 [69 Cal.Rptr.2d 563].)

Administrative Punishment Does Not Bar Criminal Action

"The protection against multiple punishment afforded by the Double Jeopardy Clause . . . is not implicated by prior prison disciplinary proceedings . . . ." (*Taylor v. Hamlet* (N.D.Cal., Oct. 29, 2003, No. C 01-4331 MMC (PR)) 2003 U.S.Dist. LEXIS 19451; see also *People v. Ford* (1959) 175 Cal.App.2d 37, 39 [345 P.2d 354] [Pen. Code, § 654 not implicated].)

Medical Use of Marijuana
The medical marijuana defense provided by Health and Safety Code section 11362.5 is not available to a defendant charged with violating Penal Code section 4573.6. (*Taylor v. Hamlet* (N.D.Cal., Oct. 29, 2003, No. C 01-4331 MMC (PR)) 2003 U.S.Dist. LEXIS 19451.) However, the common law defense of medical necessity may be available. *(Ibid.)*

2749–2759. Reserved for Future Use

3450. Insanity: Determination, Effect of Verdict (Pen. Code, §§ 25, 25.5)

You have found the defendant guilty of _____ <*insert crime[s]*>. Now you must decide whether (he/she) was legally insane when (he/she) committed the crime[s].

The defendant must prove that it is more likely than not that (he/she) was legally insane when (he/she) committed the crime[s].

The defendant was legally insane if:

1. **When (he/she) committed the crime[s], (he/she) had a mental disease or defect;**

AND

2. **Because of that disease or defect, (he/she) was incapable of ~~did not~~ knowing or understanding the nature and quality of (his/her) act or was incapable of~~did not~~ knowing or understanding that (his/her) act was morally or legally wrong.**

None of the following qualify as a mental disease or defect for purposes of an insanity defense: personality disorder, adjustment disorder, seizure disorder, or an abnormality of personality or character made apparent only by a series of criminal or antisocial acts.

[Special rules apply to an insanity defense involving drugs or alcohol. Addiction to or abuse of drugs or intoxicants, by itself, does not qualify as legal insanity. This is true even if the intoxicants cause organic brain damage or a settled mental disease or defect that lasts after the immediate effects of the intoxicants have worn off. Likewise, a temporary mental condition caused by the recent use of drugs or intoxicants is not legal insanity.]

[If the defendant suffered from a settled mental disease or defect caused by the long-term use of drugs or intoxicants, that settled mental disease or defect combined with another mental disease or defect may qualify as legal insanity. A *settled mental disease or defect* is one that remains after the effect of the drugs or intoxicants has worn off.]

You may consider any evidence that the defendant had a mental disease or defect before the commission of the crime[s]. If you are satisfied that (he/she) had a mental disease or defect before (he/she) committed the crime[s], you may conclude that (he/she) suffered from that same condition when (he/she) committed the crime[s]. You must still decide whether that mental disease or defect constitutes legal insanity.

[If you find the defendant was legally insane at the time of (his/her) crime[s], (he/she) will not be released from custody until a court finds (he/she) qualifies for release under California law. Until that time (he/she) will remain in a mental hospital or outpatient treatment program, if appropriate. (He/She) may not, generally, be kept in a mental hospital or outpatient program longer than the maximum sentence available for (his/her) crime[s]. If the state requests additional confinement beyond the maximum sentence, the defendant will be entitled to a new sanity trial before a new jury. Your job is only to decide whether the defendant was legally sane or insane at the time of the crime[s]. You must not speculate as to whether (he/she) is currently sane or may be found sane in the future. You must not let any consideration about where the defendant may be confined, or for how long, affect your decision in any way.]

[You may find that at times the defendant was legally sane and at other times was legally insane. You must determine whether (he/she) was legally insane when (he/she) committed the crime.]

[If you conclude that the defendant was legally sane at the time (he/she) committed the crime[s], then it is no defense that (he/she) committed the crime[s] as a result of an uncontrollable or irresistible impulse.]

If, after considering all the evidence, all twelve of you conclude the defendant has proved that it is more likely than not that (he/she) was legally insane when (he/she) committed the crime[s], you must return a verdict of not guilty by reason of insanity.

New January 2006; Revised April 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on insanity when the defendant has entered a plea of not guilty by reason of insanity. (Pen. Code, § 25.)

Give the bracketed paragraph that begins with "Special rules apply" when the sole basis of insanity is the defendant's use of intoxicants. (Pen. Code, § 25.5; *People v. Robinson* (1999) 72 Cal.App.4th 421, 427–428 [84 Cal.Rptr.2d 832].) If the defendant's use of intoxicants is not the sole basis or causative factor of insanity, but rather one factor among others, give the bracketed paragraph that begins with "If the defendant suffered from a settled mental." (*Id*. at p. 430, fn. 5.)

Do **not** give CALCRIM No. 224, *Circumstantial Evidence: Sufficiency of Evidence*, or CALCRIM No. 225, *Circumstantial Evidence: Intent or Mental State*. These instructions have "no application when the standard of proof is preponderance of the evidence." (*People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1274 [18 Cal.Rptr.3d 286].)

There is no sua sponte duty to inform the jury that an insanity verdict would result in the defendant's commitment to a mental hospital. However, this instruction must be given on request. (*People* v. *Moore* (1985) 166 Cal.App.3d 540, 556 [211 Cal.Rptr. 856]; *People* v. *Kelly* (1992) 1 Cal.4th 495, 538 [3 Cal.Rptr.2d 677, 822 P.2d 385].)

If the court conducts a bifurcated trial on the insanity plea, the court **must** also give the appropriate posttrial instructions such as CALCRIM No. 3550, *Pre-Deliberation Instructions*; CALCRIM No. 222, *Evidence*; and CALCRIM No. 226, *Witnesses*. (See *In Re Ramon M.* (1978) 22 Cal.3d 419, 427, fn. 10 [149 Cal.Rptr. 387, 584 P.2d 524].) These instructions may need to be modified.

AUTHORITY

- Instructional Requirements ▸ Pen. Code, §§ 25, 25.5; *People v. Skinner* (1985) 39 Cal.3d 765 [217 Cal.Rptr. 685, 704 P.2d 752].
- Burden of Proof ▸ Pen. Code, § 25(b).
- Commitment to Hospital ▸ Pen. Code, §§ 1026, 1026.5; *People* v. *Moore* (1985) 166 Cal.App.3d 540, 556 [211 Cal.Rptr. 856]; *People* v. *Kelly* (1992) 1 Cal.4th 495, 538 [3 Cal.Rptr.2d 677, 822 P.2d 385].
- Excluded Conditions ▸ Pen. Code, § 25.5.
- Anti-social Acts ▸ *People v. Fields* (1983) 35 Cal.3d 329, 368–372 [197 Cal.Rptr. 803, 673 P.2d 680]; *People v. Stress* (1988) 205 Cal.App.3d 1259, 1271 [252 Cal.Rptr. 913].
- Long-Term Substance Use ▸ *People v. Robinson* (1999) 72 Cal.App.4th 421, 427 [84 Cal.Rptr.2d 832].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §§ 7–16.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.02 (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 86, *Insanity Trial,* § 86.01A (Matthew Bender).

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

RELATED ISSUES

Bifurcated Proceedings

The defendant has a right to bifurcated proceedings on the questions of sanity and guilt. (Pen. Code, § 1026.) When the defendant enters *both* a "not guilty" and a "not guilty by reason of insanity" plea, the defendant must be tried first with respect to guilt. If the defendant is found guilty, he or she is then tried with respect to sanity. The defendant may waive bifurcation and have both guilt and sanity tried at the same time. (Pen. Code, § 1026(a).)

Extension of Commitment

The test for extending a person's commitment is not the same as the test for insanity. (*People v. Superior Court (Williams)* (1991) 233 Cal.App.3d 477, 490 [284 Cal.Rptr. 601].) The test for insanity is whether the accused "was incapable of knowing or understanding the nature and quality of his or her act or of distinguishing right from wrong at the time of the commission of the offense." (Pen. Code, § 25(b); *People v. Skinner* (1985) 39 Cal.3d 765, 768 [217 Cal.Rptr. 685, 704 P.2d 752].) In contrast, the standard for recommitment under Penal Code section 1026.5, subdivision (b), is whether a defendant, "by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others." (*People v. Superior Court, supra,* 233 Cal.App.3d at pp. 489–490; *People v. Wilder* (1995) 33 Cal.App.4th 90, 99 [39 Cal.Rptr.2d 247].)

Legal and Moral Wrong

The wrong contemplated by the two-part insanity test refers to both the legal wrong and the moral wrong. If the defendant appreciates that his or her act is criminal but does not think it is morally wrong, he or she may still be criminally insane. (See *People v. Skinner* (1985) 39 Cal.3d 765, 777–784 [217 Cal.Rptr. 685]; see also *People v. Stress* (1988) 205 Cal.App.3d 1259, 1271–1274 [252 Cal.Rptr. 913].)

