

Homicide

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

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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 typically occurs at seven to eight weeks after fertilization.]**

**[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, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM No. \_\_\_ <insert number of appropriate first degree murder instruction>. ]**

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*New January 2006; Revised August 2009, October 2010, February 2013, August 2013*

## 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*.

If the defendant is charged with first degree murder, give this instruction and CALCRIM No. 521, *First Degree Murder*. 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*.

### **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. Seden* (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* (4th ed. 2012) Crimes Against the Person, §§ 96-101, 112-113.

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.)

**2110. Driving Under the Influence (Veh. Code, § 23152(a), (f), (g))**

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The defendant is charged [in Count \_\_] with driving under the influence of (an alcoholic beverage/ [or] a drug/~~[or]~~ under the combined influence of an alcoholic beverage and a drug~~}]~~ [in violation of Vehicle Code section 23152(a)/(f)/(g)].

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

1. The defendant drove a vehicle;

AND

2. When (he/she) drove, the defendant was under the influence of (an alcoholic beverage/ [or] a drug)~~}]~~ [~~or]~~ under the combined influence of an alcoholic beverage and a drug~~}]~~.

A person is *under the influence* if, as a result of (drinking [or consuming] an alcoholic beverage/ [and/or] taking a drug), his or her mental or physical abilities are so impaired that he or she is no longer able to drive a vehicle with the caution of a sober person, using ordinary care, under similar circumstances.

The manner in which a person drives is not enough by itself to establish whether the person is or is not under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug]. However, it is a factor to be considered, in light of all the surrounding circumstances, in deciding whether the person was under the influence.

[An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains ethanol. Ethanol is also known as ethyl alcohol, drinking alcohol, or alcohol. [An *alcoholic beverage* includes \_\_\_\_\_ <insert type[s] of beverage[s] from Veh. Code, § 109 or Bus. & Prof. Code, § 23004, e.g., wine, beer>.]]

[A *drug* is a substance or combination of substances, other than alcohol, that could so affect the nervous system, brain, or muscles of a person that it would appreciably impair his or her ability to drive as an ordinarily cautious person, in full possession of his or her faculties and using reasonable care, would drive under similar circumstances.]

**[If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent or more at the time of the chemical analysis, you may, but are not required to, conclude that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense.]**

**[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Public Health.]**

**[It is not a defense that the defendant was legally entitled to use the drug.]**

**[If the defendant was under the influence of (an alcoholic beverage/ [and/or] a drug), then it is not a defense that something else also impaired (his/her) ability to drive.]**

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*New January 2006; Revised June 2007, April 2008, August 2015 [insert date of council approval]*

## **BENCH NOTES**

### ***Instructional Duty***

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with a misdemeanor or a felony based on prior convictions.

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra*, 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal. Rptr. 2d 690].)

The bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that the defendant’s blood alcohol level was 0.08 percent” explains a rebuttable presumption created by statute. (See Veh. Code, § 23610; Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences.

The court **must not** give the bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that the defendant’s blood alcohol level was 0.08 percent” if there is no substantial evidence that the defendant’s blood alcohol level was at or above 0.08 percent at the time of the test. In addition, if the test falls within the range in which no presumption applies, 0.05 percent to just below 0.08 percent, do not give this bracketed sentence. (*People v. Wood* (1989) 207 Cal.App.3d Supp. 11, 15 [255 Cal.Rptr. 537].) The court should also consider whether there is sufficient evidence to establish that the test result exceeds the margin of error before giving this instruction for test results of 0.08 percent. (Compare *People v. Campos* (1982) 138 Cal.App.3d Supp. 1, 4–5 [188 Cal.Rptr. 366], with *People v. Randolph* (1989) 213 Cal.App.3d Supp. 1, 11 262 Cal.Rptr. 378].)

The statute also creates a rebuttable presumption that the defendant was not under the influence if his or her blood alcohol level was less than 0.05 percent. (*People v. Gallardo* (1994) 22 Cal.App.4th 489, 496 [27 Cal.Rptr.2d 502].) Depending on the facts of the case, the defendant may be entitled to a pinpoint instruction on this presumption. It is not error to refuse an instruction on this presumption if the prosecution’s theory is that the defendant was under the combined influence of drugs and alcohol. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250 [32 Cal.Rptr.2d 442].)