Temporary Insanity

The defendant's insanity does not need to be permanent in order to establish a defense. The relevant inquiry is the defendant's mental state at the time the offense was committed. (*People v. Kelly* (1973) 10 Cal.3d 565, 577 [111 Cal.Rptr. 171, 516 P.2d 875].)

3516. Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited

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<Give this paragraph when the law does not specify which crime must be sustained or dismissed if the defendant is found guilty of both>
[The defendant is charged in Count __ with _____ *<insert name of alleged offense ~~, e.g., theft~~>* **and in Count __ with _____** *<insert name of alleged offense ~~, e.g., receiving stolen property~~>*. **These are alternative charges. If you find the defendant guilty of one of these charges, you must find (him/her) not guilty of the other. You cannot find the defendant guilty of both.]**

<Give the following paragraph when the defendant is charged with both theft and receiving stolen property offenses based on the same incident>
[The defendant is charged in Count ___with _____*<insert theft offense >* **and in Count ___ with _____***<insert receiving stolen property offense>.* **You must first decide whether the defendant is guilty of _____***<insert name of theft offense>.* **If you find the defendant guilty of _____***<insert name of theft offense>,* **you must return the verdict form for _____***<insert name of receiving stolen property offense>* **unsigned. If you find the defendant not guilty of _____***<insert theft offense >* **you must then decide whether the defendant is guilty of _____***<insert name of receiving stolen property offense>***.]**

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction where the defendant is charged in the alternative with multiple counts for a single event. (See *People v. Allen* (1999) 21 Cal.4th 846, 851 [89 Cal.Rptr.2d 279, 984 P.2d 486]; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757 [129 Cal.Rptr. 306, 548 P.2d 706].) This instruction applies only to those cases in which the defendant may be legally convicted of only one of the alternative charges. See dual conviction list in *Related Issues* section below.

If the defendant is charged with both theft and receiving stolen property, and the jury informs the court that it cannot reach a verdict on the theft count, the court may then instruct the jury to consider the receiving stolen property count.

If the defendant is charged with multiple counts for separate offenses, give CALCRIM No. 3515, *Multiple Counts: Separate Offenses*.

If the case involves separately charged greater and lesser offenses, the court should give CALCRIM No. 3519. Because the law is unclear in this area, the court must decide whether to give this instruction if the defendant is charged with specific sexual offenses and, in the alternative, with continuous sexual abuse under Penal Code section 288.5. If the court decides not to so instruct, and the jury convicts the defendant of both continuous sexual abuse and one or more specific sexual offenses that occurred during the same period, the court must then decide which conviction to dismiss.

AUTHORITY

- Prohibition Against Dual Conviction ▸ *People v. Ortega* (1998) 19 Cal.4th 686, 692 [80 Cal.Rptr.2d 489, 968 P.2d 48]; *People v. Sanchez* (2001) 24 Cal.4th 983, 988 [103 Cal.Rptr.2d 698, 16 P.3d 118]; *People v. Allen* (1999) 21 Cal.4th 846, 851 [89 Cal.Rptr.2d 279, 984 P.2d 486]; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757 [129 Cal.Rptr. 306, 548 P.2d 706].
- Instructional Requirements ▸ See *People v. Allen* (1999) 21 Cal.4th 846, 851 [89 Cal.Rptr.2d 279, 984 P.2d 486]; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757 [129 Cal.Rptr. 306, 548 P.2d 706].
- Conviction of Receiving Stolen Property Precluded if Defendant Convicted of Theft of Same Property ▸ *People v. Ceja* (2010) 49 Cal.4th 1, 3-4 [108 Cal.Rptr.3d 568, 229 P.3d 995].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][i] (Matthew Bender).

RELATED ISSUES

Dual Conviction May Not Be Based on Necessarily Included Offenses

"[T]his court has long held that multiple convictions may *not* be based on necessarily included offenses. The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense." (*People v. Ortega* (1998) 19 Cal.4th 686, 692 [80 Cal.Rptr.2d 489, 968 P.2d 48] [emphasis in original, citations and internal quotation marks omitted]; see also *People v. Montoya* (2004) 33 Cal.4th 1031, 1034 [16 Cal.Rptr.3d 902, 94 P.3d 1098].) "In deciding whether an offense is necessarily included in another, we apply the elements test, asking whether all the legal ingredients of the corpus delicti of the lesser offense are included in the elements of the greater offense." (*People v. Montoya, supra,* 33 Cal.4th at p. 1034 [internal quotation marks and citation omitted].)

~~Some courts have also applied the "accusatory pleading" test to determine whether one offense is necessarily included in another. (See *People v. Malfavon* (2002) 102 Cal.App.4th 727, 742 [125 Cal.Rptr.2d 618] [court must compare "the facts actually alleged in the accusatory pleading" to determine if one offense is necessarily included in the other].) In *People v. Montoya, supra,* 33 Cal.4th at p. 1034, however, the Supreme Court observed that the "accusatory pleading" test is generally used "to determine whether to instruct a jury on an uncharged lesser offense." The Court further noted that "[s]ome Court of Appeal decisions have concluded that the accusatory pleading test . . . does not apply to considerations of whether multiple convictions are proper." (*Id.* at p. 1036 [internal quotation marks and citation omitted].) The Court declined to decide this issue. *(Ibid.)* Justice Chin, in a concurring opinion, expressed the opinion that the "accusatory pleading" test should not be used to determine whether one offense is necessarily included in another. (*Id.* at p. 1039.)~~

Dual Conviction—Examples of Offense Where Prohibited or Permitted

The courts have held that dual conviction is *prohibited* for the following offenses:

- Robbery and theft ▸ *People v. Ortega* (1998) 19 Cal.4th 686, 699 [80 Cal.Rptr.2d 489, 968 P.2d 48].
- Robbery and receiving stolen property ▸ *People v. Stephens* (1990) 218 Cal.App.3d 575, 586–587 [267 Cal.Rptr. 66].
- Theft and receiving stolen property ▸ *People v. Jaramillo* (1976) 16 Cal.3d 752, 757 [129 Cal.Rptr. 306, 548 P.2d 706].

- Battery and assault ‣ See *People v. Ortega* (1998) 19 Cal.4th 686, 693 [80 Cal.Rptr.2d 489, 968 P.2d 48].
- Forgery and check fraud ‣ *People v. Hawkins* (1961) 196 Cal.App.2d 832, 838 [17 Cal.Rptr. 66].
- Forgery and credit card fraud ‣ *People v. Cobb* (1971) 15 Cal.App.3d 1, 4 [93 Cal.Rptr. 152].

The courts have held that dual conviction is *permitted* for the following offenses (although dual punishment is not):

- Burglary and theft ‣ *People v. Bernal* (1994) 22 Cal.App.4th 1455, 1458 [27 Cal.Rptr.2d 839].
- Burglary and receiving stolen property ‣ *People v. Allen* (1999) 21 Cal.4th 846, 866 [89 Cal.Rptr.2d 279, 984 P.2d 486].
- Carjacking and grand theft ‣ *People v. Ortega* (1998) 19 Cal.4th 686, 693 [80 Cal.Rptr.2d 489, 968 P.2d 48].
- Carjacking and robbery ‣ *People v. Ortega* (1998) 19 Cal.4th 686, 700 [80 Cal.Rptr.2d 489, 968 P.2d 48].
- Carjacking and unlawful taking of a vehicle ‣ *People v. Montoya* (2004) 33 Cal.4th 1031, 1035 [16 Cal.Rptr.3d 902, 94 P.3d 1098].
- Murder and gross vehicular manslaughter while intoxicated ‣ *People v. Sanchez* (2001) 24 Cal.4th 983, 988 [103 Cal.Rptr.2d 698, 16 P.3d 118].
- Murder and child abuse resulting in death ‣ *People v. Malfavon* (2002) 102 Cal.App.4th 727, 743 [125 Cal.Rptr.2d 618].

Joy Riding and Receiving Stolen Property

A defendant cannot be convicted of both joy riding (Veh. Code, § 10851) and receiving stolen property (Pen. Code, § 496), unless the record clearly demonstrates that the joy riding conviction is based exclusively on the theory that the defendant drove the car, temporarily depriving the owner of possession, not on the theory that the defendant stole the car. (*People v. Allen* (1999) 21 Cal.4th 846, 851 [89 Cal.Rptr.2d 279, 984 P.2d 486]; *People v. Jaramillo* (1976) 16 Cal.3d 752, 758–759 [129 Cal.Rptr. 306, 548 P.2d 706]; *People v. Austell* (1990) 223 Cal.App.3d 1249, 1252 [273 Cal.Rptr. 212].)

Accessory and Principal

In *People v. Prado* (1977) 67 Cal.App.3d 267, 273 [136 Cal.Rptr. 521], and *People v. Francis* (1982) 129 Cal.App.3d 241, 248 [180 Cal.Rptr. 873], the courts

held that the defendant could not be convicted as both a principal and as an accessory after the fact for the same offense. However, later opinions have criticized these cases, concluding, "there is no bar to conviction as both principal and accessory where the evidence shows distinct and independent actions supporting each crime." (*People v. Mouton* (1993) 15 Cal.App.4th 1313, 1324 [19 Cal.Rptr.2d 423]; *People v. Riley* (1993) 20 Cal.App.4th 1808, 1816 [25 Cal.Rptr.2d 676]; see also *People v. Nguyen* (1993) 21 Cal.App.4th 518, 536, fn. 6 [26 Cal.Rptr.2d 323].)

3550. Pre-Deliberation Instructions

When you go to the jury room, the first thing you should do is choose a foreperson. The foreperson should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard.

It is your duty to talk with one another and to deliberate in the jury room. You should try to agree on a verdict if you can. Each of you must decide the case for yourself, but only after you have discussed the evidence with the other jurors. Do not hesitate to change your mind if you become convinced that you are wrong. But do not change your mind just because other jurors disagree with you.

Keep an open mind and openly exchange your thoughts and ideas about this case. Stating your opinions too strongly at the beginning or immediately announcing how you plan to vote may interfere with an open discussion. Please treat one another courteously. Your role is to be an impartial judge of the facts, not to act as an advocate for one side or the other.

As I told you at the beginning of the trial, do not talk about the case or about any of the people or any subject involved in it with anyone, including, but not limited to, your spouse or other family, or friends, spiritual leaders or advisors, or therapists. You must discuss the case only in the jury room and only when all jurors are present. Do not discuss your deliberations with anyone.

[During the trial, several items were received into evidence as exhibits. You may examine whatever exhibits you think will help you in your deliberations. (These exhibits will be sent into the jury room with you when you begin to deliberate./ If you wish to see any exhibits, please request them in writing.)]

If you need to communicate with me while you are deliberating, send a note through the bailiff, signed by the foreperson or by one or more members of the jury. To have a complete record of this trial, it is important that you not communicate with me except by a written note. If you have questions, I will talk with the attorneys before I answer so it may take some time. You should continue your deliberations while you wait for my answer. I will answer any questions in writing or orally here in open court.

Do not reveal to me or anyone else how the vote stands on the (question of guilt/[or] issues in this case) unless I ask you to do so.

Your verdict [on each count and any special findings] must be unanimous. This means that, to return a verdict, all of you must agree to it. [Do not reach a decision by the flip of a coin or by any similar act.]

It is not my role to tell you what your verdict should be. [Do not take anything I said or did during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be.]

You must reach your verdict without any consideration of punishment.

You will be given [a] verdict form[s]. As soon as all jurors have agreed on a verdict, the foreperson must date and sign the appropriate verdict form[s] and notify the bailiff. [If you are able to reach a unanimous decision on only one or only some of the (charges/ [or] defendants), fill in (that/those) verdict form[s] only, and notify the bailiff.] Return any unsigned verdict form.

New January 2006; Revised April 2008

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct that the jury's verdict must be unanimous. Although there is no sua sponte duty to instruct on the other topics relating to deliberations, there is authority approving such instructions. (See *People v. Gainer* (1977) 19 Cal.3d 835, 856 [139 Cal.Rptr. 861, 566 P.2d 997]; *People v. Selby* (1926) 198 Cal. 426, 439 [245 P. 426]; *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].)

If the court automatically sends exhibits into the jury room, give the bracketed sentence that begins with "These exhibits will be sent into the jury room." If not, give the bracketed phrase that begins with "You may examine whatever exhibits you think."

Give the bracketed sentence that begins with "Do not take anything I said or did during the trial" unless the court will be commenting on the evidence. (See Pen. Code, §§ 1127, 1093(f).)

AUTHORITY

- Exhibits ▸ Pen. Code, § 1137.
- Questions ▸ Pen. Code, § 1138.

- Verdict Forms ▸ Pen. Code, § 1140.
- Unanimous Verdict ▸ Cal. Const., art. I, § 16; *People v. Howard* (1930) 211 Cal. 322, 325 [295 P. 333]; *People v. Kelso* (1945) 25 Cal.2d 848, 853–854 [155 P.2d 819]; *People v. Collins* (1976) 17 Cal.3d 687, 692 [131 Cal.Rptr. 782, 552 P.2d 742].
- Duty to Deliberate ▸ *People v. Gainer* (1977) 19 Cal.3d 835, 856 [139 Cal.Rptr. 861, 566 P.2d 997].
- Judge's Conduct as Indication of Verdict ▸ *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].
- Keep an Open Mind ▸ *People v. Selby* (1926) 198 Cal. 426, 439 [245 P. 426].
- Do Not Consider Punishment ▸ *People v. Nichols* (1997) 54 Cal.App.4th 21, 24 [62 Cal.Rptr.2d 433].
- Hung Jury ▸ *People v. Gainer* (1977) 19 Cal.3d 835, 850-852 [139 Cal.Rptr. 861, 566 P.2d 997]; *People v. Moore* (2002)96 Cal.App.4th 1105, 1118-1121 [117 Cal.Rptr.2d 715].
- This Instruction Upheld ▸ *People v. Santiago* (2010) 178 Cal.App.4th 1471, 1475-1476 [101 Cal.Rptr.3d 257].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000), §§ 643-644.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02, 85.03[1], 85.05[1] (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 fourth paragraph of this instruction.

3551–3574. Reserved for Future Use

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101	Hon. Harold Hopp Superior Court of California County of Riverside	I support the change to the second paragraph. However, the antecedent to "these things" is unclear because the phrase is separated from its antecedent by the sentence about not sharing information about the case. Perhaps the two sentences should be reversed, so that the sentence telling the jurors not to talk to each other about "these things" immediately follows the sentence that lists what the things are. (The last two sentences would read: "You must not talk about these things with the other jurors, either, until you begin deliberating. Do not share information about the case in writing, by email, by telephone, on the Internet, or by any other means of communication.") This change would lose the continuity of telling the jurors not to talk to each other about the case until deliberations begin and then (in the next paragraph) telling them how they are to deliberate. But I think it is more important to put "these things" closer to the list of what the things are. On a related topic, would it be better to put the paragraph about how to deliberate--only after all of the evidence is presented, only in the jury room, only when all jurors are present--only in 3550? Isn't the point of the instruction at the start of the trial that the jurors are not to talk about the case with each other until the jurors begin deliberating? If so, that point is covered by the sentence you are modifying in the current revisions.	The first comment requires no response. The latter two comments relate to language beyond the scope of the current invitation to comment. The committee will consider them at its next meeting.
101	Celia Rowland Asst. Dist. Attorney County of Santa Cruz	I suggest that in CALCRIM 101 that the following language be added after the language anyone "associated with them."-- “the trial such as spectators for either party." I recently tried a murder case and there were quite a few people who were there who knew the victim and who were there to support the victim's mother. One of the jurors knew one of the support people. She greeted her and discussed her presence. As a result, she developed a bias	This comment relates to language beyond the scope of the current invitation to comment. The committee will consider it at its next meeting.

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		that might not have existed but for that contact. I don't know that the added language would cure that problem, but it might be helpful. I also believe that spectators should be instructed by the judge (as opposed to by counsel of either party) to not have any contact with any juror.	
101	Public Defender Appellate Branch Los Angeles	Proposed modification: Eliminating the following paragraph: 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. This paragraph is discussed by the California Supreme Court in *People v. Bland* (2002) 28 Cal.4th 313, which states at page 334: "A court has no *sua sponte* duty to define terms that are commonly understood by those familiar with the English language, but it does have a duty to define terms that have a technical meaning peculiar to the law." *Bland* finds that terms are held "to require clarification by the trial court when their statutory definition differs from the meaning that might be ascribed to the same terms in common parlance." (*People v. Bland, supra*, 28 Cal.4th at 334 [citations omitted].) Since the court does have a duty to define certain terms that have a technical meaning peculiar to the law, it is important that a jury	This language still appears in CALCRIM No. 200, *Duties of Judge and Jury* and CALCRIM No. 761, *Death Penalty: Duty of Jury*. The committee believes it is not necessary to give this paragraph more than once during a trial.