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with “In evaluating any test results in this case.” (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)



Give the bracketed sentence stating that “it is not a defense that something else also impaired (his/her) ability to drive” if there is evidence of an additional source of impairment such as an epileptic seizure, inattention, or falling asleep.

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

### ***Related Instructions***

CALCRIM No. 2111, *Driving With 0.08 Percent Blood Alcohol*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

## **AUTHORITY**

- Elements ▶ Veh. Code, § 23152(a), [\(f\)](#), [\(g\)](#).
- Alcoholic Beverage Defined ▶ Veh. Code, § 109; Bus. & Prof. Code, § 23004.
- Drug Defined ▶ Veh. Code, § 312.
- Driving ▶ *Mercer v. Dept. of Motor Vehicles* (1991) 53 Cal.3d 753, 768 [280 Cal.Rptr. 745, 809 P.2d 404].
- Presumptions ▶ Veh. Code, § 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Mandatory Presumption Unconstitutional Unless Instructed as Permissive Inference ▶ *People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].
- Under the Influence Defined ▶ *People v. Schoonover* (1970) 5 Cal.App.3d 101, 105–107 [85 Cal.Rptr. 69]; *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665–666 [49 Cal.rptr.2d 710].
- Manner of Driving ▶ *People v. Weathington* (1991) 231 Cal.App.3d 69, 84 [282 Cal.Rptr. 170]; *People v. McGrath* (1928) 94 Cal.App. 520, 524 [271 P. 549].
- Legal Entitlement to Use Drug Not a Defense ▶ Veh. Code, § 23630.
- Prior Convictions ▶ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

### ***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare §§ 272-277.

2 Witkin, California Evidence (5th ed. 2012), Demonstrative, Experimental, and Scientific Evidence § 56.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1] (Matthew Bender).

### **LESSER INCLUDED OFFENSES**

If the defendant is charged with felony driving under the influence based on prior convictions, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the prior convictions have been proved. If the jury finds that the prior convictions have not been proved, then the offense should be set at a misdemeanor.

- Attempted Driving Under the Influence ▶ Pen. Code, § 664; Veh. Code, § 23152(a); *People v. Garcia* (1989) 214 Cal.App.3d Supp.1, 3–4 [262 Cal.Rptr. 915].

### **RELATED ISSUES**

#### ***Driving***

“[S]ection 23152 requires proof of volitional movement of a vehicle.” (*Mercer v. Dept. of Motor Vehicles* (1991) 53 Cal.3d 753, 768 [280 Cal.Rptr. 745, 809 P.2d 404].) However, the movement may be slight. (*Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1029 [229 Cal.Rptr. 310]; *Henslee v. Dept. of Motor Vehicles* (1985) 168 Cal.App.3d 445, 450–453 [214 Cal.Rptr. 249].) Further, driving may be established through circumstantial evidence. (*Mercer, supra*, 53 Cal.3d at p. 770; *People v. Wilson* (1985) 176 Cal.App.3d Supp. 1, 9 [222 Cal.Rptr. 540] [sufficient evidence of driving where the vehicle was parked on the freeway, over a mile from the on-ramp, and the defendant, the sole occupant of the vehicle, was found in the driver’s seat with the vehicle’s engine running].) See CALCRIM No. 2241, *Driver and Driving Defined*.

#### ***PAS Test Results***

The results of a preliminary alcohol screening (PAS) test “are admissible upon a showing of either compliance with title 17 or the foundational elements of (1) properly functioning equipment, (2) a properly administered test, and (3) a qualified operator . . . .” (*People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203].)

***Presumption Arising From Test Results—Timing***

Unlike the statute on driving with a blood alcohol level of 0.08 percent or more, the statute permitting the jury to presume that the defendant was under the influence if he or she had a blood alcohol level of 0.08 percent or more does not contain a time limit for administering the test. (Veh. Code, § 23610; *People v. Schrieber* (1975) 45 Cal.App.3d 917, 922 [119 Cal.Rptr. 812].) However, the court in *Schrieber, supra*, noted that the mandatory testing statute provides that “the test must be incidental to both the offense and to the arrest and . . . no substantial time [should] elapse . . . between the offense and the arrest.” (*Id.* at p. 921.)