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		instruction advise jurors that those definitions will be provided, and that, for non-legal terms, jurors are to use the definitions normally ascribed to those terms. This paragraph is exceedingly important and should be left in the instruction. Therefore, we object to this proposed modification.	
521	Michael Canzoneri Attorney Dept. of Justice	I did a quick review of the proposed instructions this morning, and I noticed in No. 521, the first modified line indicates "Give the final two paragraphs in every case." However, in the bench notes, it indicates to only give "the final paragraph in every case." In context, I think the drafters meant to only give the final paragraph in each case, but I wanted to let you know that there was an inconsistency in the proposed instruction as offered.	The committee has corrected this error.
521	Katherine Lynn Managing Attorney Second District Court of Appeal	The proposed modification to the instruction substitutes a bracketed sentence in place of "All other murders are of the second degree" as the next to the last paragraph (p. 16) and deletes the note (p. 15) "GIVE FINAL TWO PARAGRAPHS IN EVERY CASE." The Bench Note (p. 16) recognizes this proposed modification by changing "The court must give the final two paragraphs in every case" to "The court must give the final paragraph in every case." However, the first bracketed note (p. 12) still states, in part, "Give the final two paragraphs in every case." The first bracketed note (p. 12) should similarly be modified to state "Give the final paragraph in every case."	The committee has corrected this error.
571	Celia Rowland Asst. Dist. Attorney County of Santa Cruz	I suggest leaving in the word "actually" preceding "believed." While it is somewhat duplicative, it does emphasize the difference between the defendant's belief and any objectively reasonable belief. For that reason, I think it is an important qualifier.	The committee agrees with this comment and has restored the word "actually."
571	Appellate Defenders, Inc. San Diego	The proposal is to delete the word "actually" before "believed" in instructions on imperfect self defense in the voluntary manslaughter context. We agree that in a number of instructions	The committee agrees with this comment and has restored the word "actually."

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		the word "actually" is unnecessary, since the context allows no other meaning. But we think it serves an important function in the self defense instructions, because those refer to two *different* kinds of belief – actual and reasonable. Use of "actually" emphasizes the distinction and helps the jury keep these potentially confusing concepts clear as they deliberate.	
593	Public Defender Appellate Branch Los Angeles	Misdemeanor Vehicular Manslaughter (Pen. Code § 192(c)(2).) Penal Code section 192, subdivision (c)(2), describes vehicular manslaughter as "Driving a vehicle in the commission of an unlawful act, not amounting to felony, but without gross negligence; or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence." The revision to the bench notes acknowledges that "Authority is ambiguous about whether the requirement of negligence applies only to the commission of an otherwise lawful act or also to an infraction or misdemeanor." However, the proposed revision fails to resolve this ambiguity and offers the trial court two alternative instructions: one that instructs the jury that a misdemeanor or infraction, as well as a lawful act, requires proof of negligence, the other that instructs the jury only a lawful act, committed in a unlawful manner, requires negligence. The bench note should advise the trial court that the rules of statutory construction require the court to resolve this ambiguity in favor of the defendant. The California Supreme Court held, "When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted. [¶] The defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a	The bench notes to many CALCRIM instructions highlight ambiguities in the law. The committee does not believe it is necessary for the bench notes to admonish the court to resolve ambiguities in favor of the defendant because that is properly the role of defense counsel. Moreover, as the commentator acknowledges, the Supreme Court held that "*ordinarily* that construction which is more favorable to the offender will be adopted." (*People v. Davis* (1981) 29 Cal.3d 814, 828.) (Emphasis added.) The committee believes that a blanket admonition to resolve all ambiguities in favor of the defendant would not be appropriate in every case and the issue must be left to the discretion of the court.

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		statute. [Citations omitted.]" (*People v. Davis* (1981) 29 Cal. 3d 814, 828.) The proposed amendment fails to abide by this rule of statutory construction. The Judicial Council should adopt only the revision of CALCRIM 593 that instructs the jury that a misdemeanor or infraction, as well as a lawful act, requires negligence. The Judicial Council should remove the portion of the revision which alternatively instructs that only a lawful act, committed in an unlawful manner, requires negligence.	
593	Appellate Defenders, Inc. San Diego	Involuntary vehicular manslaughter under this instruction requires a death occur either (a) in the commission of a misdemeanor or infraction or (b) in the commission of an otherwise lawful act, done in an unlawful manner. The question is whether both (a) and (b) must be done negligently, or whether the requirement of negligence applies only to (b). The proposal in No. 593 is to tell the trial court the law is uncertain and require the court to make the determination. We think this ambivalence is unwarranted and that long-standing law positively indicates negligence is required for either prong of involuntary manslaughter. While the CALCRIM committee of course cannot make law or resolve issues that are genuinely in dispute, we urge that it can and should take a position when the weight of authority leads strongly and positively in a certain direction. For many instructions there is not Supreme Court authority or an uncontradicted Court of Appeal line of authority directly in point, but that does not mean the law is so uncertain the committee must throw up its hands. Often the statutory language and/or trend of the case law, combined with the logic of the law, gives adequate certitude for CALCRIM to take a stand. Leaving the instruction as an open choice is not cost-free: it puts a burden on the trial	The committee understands that there is legal support for this comment, but believes that until there is direct support, it is better to point out the ambiguity in the law and leave the choice in the discretion of the trial judge.

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		court and trial counsel to research and argue the law in each case involving the charge. The fact this is often done in the rush of trial, without the benefit of the deliberative process and opportunity for public comment offered the CALCRIM committee, increases the risk the trial court will make the "wrong" choice, potentially requiring retrial. The authority cited in the proposed bench note solidly supports the position that negligence is required for any form of involuntary vehicular manslaughter: • *People v. Pearne* (1897) 118 Cal. 154 reversed for conflicting instructions, part saying violation of a local speed law ordinance resulting in death was sufficient for involuntary manslaughter, and part suggesting otherwise. It ordered that on retrial the case should be based on lack of "due caution and circumspection," without reference to the ordinance. • *People v. Wells* (1996) 12 Cal.4th 979, 987, cited, as "directly on point here," the case of *Thiede v. State* (1921) 106 Neb. 48 [182 N.W. 570], which held an act that is merely *malum prohibitum* is ordinarily insufficient for involuntary manslaughter, unless "accompanied by negligence or further wrong, so as to be, in its nature, dangerous, or so as to manifest a reckless disregard for the safety of others." (See also *People v. Stuart* (1956) 47 Cal.2d 167 [pharmacist accidentally, without any fault, provided adulterated drug in violation of a strict liability law; court holds such a violation without culpability is insufficient for involuntary manslaughter]; see *People v. Cox* (2000) 23 Cal.4th 665 [act causing death must be "dangerous in the circumstances of its commission"].) • *People v. Burroughs* (1984) 35 Cal.3d 824, 835, overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89,	

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		held that an "unintentional homicide committed in the course of a noninherently dangerous felony may properly support a conviction of involuntary manslaughter, if that felony is committed without due caution and circumspection." (Emphasis added.) It would be incongruous to require negligence for manslaughter based on a felony but not for the same crime based on a lesser offense, a misdemeanor. • *In re Dennis B.* (1976) 18 Cal.3d 687, 696, stated the "without gross negligence" provision of Penal Code section 192, subdivision (c)(2) means ordinary negligence is required.[1] (See also *People v. Pociask* (1939) 14 Cal.2d 679; *People v. Wilson* (1947) 78 Cal.App.2d 108; *People v. Bussel* (2002) 97 Cal.App.4th Supp. 1.) Since Penal Code section 192, subdivision (c)(2) uses "without gross negligence" after both the misdemeanor or infraction prong and otherwise act prong, the necessary conclusion is that the former requires negligence. [1] The misdemeanor-infraction prong of involuntary manslaughter requires the death occur "in the commission of an unlawful act, not amounting to a felony, but without gross negligence." (Pen. Code, § 192, subd. (c)(2), emphasis added.) *Dennis B.* held the underscored words do not merely denote the absence of gross negligence but affirmatively require ordinarily negligence. Although not citable to a court, *People v. Lopez* (June 8, 2010, G042140) 2010 WL 2282050 states: "To convict an adult defendant of vehicular manslaughter while intoxicated, the prosecution must prove that in addition to driving in violation of section 23152, the defendant committed a misdemeanor or infraction with ordinary negligence and the negligent conduct caused death. (Pen.Code, § 191.5, subd. (b); CALCRIM No. 591.)" CALCRIM No. 591 explicitly requires ordinary negligence for	

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		involuntary manslaughter without gross negligence while intoxicated, in violation of Penal Code section 191.5, subdivision (b). There are no material differences in the provisions of sections 191.5(b) and 192(c)(2) with respect to the requirement of negligence. Indeed, we note that CALCRIM 593 itself describes the offense it defines as "vehicular manslaughter with ordinary negligence." (Emphasis added.) Against this array of authority the proposed bench note cites *People v. Mitchell* (1946) 27 Cal.2d 678, 683-684, presumably for a statement in it that violation of a speed law is sufficient to support involuntary vehicular manslaughter. That language does not suggest mere commission of *any* infraction is sufficient, regardless of negligence toward personal safety. Indeed, the whole point of that discussion in *Mitchell* was to distinguish technical violations of law from those carrying risk to safety – in that case, violation of a law explicitly "designed to prevent injury to the person" (27 Cal.2d at p. 683) and requiring the speed be "greater than is reasonable or prudent" (former Veh. Code, § 510) – where negligence is built into the commission of the infraction. The court explicitly found the evidence showed "reckless disregard for the safety of others." (27 Cal.2d at p. 684.) A broader reading of *Mitchell*'s language as saying a simple violation of a technical law not addressed to safety is sufficient for manslaughter would violate that opinion's own reasoning and render the decision inconsistent with later Supreme Court cases, such as *Stuart*, *Wells*, and *Cox*, which require dangerousness and criminal culpability.[2] In short, the strong weight of the law suggests criminal culpability in the form of negligence is required for both prongs of involuntary vehicular manslaughter. To avoid burdening trial courts and counsel and creating the risk of reversible error, we	

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		think CALCRIM No. 593 should so state. [2] Likewise dictum is the statement in *People v. Thompson* (2000) 79 Cal.App.4th 40, 53, that one can commit involuntary manslaughter when acting negligently or when committing a misdemeanor or infraction. *Thompson* involved the prong of involuntary manslaughter dealing with a lawful act committed in an unlawful manner, not the misdemeanor-infraction prong. It had no occasion to consider whether the latter requires negligence.	
593	Manuel Medeiros Department of Justice	We would like to offer the following modification to the proposed change to CALCRIM 593 in the interest of further clarity: Following: To prove that the defendant is guilty of vehicular manslaughter with ordinary negligence, the People must prove that: Change: If the court concludes that only a "lawful act, committed in an unlawful manner," requires negligence, give the following: To read instead: If the court concludes that negligence must be established only for a "lawful act, committed in an unlawful manner," and not for a misdemeanor or infraction (see Bench Notes), give the following:> And following: 3. The (misdemeanor[,]/ [or] infraction[,]/ [or] negligent act) caused the death of another person. Change: If the court concludes that a misdemeanor or infraction, as well as a lawful act, require negligence, give the following: To read instead: If the court concludes that negligence must be established for a misdemeanor or infraction, as well as for a "lawful act committed in an unlawful manner," give the following:	The committee agrees with this suggestion and has made corresponding changes to the instruction.

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604	Celia Rowland Asst. Dist. Attorney County of Santa Cruz	I suggest leaving in the word "actually" preceding "believed." While it is somewhat duplicative, it does emphasize the difference between the defendant's belief and any objectively reasonable belief. For that reason, I think it is an important qualifier.	This comment relates to language beyond the scope of the current invitation to comment. The committee will consider it at its next meeting.
604	Appellate Defenders, Inc. San Diego	We agree with the substance of the change specifying that "at least one" of the defendant's beliefs was unreasonable. Because there are other elements of the defense and it may not be clear to the jury what beliefs are referred to, we suggest a minor clarification: "A least one of *these two beliefs* was unreasonable." The proposal is to delete the word "actually" before "believed" in instructions on imperfect self defense in the voluntary manslaughter context. We agree that in a number of instructions the word "actually" is unnecessary, since the context allows no other meaning. But we think it serves an important function in the self defense instructions, because those refer to two *different* kinds of belief – actual and reasonable. Use of "actually" emphasizes the distinction and helps the jury keep these potentially confusing concepts clear as they deliberate.	Only two elements refer to "believing" and the committee believes that no further clarification is necessary. Moreover, this language is consistent with element 3 of CALCRIM 571, *Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense*.
875	Mike Roddy Court Executive Officer Superior Court of CA County of San Diego	In order to be consistent with the other instructions, Instruction 875, element 4, should be revised to state: "When the defendant acted,(he/she) had the present ability to apply force(likely to produce great bodily injury/with a deadly weapon other than a firearm/with a firearm . . ."	The committee agrees with this comment and has made the corresponding change.
875	Public Defender Appellate Branch Los Angeles	The proposed changes to this instruction would amend the language describing the means of assault from an assault with a "deadly weapon" to assault with a "deadly weapon other than a firearm." The authority cited for the revision is *People v. Milward*, previously published at 182 Cal.App.4th 1477. This case, however, has had review granted. We do not want to run the risk of having attorneys and/or bench officers relying on law that is unsettled, and thus oppose the proposed change. Reference to *Milward* in the "Authority" section should also be	The committee agrees with this comment and will delete the reference to the *Milward* case, which was depublished while this instruction was circulating for public comment. However, even without that case as precedent, the committee believes the law is not

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		deleted.	"unsettled" and it is appropriate to conform the instructional language to Penal Code section 245(a)(1), as CALJIC 9.02 has done as well.
945	Public Defender Appellate Branch Los Angeles	We oppose the change. The revision would delete the text explaining that a peace officer is not lawfully performing his or her duties if he or she is using excessive force or is unlawfully arresting or detaining someone. The section in the bench notes regarding lawful performance and the references to CALCRIMS 2670 and 2672 would also be deleted. CALCRIM 945 should not be amended as proposed. CALCRIMS 2670 and 2672 are not simply repetitive of the targeted paragraph in CALCRIM 945. The language in 945, instead, is simply introductory language that lets the jurors know that unlawful arrest/detention/force is an issue in the case and tells the jurors that they need to look at a specific instruction defining those terms. This is a good idea, it is informative and logical. Taking it out deprives the jurors of information they need to understand their duties. This is particularly important in these types of cases where the lawfulness of police conduct is often a huge issue and perhaps even the entirety of the defense.	The language was deleted at the suggestion of a trial judge who found the repetition unnecessary and was concerned that unnecessary repetition causes jurors to "tune out." The committee agrees that the deletion streamlines reading the instructions to a jury.
1170	Melissa Johnson, Research Attorney, Supreme Court	The definition of residence should be changed to state that "Residence means one or more addresses" and not that "A residence is one or more addresses . . . ." This tracks the language of the statute and avoids grammatical error.	The committee agrees with this comment and has made corresponding changes to the instruction.
1203	Celia Rowland Asst. Dist. Attorney County of Santa Cruz	The CALCRIM is a misstatement of Penal Code section 209(b)(2) and has been since 1997 when the section was amended. In 1997, the portion of the section regarding transportation was amended to delete "substantially" as it related to increasing the risk of harm to the victim. I have never understood why the instruction (formerly the CALJIC	CALCRIM No. 1203 was not part of the current invitation to comment. The committee will consider this comment at its next meeting.

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		instruction) was not changed accordingly. In several trials I have submitted a special instruction with the correct standard.	
1215	Public Defender Appellate Branch Los Angeles	Proposed Modification: Eliminating the following paragraph: The defendant is also charged in Count ___ with _____<insert crime>. In order for the defendant to be guilty of kidnapping, the other person must be moved or made to move a distance beyond that merely incidental to the commission of _____ <insert crime>. Instead, the proposed instruction includes the fragment [whether the distance the other person was moved was beyond that merely incidental to the commission of _____ <insert associated crime>] as one of the factors to consider when deciding whether the asportation distance is substantial. Additionally, the following bench note would be eliminated: The bracketed paragraph that begins with 'The defendant is also charged' must be given on request when an associated crime is charged. (See *People v. Martinez* (1999) 20 Cal.4th 225, 237-238.) See also commentary to CALCRIM 1203, Kidnapping: For Robbery, Rape, or Other Sex Offenses. Currently, the legal term "substantial distance," as defined in this instruction, has several factors for jurors to consider. The bench note indicates that the paragraph is to be given *upon request* when an associated crime is charged. The proposed change eliminates the bench note, eliminates the paragraph, and adds one	The committee believes that the suggestion of Appellate Defenders, Inc. (see below) addresses the concerns raised in this comment and eliminates the need for the changes proposed here.

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		more factor to consider when determining whether the victim was moved a substantial distance. The additional factor is whether the distance the victim was moved was beyond that merely incidental to the commission of some other crime. Making this modification will confuse jurors. The instruction, as currently written, clearly delineates a situation in which the defendant is charged with another offense, and indicates that the movement involved in merely committing the other crime does NOT count towards the substantial distance needed for kidnapping. If the paragraph and bench note are eliminated, the instruction becomes much more confusing, and makes it more likely that defendants could be convicted in error. Therefore, we object to this proposed modification. Proposed Modification: Changes the clause "gave the attacker a greater opportunity to commit additional crimes" to "or provided a greater opportunity to commit additional crimes." The proposed modification, by eliminating the word "attacker," makes the instruction vague. Just about anything could be defined as providing a greater opportunity to commit additional crimes. The instruction, as currently written, correctly places the focus on the *attacker*, and whether or not the movement provides the *attacker* a greater opportunity to commit additional crimes. Therefore, we object to this proposed modification.	The committee agrees with this comment and has maintained the original language of this phrase.
1215	Appellate Defenders, Inc. San Diego	The proposed change was based on *People v. Bell* (2009) 179 Cal.App.4th 428, which said the current CALCRIM 1215 is erroneous. *Bell* said in full on this point: On remand, however, CALCRIM No. 1215 should not be given in its current form. The form instruction, as currently worded, is misleading. As currently phrased, the incidental movement paragraph operates as a threshold or gatekeeper	The committee agrees with this comment and has made corresponding changes to the instruction.