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

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The defendant is charged [in Count \_\_] with  
(selling/furnishing/administering/giving away/transporting for  
sale/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  
for sale/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]

*<If the controlled substance is not listed in the schedules set forth in  
sections 11054 through 11058 of the Health and Safety Code, give  
paragraph 4B and the definition of analog substance below instead of 4A.>*

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

**4B.** The controlled substance was an analog of \_\_\_\_\_ <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.]

[In order to prove that the defendant is guilty of this crime, the People must  
prove that \_\_\_\_\_ <insert name of analog drug> is an analog of  
\_\_\_\_\_ <insert type of controlled substance>. An analog of a controlled  
substance:

**[1. Has a chemical structure substantially similar to the structure of a controlled substance(./;)]**

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**[(2/1). Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]**

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

**[A person transports something for sale if he or she carries or moves **it something** from one location to another for sale, 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 for sale/imported).]**

**[A person does not have to actually hold or touch something to (sell/furnish/administer/transport it for sale/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.]**

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*New January 2006; Revised October 2010, February 2014, August 2014, February 2016 [insert date of council approval]*

## **BENCH NOTES**

### ***Instructional Duty***

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

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 5-5/6 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].
- Definition of Analog Controlled Substance. ▶ Health & Saf. Code, § 11401, *People v. Davis* (2013) 57 Cal.4th 353, 357, fn 2 [159 Cal.Rptr.3d 405; 303P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance. ▶ *People v. Davis* (2013) 57 Cal.4th 353, 362, fn 5 [159 Cal.Rptr.3d 405; 303P.3d 1179].

- [Intent Requirement for Transportation for Sale ▶ \*People v. Lua\* \(2017\) 10 Cal.App.5th 1004, 1014-1016 \[217 Cal.Rptr.3d 23\].](#)

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 115-123.

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

## **LESSER INCLUDED OFFENSES**

- Simple Possession Is Not a Lesser Included Offense of This Crime. (*People v. Murphy* (2007) 154 Cal.App.4th 979, 983-984 [64 Cal.Rptr.3d 926]; *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 Is Not a Lesser Included Offense of This Crime. (*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 personal possession by the defendant. (*People v. Rogers* (1971) 5 Cal.3d 129, 134 [95 Cal.Rptr. 601, 486 P.2d 129] [abrogated in part by statute on other grounds].) 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.)



**2301. Offering to Sell, Transport for Sale, etc., a Controlled Substance  
(Health & Saf. Code, §§ 11352, 11379)**

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The defendant is charged [in Count \_\_\_] with offering to (sell/furnish/administer/give away/transport for sale/import) \_\_\_\_\_ <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] offered to (sell/furnish/administer/give away/transport for sale/import into California) a controlled substance;

**[AND]**

2. When the defendant made the offer, (he/she) intended to (sell/furnish/administer/give away/transport for sale/import) the controlled substance.

*<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 3B and the definition of analog substance below instead of 3A>*

**3A.** The controlled substance was \_\_\_\_\_ <insert type of controlled substance>.

**3B.** The controlled substance was an analog of \_\_\_\_\_ <insert type of controlled substance>.

[In order to prove that the defendant is guilty of this crime, the People must prove that \_\_\_\_\_ <insert name of analog drug> is an analog of \_\_\_\_\_ <insert type of controlled substance>. An analog of a controlled substance:

- [1. Has a chemical structure substantially similar to the structure of a controlled substance(./;)]**

**[OR]**

**[(2/1). Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]**

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

**[A person transports something for sale if he or she carries or moves it something 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.]**

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

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*New January 2006, Revised February 2014, August 2014 [insert date of council approval]*

## **BENCH NOTES**

### ***Instructional Duty***

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

## **AUTHORITY**

- Elements. ▶ Health & Saf. Code, §§ 11352, 11379.
- Administering. ▶ Health & Saf. Code, § 11002.
- Specific Intent. ▶ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Definition of Analog Controlled Substance. ▶ Health & Saf. Code, § 11401; *People v. Davis* (2013) 57 Cal.4th 353, 357, fn 2 [159 Cal.Rptr.3d 405; 303P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance. ▶ *People v. Davis* (2013) 57 Cal.4th 353, 362, fn 5 [159 Cal.Rptr.3d 405; 303P.3d 1179].

- [Intent Requirement for Transportation for Sale ▶ \*People v. Lua\* \(2017\) 10 Cal.App.5th 1004, 1014-1016 \[217 Cal.Rptr.3d 23\].](#)

### ***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], [g]-[j] (Matthew Bender).

### **LESSER INCLUDED OFFENSES**

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

### **RELATED ISSUES**

#### ***No Requirement That Defendant Delivered or Possessed Drugs***

A defendant may be convicted of offering to sell even if there is no evidence that he or she delivered or ever possessed any controlled substance. (*People v. Jackson* (1963) 59 Cal.2d 468, 469 [30 Cal.Rptr. 329, 381 P.2d 1]; *People v. Brown* (1960) 55 Cal.2d 64, 68 [9 Cal.Rptr. 816, 357 P.2d 1072].)

#### ***Transportation for Sale***

Effective January 1, 2014, the definition of “transportation” is limited to transportation for sale for the purposes of section 11352. Health & Saf. Code, § 11352(c).

**2306. Possession of Controlled Substance With Intent to Commit Sexual Assault (Health & Saf. Code, §§ 11350.5, 11377.5)**

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**The defendant is charged [in Count \_\_\_\_] with possession of \_\_\_\_\_**  
*<insert type of controlled substance from sections 11056(c)(11), (g), 11054(e)(3); or 11057(d)(13) of the Health and Safety Code>*, **a controlled substance, with intent to commit \_\_\_\_\_**  
*<insert description of alleged target crime or crimes from sections 243.4, 261, 262, 286, 288a, or 289 of the Penal code, [in violation of Health and Safety Code section[s] (11350.5[,]/ [and/or] 11377.5)].*

**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 use it to commit \_\_\_\_\_**  
*<insert description of alleged target crime or crimes from sections 243.4, 261, 262, 286, 288a, or 289 of the Penal code>*;
- 5. The controlled substance was \_\_\_\_\_**  
*<insert type of controlled substance>*;
- 6. 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.]**

**[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.]**

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*New [insert date of council approval]*

## **BENCH NOTES**

### ***Instructional Duty***

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

The court must also give the appropriate instructions on the target sexual offense or offenses in element 4.

## **AUTHORITY**

- Elements ▶ Health & Saf. Code, §§ 11350.5, 11377.5.
- Prohibited Controlled Substances ▶ Health & Saf. Code, §§ 11054(e)(3), 11056(c)(11) or (g); 11057(d)(13).
- 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].

**2383. Use of Minor as Agent to Violate Controlled Substance Law  
(Health & Saf. Code, § 11380(a))**

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The defendant is charged [in Count \_\_] with using someone under 18 years of age as an agent to (transport/sell/give away/possess/possess for sale) \_\_\_\_\_ <insert type of controlled substance>, a controlled substance [in violation of Health and Safety Code section 11380(a)].

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

1. The defendant used \_\_\_\_\_ <insert name of person hired> as an agent;
2. \_\_\_\_\_ <insert name of person hired> was used by the defendant to (transport/sell/give away/possess/possess for sale) a controlled substance;

*<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 3B and the definition of analog substance below instead of paragraph 3A.>*

3A. The controlled substance was \_\_\_\_\_ <insert type of controlled substance>;

3B. The controlled substance was an analog of \_\_\_\_\_ <insert type of controlled substance>;

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

5. At that time, \_\_\_\_\_ <insert name of person hired> was under 18 years of age;

AND

6. The defendant knew of the substance's nature or character as a controlled substance.

[In order to prove that the defendant is guilty of this crime, the People must prove that \_\_\_\_\_ <insert name of analog drug> is an analog of

\_\_\_\_\_ <insert type of controlled substance>. **An analog of a controlled substance:**

**[1. Has a chemical structure substantially similar to the structure of a controlled substance(./;)]**

**[OR]**

**[(2/1). Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]**

**An *agent* is a person who is authorized to act for the defendant in dealings with other people.**

**[*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.]**

**[The People do not need to prove that the defendant knew which specific controlled substance was to be (transported/sold/given away/possessed/possessed for sale), only that (he/she) was aware that it was a controlled substance.]**

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

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*New January 2006; Revised February 2014 [insert date of council approval]*

## **BENCH NOTES**

### ***Instructional Duty***

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

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, § 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].
- 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].
- Agent ▶ Civ. Code, § 2295.
- Definition of Analog Controlled Substance ▶ [Health & Saf. Code, § 11401](#); *People v. Davis* (2013) 57 Cal.4th 353, 357, fn. 2 [159 Cal.Rptr.3d 405, 303 P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance ▶ *People v. Davis, supra*, 57 Cal.4th at p. 362, fn. 5.

### *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. 140, *Challenges to Crimes*, § 140.12, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a], [b], [d], [e], [g], [h], [3][a] (Matthew Bender).