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		determination of guilt or innocence. It states: "In order for the defendant to be guilty of kidnapping, the other person must be moved or made to move a distance beyond that merely incidental to the commission of [the associated crime]." (CALCRIM No. 1215.) Without further explanation of what distance is "merely incidental" to the associated crime, a jury could easily interpret the instruction to require a jury to acquit a defendant of kidnapping because the movement was compelled "in the course of" committing the associated crime, regardless of the increased risk of danger to the victim, or, for that matter, that the distance was "substantial" by any reasonable measure. That is not what the *Martinez* court held, and if the incidental movement paragraph were to be interpreted in that fashion, it would be an incorrect statement of the law. To the contrary, *Martinez* held: "In addition, in a case involving an associated crime, the jury should be instructed to consider whether the distance a victim was moved was incidental to the commission of that crime in determining the movement's substantiality." (*Martinez, supra*, 20 Cal.4th at p. 237.) Put more directly, one of the additional factors to be considered in determining the movement's substantiality is whether the movement of the victim was for a distance beyond that which was incidental to the commission of an associated crime. Thus, whether the movement was over a distance merely incidental to an associated crime is simply one of several factors to be considered by the jury (when permitted by the evidence) under the "totality of circumstances" test enunciated in *Martinez*. The factor is not a separate threshold determinant of guilt or innocence, separated from other considerations bearing on the	

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		substantiality of the movement as the current wording of the incidental movement paragraph of CALCRIM No. 1215 now suggests. Accordingly, in the event the kidnapping charge is retried on remand, and if the evidence at the new trial permits, the incidental movement paragraph should be made a part of the instruction on substantiality within CALCRIM No. 1215 as follows: "Substantial distance means more than a slight or trivial distance. In deciding whether the distance was substantial, you must consider all the circumstances relating to the movement. Thus, in addition to considering the actual distance moved, you may also consider other factors such as whether the [distance the other person was moved was beyond that merely incidental to the commission of the crime of evading a police officer,] whether the movement increased the risk of [physical or psychological] harm, increased the danger of a foreseeable escape attempt, [or] gave the [defendant] a greater opportunity to commit additional crimes." (Id. at pp. 440-441, emphasis added.) Our proposed change mirrors this quite precisely, I think. It also seems consistent with *People v. Martinez* (1999) 20 Cal.4th 225, 237, quoted in *Bell*. We disagree that the movement involved in merely committing the other crime does NOT count towards the substantial distance needed for kidnapping. That isn't what the law, as delineated in *Martinez* and especially *Bell*, says. Brackets The paragraph is bracketed. We're not sure it should be, since substantial distance is an element of the crime and this explains what that means. At least the first two sentences should be given	

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		in all cases. Perhaps the last sentence can be bracketed, and the associated crime part bracketed within that. That change would also help make the applicable bench note more accurate. It says in part: "In the paragraph defining 'substantial distance,' give the bracketed sentence listing factors that the jury may consider, when evidence permits, in evaluating the totality of the circumstances. (*People v. Martinez* (1999) 20 Cal.4th 225, 237.)" The problem is that, as the instruction currently is written, there is no "bracketed sentence" as such. If we bracket just the last sentence, as suggested, the bench note is correct. <u>Bench note</u> *Bell* says it is a *sua sponte* duty when relevant (179 Cal.App.4th at p. 439), and *Martinez* speaks of what the jury "should be instructed," without mentioning any request. "Principles of law commonly or closely and openly connected with the facts of the case before the court" form the basis for a *sua sponte* duty. It deals with an element of the offense, not a defense. Perhaps we can add this at the end of the current paragraph: The court must give the bracketed provision on movement incidental to an associated crime when supported by the evidence. (*People v. Martinez* (1999) 20 Cal.4th 225, 237; *People v. Bell* (2009) 179 Cal.App.4th 428, 439.)	
1750	Katherine Lynn Managing Attorney Second District Court of Appeal	The Bench Notes properly include a proposed modification to refer to *People v. Ceja* (2010) 49 Cal.4th 1 (*Ceja*), where the California Supreme Court held that a defendant charged with both a theft offense and receiving stolen property can only be convicted of the theft offense. The addition of the *Ceja* cite follows the existing sentence that states, "If the defendant is also charged with a theft crime, the court has a *sua sponte* duty to instruct that the defendant may not be convicted of both theft and	The committee agrees with this comment and has made corresponding changes to the referenced instructions.

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		receiving the same stolen property." The instruction that covers the court's *sua sponte* duty to instruct is CALCRIM No. 3516, which includes a proposed modification in accordance with *Ceja* that precludes a jury from returning a guilty verdict of receiving stolen property if it finds the defendant guilty of the theft offense. CALCRIM No. 3516 also contains a proposed modification under "Authority" that states, citing *Ceja*, "Conviction of Receiving Stolen Property Not Possible if Defendant Convicted of Theft." The proposed changes to CALCRIM No. 3516 thus do not merely give the general rule that dual conviction is impermissible, but, in accordance with *Ceja*, state the specific rule that a conviction of receiving stolen property is not permissible if the defendant is convicted of theft. In CALCRIM No. 1750, there is currently a reference to CALCRIM No. 3516 under "Related Issues, Dual Convictions Prohibited." It is suggested that the placement of this reference and the existing language in CALCRIM No. 1750 describing the court's sua sponte duty to instruct ("If the defendant is also charged with a theft crime, the court has a sua sponte duty to instruct that the defendant may not be convicted of both theft and receiving the same stolen property") are no longer specific enough in light of *Ceja*. Instead, it is suggested that an express reference to CALCRIM No. 3516 be added to the Bench Notes for CALCRIM No. 1750 and that the Bench Notes be modified to more specifically state, in place of the above-quoted language, "If the defendant is also charged with a theft crime, the court has a sua sponte duty to instruct that the defendant may not be convicted of receiving stolen property if he is convicted of the theft of the same property. (CALCRIM No. 3516; see Pen. Code, § 496(a), *People*	

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		v. Ceja . . . .)"	
1806; 1862	Public Defender Appellate Branch Los Angeles	The proposed addition to these sections states that an intent to return the property at the time of the taking is not a defense to embezzlement under Penal Code section 512. Section 512, however, states that the intent to return embezzled property is not a defense "if it [the embezzled property] has not been restored before an information has been laid before a magistrate, or an indictment found by a grand jury, charging the commission of the offense." Thus the new addition is incomplete and misleading; it should, at a minimum, state that an intent to return the property is not a defense *unless the property was returned prior to the time the person was charged.*	The committee agrees with this comment and has made the suggested changes to the referenced instructions.
2140; 2141	Public Defender Appellate Branch Los Angeles	We oppose the deletion of the text regarding the lesser included offense. These sections involve the failure to perform legal duties following an accident which causes death or injury. The deleted text relates to the lesser included offense of failing to perform legal duties after an accident causing property damage. The cited authority, *People v. Carter* (1966) 243 Cal.App.2d 239, indicates that an accident causing property damage is not an automatically lesser included since there can be a minor fender bender causing injury but no property damage. If the accusatory pleading provides adequate information to indicate that property damage has also occurred, in addition to any injury, then it would be a lesser included offense. In such circumstances, jurors should have the option to convict on the lesser, thus this text should be retained.	The committee agrees with this comment and has made the suggested changes to the referenced instructions.
2410	Elizabeth Norton District Attorney County of Butte	I would propose that the word "consume" be restored instead of the proposed change to "smoked". Drugs are often inhaled.	The committee disagrees with this comment because even though drugs may be ingested in a variety of ways, Penal Code section 1136 specifies "smoking." There is no legal basis for expanding "smoking"

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			into "consuming."
3450	James Finn NAMI Novato, California	Outpatient program longer than the maximum sentence available for (his/her) crime[s]. This wording should be removed from the insanity plea 3450. Insanity: Determination, Effect of Verdict (Pen. Code, §§ 25, 25.5).	This comment relates to language beyond the scope of the current invitation to comment. The committee will consider it at its next meeting.
3450	Public Defender Appellate Branch Los Angeles	The proposed modification to CALCRIM 3450 seeks to change the following paragraph: "2. Because of that disease or defect, (he/she) did not know or understand the nature and quality of (his/her) act or did not know or understand that (his/her) act was morally or legally wrong." Instead the following text is proposed: "2. Because of that disease or defect, (he/she) was incapable of knowing or understanding the nature and quality of (his/her) act or was incapable of knowing or understanding that (his/her) act was morally or legally wrong." The proposed modification to CALCRIM 3450 is erroneous because it fails to track and convey the intended import and language of Penal Code section 25, subdivision (b), and *People v. Skinner* (1985) 39 Cal.3d 765, by the addition of the word "incapable" in lieu of the words "did not" to the last phrase of the sentence "of knowing or understanding that (his/her) act was morally or legally wrong."	The committee disagrees with this comment because it believes that the proposed new language conforms to both Penal Code section 25(b) and the requirements of the *Skinner* case.
3450	Hon. Wayne Ellison Sup. Court California County of Fresno	As of the last revision in 2008, CALCRIM 3450 reads in pertinent part as follows: 2. Because of that disease or defect, (he/she) did not know or understand the nature or quality of (his/her) act or did not know or understand that (his/her) act was morally or legally wrong. As I understand the Committee's proposal, CALCRIM 3450	The committee disagrees with this comment because it believes that the proposed new language conforms to Penal Code section 25(b) and the requirements of the *Kelly* case.

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		would now read: 2. Because of that disease or defect, (he/she) was incapable of knowing or understanding the nature or quality of (his/her) act or was incapable of knowing or understanding that (his/her) act was morally or legally wrong. The proposed revision appears to focus the jury's consideration on the defendant's capacity to know right from wrong, rather than on the defendant's mental state at the time. The case of People v. Kelly (73) 10 Cal.3d 565, 577, which continues to be cited in the proposed bench notes, holds that a defendant's insanity need not be permanent to establish this defense, and that the relevant inquiry is the defendant's mental state at the time of the crime. I suggest that directing the jury's consideration to the defendant's "capacity" to understand, rather than to his or her actual understanding at the time of the crime , implies that they must find a more permanent consequence of the mental disease or defect than Kelly would seem to require.	
3454	Public Defender Appellate Branch Los Angeles	The proposed modification to CALCRIM 3454 seeks to add the following paragraphs: Give the following language if evidence of the respondent's failure to participate in or complete treatment is offered as proof that respondent's condition has not changed. You may consider proof of respondent's failure to participate in or complete the State Department of Mental Health Sex Offender Commitment Program as evidence that respondent's condition has not changed. The meaning and importance of that evidence is for	The committee agrees to withdraw the proposed addition to this instruction for now and will consider the proposed new instruction at the next committee meeting.

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		you to decide. The proposed revision of CALCRIM 3454 is erroneous because of its placement within the main body of the instruction and because its language is misleading. The placement of the proposed revision within the main body of CALCRIM 3454 is erroneous because it is only applicable in post-commitment Petitions for Conditional Release pursuant to Welfare and Institutions Code section 6605 and not under general Sexual Violent Predator commitment proceedings pursuant to Welfare and Institutions Code section 6600. The proposed revision is based on Senate Bill No. 669 (Stats. 2009, c. 61 (S.B.669), § 1), which amended Welfare and Institutions Code section 6605. Welfare and Institutions Code section 6605 is confined to post-commitment issues. A review of the legislative intent of Senate Bill No. 669 demonstrates that "the Instruction Required by this Bill would likely Rarely be Given" and that it only be given "in an odd or rare case." (Senate Committee on Public Safety Analysis for April 28, 2009, pp. K-L.) The legislative history also demonstrates that Senate Bill 502 (2008), which *would* have required the giving of the proposed language in every case, was rejected by the Legislature. (Senate Committee on Public Safety Analysis for April 28, 2009, p. G.) Therefore, it would create a false and misleading impression if the proposed revision were to be set forth in the main body of CALCRIM 3454. The language contained in Senate Bill No. 669 would be better situated within the "Related Issues" section with a bench note that the court should only consider giving the instruction in Conditional Release Trials held pursuant to Welfare and Institutions Code section 6605.	

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		Secondly, the language of the proposed revision is erroneous. Significantly, Senate Bill No. 669 itself sets forth the suggested instruction language: > The committed person's failure to participate in or complete the State Department of Mental Health Sex Offender Commitment Program (SOCP) are facts that, if proved, may be considered as evidence that the committed person's condition has not changed. The weight to be given that evidence is a matter for the jury to determine. The legislative history of Senate Bill No. 669 reveals that its language was carefully drafted to avoid being argumentative, out of concern for precision, with a requirement that it only be given when supported by the evidence. (Senate Committee on Public Safety Analysis for April 28, 2009, p. G.)	
3454	Micheal J. Aye Attorney at Law	In regard to the proposed change to CALCRIM No. 3454 I see several things that give me concern. In the fourteen years of this program, the Director of the Department of Mental Health has never complied with his statutory duty under Welf. & Inst. §§ 6605 and 6607 to notify the court that any committed person no longer meets the criteria or that any committed person is fit for release into the community under supervised release, or CONREP. It is my experience that this is a factor which strongly affects the decision of many individual not to participate in treatment. Secondly, in order to finish treatment one has to be completely released from the program, including having completed Phase V, the CONREP portion. The circularity of this is obvious.	No response required.
3454	Elaine Alexander Executive Director	Following a recent amendment to Welfare and Institutions Code section 6605, the proposal is to tell the jury it may consider	The committee agrees to withdraw the proposed addition

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	Appellate Defenders, Inc.	failure to participate in or complete treatment as proof that respondent's condition has not changed. We agree with the substantive content of the language but not with its placement in No. 3454. Instead, we suggest there be two instructions on sexually violent predator commitments – one for the initial commitment and one for a subsequent hearing designed to determine whether the committed person still comes under the SVP law. <u>Initial commitment</u> The original hearing requires all of the findings enumerated in current No. 3454. It does *not* require a finding the person's condition has not changed. Indeed, such a requirement would be meaningless – changed from *what*? There is no antecedent finding of a disorder against which to measure the current condition. If the Legislature intended to make this finding a requisite for the initial commitment, it would have added it to section 6600 et seq. and not just 6605, which deals with post-commitment matters. We suggest No. 3454 be retitled "Initial Commitment as Sexually Violent Predator." It would not be modified otherwise from the current version and would not include the proposed new paragraph based on amended section 6605, referring to a change in condition. <u>Subsequent hearings to determine current status</u> In contrast to the initial commitment, hearings under section 6605 do measure change in condition, and that is the context in which the Legislature presumably intended the instructional requirement to apply. But not all of the requirements for the initial commitment apply here. Section 6605 does not say that the jury must find the committed person was convicted of a sexually violent offense. That is a finding referring to the past; it presumably was resolved in the initial hearing and so, under the	to this instruction for now and will consider the proposed new instruction at the next committee meeting.

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		doctrines of *res judicata* and collateral estoppel, cannot be relitigated in a subsequent proceeding. (See, e.g., *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075-1076 [MDO extension – findings in initial hearing based on original conviction are conclusively resolved].) Much of No. 3454 is devoted to describing what such offenses are and so is inapplicable to a later hearing focusing on current condition. Because the original offense is not an issue in this hearing, the penultimate paragraph referring to a "prior conviction" may also be irrelevant; it should be given only if the jury is told about the underlying conviction during the proceeding. Current 3454 is additionally unsuited for use in a section 6605 hearing because it refers to the committed person as the "respondent," whereas he or she is the petitioner under that section. We suggest the committee adopt a new instruction, perhaps No. 3454A, entitled "Hearing To Determine Current Status Under Sexually Violent Predator Act (Welf. & Inst. Code, § 6605)." A suggested text is appended. I concur that adding a new instruction should not be done without circulating it for comments. But I do think we should not put that new paragraph in existing 3454. I ran this by civil commitment experts in our office and at the First District Appellate Project, and they agreed it's out of place.	
3454	Katherine Lynn Managing Attorney Second District Court of Appeal	[This is not a comment on the proposed modification, which is required under Welfare and Institutions Code section 6605, subdivision (d) as recently amended. It is a suggestion regarding possible future consideration of this instruction.] The proposed modification adds the language required by a recent amendment to Welfare and Institutions Code section 6605, subdivision (d). Section 6605 does not govern the trial upon the initial petition for commitment as a sexually violent predator (see §§ 6603, 6604), but governs the hearing (which may be a trial by jury) required after a court finds probable cause to believe that	The committee will withdraw the proposed addition to this instruction for now and will consider the proposed new instruction (see 3454A below) at the next committee meeting.

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		the diagnosed mental disorder of a person already committed has changed sufficiently to warrant his release. The language of section 6605, subdivision (d) requires the state to prove beyond a reasonable doubt "that the committed person's diagnosed mental disorder remains such that he or she is a danger to the health and safety of others and is likely to engage in sexually violent criminal behavior if discharged." It appears that CALCRIM No. 3454 is intended for use both at the trial on the initial petition for commitment and at the trial on whether the committed person's condition has changed. However, the findings required for two proceedings are not necessarily the same. For example, at the hearing on whether the person's condition has changed, it may not be necessary to prove element (1) of CALCRIM No. 3454, that the person was convicted of committing sexually violent offenses against one or more victims, since that is no longer at issue since the person was already determined to be a sexually violent predator. On the other hand, the jury considering whether the person's condition has changed under section 6605 should be instructed more precisely on the issue before it and on the beyond a reasonable doubt standard for that specific determination, either using language asking whether the person's disorder "remains such that he or she is a danger . . ." (§ 6605, subd. (d)) or using terms relating to the additional language added in the current proposal ("evidence that [the person's] condition has not changed"). The committee may wish to examine CALCRIM No. 3454 to determine whether a new instruction tailored to the requirements of the section 6605 hearing should be written.	
3454	Appellate Defenders, Inc. San Diego	Instead of adding a new paragraph to CALCRIM No. 3454, we propose adding the following new instruction, CALCRIM No.	The committee will consider this proposed new instruction at

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		3454A: The People allege that _____ <*insert name of petitioner*> currently is a sexually violent predator. To prove that _____ <*insert name of petitioner*> is currently a sexually violent predator, the People must show beyond a reasonable doubt that: 1. (He/She) has a diagnosed mental disorder; [AND] 2. As a result of that diagnosed mental disorder, (he/she) is a danger to the health and safety of others because it is likely that (he/she) will engage in sexually violent predatory criminal behavior(;/.) <*Give element 3 when evidence has been introduced at trial on the issue of amenability to voluntary treatment in the community*.> [AND 3. It is necessary to keep (him/her) in custody in a secure facility to ensure the health and safety of others.] The term *diagnosed mental disorder* includes conditions either existing at birth or acquired after birth that affect a person's ability to control emotions and behavior and predispose that person to commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others.	its next meeting.

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		A person is *likely to engage in sexually violent predatory criminal behavior* if there is a substantial, serious, and well-founded risk that the person will engage in such conduct if released into the community. The likelihood that the person will engage in such conduct does not have to be greater than 50 percent. Sexually violent criminal behavior is *predatory* if it is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or a person with whom a relationship has been established or promoted for the primary purpose of victimization. <G*ive the following paragraph if evidence of the petitioner's failure to participate in or complete treatment is offered as proof that petitioner's condition has not changed*> [You may consider evidence that _____ <*insert name of petitioner*> failed to participate in or complete the State Department of Mental Health Sex Offender Commitment Program as an indication that (his/her) condition as a sexually violent predator has not changed. The meaning and importance of that evidence is for you to decide.] <*Give the following paragraph if the jury has been told about the petitioner's underlying conviction*> [You may not conclude that _____<*insert name of petitioner*> is currently a sexually violent predator based solely on (his/her) prior conviction[s].] In order to prove that _____ <*insert name of petitioner*> is a danger to the health and safety of others, the People do not need to prove a recent overt act committed while (he/she) was in	

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		custody. A recent overt act is a criminal act that shows a likelihood that the actor may engage in sexually violent predatory criminal behavior.	
3516	Appellate Defenders, Inc. San Diego	We agree this instruction needs revision in light of the Supreme Court decision in *People v. Ceja* (2010) 49 Cal.4th 1. *Proposed changes* The proposed removal of references to theft and receiving stolen property in the first paragraph is appropriate and necessary, given *Ceja*. However, we think the proposed second paragraph is in various ways (a) confusing, (b) partially inconsistent with the law, and (c) incomplete: (a) The lead sentence, directed to the judge, says: "Give this paragraph when it is possible that the defendant may be found guilty of both theft and receiving stolen property offenses for the same act." (Emphasis added.) This can easily be confusing, since Penal Code section 496 forbids convicting of both. It would be clearer to say: "Give the following paragraphs when the defendant is charged with both theft and receiving stolen property for the same incident." (b) The proposed paragraph is inconsistent with the rule of *People v. Kurtzman* (1986) 46 Cal.3d 322. It tells the jury it must "first decide" whether the defendant is guilty of theft and, if not, "then decide" whether he is guilty of receiving stolen property. This direction violates *Kurtzman*'s holding that it is error to instruct the jury in what order it must conduct its deliberations; the instruction should tell the jury only how to return its verdicts, not what to consider or decide when.[3] [3] True, *Ceja* has language suggesting the jury must be told to "reach a verdict on the theft charge first" and that decision would make it "unnecessary to consider" receiving. (*People v. Ceja*,	The committee has implemented some of the suggested changes, but believes that the proposed new language complies with the requirements of the *Ceja* case. Nevertheless, the committee also added an explanatory bench note regarding what the court should do in case the jury hangs on the theft count.

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		supra, 49 Cal.4th 1, 10.) But the part of *Ceja* dealing with jury instructions was informal and advisory only, since the case did not concern that issue. (*Ibid*.) Such casual dicta should not be construed as overruling *Kurtzman*'s explicit holding of more than two decades' unchallenged standing. (c) The draft instruction is incomplete because it tells the trial court and jury what to do if there is an acquittal on theft, but fails to deal with the possibility the jury may hang on theft. *Ceja* decided what must happen when the jury finds the defendant guilty of both – namely, it may return only a verdict convicting of theft. It also decided what happens when the jury acquits of theft – namely, it may then return a verdict on receiving stolen property. However, neither *Ceja* nor the authority it cites says whether a receiving stolen property conviction would be permitted or forbidden if the jury hangs on theft. This is a genuinely undecided area of the law (in contrast to CALCRIM No. 593 above, where there are multiple Supreme Court authorities going back more than a century). CALCRIM should assist the trial court in dealing with it by pointing out what options it has and what to do depending on its determination of the law. *<u>Recommendation for second paragraph et seq.</u>* Putting all of these observations together, paragraph two et seq. could read: *<Give the following paragraphs when the defendant is charged with both theft and receiving stolen property for the same incident>* [The defendant is charged in Count ___ with ___ <*theft*	

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		offense> and in Count ___ with ___ <*receiving stolen property*>. Before returning your verdict you must decide whether the defendant is guilty of ___ <*theft offense*>. If you find (him/her) guilty of ___ <*theft offense*>, you must return the verdict form for guilty of that offense and return the verdict form for ___ <*receiving stolen property*> unsigned. If you find (him/her) not guilty of ___ <*theft offense*>, you must fill out the not guilty verdict form for that offense and then state whether the defendant is guilty or not guilty of ___ <*receiving stolen property*> by filling out the appropriate verdict form. If you are unable to reach a verdict on ___ <*theft offense*>, report your disagreement to me and do not fill out any verdict forms [for (that/those) count(s)].] <*If the jury reports it is unable to reach a verdict on theft, the court must determine whether it is nevertheless permissible to return a verdict on receiving stolen property. If it concludes the jury may not return a verdict on receiving stolen property without acquitting of theft, it should declare a mistrial as to all charges. If it concludes otherwise, it should declare a mistrial on the theft charge and instruct the jury to return a verdict or resume deliberations on the receiving stolen property charge.*> We at ADI tend to like this approach because it gives the jury a simple direction in the event of a deadlock and puts the judge in	

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		control of the process. However, an alternative would be to instruct the jury upfront what to do in the event of a deadlock on theft. Depending on the court's resolution of the undecided law, the jury would be told either to (a) report the deadlock and do nothing else (in which case the court will declare a mistrial as to all charges) or (b) proceed to return a verdict as to receiving stolen property. We would be pleased to suggest specific language if the committee wishes to pursue this approach.	
3516	Katherine Lynn Managing Attorney Second District Court of Appeal	[This is not a comment on the proposed modification, which is proper under *People v. Ceja* (2010) 49 Cal.4th 1. It is a suggestion regarding possible future consideration of this instruction.] The proposed modification that gives effect to *People v. Ceja* (2010) 49 Cal.4th 1 properly notes that the court should "[g]ive this paragraph when it is possible that the defendant may be found guilty of both theft and receiving stolen property offenses for the same act." The Bench Notes state that the court "has a *sua sponte* duty to give this instruction where the defendant is charged in the alternative with multiple counts for a single event." Both of these statements, and the proposed instruction, assume the court has determined that the same act or single event underlies both the theft and the receiving offenses. It is possible, however, that, under the evidence presented in a given case and for purposes of this instruction, *whether* the same act or single event underlies both a theft conviction and a receiving stolen property conviction could be a question for the jury. A Bench Note might so indicate to the court, and an alternate instruction might then be provided that would put that determination to the jury.	No response required, as commentator acknowledges that the proposed new language is correct. The committee will consider the additional comment at its next meeting.